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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

# FROM THE PEN OF THE EDITOR

**J.P. Gupta**
**Director, JOTRI**

Esteemed Readers

This is the final issue of JOTI of the year 2010. By the time this issue reaches you, Year 2011 would have already set in. Nothing in this world is stationery. Similar is the case with time. Years that have gone by were always good and as all good things come to an end, year 2010 will also follow likewise and will submerge into the vast ocean of the past. Where one dot symbolizes the end of a sentence, two more mean continuity. Each ending gives us the opportunity for a new beginning.

Every year gone by makes us richer in our knowledge and experience. We have to enrich ourselves with the coming years. The past teaches us many lessons. A sensible person is one who learns from the past and moves forward. In our journey through life, we may have faced many highs and lows. We should not brood over the past and take failure to heart. We have to accept our failures with calmness and total submission and success with all modesty. Making mistake is also an inevitable part of our life. But then life is not a paper and pencil that we can erase our mistakes and write something which is correct.

The word 'learned' is associated with our field only. This word itself puts a great amount of responsibility on our shoulders. We have to prove ourselves with the real meaning of the word. For this, learning becomes an unending process to us. Though we are having a very hectic routine, still we have to reserve some time for reading books, landmark judgments of higher courts and also become expert in legal softwares that have been provided to us by the Hon'ble High Court.

The Institute has diversified its training curricula for covering various fields of law so as to update the Judicial Officers for meeting the new challenges and needs of the society. Through such trainings, quick and qualitative justice may be rendered to the needy.

The Institute had a very busy schedule in the year 2010. This year in all 27 training programmes were conducted. 11 *Training Programmes on – Application of Information and Communication Technology to District Judiciary* were conducted in which some 370 Judicial Officers have been imparted training on computers. Thereafter three weeks *Second Phase Induction Training Programme* for the Civil Judges Class II of 2008 Batch was held in the month of January. *Foundation Course* for the Directly Appointed Additional District Judges of 2009 was conducted in the month of March. In the month of April, *Refresher Course* for the Directly Appointed ADJs of 2008 was held. In the month of July *Training*

*Programme on Gram Nyayalayas Act, 2008* was held in two batches in which 81 Nyayadhikaris were imparted training. A *Workshop/Symposium on Key Issues and Challenges under Electricity Act, 2003* and another *Workshop/Symposium on Key Issues and Challenges under SC/ST (PA) Act, 1989/NDPS Act, 1985* were also held in the month of August. The *First and Second Phases Induction Training Programme* for newly appointed Civil Judges Class II of 2010 Batch were held in the months of September and December, respectively. *Refresher Course Training* for the first two batches of Civil Judges Class II of 2007 batch was held in the months of October and November, each of five days duration. Apart from that, the Institute also conducted Regional Workshops on *Keys Issues and Challenges regarding Offence of Dishonour of Cheque u/s 138 of Negotiable Instruments Act, 1881* at Bhopal, Gwalior and Indore.

Besides the regular training programmes of the Institute, we also organized one day Symposium on – *Child Rights and Child Protection* in collaboration with HRLN and UNICEF Madhya Pradesh and Human Rights Commission, Bhopal and another two days Symposium on – *Women's Human Rights and Access to Justice* in collaboration with National Committee for Legal Aid Services India, Centre for Social Research and Legal Aid Services – Madhya Pradesh Chapter at Jabalpur and M.P. State Legal Services Authority in the Institute.

The Institute while imparting training to the various cadres of the Judicial Officers was fortunate enough to have the support and guidance of Hon'ble the Chief Justice, Hon'ble the Administrative Judge as well as other Hon'ble Judges of the High Court, Officers of the Registry and the Judicial Officers of the District Court. Without their co-operation and support, it would not have been possible for us to run the affairs of the Institute smoothly.

Year 2011 has arrived. I wish all of you A VERY HAPPY, PROSPEROUS AND EXCITING NEW YEAR. Let us all endeavour to work wholeheartedly in bringing about a remarkable change in the Indian Judiciary. This Journal is just a beacon light to the Judicial Officers and by taking aid of this Journal, we can move a step ahead in illuminating the Judiciary.

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> We spend January 1 walking through our lives, room by room, drawing up a list of work to be done, cracks to be patched. May be this year, to balance the list, we ought to walk through the rooms of our lives.... not looking for flaws, but for potential.
>
> ELLEN GOODMAN

# APPOINTMENT OF HON'BLE SHRI JUSTICE SRI NIWAS AGGARWAL AS ADDITIONAL JUDGE OF HIGH COURT OF M.P.

*Hon'ble Shri Justice Sri Niwas Aggrawal has been administered the oath of office by Hon'ble Shri Justice Rafat Alam, Chief Justice, High Court of Madhya Pradesh on 28th October, 2010 as Additional Judge of High Court of Madhya Pradesh in a Swearing-in-Ceremony held in the High Court at Jabalpur.*

*Hon'ble Shri Justice Sri Niwas Aggarwal has been appointed as the Additional Judge of the Madhya Pradesh High Court High Court. Born on August 25, 1950. Passed B.Sc. and Master of Laws from Delhi University. Had the distinction of getting several gold medals and silver medals, both during the L.L.B. and L.L.M. studies. Enrolled as an Advocate with Bar Council of Delhi on 25.10.1980.Practised civil and criminal law, both original and appellate side in District Courts, Delhi High Court and Supreme Court.Became Advocate on record in Supreme Court in 1984 and had the distinction of attaining first position in Advocate on record examination, Joined Faculty of Law, Delhi University as part time Lecturer-in-Law in 1996 and continued teaching there till appointment as Additional District & Sessions Judge, Delhi on 30.11.1991. Handled several important matters of public importance and exercised different jurisdictions as Member of Delhi Higher Judicial Service. Went on deputation as Presiding Officer of Debt Recovery Tribunal, Delhi on 20.12.2000. Was appointed as Chairman of an All India Working Group for suggesting amendments in Recovery of Debts Due to Banks and Financial Institution Act, 1993. Worked as Registrar General of High Court of Delhi from 14.10.2005 till 27.02.2006. Elevated to the Bench of High Court of Delhi as Additional Judge on 28.02.2006 and was confirmed on 25.04.2007.*

*As a Judge of High Court of Delhi High Court, delivered more than 2000 judgments. Sat on almost all jurisdictions, civil, criminal and also on Company side. Handled many important matters including PIL cases. In 19 years of judgeship, acquired rich judicial and administrative experience. Transferred to High Court of Madhya Pradesh and took oath on 28.10.2010.*

We on behalf of JOTI Journal wish His Lordship a successful tenure.

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# HON'BLE SHRI JUSTICE S.L. KOCHAR
# HON'BLE SHRI JUSTICE RAM KISHORE GUPTA &
# HON'BLE SHRI JUSTICE VINEY MITTAL DEMIT OFFICE

*Hon'ble Shri Justice S.L. Kochar demitted office on His Lordship's attaining superannuation. Was born on 26.10.1948. Passed B.Com. M.A. (Eco.) and obtained Law Degree in the year 1973. Was enrolled as an Advocate on December 6, 1973. Practised in the High Court of Madhya Pradesh, Jabalpur, State Administrative Tribunal, Central Administrative Tribunal, Jabalpur, Debt Recovery Tribunal and District Courts in Madhya Pradesh in Civil, Criminàl, Constitutional, Service and Election matters for 27 years. Elected as a Member of State Bar Council in the year 1984 and worked continuously in various committees of Bar Council as well as Treasurer for several years. Was appointed as an Additional Judge of the Madhya Pradesh High Court on 22.10.2001 and Permanent Judge on 01.04.2002. Was accorded farewell ovation on 25.10.2010 in the High Court of Madhya Pradesh, Bench Indore.*

*Hon'ble Shri Justice Ram Kishore Gupta demitted office on His Lordship's appointment as Chairperson of the Debt Recovery Appellate Tribunal. Was born on 01.01.1949. Was practising lawyer at Jabalpur for more than 33 years. Had extensive practice in Labour & Service, Civil and Constitutional matters. Had appeared in a number of important cases. Was Senior Standing Counsel for Indian Railways, Food Corporation of India, Steel Authority of India, Hindustan Coppers Limited, Balaghat and Chhattisgarh Infrastructure Development Corporation. Was designated as a Senior Counsel on 20.06.2003. Elevated as Additional Judge of M.P. High Court on 18.10.2005. Took oath as Permanent Judge on 02.02.2007. Was accorded farewell ovation on 30.11.2010 in the High Court of Madhya Pradesh, Main Seat, Jabalpur.*

*Hon'ble Shri Justice Viney Mittal demitted office on His Lordship's attaining superannuation. Was born on 01.12.1948. Enrolled as an Advocate on 06.07.1972. Practised on Civil and Constitutional sides in the Punjab & Haryana High Court for 29 years. Appointed as Permanent Judge of the Punjab & Haryana High Court on 02.07.2002. Transferred to High Court of Madhya Pradesh on 11.04.2007. Was accorded farewell ovation on 30.11.2010 in the High Court of Madhya Pradesh, Bench Indore.*

We, on behalf of JOTI Journal wish Their Lordships a healthy, happy and prosperous life

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**PART - I**

# THE VICTIM'S CONSTITUTIONAL & LEGAL RIGHTS IN CRIMINAL JUSTICE SYSTEM

**Judicial Officers**
**Districts Chhindwada, Gwalior, Jhabua and Katni**

## Introduction

A crime free society is unconceivable and justice without consoling the victim is incomplete, insatiable, unsatisfied. When a serious crime is committed, the State immediately steps into ensure that the accused is apprehended and after investigation he is prosecuted and if found guilty, he is punished by fine, imprisonment or death. All this is done by the State to prevent similar crimes being committed in society in future. Punishment of the convict also gives satisfaction to the victim of the crime or his near relatives that retributive justice has been done.

Notwithstanding the punishment of the convict, the victim may continue to be financially crippled on account of the crime and his right to life and liberty guaranteed under Article 21 of the Constitution may continue to be infringed. A victim is the cause upon which the whole edifice of judicial functions stands and dispensing justice without considering the rights of a victim is somewhat like unheard of its loud cry for justice and not providing justice in true sense and spirit. So a society as a moral guardian of law, seeks the victim-centered relief.

Crime is not committed by the State. However, and therefore it cannot be said that the State is not liable to compensate the victim. The State, can be held vicariously liable for compensation to victims for violation of their fundamental rights by its employees. By the CrPC Amendment Act 2008, now rights of the victims in the criminal justice system have been recognized and burden of preparation of "Victim Compensation Scheme" is also imposed on every State Government in co-ordination with the Central Government, because the ultimate object is to achieve the Social Justice in the right perspective of Constitution of India and protection of victim's rights is one of the mode therefor.

## "Victim" - Who is?

"Victim" includes any person who, individually or collectively, has suffered harm, including physical or mental injury, economic loss or substantial impairment of his fundamental rights through acts or omissions that are in violation of criminal laws. Generally victims may be the injured, may be a witness and may be that

Note: The Article is compiled and edited by the Institute and the Italicized portion there of has been taken from the Law Lecture delivered by Hon'ble Mr. Justice A.K. Patnaik, Judge Supreme Court of India at National Law University, Cuttack, Orissa

part of society which makes a loud cry for getting justice. Victim can be one's own family member, the near relatives, dear friends, close neighbours and intimate colleagues. The singular inherently engulfs and encapsules the plural when the individual traumatic experience gets transformed to an agonized and anguished experience of the society at large.

In India for the first time, in criminal trials, the word "victim" has been defined in Section 2(wa) by way of a Cr.P.C Amendment Act, 2008, as under –

> A "Victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir.

**Expectations from/for victim**

The victim with the adjudicatory process must feel satisfied that there has been a fair trial and proper dispensation of justice. He must feel happy to be a witness in the trial. Victims must be well informed about the action taken by the investigation agency. Security must be provided as far as practicable, to all the witnesses. There should not be unnecessary postponement of cases, as such postponement is likely to create disillusion and collapse of faith. Certain categories of victims like children, rape victims, domestic violence and those who experience repeated victimization need specific and special attention.

In criminal justice system, a victim of crime sometimes goes through a distressing and disturbing experience. Many a time the victims themselves are witnesses to the crime and their evidence can help, aid and assist in convicting an offender. The witnesses are not made aware about the sense of security, turn of their case in Court, the reason for adjournment of cases and the catastrophe which eventually takes place of their honour of speaking the truth in Court. They are subjected to unnecessary stressful Court-room experiences.

Victimized members of the general public are pressurising police administrators to re-order institutional priorities, re-allocate resources and re-deploy officers. Law enforcement decision-makers find it difficult to openly oppose these calls for greater responsiveness by the people, to whom they are sworn to protect and serve. If victims are going to be meaningfully empowered within the criminal justice process, officials must undertake the additional effort to tell them all that they need to know. But generally, officials never perceived an obligation to inform victims about important developments in their cases. Now this is required to be changed to keep victims informed of the progress of their cases as they wind their way through the criminal justice process. Victims want access to a steady flow of progress reports from the prosecution to keep them posted about major developments in their cases.

It may be mentioned that constitutional rights of a victim are enforceable under Articles 226 and 32 while legal rights can be enforced in ordinary Courts according to the nature of rights.

**Victims' Rights in the Indian Constitution**

- The obligation of the State in the Indian Constitution to protect and help victims of violation of human rights can be culled from Articles 14 and 21, which contain important fundamental rights to be read with directive principles of State policy contained in Articles 39-A, 41, 46 and 51(c) of the Constitution.
- The first part of Article 14 is in negative term prohibiting the State not to deny "equality before law" to any person. The second part of the article has a positive content indicating an obligation on the State to extend "equal protection of laws" to every person.
- In the current criminal administration of justice system, it is the responsibility of the State to prosecute offenders and provide retribution for offence to the victims of crime. When the State has undertaken the responsibility to protect "right to life and property" of all its citizens and for that purpose has assumed all police powers, it is the obligation of the State not only to prosecute the offenders as violators of human rights but at the same time to extend help and support to the victims of crime.
- Article 21 has been construed widely by the Supreme Court. Directive principles of the State Policy contained in Part IV of the Constitution, to the extent of directing the State to help citizens to maintain and safeguard their life with human dignity, have been read into Article 21. Right to health, food, shelter, legal aid, fair trial, clean environment have all been held by the Supreme Court to be parts of inalienable "right to life and liberty" of every person.
- In case of *State of Maharashtra v. Madhukar N. Mardikar, (1991) 1 SCC 57,* Supreme Court held that even a prostitute has a right to privacy and no person can rape her just because she is a woman of easy virtue.
- Victims who suffer by crime or abuse of power are deprived of the normal quality of enjoyment of life and sometimes face threat to their well-being and safety. All victims have a right to seek help and protection from the State as their fundamental rights included in Article 21 which guarantees to every person protection of his "life and personal liberty". in this respect, directive principles contained in Part IV, particularly Article 39(a) of "right to adequate means of livelihood", Article 39-A of seeking "free legal aid for seeking justice", Article 41 of "seeking assistance from the State for work, education and public assistance in case of unemployment, old age, sickness and disablement", Article 46 of "promotion of educational and economic interests of SCs, STs and weaker sections", are relevant.

- Article 51(c) directs the State to make endeavour to "foster respect for international law and treaty obligations in the dealings of organised people with one another".
- In *Nilabati Behera v. State of Orissa, AIR 1993 SC 1960,* the Supreme Court pressed into service the right to compensation for victims of unlawful arrest or detention.
- The legislative vacuum of a legal right to monetary compensation for violation of human rights has been supplemented by the Apex Court by developing a parallel constitutional remedy in *Rudal Sah v. State of Bihar, AIR 1983 SC 1086,* the Supreme Court for the first time in made it categorically clear that the higher judiciary has the power to award compensation for violation of fundamental rights through the exercise of writ jurisdiction and evolved the principle of compensatory justice in the annals of human rights jurisprudence.
- The authorities of the State in each district through Collector being the district administrative head, the Superintendent of Police, the Chief Medical and Health Officer and the District Legal Services Authority are constitutionally and statutorily obliged to extend help and support to the victims.
- Legal Services Authority is constituted under the Legal Services Authorities Act, 1987 for fulfillment of the objective contained in Article 39-A of providing free legal aid to the members of the oppressed and depressed sections of the society who are financially and socially disabled to avail legal services on payment of remuneration. "Legal services" as defined includes counselling and advices by lawyers in and outside the Court as also actual conduct of proceedings in the Court. "Victims of crime and abuse of power" are covered in the categories of persons who can avail free legal services such as SCs, STs, women, children, poor and persons under circumstances of undesired want such as victims of mass disaster, ethnic violence, caste atrocities, flood, etc as enumerated in Section 12 of the Legal Services Authorities Act, 1987.
- The provisions in Sections 8 and 11 of the Legal Services Authorities Act mandates that the State and district authorities will act in coordination with each other (which includes Human Rights Commission) engaged in the work of promoting the cause of legal services to the poor and needy.

**Compensation to rape victims**

- Right of the rape victim to receive compensation flows from Article 21 of the Constitution. Every Court has jurisdiction to grant compensation not only at the final stage of trial but also to award interim compensation at

any interlocutory stage of trial in view of Apex Court's judgment in *Shri Bhodhisattwa Gautam v. Shubhra Chakraborty, AIR 1996 SC 922. In Delhi Domestic Working Women's Forum v. Union of India, 1995 (1) SCC 14* the Supreme Court indicated a scheme to award compensation to rape victim at the end of the trial. The Supreme Court suggested the establishment of Criminal Injuries Compensation Board under Article 38(1) of the Constitution of India. The rape victim shall be paid compensation by this Criminal Injuries Compensation Board or the Court and while awarding compensation, the following particulars are to be taken into account to calculate the compensation amount i.e., pain, suffering and shocks experienced by the victims and also loss of earnings due to pregnancy and the expenses of child birth if this occurs as a result of rape. Unfortunately till now this Criminal Injuries Compensation Board has not been established by the Central Government. But now, this concept of interim relief and also immediate medical assistance has been legally recognized in sub-section (6) of Section 357-A of CrPC incorporated by the Amendment Act, 2008.

- In the landmark judgment of *D.K. Basu v. State of West Bengal, (1997) 1 SCC 4*, the Supreme Court has laid down a number of guidelines to prevent custodial violence including rape, and has recognized that custodial rape could be compensated as the same violate right to life and personal liberty guaranteed under Article 21 of the Constitution.

**Rights of Working Women**

- The fundamental right to carry on any occupation, trade or profession depends on the availability of a "safe" working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation and the creation of a mechanism for its enforcement, is of the legislature and the executive. In case of *Vishakha v. State of Rajasthan, AIR 1997 SC 30ll,* it was held by the Supreme Court that sexual harassment of working women amounts to violation of right of gender equality and right to life and liberty. It is a clear violation of the rights under Articles 14, 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1) (g) to practice any profession or to carry out any occupation, trade or business. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women. Therefore, for the protection of these rights and to fill the legislative vacuum, the Apex Court laid down detailed guidelines to be observed by employers when they employ women employees in their institution.

**The Duty of Court while trying rape cases**

- The police, Court and lawyers should come forward to provide all sorts of assistance to victims of rape. Courts must deal with such cases with utmost sensitivity. The Court should examine the broader probabilities of case and not get swayed by minor contradictions or insignificant discrepancies in witness statements. The Court should also provide adequate financial assistance to the victim of rape. Apart from providing financial assistance the victim should be provided medical, social, psychological assistance which would help her to come out of the trauma.

**Legal Rights of the victims**

As far as legal rights of a victim under criminal justice system are concerned, following provisions are there under the Code of Criminal Procedure, 1973 -

- Section 24 of Code of Criminal Procedure provides for appointment of Public Prosecutor and Additional Public Prosecutor. The Amendment Act of 2008 has acknowledged the legal right of victim to engage an advocate of his choice. Now a victim of crime can engage an advocate of his choice to assist a prosecution without formal permission of the Court. The conduct of trial still remains with the Public Prosecutor or the Assistant Public Prosecutor.
- Legislature has laid down a lot of emphasis on need for the protection of a victim of rape. Section 26 of the Code has been amended and a proviso has been inserted in the Code which provides that any offence under Sections 376 and 376-A to 376-D shall be tried as far as practicable by a woman. This has been done to do away with the embarrassment suffered by a victim of rape during the trial of offence under Section 376.
- A victim may lodge an information (F.I.R.) with the police regarding commission of a cognizable offence. The victim, as an informant, is entitled to a copy of the FIR, free of cost. Where the officer in charge of a police station refuses to act upon such information, the victim can write to the Superintendent of the Police who is then expected to direct investigation into the complaint. (Section 154 of the CrPC)
- New inserted second proviso to Section 157 of the CrPC lays down that in relation to an offence of rape, the recording of statement of victim shall be conducted at residence of victim or in place of her choice and as far as practicable by a women police officer in the presence of her parents or guardian or near relatives or social worker of the locality.
- Section 164-A of the Code of Criminal Procedure provides when a victim of rape proposes to be examined by medical expert, such examination

shall be conducted by registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence. Thus, it is clear that a victim of rape is entitled to be examined by a medical practitioner with her consent.

- Section 173 of the Code of Criminal Procedure has also been amended and Section 1-A has been added which mandates that investigation in relation to a rape of child may be completed within 3 months from the date on which information was recorded by officer-in-charge of police station. Thus, this section recognizes the right of a child victim of rape to have the investigation completed expeditiously.
- It has been repeatedly held by Courts that final closure report submitted by police officer under Section 169 of the Cr. P. C. can be accepted by a Magistrate only after hearing the informant, hence, a victim if he is an informant of crime has a right of audience before acceptance of a closure report.
- A victim may file a complaint in the Court of competent Judicial Magistrate, alleging that an offence, cognizable or non-cognizable has been committed and may require the Magistrate to take action according to law [Section 190(1)(a) of the CrPC]. In a complaint case filed by the victim, he/she may directly and actively participate in the prosecution u/s 200 of the Cr. P. C.
- Section 195 CrPC has given the statutory right to the witness of a crime the right to file a complaint under Section 195-A IPC. This amendment has been incorporated to ensure a person with protection who is a witness of crime.
- In a trial before Magistrate, the victim may engage an advocate, who can assist the prosecution during trial u/s 302 CrPC
- When the victim files a complaint and the proceeding arising out of it is a summons case pending in Court, he/she may withdraw the complaint, at any time before the final order is passed if the concerned Magistrate is satisfied that there are sufficient grounds for permitting such withdrawal. (Section 257 CrPC).
- Where the accused has voluntarily made an application for plea bargaining u/s 265-B of the CrPC, he is entitled to participate in the meeting meant for working out a satisfactory disposition of the case, which may include giving the victim compensation by the accused and expenses during the case.

- The victim may, as a person, who suffered harm in consequence of an offence committed against him/her, compound the offence, provided that it is compoundable u/s 320 of the CrPC, with or without the consent of the Court.
- Section 327 (2) of the Code provides that-

  "Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code, 1860 (45 of 1860), shall be conducted in camera".

  This provision has been incorporated to obviate the embarrassment to a woman during the trial of an offence of rape.
- In *Sakshi v. Union of India, AIR 2004 SC 3566* the Apex Court has held that the provisions of sub-section (2) of Section 327 CrPC shall, in addition to the offences mentioned in the sub-section, would also apply in inquiry or trial of offences under Sections 354 and 377 IPC. In holding trial of child sex abuse or rape, the following procedure would be followed: –
  (i) A screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;
  (ii) The questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident, should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;
  (iii) The victim of child abuse or rape, while giving testimony in Court, should be allowed sufficient breaks as and when required.
- The victim may be awarded compensation by the Court u/s 357 CrPC, either out of fine imposed by the Court upon conviction of the accused or when fine does not form part of the sentence. By M.P. Act No. 29 of the 1978, in Madhya Pradesh where a person against whom an offence is committed belongs to a Scheduled Caste or Scheduled Tribe as defined in clauses (24) and (25) of Article 366 of the Constitution, except when both the accused persons and the person against whom an offence is committed belong either to such castes or tribes, awarding of compensation to such victim person is mandatory.

*In Hari Singh v. Sukhbir Singh and others, (1988) 4 SCC 551 the Supreme Court has observed that the payment by way of compensation must be reasonable and what is reasonable, may depend on the facts and circumstances of each case. The Supreme Court has also observed that in each case the quantum of compensation may be determined by taking into account the nature of crime, the*

*justness of the claim by the victim and the ability of the accused to pay and if there are more than one accused, they may be asked to pay in equal terms unless the capacity to pay varies considerably.*

*Should the convict be heard before the Court determines the compensation to be payable to the victim? In Mangilal v. State of M.P., (2004) 2 SCC 447, the Supreme Court found that Section 357 of the Code of Criminal Procedure, 1973 was silent on whether the convict should be heard before the Criminal Court decides to award compensation and held that even if Section 357 of the Code of Criminal Procedure, 1973 is silent there should be nothing wrong in spelling out the need to hear the convict before the Criminal Court awards the compensation. The Supreme Court held that the principles of natural justice and fair play require that an opportunity be given to the convict by the Court before directing payment of compensation under Section 357 of the Code of Criminal Procedure, 1973.*

*The provisions of Section 357 of the Code of Criminal Procedure, 1973 make it amply clear that the trial Court, the appellate Court and the revisional Court have been vested with the powers to award compensation to the victims of crime against the convict, but unfortunately, these provisions have not been availed by the Courts in India to award compensation to the victims of crime except in a few cases. It is for this reason that in Manish Jalan v. State of Karnataka, (2008) 8 SCC 225 the Supreme Court observed that though a comprehensive provision enabling the Court to direct payment of compensation has been in existence all through experience has shown that the provision has rarely attracted the attention of the Courts. The Supreme Court further observed that time and again the Courts have been reminded that the provision is aimed at serving the social purpose and should be exercised liberally and yet the results are not very heartening.*

*In our country, the Supreme Court and the High Courts, while exercising jurisdiction under Articles 32 and 226 of the Constitution respectively, have the power to award compensation to victims whose fundamental rights are violated and Criminal Courts, Appellate Courts and the Revisional Courts also have the powers under Section 357 of the Code of Criminal Procedure, 1973, to award compensation to victims of crime. Where the victims of crime desperately need compensation, the Criminal Courts must come to their rescue and award compensation if they find that the victim has the capacity to afford compensation. The State must also amend the compensation. The State must also amend the laws to provide for creation of a common fund for victim compensation out of a portion of the wages of convicts who are responsible for the wrong done to the victims.*

- Yet another new concept of "Victim Compensation Scheme" has been introduced by the Code of Criminal Procedure (Amendment) Act, 2008. According to Section 357-A of the CrPC, the State Government in

coordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his defendants who have suffered loss or injury as a result of the crime and who require rehabilitation irrespective of the outcome of the case, whether it resulted in conviction, acquittal or discharge of the accused person. Even where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the compensation under the Scheme is in addition to the compensation provided u/s 357 CrPC

- In sub-section (6) of Section 357-A Cr.P.C to alleviate the suffering of the victim, the State or the District Legal Services Authority, as the case may be, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.
- Section 421 (1) CrPC *inter alia,* provides for realization of fine and in turn, payment to the injured person of expenses or compensation out of the fine imposed under Section 357 CrPC. It empowers a criminal Court passing a sentence of fine, at its discretion, to recover the fine either by attaching and selling movable property of the offender or as arrears of land revenue from the movable and/or immovable property of the offender and thereby to make payment of the ordered 'compensation' to the crime victim. It is also pertinent to note that by virtue of Section 431 of the Code, provisions of Section 421 CrPC, are equally applicable to the recovery of 'specified amount' of compensation awarded under Section 357 (3) CrPC.
- Under the new amendment of 2008 in Criminal Procedure Code, a victim shall have right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against order of conviction of such Court. (Section 372 CrPC)
- So far as the victims of the sexual offence is concerned, there are certain provisions safeguarding them. Section 114-A of the Evidence Act, 1872 raises a presumption as to the absence of consent where the woman raped when says in her evidence before the Court that she did not consent. In the year 1983, the Indian Penal Code was amended so as to prohibit the disclosure of the identity of the victim in any publication concerning the offence (Section 228-A IPC).

**Special victim compensation payment provisions in Madhya Pradesh under Prisons Act, 1894 from common fund of wages earned by prisoners**

*The Supreme Court in State of Gujarat and another v. Hon'ble High Court of Gujarat, (1998) 7 SCC 392 (Three Judge Bench) recommended to the States to make a law for setting apart a portion of the wages earned by the prisoners to be paid as compensation to deserving victims of the offence, the commission of which entailed the sentence of imprisonment to the prisoner, either directly or through a common fund to be created for this purpose or in any other feasible mode. In accordance with the directions of the Supreme Court in the case of State of Gujarat and Another v. Hon'ble High Court of Gujarat (supra) some of the State Legislatures have made law setting apart a portion of the wages earned by the prisoners to be paid as compensation to the deserving victims of the offence, the commission of which entailed the sentence of imprisonment to the prisoner. The State Legislature of Madhya Pradesh, for example, introduced a new Section 36-A in the Prisons Act, 1894 by the Prisons (Madhya Pradesh Amendment) Act, 1999 which reads as follows:*

> *"36-A. The prisoners shall be paid wages for the employment provided to them at such rate as may be prescribed from time to time. The amount of fifty per cent of the total amount of wages earned by the prisoner in a month shall be kept and deposited in a separate common fund which shall be exclusively used for the payment of compensation to the deserving victims or his family of the offence the commission of which entailed the sentence of imprisonment to the prisoner. The account of the fund shall be maintained by the Superintendent of Jail in such form and in such manner as may be prescribed. The rate of compensation to be paid to the victims shall be fixed by a committee consisting of such persons as may be prescribed."*

*Rule 647-B of the Madhya Pradesh Prison Rules, 1968 prescribes that 50% of the total amount of wages earned by the prisoner in a month shall be deposited in a separate common fund which is to be exclusively used for the payment of compensation to the deserving victims or his family of the offence, the commission of which entailed the sentence of imprisonment to the prisoner. The thinking behind such a provision is that it is the convict who is responsible for causing injury to the victim and therefore he must compensate the needy victim by hard labour during the period of imprisonment. The creation of such common fund for victim compensation achieves two objects: first, that in a particular case if the convict does not have the financial capacity to compensate his direct victim, compensation can be granted from the common fund and second, the victim may*

*not like to receive compensation from the convict responsible for the offence but may not mind receiving compensation from the common fund. The High Court of Madhya Pradesh in S.P. Anand v. State of M.P., AIR 2007 M.P. 166 has in fact directed the State Government of Madhya Pradesh to consult the High Court and the State Human Rights Commission and issue instructions under sub-rule (4) of Rule 647-A of the Madhya Pradesh Prisons Rules, 1968 for determination of the victims of the offence committed by the prisoner so that the Court before whom the prisoner is tried of the offence and human rights activists of the area are involved in the identification of the deserving victims and in case of the death of the victim his family members. These directions were necessary because the High Court found that compensation was being paid to claimants by the authorities of the State Government without reference to the Court trying the offence and without reference to the State Human Rights Commission. When the judgment was delivered on 11th May, 2007, the Madhya Pradesh High Court had found that a sum of Rs. 4,71,57,686/- (as on 31-12-06) was lying unutilized in the common fund, whereas victims of offence in the State of Madhya Pradesh continued to suffer without payment of any compensation.*

**Special provision for SC/ST victims**

- As authorized under Section 23 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, the Central Government has framed Rules in the year 1995. Rule 11 thereof provided for travelling allowance, daily allowance, maintenance expenses and transport facilities required during the investigation and hearing of trial of an offence under the Act and Medical expenses to the victim of atrocity, his or her dependant and witness.
- Sub rule (4) of Rule 12 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 makes arrangement for providing immediate relief in cash or in kind or both to the victims of atrocity, their family members and dependants according to the scale as in the Schedule annexed to these Rules (Annexure-I read with Annexure-II). Such immediate relief shall also include food, water, clothing, shelter, medical aid, transport facilities and other essential items necessary for human beings and sub rule (5) of Rule 12 specifically declares that the relief provided to the victim of atrocity of his/her dependant under sub-rule (4) in respect of death, or injury or damage to, property shall be in addition to any other rights to claim compensation in respect thereof under any other law for the time being in force.

## Conclusion:

The paradox of our criminal justice system is that a victim has no space at the stage of inquiry and investigation. A victim is basically upon the mercy of the State and the concerned investigating agency. The indifference and apathy as regards victim is perceivable at the stage of trial also with frequent occurrence of the witnesses turning hostile under compulsion like intimidation, allurement etc. deflect the course of justice which invariably results in acquittals. Thus, the victim of crime is left in rueful and pathetic condition to suffer socially, economically and physically. Victims are not given long-term support and adequate safety measures in a case where situation demands it which highly erodes and weakens the efficacy of the criminal justice delivery system in commonality.

The best way to make sure that victims could pursue their personal goals and protect their own best interests is by granting them formal rights within the criminal justice system. The adjudication relies upon the principles of conflict resolution, using the techniques of mediation to achieve the goals of victim restitution, offender rehabilitation, mutual reconciliation and community harmony. It may well be said that, in an era of shrinking resources and continued constitutional limitations, this will be the most productive avenue for the victims' activism. Of course, the rights of the accused have to be kept in mind and safeguarded, but they should not be over-emphasized to the extent of forgetting that the victims also have rights. Recognition of victim's rights by CrPC Amendment Act, 2008 is definitely a step forward to achieve social justice and its implementation thereof in justice delivery system is the duty of all concerned functionaries.

As Hon'ble Mr. Justice Dipak Misra (presently, Chief Justice of Delhi High Court) in his Article "Victimology: A Developing Concept" had said:

> ".....the needs of victims and witnesses are to be understood in magnified canvass and it must enter into our hearts that in criminal justice system endeavor has to be made to ensure that justice is not only done expeditiously but with grace, respect, mercy and care. The prosecution has to make an effort to empower the witnesses and victims to give best evidence in a most secure atmosphere .....so that loud cry of the society gets a positive answer and victim as an individual gets satisfaction".

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# LAW AND PROCEDURE OF GRANTING PROBATE OR LETTERS OF ADMINISTRATION

**Judicial Officers**
**Districts Betul and Narsinghpur**

The Indian Succession Act, 1925 (Act 39 of 1925) is an Act to consolidate the law applicable to intestate and testamentary succession under which the probate jurisdiction can be exercised by a Probate Court in probate matters i. e. probates and letters of administration.

**Probate and Letters of Administration - Definition**

Probate, as defined under Section 2 (f) of the Indian Succession Act, 1925 (in short "the Act"), means the copy of a Will certified under the seal of a Court of competent jurisdiction, with a grant of administration of the estate of the testator.

Letter of administration has not been defined in the Act. According to the Law Lexicon, letters of administration are granted by a Court having probate jurisdiction to show that the authority incident to the office and duty of an administrator has been devolved upon the person therein named. Letters of administration include any letters of administration whether general or with a copy of the Will annexed, or limited in time or otherwise.

A surrogate court decides the validity of a testator's Will. A probate interprets the instruction of the deceased and decides the executor as the personal representative of the estate. A probate of a Will when granted establishes the Will from the death of the testator and renders valid all intermediate acts of the executer as such. It is conclusive evidence of the validity and due execution of the Will. A probate differs from succession certificate. A probate is issued by the court, when a person dies testate i.e. having made a Will and the executor or beneficiary applies to the court for grant of probate. Where a person has not made any Will, his legal heirs will have to apply to the Court for grant of a succession certificate which can be given as per applicable laws of inheritance.

Letters of administration entitle the administrator to all rights belonging to the intestate as effectively as if the administration has been granted at the moment after his death. They, however, do not render valid any intermediate acts of the administrator tending to the damage of the testator's estate.

A probate can be granted only to the executor appointed by the Will. The appointment may be express or implied by necessary implication. It cannot be granted to any person who is a minor or is of unsound mind, nor to any association of individuals unless it is a company satisfying the conditions prescribed by the rules made by the concerned State Government. Where the deceased was a Hindu, Mohammedan, Buddhist, Sikh, Jaina or an exempted person and has died intestate, the Court may grant administration of his estate to any person

eligible for grant of letter of administration, who, according to the rule of distribution of the estate applicable to such deceased, would be entitled to the whole or any part of such deceased's estate. When several of such persons apply for administration, it will be the discretion of the Court to grant it to any one of them. Where no such person applies, it may be granted to a creditor of the deceased.

Part VIII of the Act provides for representative title to property of deceased on succession. Section 211 provides that the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vest in him as such. However, when the deceased was a Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi or an exempted person, nothing shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

The requirement of probate or letters of administration has been ruled in Sections 212 and 213 of the Act. Subject to the other provisions of the Act or any other law for the time being in force, all grants of probate and letters of administration with the Will annexed and the administration of the assets of the deceased in case of intestate succession shall be made or carried out, as the case may be, in accordance with the provisions of Part IX of the Act.

In Part IX, Sections 217 to 263 of Chapters I to III deal with the probate, letters of administration and administration of assets of deceased. The provisions with regards to the grant of probate and letters of administration, limited grants i.e. grants limited in duration, grants for the use and benefit of others having right, grants for special purposes, grants with exception, grants with rest and grant of effects unadministered and provisions regarding alteration and revocation of grants have been made therein. Sections 264 to 302 of Chapter IV lay down the practice to be followed in granting and revoking probates and letters of administration.

**Probate or Letters of Administration - Necessity of**

The necessity of letters of administration or probate has been ruled in Sections 212 and 213 of the Act. Section 212 says that no right to any part of the property of a person who has died intestate can be established in any Court of Justice, unless letters of administration have first been granted by a Court of competent jurisdiction. However, this rule shall not apply in the case of the intestacy of a Hindu, Muhammadan, Buddhist, Sikh, Jaina, Indian Christian or Parsi. Thus, Section 212 imposes a bar against the right to any property of a person who has died intestate unless letters of administration have first been obtained. Though, Section 212 is not applicable in case of the intestacy of a Hindu, Muhammadan, Buddhist, Sikh, Jaina, Indian Christian and Parsi. Section 213 clearly creates a bar to the establishment of any right under Will by an

executor or a legatee unless probate or letters of administration of the Will have been obtained. It is apposite to quote Section 213 of the Act here, which reads as under:

**"213. Right as executor or legatee when established-**

(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed.

(2) This section shall not apply in the case of Wills made by Mohammedans, and shall only apply-

(i) in the case of Wills made by any Hindu, Buddhist, Sikh or Jaina where such Wills are of the classes specified in clauses (a) and (b) of Section 57, and

(ii) in the case of Wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962, where such Wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay and where such Wills are made outside those limits, in so far as they relate to immovable property situate within those limits."

Section 57 of the Act also needs to be quoted here to interpret the above mentioned provision. The same reads thus:

**"57. Application of certain provisions of Part to a class of Wills made by Hindus, etc.-** The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply-

(a) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all Wills and codicils made outside those territories and limits so far as relates to immovable property situate within those territories or limits; and

(c) to all Wills and codicils made by a Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b):

Provided that marriage shall not revoke any such will or codicil."

It is clear from the abovementioned provisions that a probate for establishment of a right under a Will or letters of administration is not necessary where the provisions of clauses (a) and (b) of Section 57 are not attracted. Therefore, a person, who sets up a Will does not fall within clauses (a) and (b) of Section 57 can establish his right as legatees in any Court of Justice without obtaining a probate or letters of administration. Obtaining of probate or letters of administration, in such a situation, is optional. But, in such matters, a Probate Court should be authorised by notification in the Official Gazette issued by the concerned State Government as provided under sub-section (2) of Section 264 of the Act to accept application for obtaining probate or letters of administration. This legal position is emerged from the catena of decisions.

A probate for a Will is required to be obtained only under circumstances mentioned in Section 213 of the Act. In *Administrator General, Allahabad v. Dharamvir, AIR 1997 All. 158* it has been held that the bar contained in Section 370 of the Succession Act is attracted in a case to which Sections 212 and 213 of the Act apply. Section 212 of the Act speaks about the fight to intestate's property and, therefore, would not apply, where the deceased has executed a will. Sub-clause 2 (1) of Section 213 read with Clauses (a) and (b) of Section 57 of the Act applies where the parties to the Will are Hindus and the properties in dispute are in Bengal, Bombay and Madras. Section 213(2) of the Act has to be read with Section 57 of the same Act. A probate is not necessary for establishment of a right under a Will by a Hindu where the provisions of clauses (a) and (b) of Section 57 are not attracted. Since the Will in question could not fall under clauses (a) and (b) of Section 57, Section 213 has no application to it and consequently the bar contained in Section 370 of the Act is also not attracted.

Similarly in *Srinivasa and others v. K. V. Srinivasa Rao, AIR 1986 Kant 9*, it is observed that probate of Will is not necessary where property and persons, who are Hindus, are outside the territories specified in Section 57(a).

This issue was discussed at length by referring various decisions in *Mayank v. Public in General, AIR 2006 MP 235* in which the High Court of Madhya Pradesh has viewed that the rejection of the petition filed before District Judge on the ground that in Madhya Pradesh, petition filed for grant of probate or letters of administration, is not maintainable was improper. The relevant portion of the judgment reads as under:

"In the matter of *Damodarlal v. Gopinath, AIR 1956 Nagpur 209,* Hon'ble Shri Justice Hidayatullah observed that under the Notification No. 7988, dated 19.7.1994, issued by the Judicial Commissioner, Central Provinces, the District Judges, were authorized to receive applications for Probate and Letters of Administration even in the cases of Hindu Wills not falling under Section 57. That notification must be deemed to continue in force as one under Sub-section 2 of Section 264 of the present Succession Act. The jurisdiction of the District Judge to grant probate is limited under Section 270 to the cases of a testator who had a fixed place of abode at the time of his decease or any property movable or immovable within the jurisdiction of the Judge. It was further observed that it is not obligatory for any one to obtain probate in respect of the Will of a Hindu in any local area beyond the towns of Calcutta, Madras and Bombay. .....When the requirements of Section 270 are satisfied it cannot be said that the Court has no jurisdiction in granting the probate."

"In the matter of *Lachhman Singh v. Smt. Brisbhan Dulari, 1966 MPLJ SN 8,* this Court has held that the combined effect of Section 213 (2) (i) and Section 57 of the Act is that obtaining of a probate of the Will is not a condition precedent to the establishment of a right where the Will has been made by a person who is a resident of Madhya Pradesh in respect of the property situated in Madhya Pradesh."

"In the case of *M/s. Kalka Prasad Ramlal v. Rammo Mal, AIR 1978 Allahabad 298,* Allahabad High Court has held that there was no necessity of a notification in the Official Gazette empowering the District Judge to entertain petitions for Probates and Letters of Administration and grant the same. It, therefore, follows that the District Judge has jurisdiction to entertain petitions and grant Letters of Administration."

"In the case of *Vidhyaram v. Devilal, 1981 JLJ 203 : AIR 1981 NOC 93,* this Court has observed that there can be no dispute with the proposition that Section 213(1) has no applicability to a Will made by a Hindu which falls in Clause (c) of Section 57 of the Act. Accordingly, a person sets up a Will does not fall within Clauses (a) and (b) of Section 57 can establish his right as legatees in any Court of justice without obtaining a probate. To put it differently, obtaining of probate in such a case is optional."

"In the matter of *Madan Gopal v. Ramjiwanibai, 1986 JLJ 806,* this Court has held that Will falling under Section 57(a) or (b) are exempted from the requirement of being probated in order to establish legatee's right under the Will."

"In the matter of *Balbir Singh Wasu v. Lakhbir Singh, (2005) 12 SCC 503,* the question before Hon'ble Apex Court was that Section 213 of Succession Act which requires an executor to obtain probate before establishing his claim under the Will was not applicable outside the Presidency Towns of Calcutta, Madras and Bombay. The Hon'ble Court held that assuming this to be correct, we do not read Section 213 as prohibiting the executor from applying for probate as a matter of prudence or convenience to the Courts in other parts of the country not covered by Section 213. Those Courts are competent to entertain such applications if made."

Thus, it is very clear form the abovementioned legal position that a probate or letters of administration is required compulsorily only under following circumstances:

(i) Where a Will made by Hindu, Buddhist, Sikh or Jaina on or after 1st September 1870, within the territories of Bengal, Bihar, Orissa and Assam as those territories were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Madras and Bombay.

(ii) Where such Will is made outside those territories and limits so far as relates to immovable property situate within those areas.

(iii) Where a Will made by Hindu, Buddhist, Sikh or Jaina on or after 1st January, 1927 to which those provisions are not applied by above clause (i) and (ii).

In other words, where a Will is not executed within the territories mentioned in clause (i) or the Will does not relate to the immovable property situated within the territories mentioned in clause (i), sub-section (1) of Section 213 is not attracted. Thus, since Will is executed in Madhya Pradesh or it relates to the immovable property situated in Madhya Pradesh, such a Will does not attract provision of Section 213 of the Act. Therefore, such a Will is not required to be probated. However, as Section 213 does not create bar in granting probate or letters of administration in those areas which are not covered under Section 57 of the Act, obtaining of probate or letters of administration in such areas is optional. In such cases, probate or letters of administration can be granted by the Probate Court according to the practice laid down in Section 264 of the Act.

**Jurisdiction of District Judge and appointment of District Delegates**

The aforesaid discussion makes it clear that although obtaining probate of a Will or letters of administration is not compulsory in the State of Madhya Pradesh but the grant of probate and letters of administration is not prohibited. Section 264 of the Act provides that the District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district. However, this jurisdiction is conferred with the restriction imposed under sub-section (2) of Section 264 which says that except in case to which Section 57 applies, no Court in any local area beyond the limits of the towns of Calcutta, Madras and Bombay shall, where the deceased is Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, receive applications for probate or letters of administration until the State Government has, by notification in the Official Gazette, authorised it so to do. In *Damodarlal's case* (supra), it was observed that under the Notification No. 7988, dated 19.7.1994, issued by the Judicial Commissioner, Central Provinces, the District Judges were authorized to receive applications for Probate and Letters of Administration even in the cases of Hindu Wills not falling under Section 57. That notification must be deemed to continue in force as one under Sub-section 2 of Section 264 of the Act.

In *Pishorilal Sethi v. Arvind K. Jauhar, AIR 2009 MP 128* it has been held that granting probate is not prohibited in Madhya Pradesh. Courts are competent to entertain any such applications made to them. It was also held that court fees is not charged on application of the probate, but blank stamp paper of proper duty should be presented before the Court for obtaining probate or letters of administration.

Section 265 of the Act provides for the appointment of District Delegates to act for the District Judge as delegates to grant probate and letters of administration in non-contentious cases. The High Court is empowered to appoint the District Delegate to the District Judge but the District delegate is not empowered to reject the probate application. If the District Delegate is not able to grant the probate in such a situation District Delegate should return application with documents for presentation before the District Judge.

**District Judge includes Additional District Judge**

In *Ashok Kumar v. Smt. Rampyari Bai, AIR 1999 MP 67* it has been held that the Additional District Judge has power to grant probate. The Additional District Judge is also a Judge of principal Civil Court of original jurisdiction and has power to entertain the probate proceedings and he will be the District Judge within the meaning of S. 264 of the Act. Similar view was expressed by the Assam High Court in *Sagar v. Nabin, AIR 1970 Assam and Nagaland 111.*

**Powers of the District Judge in probate matters**

The District Judge shall have the same powers and authority while granting probate and letters of administration as are vested in him in relation to any civil

suit or proceeding pending in his Court and he may order any person to produce and bring into Court any document. All proceedings in relation to the grant of probate and letters of administration shall be regulated by the Code of Civil Procedure, 1908. The District Judge can also interfere for the protection of the property of the deceased person where the deceased is not a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, or not an Indian Christian who has died intestate.

**Jurisdiction of the Probate Court**

Probate jurisdiction can be exercised by a Probate Court in probate matters i. e. probates and letters of administration. The jurisdiction of a Probate Court is only concerned with finding out whether or not the testator executed the testamentary instrument of his free will. Thus, the grant of a probate or letters of administration does not confer title to property.

In *Kanwarjit Singh Dhillon v. Hardyal Singh Dhillon, AIR 2008 SC 306* it has been held that Probate Court is not competent to decide title or whether property was joint ancestral property. Therefore, mere fact that probate of Will was granted by competent Court in respect of property, does not bar civil suit for declaration of title and permanent injunction in respect of the same property.

In *Delhi Development Authority v. Vijaya C. Gurshaney, AIR 2003 SC 3669* it has been held that it is settled law that a Testamentary Court whilst granting Probate or Letters of Administration does not even consider particularly in uncontested matters, the motive behind execution of a testamentary instrument. A Testamentary Court is only concerned with finding out whether or not the testator executed the testamentary instrument of his free will. It is settled law that the grant of a Probate or Letters of Administration does not confer title to property. They merely enable administration of the estate of the deceased. Thus, it is always open to a person to dispute title even though Probate or Letters of Administration have been granted.

In *Ishwardeo Narain Singh v. Kamta Devi, AIR 1954 SC 280* the Apex Court, while considering the jurisdictional aspects of a Probate Court, has opined that "The Court of Probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court."

In a Single Bench decision rendered in *Ram Shankar v. Balakdas, AIR 1992 MP 224,* it was held that exclusive jurisdiction is vested in the special forum created under the Act, which is a Special Law, for grant of probate "and for matters connected therewith". Obviously, that forum namely probate Court must have exclusive jurisdiction to decide, in the case of contest between two Wills, if and which one of the two of them, had been "duly proved" or "established" as

the "last Will" of the testator because the question of "revocation", which may be, express or implied, only it can decide under the Act. Therefore in a Civil Court in a suit instituted by any party, claiming right, title and interest in any property on the basis of a Will, no issue can be struck to decide if that Will was the "last Will" and was a valid Will and the other Will which it purported to revoke had been duly and validly revoked by the Will relied on by the plaintiff. But in *Phool Singh and others v. Smt. Kosa Bai and others, 1999 (1) MPJR 352,* the Division Bench has expressed disagreement with the view taken in *Ramshankar's case* (supra) and held that even in case of two contesting or rival Wills, which are not covered by Section 57 (a) & (b) of the Act, obtaining of probate is not compulsory and the jurisdiction of the Civil Court would not be barred.

**Petition for probate and letters of administration**

As mentioned earlier, the District Judges have powers under Section 264 of the Act to grant or revoke the probate and letters of administration. The petition for probate or letters of administration has to contain the details as provided in Sections 276 and 278 of the Act. The application for probate or letters of administration, with the Will annexed, shall be made by a petition and shall contain particulars and statements as required by Section 276 and where the application for letters of administration is without a Will annexed, the same shall contain particulars as required by Section 278. The application for probate or letters of administration shall be signed and verified in the manner provided in Sections 280 and 281 of the Act.

In *Om Prakash Sharma v. Saraswati Bai and 6 others, AIR 1998 MP 226* based on K*alyan Singh v. Chhoti, AIR 1990 SC 396* it has been held that if there is some suspicious circumstances in the Will then burden lies on propounder of the Will to clear suspicious circumstances.

**Applicability of the Limitation Act**

However, in *Shobha Kshirsagar v. Janki, AIR 1987 MP 145* the High Court of Madhya Pradesh was of the view that the Succession Act is a self-contained Code in so far as the question of making of an application for probate or an appeal taken from a decision of the Probate Court is concerned. This is very clearly manifested in the provisions of Sections 217, 264, 299 and 300 of Part IX of the Act. That apart, on reading the Scheme also of the Schedule appended to the Limitation Act, it can be held that the enactment is not meant to apply to probate proceedings. Hence an application for Probate cannot be thrown out at the threshold as time-barred, invoking Article 137 of the Limitation Act. But, in *Kunvarjeet Singh Khandpur v. Kirandeep Kaur, AIR 2008 SC 2058* the Supreme Court has held that any application to Civil Court made under any Act is covered by Article 137 of Limitation Act. Article 137 is clearly applicable to the petition for grant of Letters of Administration. Therefore, the provisions of the Limitation Act are applicable to the probate proceedings.

**Revocation of Probate and Letters of Administration**

A probate or letters of administration can be revoked on any of the grounds enumerated in Section 263 of the Act.

In *Crystal Developers v. Asha Lata Ghosh, AIR 2004 SC 4980* it has been held that under Section 263, grant of probate or letters of administration is liable to be revoked on any of five grounds mentioned therein. One of the grounds is failure on the part of the grantee to exhibit/file an inventory or statement of account. Similarly, the probate or letter of administration is liable to be revoked if the grant is obtained fraudulently.

All places, where the properties of testator were situated, are not disclosed in application. Therefore citations requisite could not be published in all places so that it is sufficient ground. (*Basanti Devi v. Raviprakash Ramprasad Jaiswal, AIR 2008 SC 295*). Where the respondents are the grand children of the testator and they claimed estate of deceased on the basis of settlement deed executed by testator himself which admittedly was revoked by testator on this situation. The Apex Court held that respondents had caveatable interest in estate of testator therefore they are entitled to be served before final order is passed so the application for revocation of probate is allowed. (*G. Gopal v. Bhaskar, AIR 2009 SC 1232*).

As to the revocation of a probate under Section 263 of the Act, it has been held in *Smt. Y.T. Rajeshwari Devi v. Harilal & others, AIR 1978 MP 201,* that person claiming issue of citation and its service must show prima facie case for revocation. The absence of citations in a case in which they are ordered but did not issue does not by itself constitute just cause for revocation of probate. In cases where citation had not been ordered, the party impugning the Will on the ground of his non-citation must first show that he ought to have been cited, before the burden of proof is shifted to the executor to show that the defect in the proceedings was not one of substance and that no just cause for revocation exists.

An application to revoke probate or letters of administration is to be treated as miscellaneous application and may be disposed of on the fact situation in an appropriate case either summarily or after recording evidence. The burden will be on the applicant to prove the facts to revoke the probate or letters of administration and the respondent, who obtained probate or letters of administration, has to disprove the contentions of the applicant.

During pendency of revocation of probate some dispositions made by the testator after the application of revocation is allowed, then the revocation of grant of probate operate prospectively and the bona fide intermediate acts performed by grantee during pendency of probate are not invalidated.

Can it be said that revocation of the probate on the ground of non-exhibiting an inventory or statement of account will make the grant ab initio void so as to

obliterate all intermediate acts of the executor? In *Crystal Developers v. Asha Lata Ghosh* (supra), the Apex Court has been of the view that if it is not ab initio void in the case of non-filing of inventory or statement of account then equally it cannot be ab initio void in the case of a grant obtained fraudulently. In other words, what applies to clause (e) of the explanation equally applies to clause (b) of the explanation. If the intermediate acts of the executor is not for the purpose of administration of the estate or if the act is performed in breach of trust, then such act(s) is not protected. However, acts which are in consonance with the testator's intention and which are compatible with the administration of the estate are protected. Therefore, on reading Sections 211, 227 along with Section 263, it is clear that revocation of the grant shall operate prospectively and such revocation shall not invalidate the bona fide intermediate acts performed by the grantee during the pendency of the probate.

**Conclusiveness of Probate and Letters of Administration**

The decision of a Probate Court is judgment in rem and it is conclusive as to due execution and validity of Will unless it is duly revoked as per law and no evidence can be admitted to impeach it except in a proceeding taken for revoking the probate or letters of administration as the case may be. Section 273 of the Act says that probate or letters of administration shall have effect over all the property and estate, movable or immovable, of deceased. It shall be conclusive as to the representative title against all debtors of the deceased and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts and all persons delivering such property to the person to whom such probate or letters of administration have been granted.

A decision of the Probate Court would be a judgment in rem which would not only be binding on the parties to the probate proceedings but would be binding on the whole world. [See- *Rukmani Devi v. Narendra Lal Gupta, (1985) 1 SCC 144*].

In *Syed Askari Hadi Ali Augustine Imam v. State, AIR 2009 SC 3232* the Apex Court held that under Section 41 of the Evidence Act, the judgment, order or decree conferring conclusive proof of legal character rendered by Probate Court is judgment in rem and it is binding on all Courts and authorities. Judgment *in rem*, indisputably is conclusive in a criminal as well as civil proceeding.

A judgment of the Probate Court can be attacked successfully on the ground that it was procured by the successful party by exerting fraud or collusion. Section 44 of the Evidence Act makes it clear that any party to a suit or other proceedings can establish that any judgment, order or decree which is relevant under Sections 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

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# घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, 2005 की धारा 26 का विस्तार

**न्यायिक अधिकारीगण,**
**जिला सीहोर (म.प्र.)**

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, 2005, जो दिनांक 26.10.2006 से प्रभावशील हुआ तथा जिसे अत्र पश्चात् केवल 'अधिनियम' कहा जायेगा, घरेलू हिंसा से पीड़ित महिलाओं को त्वरित एवं प्रभावशाली उपचार उपलब्ध कराने के उद्देश्य से अधिनियमित किया गया है। 'अधिनियम' के अंतर्गत घरेलू हिंसा, जिसको विस्तार के साथ 'अधिनियम' की धारा 3 में परिभाषित किया गया है, से पीड़ित महिला या संरक्षण अधिकारी या कोई अन्य व्यक्ति 'अधिनियम' की धारा 12 के अंतर्गत सक्षम मजिस्ट्रेट के समक्ष आवेदन पत्र प्रस्तुत कर 'अधिनियम' की धारा 18 से 22 में प्रावधित विभिन्न प्रकार के अनुतोष प्राप्त कर सकता है, जो संरक्षण आदेश (धारा–18), निवास आदेश (धारा–19), मौद्रिक आदेश (धारा–20), अभिरक्षा आदेश (धारा–21) तथा प्रतिकर आदेश (धारा–22) की प्रकृति के हो सकते हैं। 'अधिनियम' की धारा 27 यथास्थिति मजिस्ट्रेट के न्यायालय को उक्त स्वरूप के आदेश पारित करने की अधिकारिता प्रदान करती है। 'अधिनियम' की धारा 36 भी इस क्रम में संदर्भ योग्य है, जो यह कहती है कि 'अधिनियम' के प्रावधान तत्समय प्रवृत्त अन्य किसी विधि के प्रावधानों के अतिरिक्त स्वरूप के हैं, जिसका अर्थ यह हुआ कि यदि पूर्वोक्त प्रकृति का कोई अनुतोष पूर्व में प्रवृत्त या पश्चात्वर्ती अधिनियमित किसी विधि के अंतर्गत किसी अन्य फोरम से प्राप्त किया जा सकता है तो इस हेतु ऐसे फोरम के समक्ष कार्यवाही की जा सकेगी।

'अधिनियम' की धारा 26 प्रावधित करती है कि धारा 18 से 22 के अंतर्गत उपलब्ध अनुतोष पीड़ित पक्ष और उत्तरदाता को प्रभावित करने वाली किसी अन्य विधिक कार्यवाही में सिविल न्यायालय, कुटुम्ब न्यायालय या दण्ड न्यायालय द्वारा भी प्रदान किये जा सकेंगे। चाहे ऐसी कार्यवाही 'अधिनियम' के प्रवृत्त होने के पूर्व में प्रारम्भ हुयी हो अथवा पश्चात् में। उक्त धारा मूलतः निम्नवत् है:–

**धारा – 26 : अन्य दावे और विधिक कार्यवाहियों में अनुतोष/सहायता:–**

(1) कोई सहायता जो धाराओं 18, 19, 20, 21 तथा 22 में उपलब्ध है उसे सिविल न्यायालय, कुटुम्ब/परिवार न्यायालय अथवा दाण्डिक न्यायालय के समक्ष व्यथित व्यक्ति और रिस्पान्डेन्ट को प्रभावित करने वाली किसी विधिक कार्यवाही में भी चाहा जा सकेगा चाहे ऐसी कार्यवाही इस अधिनियम के प्रारम्भ होने के पूर्व या पश्चात् संस्थित की गयी हो।

(2) उपधारा (1) में निर्दिष्ट कोई सहायता ऐसी किसी अन्य सहायता के अतिरिक्त और साथ में चाहा जा सकेगा जो व्यथित व्यक्ति सिविल या दाण्डिक न्यायालय के समक्ष ऐसे वाद या विधिक कार्यवाही में चाहे।

(3) उस दशा में जब कोई सहायता व्यथित व्यक्ति द्वारा किसी कार्यवाही में इस अधिनियम के अधीन कार्यवाही से अलग प्राप्त कर ली गयी हो तो वह (स्त्री/महिला) बाध्य होगी कि वह मजिस्ट्रेट को ऐसी सहायता मिलने के बारे में सूचित करे।

धारा 26 के परिशीलन से पहली दृष्टि में यह प्रकट होता है कि उसकी भाषा सरल अर्थबोध युक्त नहीं है। विशेषतः वाक्यांश 'किसी भी विधिक कार्यवाही में' का अर्थ बहुत अधिक स्पष्ट नहीं है। ऐसी स्थिति में अनेक प्रश्न इस धारा की प्रयोज्यता, परिधि एवं विस्तार के विषय में उत्पन्न होते हैं। जैसे कि क्या सिविल न्यायालय के समक्ष पति–पत्नी के मध्य संविदा के विनिर्दिष्ट अनुपालन हेतु लंबित वाद में धारा 18 से 22 में प्रावधित प्रकृति के अनुतोष प्रदान किये जा सकते हैं? यह प्रश्न भी उठता है कि क्या सिविल न्यायालय, कुटुम्ब न्यायालय या दण्ड न्यायालय धारा 26 के अंतर्गत अधिकारिता का प्रयोग करने से इस आधार पर इंकार कर सकता है कि धारा 12 के अंतर्गत सक्षम मजिस्ट्रेट के न्यायालय में उपचार उपलब्ध है। साथ ही साथ यह प्रश्न भी उठता है कि जहाँ पीड़ित व्यक्ति ने मजिस्ट्रेट के समक्ष उपचार हेतु धारा 12 के अंतर्गत आवेदन पत्र दिया है एवं उन्हीं पक्षकारों के मध्य कुटुम्ब न्यायालय या सिविल न्यायालय में कार्यवाहियाँ लंबित है तो क्या उस दशा में पति की यह दलील स्वीकार्य होगी कि दोनों मामले एक ही न्यायालय में चलाये जायें।

'अधिनियम' की धारा 12 के अंतर्गत कार्यवाही संस्थित कर 'अधिनियम' की धारा 18 से 22 के अंतर्गत प्रावधित अनुतोष धारा 27 के अंतर्गत सक्षम मजिस्ट्रेट के द्वारा दिये जाने के लिए यह आवश्यक है कि जो व्यक्ति अनुतोष की मांग कर रहा है वह 'अधिनियम' की धारा 2 (a) के अंतर्गत पीड़ित व्यक्ति की परिभाषा से आवृत्त होता हो, साथ ही जिस व्यक्ति के विरूद्ध अनुतोष चाहा जा रहा है, वह व्यक्ति 'अधिनियम' की धारा 2 (q) के अंतर्गत उत्तरदाता की परिधि में आता हो।

**व्यथित व्यक्ति :–**

'अधिनियम' की धारा–2 उपधारा–(a) के अंतर्गत पीड़ित व्यक्ति की परिभाषा में ऐसी महिला को शामिल किया गया है, जो किसी समय पर उत्तरदाता के साथ पारिवारिक संबंध (Domestic Reletionship) में थी तथा जो यह आक्षेप लगा रही है कि उसके प्रति उत्तरदाता के द्वारा घरेलू हिंसा की गयी है।

इस प्रकार, इस अधिनियम 2005 में व्यथित व्यक्ति को व्यापक स्वरूप प्रदान किया गया है, इसमें न केवल पत्नी बल्कि उस महिला को भी अच्छादित किया गया है, जो उस पुरूष की यौन भागीदार है, चाहे वह उसकी वैध पत्नी हो या नहीं, पुत्री, माता, बहन, विधवा संबंधी और घर में निवास करने वाली कोई भी महिला जो किसी तरह से प्रत्यर्थी से संबंधित है।

**प्रत्यर्थी व्यक्तिः–**

प्रत्यर्थी को अधिनियम 2005 की धारा 2 (q) में वर्णित किया गया है– ''प्रत्यर्थी से अभिप्रेत कोई भी वयस्क पुरूष है, जो व्यथित व्यक्ति के साथ घरेलू नाता रखता है या घरेलू नातेदारी में रहा है और

उसके विरूद्ध व्यथित, इस अधिनियम के अधीन किसी अनुतोष की ईप्सा कर चुका है''। परंतु व्यथित पत्नी या विवाह की प्रकृति वाली नाते दारी में रहने वाली स्त्री, पति या पुरूष भागीदार के, नातेदार के विरूद्ध भी शिकायत दाखिल कर सकेगी।

अतः उक्त परिभाषा से स्पष्ट है कि घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम 2005 के अधीन दिये गये अनुतोषों की याचना वयस्क पुरूष सदस्य के विरूद्ध ही की जा सकती है। इस संबंध में माननीय उच्च न्यायालय के न्याय दृष्टांत ***अजयकांत शर्मा व अन्य विरूद्ध श्रीमती अल्का शर्मा, 2008 (1) जे.एल.जे. 393 = 2008 (2) क्राईम 235*** में यह सिद्धांत प्रतिपादित किया गया है कि अधिनियम 2005 के अधीन एक या एक से अधिक अनुतोष की याचना वयस्क पुरूष के विरूद्ध ही की जा सकती है, तथा इस संबंध में माननीय उच्च न्यायालय, म.प्र. द्वारा एक अन्य न्याय दृष्टांत ***तहमीना कुर्रेशी विरूद्ध शाजिया कुर्रेशी, 2010 (1) एम.पी.एच.टी. 133*** में यह सिद्धांत प्रतिपादित किया गया है कि धारा 19 की उपधारा 01 (ख) के अधीन कोई भी आदेश किसी महिला के विरूद्ध पारित नहीं किया जायेगा।

अतः उक्त न्यायदृष्टांतों से स्पष्ट है कि घरेलू नातेदारी में वयस्क पुरूष के साथ रह रही कोई भी स्त्री, जो कि व्यथित व्यक्ति होगी, तथा वह वयस्क पुरूष, जो कि घरेलू नातेदारी में उस स्त्री के साथ रहा है, या रह चुका है, प्रत्यर्थी होगा।

अतः 'अधिनियम' की धारा 26 के अन्तर्गत अधिकारिता का प्रयोग करने के लिये उक्त स्थितियों का स्थापित किया जाना आवश्यक होगा। उक्त परिप्रेक्ष्य में सिविल न्यायालय, कुटुम्ब न्यायालय या दण्ड न्यायालय के समक्ष पीड़ित पक्ष या उत्तरदाता के मध्य लंबित विधिक कार्यवाही में यदि 'अधिनियम' की धारा 18 से 22 के अंतर्गत प्रावधित एक या अधिक अनुतोषों की याचना की जाती है तो यह स्थापित किया जाना आवश्यक होगा कि एक पक्ष पीड़ित व्यक्ति या दूसरा पक्ष उत्तरदाता की परिभाषा से आवृत्त होता है।

धारा 26 की परिधि और विस्तार के विषय में न्याय दृष्टांत ***नीतू सिंह विरूद्ध सुनील सिंह, A.I.R. 2008 Chh.-1 (D.B.)*** में विधिक स्थिति का विश्लेषण करते हुये यह प्रतिपादित किया गया है कि धारा 26 इस उद्देश्य से 'अधिनियम' में रखी गयी है कि धारा 12 के प्रावधानों के बावजूद 'अधिनियम' की धारा 18 से 22 में प्रावधित अनुतोष सिविल न्यायालय, कुटुम्ब न्यायालय या दण्ड न्यायालय के द्वारा उस दशा में प्रदान किये जा सकेंगे जबकि पीड़ित पक्ष तथा उत्तरदाता के मध्य ऐसे न्यायालय में विधिक कार्यवाहियाँ लंबित हैं। अर्थात् यह विकल्प धारा 26 की शब्दावली के परिप्रेक्ष्य में पीड़ित पक्ष को उपलब्ध होगा, क्योंकि अनुतोष की याचना पीड़ित पक्ष के द्वारा ही की जानी है। अतः पीड़ित पक्ष के लिये यह विकल्प उपलब्ध है कि वह या तो 'अधिनियम' के अतंर्गत धारा 27 में प्रावधित सक्षम मजिस्ट्रेट के समक्ष अनुतोष की याचना करें अथवा ऐसे सिविल न्यायालय, कुटुम्ब न्यायालय या दण्ड न्यायालय से, जिसके समक्ष कि उन दोनों पक्षों के मध्य विधिक कार्यवाही लंबित है तथा इस हेतु वे पीड़ित पक्ष तथा उत्तरदाता की परिधि में आते हैं।

***नीतू सिंह (पूर्वोक्त)*** के मामले में पत्नी के द्वारा 'अधिनियम' की धारा 12 के अंतर्गत विवाह समारोह के आयोजन में व्यय हुयी राशि तथा विवाह में दिये गये दहेज आदि की वसूली के लिये कुटुम्ब न्यायालय के समक्ष याचिका प्रस्तुत की गयी थी, जिसे कुटुम्ब न्यायालय ने इस आधार पर अस्वीकृत कर दिया कि याचिका धारा 26 के अंतर्गत नहीं है। इस क्रम में उच्च न्यायालय के द्वारा यह अभिनिर्धारित किया गया कि यदि कुटुम्ब न्यायालय से अनुतोष प्राप्त किया जाना है तो आवेदन पत्र 'अधिनियम' की धार 26 के अंतर्गत दिया जाना चाहिये, क्योंकि धारा 12 के अंतर्गत आवेदन पत्र सक्षम मजिस्ट्रेट के समक्ष ही प्रस्तुत किया जा सकता है।

न्याय दृष्टांत ***राजकुमार रामपाल पाण्डे विरूद्ध सरिता राजकुमार पाण्डे (मुम्बई) उच्च न्यायालय रिट पिटीशन क्र. 5730/08 निर्णय दिनांक 26.08.2008*** में भी अधिनियम की धारा 26 का निर्वचन किया गया। इस मामले में यह व्यवस्था की गई कि धारा 26 के अंतर्गत सिविल न्यायालय, कुटुम्ब न्यायालय या दण्ड न्यायालय वे सारे अनुतोष प्रदान कर सकते हैं, जो धारा 18 से 22 में प्रावधित किये गये है।

न्याय दृष्टांत ***संजय शर्मा (दाण्डिक पुनरीक्षण क्र. 3700/09 आदेश दिनांक 15.07.10 कोलकाता उच्च न्यायालय)*** के मामले में पत्नी के द्वारा परिवार न्यायालय के समक्ष दण्ड प्रक्रिया संहिता की धारा 125 के अंतर्गत भरण–पोषण हेतु आवेदन पत्र प्रस्तुत किया गया था। इस कार्यवाही के लंबित रहने के दौरान पत्नी द्वारा 'अधिनियम' की धारा 12 के अंतर्गत न्यायिक मजिस्ट्रेट प्रथम श्रेणी के समक्ष भरण–पोषण दिलाये जाने के लिये आवेदन पत्र प्रस्तुत किया। पति के द्वारा इस आवेदन का विरोध इस आधार पर किया गया कि भरण–पोषण के बारे में पूर्व से ही कुटुम्ब न्यायालय के समक्ष कार्यवाही लंबित है अतः मजिस्ट्रेट के समक्ष भरण–पोषण याचिका संधारणीय नहीं है, लेकिन न्यायालय ने इस तर्क को स्वीकार नहीं किया था यह मत प्रकट किया कि 'अधिनियम' के प्रावधान अनुपूरक स्वरूप के हैं तथा पूर्व से प्रवृत्त किसी विधि के अंतर्गत अनुतोष प्राप्त करने के अधिकार को प्रभावित नहीं करते हैं।

न्याय दृष्टांत ***डेनिशन पोलराज आदि विरूद्ध श्रीमती माया विनोला (दाण्डिक याचिका क्र. 7156/07 आदेश दिनांक 02.04.2008, चेन्नई उच्च न्यायालय)*** के मामले में पति के द्वारा न्यायिक पृथक्करण के लिये कुटुम्ब न्यायालय के समक्ष याचिका प्रस्तुत की गयी थी। उक्त मामले में पत्नी को कथित रूप से दी जा रही धमकियों के संबंध में उसने संरक्षण आदेश के लिये सक्षम मजिस्ट्रेट के न्यायालय में याचिका प्रस्तुत की, जिसका विरोध इस आधार पर किया गया कि यह विधिक प्रक्रिया का दुरूपयोग है, क्योंकि पूर्व से ही विवाह पृथक्करण के लिये कुटुम्ब न्यायालय में मामला लंबित है अतः उक्त याचिका कुटुम्ब न्यायालय को अंतरित कर दी जाये। चेन्नई उच्च न्यायालय के द्वारा उक्त दलीलों को अस्वीकार करते हुये यह ठहराया गया कि 'अधिनियम' की धारा 26 पीड़ित व्यक्ति को यह विवेकाधिकार देती है कि वह धारा 18 से 22 के अंतर्गत प्रावधित अनुतोष या तो संबंधित सक्षम मजिस्ट्रेट के न्यायालय से प्राप्त करे अथवा विधिक कार्यवाहियाँ लंबित होने की दशा में कुटुम्ब न्यायालय या दण्ड न्यायालय से ऐसा अनुतोष प्राप्त करे, लेकिन पीड़ित व्यक्ति पर ऐसा कोई बंधन

नहीं है कि कुटुम्ब न्यायालय या सिविल न्यायालय में कार्यवाही विचाराधीन होने पर उक्त अनुतोष उसी न्यायालय में याचित किया जाये और न ही ऐसी स्थिति मे सक्षम मजिस्ट्रेट के समक्ष प्रस्तुत की गयी याचिका को परिवार को अंतरित किया जा सकता है।

'अधिनियम' की धारा 26 के विस्तार के संबंध में ***एम. पलानी विरूद्ध मिनाक्षी,*** *A.I.R. 2008 Chennai 162* के मामले में भी विचार किया गया तथा यह ठहराया गया कि जहाँ धारा 12 की याचिका के निराकरण हेतु संबंधित मजिस्ट्रेट के लिये यह आवश्यक होगा कि वह आदेश पारित करने से पहले संरक्षण अधिकारी द्वारा दी गयी Domestic Incident Report पर विचार करे, वहीं सिविल न्यायालय या कुटुम्ब न्यायालय के लिये ऐसा कोई बंधन नहीं है। इस मामले में किया गया सुसंगत प्रतिपादन निम्नवत है:-

> "Section 12 (1) contemplates an application before the Magistrate wherein the proviso to the Section makes it clear that before passing an order by the Magistrate, he shall take into consideration the domestic incident report received from the Protection officer. But however, no such proviso is enumerated U/S 26 of the said Act. If the intention of the legislature is that even if an application is filed before the Civil Court or Family Court or a Criminal Court by the aggrieved person, an order shall be passed by them taking into consideration any domestic incident report received from the Protection Officer or the service provider, then the legislature would have incorporated such proviso as in the case of Section 12 (1), even in Section 26 also. Thus, a conjoint reading of both Sections 12 and 26 will make it clear that when a Magistrate passes an order, he shall receive the report from the protection officer but whereas such a report is not contemplated, when an order is passed by the Civil Court or by the Family Court."

उक्त विश्लेषण के प्रकाश में यह स्थिति उभरकर सामने आती है कि सिविल न्यायालय, कुटुम्ब न्यायालय या दण्ड न्यायालय, पीड़ित पक्ष तथा उत्तरदाता के मध्य चल रही विधिक कार्यवाही में 'अधिनियम' की धारा 26 के अंतर्गत प्रार्थना किये जाने पर एवं इस हेतु आधार दर्शित किये जाने पर 'अधिनियम' की धारा 18 से 22 के अंतर्गत प्रावधित अनुतोष प्रदान कर सकते हैं, लेकिन ऐसी अधिकारिता का प्रयोग किये जाने के लिये यह आवश्यक है कि जो पक्ष अनुतोष प्राप्त करना चाहता है, वह 'अधिनियम' की धारा 2 (a) के अंतर्गत पीड़ित पक्ष की परिधि में आता हो, जबकि जिस व्यक्ति के विरूद्ध अनुतोष चाहा गया है, वह व्यक्ति 'अधिनियम' की धारा 2 (q) के अंतर्गत उत्तरदाता की परिधि में आता हो।

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# गर्भपात से संबंधित, विशेषकर महिला भ्रूण हत्या के संदर्भ में, प्रयोज्य विधि

**न्यायिक अधिकारीगण**
**जिला सिवनी एवं धार**

भारतीय सामाजिक संरचना में पारम्परिक रूप से स्त्री को पुरूष की तुलना में दोयम दर्जे पर रखा गया है। आज भी समाज में पुरूष–शिशु का जन्म सुखद और स्वागत योग्य है जबकि स्त्री–शिशु का जन्म दुःस्वप्न है। परिणाम स्वरूप देश के अधिकांश भागों में पुरूष जनसंख्या की अपेक्षा स्त्री जनसंख्या कम है। भारत के संविधान में अनुच्छेद 15 के अंतर्गत लिंग के आधार पर भेद का प्रतिषेध किया गया है। कतिपय आपवादिक परिस्थितियों को छोड़कर, गर्भपात को दण्डनीय अपराध बनाया गया है। विज्ञान और तकनीक के विकास तथा चिकित्सा क्षेत्र की वैज्ञानिक प्रगति के साथ स्त्री–शिशु के जन्म निषेध की मनोवृत्ति से ग्रसित लोगों के लिए गर्भपात व महिला भ्रूण हत्या का अनैतिक कार्य और सुलभ हुआ है। परिणामतः गर्भपात नियंत्रण संबंधी नवीन और तकनीकी दृष्टि से प्रभावी विधि की आवश्यकता हुई।

गर्भपात नियंत्रण संबंधी विधि के प्रावधान मुख्यतः तीन अधिनियमों से समाहित हैः–

1. दण्ड विधि के प्रावधान, जिनके अंतर्गत गर्भपात दण्डनीय है – भारतीय दण्ड संहिता की धारा 312 से 316 (Sections 312 to 316 of The Indian Penal Code, 1860)।
2. गर्भवती स्त्री और गर्भस्थ शिशु के जीवन के आसन्न संकट और शारीरिक या मानसिक अस्वस्थता के निवारण हेतु चिकित्सीय प्रयोजन से गर्भपात अनुज्ञेय बनाने वाली विधि। चिकित्सीय गर्भपात समापन अधिनियम, 1971 (The Medical Termination of Pregnancy Act, 1971)।
3. विशेषकर महिला भ्रूण हत्या के निवारण की दृष्टि से, गर्भधारण पूर्व या पश्चात् और प्रसव पूर्व लिंग निर्धारण का प्रतिषेध करने एवं प्रसव पूर्व निदान तकनीक को विनियमित करने संबंधी विधि–गर्भधारण पूर्व और प्रसव पूर्व निदान तकनीक (लिंग चयन प्रतिषेध) अधिनियम, 1994 (The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994)

## भारतीय दण्ड संहिता, 1860 के अंतर्गत प्रावधानः

अनैतिक उद्देश्यों की पूर्ति हेतु किए जाने वाले गर्भपात को हमेशा से एक अपराध माना जाता रहा है और उस अपराध के संबंध में वर्तमान भारतीय दण्ड संहिता का प्रारूप निर्मित करने वाले प्रथम विधि आयोग के द्वारा भारतीय दण्ड संहिता, 1860 में दण्ड की व्यवस्था की गई है। भारतीय दण्ड संहिता के अध्याय 16 में गर्भपात कारित करने, अजन्मे शिशुओं को क्षति पहुंचाने, शिशुओं को आरक्षित छोड़ देने और जन्म छिपाने के विषय में धारा 312 से 318 के अंतर्गत प्रावधान किये गये है।

**धारा 312** में किसी गर्भवती स्त्री का स्वेच्छया गर्भपात कारित किया जाना, जब तक कि ऐसा गर्भपात उस स्त्री का जीवन बचाने के प्रयोजन से सद्भावपूर्वक न किया गया हो, दण्डनीय बनाया गया है। गर्भ की अवस्था की दृष्टि से यथा स्पन्दनगर्भा अवस्था में किया जाने वाला गर्भपात और अधिक गंभीर अपराध बनाया गया है इस धारा के अंतर्गत स्वयं अपना गर्भपात कारित करने वाली स्त्री भी अपराध की दोषी हो सकती है। स्पष्ट है कि धारा 312 में गर्भवती स्त्री की सहमति से किया गया गर्भपात भी दण्डनीय अपराध है। इसका एकमात्र अपवाद यह है कि गर्भवती स्त्री की सहमति से उसका जीवन बचाने के प्रयोजन से सद्भावपूर्वक गर्भपात कारित किया जाना अपराध नहीं है।

**धारा 313** यह प्रावधानित करती है कि यदि ऐसा गर्भपात गर्भवती स्त्री की सहमति के बिना किया गया हो तब वह अपेक्षाकृत अधिक गंभीर अपराध होगा जिसके लिए आजन्म कारावास या 10 वर्ष तक की अवधि के कारावास और जुर्माना दोनों से दंडित करने का प्रावधान किया गया है।

**धारा 314** में गर्भपात करने के आशय से किये गये ऐसे कार्यों को दण्डनीय अपराध बनाया गया है जिन कार्यों से गर्भवती स्त्री की मृत्यु हो जाए, भले ही ऐसा कार्य करने वाला व्यक्ति यह नहीं जानता हो कि उसके ऐसे कार्य से मृत्यु हो सकती है। अभियुक्त मृत्यु का ज्ञान न होने का बचाव नहीं ले सकता है। यदि महिला की सहमति से गर्भपात किया जा रहा है और उसमें महिला की मृत्यु हो जाती है तो उसे दस वर्ष तक के कारावास के लिये दण्डित किया जायेगा और जुर्माने से भी दण्डनीय होगा। यदि गर्भपात महिला की स्वीकृति के बगैर किया गया है, तो आजीवन कारावास या उपरोक्त दण्ड से दण्डनीय होगा और जुर्माने से भी दण्डित किया जायेगा।

**धारा 315** में शिशु के जीवित पैदा होने को रोकने या जन्म के पश्चात् शिशु की मृत्यु कारित किये जाने के आशय से किये गये कार्य को दण्डनीय बनाया गया है। जब तक कि ऐसा कार्य उस शिशु को जन्म देने वाली मां के जीवन बचाने के प्रयोजन से न किया गया हो। ऐसा अपराध 10 वर्ष तक के कारावास या जुर्माने या दोनों दण्डनीय है। यदि ऐसा कार्य इन परिस्थितियों में किया गया हैं कि उससे मृत्यु कारित होती तो वह आपराधिक मानव वध का दोषी होता और ऐसे कार्य से वह किसी सजीव अजात शिशु की मृत्यु कारित करता है तो वह धारा 316 अनुसार 10 वर्ष तक के कारावास एवं जुर्माने से दण्डनीय होगा। 12 वर्ष से कम आयु के शिशु को पूर्णतः परित्याग करने के आशय से आरक्षित छोड़ देने एवं किसी मृत शिशु का जन्म का तथ्य छिपाने के प्रयोजन से शिशु के मृत शरीर के गुप्त व्ययन को भी क्रमशः धारा 317 एवं 318 में दण्डनीय बनाया गया है।

## उक्त प्रावधानों के संबंध में विभिन्न न्याय दृष्टांतों पर विचार भी उपयोगी होगा जो इस प्रकार है–

भारतीय दण्ड संहिता की धारा 312 के प्रावधानों के प्रकाश में, गर्भवती महिला एवं स्पन्दन गर्भा के गर्भपात में अन्तर बताते हुये ***इन री, मलयारा सीथु, 1995 क्रि.लॉ.ज. 372*** के मामले

में यह अवधारित किया गया है कि जहाँ 210 दिवस या 7 माह की गर्भ अवधि पश्चात् शिशु के जन्म को समय पूर्व करा लिया गया है, वहां मामला अपरिपक्व प्रसव का होगा गर्भपात का नहीं।

***डॉ. अखिल कुमार विरूद्ध स्टेट ऑफ मध्यप्रदेश, 1992 क्रि.लॉ.ज. 2029*** के मामले में, जहाँ महिला अवैध संबंधों के फलस्वरूप 24 सप्ताह की गर्भधारक थी, वहाँ चिकित्सक/अभियुक्त द्वारा महिला को गर्भपात के लिए मेन्स्ट्रोजेन फोर्ट इन्जेक्शन दिये जाने और अगले दिन बिना गर्भपात के महिला की मृत्यु हो जाने के तथ्यों के प्रकाश में चिकित्सक/अभियुक्त को स्वेच्छया गर्भपात कारित करने के अपराध का दोषी माना गया। जबकि ***मोहम्मद शरीफ विरूद्ध स्टेट आफ उड़ीसा, 1996 क्रि.लॉ.ज. 2826*** के मामले में जहाँ अविवाहित लड़की ने सामाजिक कलंक से बचने के लिए गर्भपात की सहमति दी थी तथा गर्भपात करने वाले चिकित्सक और गर्भवती लड़की अभियोजित नहीं किये गये थे, वहाँ तथ्यों के प्रकाश में यह अवधारित किया गया कि लड़की का प्रेमी–अभियुक्त अपराध के लिए दोषी नहीं है, विशेषकर तब जबकि चिकित्सक की राय में लड़की का जीवन बचाने के लिए गर्भपात आवश्यक था।

स्वेच्छया गर्भपात अवधारित करने के संबंध में ***डॉ. मीरू भाटिया प्रसाद विरूद्ध स्टेट, 2002 क्रि.लॉ.ज. 1674*** के मामले में चिकित्सक अभियुक्त द्वारा लापरवाही और असावधानी से गर्भवती महिला के परीक्षण हेतु सुईयाँ चुभोने से विकसित हुए सेप्टिक के फलस्वरूप महिला का गर्भपात होने की दशा में यह माना गया कि चिकित्सक अभियुक्त ने महिला की सहमति के बिना गर्भपात कारित किया था।

***स्टेट ऑफ महाराष्ट्र विरूद्ध लोरा सान्तुनु कुटिनो, 2007 क्रि.लॉ.ज. 2233*** के मामले में अविवाहित लड़की के गर्भवती होने की साक्ष्य समाप्त करने के आशय से गर्भपात किये जाने के फलस्वरूप लड़की की मृत्यु हुई थी वहाँ अभियुक्त जो, लड़की को गर्भपात हेतु चिकित्सक के पास ले गया था, को अपराध का दोषी ठहराया गया।

## चिकित्सीय गर्भ समापन अधिनियम, 1971 के प्रावधान (The MedicalTermination of Pregnancy Act, 1971)

### पृष्ठभूमि

भारतीय दण्ड संहिता में गर्भपात को दण्डनीय अपराध बनाया गया है जिसमें मां के साथ –साथ गर्भपात करने वाला, दोनों ही गर्भपात के अपराध के लिए दण्ड के भागीदार है जब तक कि ऐसा गर्भपात का किया जाना गर्भवती स्त्री के जीवन को बचाने के प्रयोजन से आवश्यक न हो। यह अनुभव किया गया कि गर्भवती स्त्री के स्वास्थ्य और जीवन को बचाने के प्रयोजन से जहां ऐसी स्त्री को जीवन या शारीरिक अथवा मानसिक स्वास्थ्य के प्रति खतरा है, मानवीय कारण जैसे कोई मानसिक रुप से अस्वस्थ स्त्री लैंगिक अपराध के परिणाम स्वरूप गर्भवती हुई हो या जहां शिशु के जन्म उपरान्त उसके विकृत या बीमारीग्रस्त होने की आशंका हो, जैसी परिस्थितियों में गर्भपात संबंधी प्रावधानों को शिथिल बनाया जाना चाहिए क्योकि गंभीर रुप से बीमार या मरणासन्न गर्भवती स्त्री की दशा में भी चिकित्सकों द्वारा गर्भपांत किये जाने पर चिकित्सकों को गंभीर कानूनी परिणाम भुगतना पढ़ सकते है।

विज्ञान एवं तकनीकी के विकास के साथ विभिन्न तकनीकों के माध्यम से यह ज्ञात होना संभव हुआ कि गर्भपात का किया जाना गर्भवती स्त्री के जीवन को बचाने के प्रयोजन से या गर्भवती स्त्री को कारित होने वाली शारीरिक एवं मानसिक क्षति के निवारण हेतु या गर्भस्थ शिशु कोई शारीरिक और मानसिक असामान्यता या गंभीर विकलांगता से ग्रसित होने के निवारणार्थ किया जाना आवश्यक है, तब भारतीय दण्ड संहिता के प्रावधानों को तात्कालिक परिस्थितियों के पूर्ण अनुकूल न पाते हुए ऐसे आवश्यक गर्भपात को अनुज्ञेय बनाने के प्रयोजन से चिकित्सकीय गर्भ समापन अधिनियम, 1971 लागू किया गया।

## सुसंगत प्रावधान–

चिकित्सकीय गर्भ समापन अधिनियम, 1971 की धारा 3 में यह प्रावधान किया गया है कि भारतीय दण्ड संहिता में किसी बात के होते हुये भी रजिस्टर्ड चिकित्सा व्यवसायी किसी अपराध का दोषी नहीं होगा यदि वह इस अधिनियम के अंतर्गत बनाये गये प्रावधानों के अनुसार चिकित्सकीय गर्भपात करता है। अधिनियम के प्रावधानों के अंतर्गत, रजिस्टर्ड चिकित्सा व्यवसायी गर्भ समापन कर सकता है यदि गर्भ की अवधि 12 सप्ताह से अधिक की न हो, या गर्भ की अवधि 12 सप्ताह से अधिक किन्तु 20 सप्ताह से अधिक न हो, लेकिन ऐसे मामले में गर्भपात आवश्यक होने के पक्ष में प्रथम परिस्थिति में उस रजिस्टर्ड चिकित्सा व्यवसायी और पश्चातवर्ती परिस्थिति में दो रजिस्टर्ड चिकित्सा व्यवसाइयों का सद्भावना से बनाया गया ऐसा अभिमत हो और परिस्थिति यह हो की गर्भ जारी रखना गर्भवती महिला के जीवन के लिए जोखिम भरा होगा या उसके शारिरिक या मानसिक स्वास्थ्य के लिए गंभीर क्षति कारक होगा या इसमें ऐसा सारभूत जोखिम है कि यदि बच्चा पैदा होगा तो वह शारिरिक या मानसिक असामान्यताओं से पीड़ित होकर गंभीर रूप से विकलांग होगा।

किन्तु यदि 20 सप्ताह से अधिक का गर्भ हो तो प्रश्न उठता है कि क्या उसका समापन इस अधिनियम के तहत किया जा सकता है? इस संबंध में ***श्रीमति निकिता मेहता*** नामक महिला के द्वारा माननीय उच्च न्यायालय में प्रस्तुत की गई याचिका *क्रमांक 1816/2008* में माननीय उच्च न्यायालय के द्वारा यह अभिनिर्धारित किया गया है कि गर्भस्थ शिशु के हृदय में अत्याधिक रूकावट ***(congenital heart block)*** हो और शिशु के जन्म के पश्चात् उसे जीवित रहने हेतु सदैव पेसमेकर ***(pacemaker)*** की आवश्यकता हो, तो गर्भ की अवधि लगभग 25 सप्ताह होने पर भी गर्भ का समापन अधिनियम के उद्देश्यों की पूर्ति हेतु किया जा सकता है।

यदि किसी महिला के साथ बलात्कार किया गया है एवं इस कारण से महिला गर्भवती हुई है तब ऐसे गर्भ के समापन के लिए उसे इस कारण हुई मानसिक वेदना को उसके मानसिक स्वास्थ्य के लिए गंभीर क्षतिकारक होना उपधारित किया जाएगा।

यदि किसी विवाहित महिला या उसके पति ने परिवार नियोजन का साधन अपनाया है एवं परिवार नियोजन के ऐसे साधन की असफलता के परिणामस्वरूप अवांछित गर्भधारण होता है तो

उसके गर्भ के समापन के लिए ऐसी गर्भवती महिला को इस कारण हुई मानसिक वेदना, उसके मानसिक स्वास्थ्य के लिए गंभीर क्षतिकारक होना उपधारित किया जाएगा।

उपरोक्तानुसार गर्भ का समापन स्वस्थचित्त गर्भवती महिला की सहमति से अन्यथा नहीं किया जाएगा। यदि कोई महिला 18 वर्ष से कम आयु की अर्थात् अवयस्क है या मानसिक रूप से अस्वस्थ (Mentally ill) है तो उसके गर्भ का समापन उसके संरक्षक की लिखित सहमति से ही किया जायेगा। यदि कोई गर्भवती स्त्री मानसिक रूप से अस्वस्थ (Mentally ill) हो और उसका कोई अभिभावक नहीं हो तो क्या उसके गर्भ का समापन किया जा सकता है? 'इस संबंध में हाल ही में माननीय सर्वोच्च न्यायालय के द्वारा न्याय दृष्टांत ***सुचिता श्रीवास्तव व अन्य विरूद्ध चंडीगढ़ प्रशासन, (2009) 9 एस.सी.सी. 1*** में यह अवधारित किया गया है कि यद्यपि चिकित्सकीय गर्भ समापन अधिनियम, 1971 की धारा 3(2)(a) या (b) अनुसार गर्भपात के समय यदि स्वस्थचित्त गर्भवती महिता की आयु 18 वर्ष या उससे अधिक की हो तो स्वयं उसकी, और धारा 3(4)(a) के अनुसार गर्भवती स्त्री की आयु 18 वर्ष से कम हो अथवा 18 वर्ष की हो गई हो लेकिन वह मानसिक रूप से अस्वस्थ (Mentally ill) हो, तब गर्भपात उसके अभिभावक की लिखित सहमति, पर ही किया जा सकेगा, किन्तु यदि स्वस्थचित गर्भवती महिला सम्मति देने की स्थिति में नहीं या जहाँ गर्भवती स्त्री मानसिक रूप से अस्वस्थ (Mentally ill) हो और उसका कोई अभिभावक गर्भपात हेतु अनुमति देने के लिए उपलब्ध नहीं हो, तब भी भारतीय संविधान के अनुच्छेद 21 के अनुसार उस गर्भवती स्त्री के प्राण एवं दैहिक स्वतंत्रता को बनाए रखने हेतु पंजीकृत चिकित्सा व्यवसायी के इस अभिमत पर गर्भपात किया जा सकता है कि गर्भपात उस स्त्री के जीवन को बचाने के प्रयोजन से अथवा गर्भवती स्त्री को कारित होने वाली शारीरिक एवं मानसिक क्षति के निवारणार्थ किया जाना आवश्यक है। धारा–4 के अनुसार किसी भी गर्भ का समापन शासन द्वारा स्थापित या पोषित चिकित्सालय अथवा ऐसे स्थान जिसे इस अधिनियम के उद्देश्य के लिए सरकार अथवा सरकार द्वारा घटित जिला स्तरीय कमेटी द्वारा अनुमोदित किया गया हो पर ही किया जाएगा। अन्य किसी स्थान पर नहीं और यदि कोई भी व्यक्ति ऐसे किसी अन्य स्थान पर गर्भपात करेगा तो वह कठोर कारावास से जिसकी अवधि 2 वर्ष से कम की नहीं होगी और 7 वर्ष हो सकेगी से दण्डनीय होगा। [धारा 5 (3),]

धारा 5 (1) में, गर्भ की अवधि 12 सप्ताह से अनधिक अथवा 12 सप्ताह से अधिक लेकिन 20 सप्ताह से अनधिक होने पर रजिस्टीकृत चिकित्सा व्यवसायी के ही द्वारा गर्भ का समापन करने की आवश्यकता, एवं रजिस्टीकृत चिकित्सक का स्त्री रोग विज्ञान और उसके निदान में अनुभव व प्रशिक्षण होने की आवश्यकता से आपात स्थिति में, यानि जब ऐसा गर्भपात किसी स्त्री के जीवन बचाने के लिये यदि आवश्यक हो, छूट दी गई है। इसी तरह यदि महिला की जान बचानी हो तो सद्भावनापूर्वक परिस्थिति में किसी भी जगह गर्भपात किया जा सकता है। ऐसी स्थिति में गर्भपात शासकीय अस्पताल में अथवा सरकार द्वारा मान्यता प्राप्त अस्पताल में ही किया जाना आवश्यक न होगा। लेकिन ऐसा गर्भपात रजिस्टर्ड चिकित्सा व्यवसायी द्वारा किया जाऐगा।

भारतीय दण्ड संहिता के अन्तर्गत किसी भी प्रावधान के होते हुए भी यदि किसी व्यक्ति ने जो कि रजिस्टर्ड चिकित्सा व्यवसायी नहीं है, गर्भ का समापन किया है तो वह अपराध होगा और जो दो वर्ष से कम के कठोर कारावास से दण्डनीय नहीं होगा, लेकिन सात वर्ष तक का कठोर कारावास दिया जा सकेगा, और इसी सीमा तक भारतीय दण्ड संहिता को परिवर्तित किया जाता है। [धारा 5 (2),]

यदि कोई व्यक्ति किसी भवन का स्वामी है, जहां पर गर्भपात किया गया है और ऐसा भवन धारा 4 (खण्ड बी) के अधीन अनुमोदित नहीं है तो वह भी कठोर कारावास से दण्डनीय होगा जिसकी अवधि दो वर्ष से कम नहीं होगी लेकिन जो सात वर्ष तक की हो सकेगी।

अधिनियम की धारा 7(3) में उपबंध है कि यदि कोई व्यक्ति इस अधिनियम के अंर्तगत बनाये गये विनियमों का उल्लंघन करता है तो उसे एक हजार रुपये तक के अर्थदण्ड से दण्डित किया जा सकेगा।

अधिनियम की धारा 8 में किसी रजिस्टीकृत चिकित्सा व्यवसायी द्वारा, सद्भावनापूर्वक इस अधिनियम के अंतर्गत कार्य करने से हुई किसी क्षति के संबंध में उसके विरुद्ध कोई वाद या विधिक कार्यवाही संस्थित किये जाने से सुरक्षा प्रदान की गई है।

**गर्भधारण पूर्व एवं प्रसूति पूर्व निदान तकनीकी (लिंग चयन प्रतिषेध) अधिनियम 1994 [The Pre-conception and Pre-natal DiagnosticTechniques (Prohibition of Sex Selection) Act, 1994] के प्रावधान**

विज्ञान और तकनीक के विकास के साथ प्रसव पूर्व निदान केन्द्रों में गर्भस्थ लिंग के निर्धारण की तकनीक का प्रयोग प्रचलन में आया है जैसा कि भारतीय परिवारों में स्त्री शिशु के जन्म को रोकने कि प्रवृत्ति है, ऐसे निदान केन्द्र स्त्री भ्रूण हत्या के साधन के रूप में उपयोग में लाये जाने लगे हैं, फलतः यह विचार किया गया कि प्रसव पूर्व निदान तकनीक को विनियमित करने और उसके दुरूपयोग को दण्डनीय बनाने के लिए कानून लाए जाने की आवश्यकता है। इस प्रयोजन से संसद में "प्रसव पूर्व निदान तकनीक (विनियमन एवं दुरूपयोग का निवारण) विधेयक, 1991" लोक सभा में प्रस्तुत किया गया जिसे संसद के दोनों सदनों की संयुक्त समिति को भेजा गया। संयुक्त समिति ने दिसम्बर 1992 में इस पर अपनी रिपोर्ट प्रस्तुत की और समिति की अनुशंसाओं के आधार पर विधेयक पुनः संसद में पेश किया गया। विधेयक में प्रसव पूर्व निदान तकनीक का गर्भ के लिंग निर्धारण हेतु दुरूपयोग को रोकने, लिंग निर्धारण के लिए ऐसी तकनीक के विज्ञापन रोकने तथा प्रसव पूर्व निदान तकनीक का अनुवांशिक विकारों का पता लगाने के लिए उपयोग में लाये जाने हेतु अनुमति और विनियमन, तथा ऐसी तकनीक का निश्चित शर्तों के अधीन केवल पंजीकृत संस्थाओं द्वारा उपयोग करने एवं प्रस्तावित विधान के प्रावधानों के उल्लंघन के लिए दण्ड विषयक प्रावधान किये गए। अंततः यह विधेयक "प्रसव पूर्व निदान तकनीक (विनियमन एवं दुरूपयोग का निवारण) अधिनियम, 1994" के रूप में अधिनियमित किया गया।

"प्रसव पूर्व निदान तकनीक (विनियमन एवं दुरूपयोग का निवारण) संशोधन अधिनियम, 2002" के द्वारा अधिनियम का नाम संशोधित किया गया। तदनुसार यह अधिनियम ***"गर्भ धारण पूर्व एवं प्रसव पूर्व निदान तकनीक (लिंग चयन का प्रतिषेध) अधिनियम, 1994"*** के रूप में वर्तमान में प्रभावशील है। इस अधिनियम में प्रसव पूर्व अथवा पश्चात् लिंग चयन के लिये तथा आनुवांशिक विकारों या उपापचयी विकारों या गुणसूत्री विकारों या कुछ जन्मजात विषमताओं या यौन संबंधी विकारों का पता लगाने के लिये प्रसूति पूर्व परीक्षण तकनीक के विनियमन के लिये और इनका दुरूपयोग लिंग पता कर कन्या भ्रूण हत्या की प्रवृत्ति को रोकने के लिये तथा उससे संबंधित या अनुषांगिक मामलों के लिये उपबंध किये गये है। उक्त अधिनियम 14 फरवरी 2003 को लागू किया गया।

अधिनियम की धारा – 2 (ख ख) में "गर्भ के भ्रूण" से अभिप्रेत है, फर्टिलाइजेशन के पश्चात् 8 सप्ताह (56 दिवस) के अंत तक की विकासशील मानव संरचना और धारा–2 (ख ग) में "गर्भस्थ शिशु" से अभिप्रेत है, फर्टिलाइजेशन या क्रियेशन के सत्तावनवें दिन (वह काल जिसमें उसका विकास अवरूद्ध हो गया हो, को छोड़कर) से शुरू होकर जन्म के समय तक की मानव रचना।

अधिनियम की धारा 3 में जेनेटिक काउंसलिंग सेन्टर, जेनेटिक लेबोरेट्री एवं जेनेटिक क्लीनिक को प्रसर्व पूर्व निदान तकनीकी संबंधित गतिविधियाँ संचालित करने के लिए अधिनियम के प्रावधानों के अंतर्गत पंजीकृत होना अनिवार्य बनाया गया है। साथ ही ऐसे स्थानों पर कार्य करने वाले व्यक्तियों को विहित योग्यता रखना आवश्यक होगा तथा ऐसे योग्यताधारी व्यक्ति ऐसे पंजीकृत नियत स्थान के अलावा अन्य किसी स्थान पर प्रसव पूर्व निदान तकनीकी का संचालन नहीं करेंगे।

अधिनियम की धारा 3–ए में लिंग चयन का प्रतिषेध किया गया है। धारा–2 (ण) के अनुसार "लिंग चयन" में सम्मिलित है, कोई विधि, तकनीक, जांच या प्रशासन या प्रेस्क्रिप्शन या कोई भी बात जो गर्भस्थ भ्रूण के किसी विशेष लिंग के होने का सुनिश्चित करे या इसकी संभाव्यता का वर्धन करे तथा धारा 3–बी में लिंग निर्धारण करने वाली मशीनें और उपकरण किसी ऐसे जेनेटिक सेन्टर, लेबोरेट्री, क्लीनिक या अन्य किसी व्यक्ति को जो अधिनियम के अधीन पंजीकृत नहीं है, विक्रय किये जाने का निषेध किया गया है।

अधिनियम के अध्याय 3 में प्रसव पूर्व निदान तकनीक का विनियमन किया गया है।

धारा 4 के अनुसार प्रसव पूर्व निदान तकनीक केवल निम्न 6 बातों के सिवाय प्रयोग में लाये जाने पर रोक लगायी गई है। अर्थात् (1) गुणसूत्री असामान्यता (chromosomal abnormalities) (2) आनुवांशिक उपापचयी विकार (genetic metabolic diseases) (3) हीमोग्लोबिनोपैथी (haemoglobinopathies) (4) लिंग संबंधी अनुवांशिक विकार (sex-linked genetic diseases) (5) जन्मजात विषमता (congenital anomalies) एवं (6) अन्य कोई असामान्यता या विकार जिसे केन्द्रीय सुपरवाइजरी बोर्ड द्वारा विनिर्दिष्ट किया जाये, के पता लगाने के प्रयोजन से ही प्रसव पूर्व निदान तकनीक का प्रयोग किया जा सकता है। तथापि ऐसा प्रयोग कतिपय शर्तों के पूर्ण होने पर ही किया जा सकेगा अर्थात् प्रसव पूर्व निदान तकनीक का प्रयोग इसके लिए योग्य

व्यक्ति द्वारा उसकी ऐसा करने की अपनी संतुष्टि के कारणों को अभिलिखित कर के ही किया जा सकता है। साथ ही निम्न शर्तों में से कोई भी पूर्ण होना आवश्यक होगा–

(1) गर्भवती महिला की उम्र 35 वर्ष से अधिक हो।

(2) गर्भवती महिला के दो या अधिक शीघ्र गर्भपतन या गर्भस्थ भ्रूण की क्षति हो चुकी हो।

(3) गर्भवती महिला किसी पोटेनशियली टेराटो जेनिक एजेन्ट्स जैसे ड्रग्स, विकिरण, इन्फेक्शन या रसायनों के सम्पर्क में आई हो।

(4) गर्भवती महिला या उसके पति के परिवार में मेन्टल रिटारडेशन या शारीरिक विकृति जैसे स्पास्टीसिटी या अन्य किसी अनुवांशिक बीमारी का इतिहास हो।

(5) अन्य कोई शर्त जो बोर्ड द्वारा विनिर्दिष्ट की जाए।

इसके साथ ही गर्भवती महिला पर अल्ट्रासोनोग्राफी का संचालन करने वाला व्यक्ति क्लीनिक पर ऐसी रीति में जो विहित की जाये, उसका सम्पूर्ण अभिलेख रखेगा और उसमें पाई गयी कोई भी कमी या अशुद्धि धारा–5 या धारा–6 के प्रावधानों के उपबंधों का उल्लघंन मानी जायेगी जब तक कि ऐसी अल्ट्रासोनोग्राफी का संचालन करने वाला व्यक्ति इसके विपरीत साबित नहीं कर देता है।

अधिनियम की धारा–5 (1) के अुनसार धारा 3 (2) में निर्दिष्ट व्यक्ति द्वारा प्रसव पूर्व निदान प्रक्रियाओं का उपयोग तभी किया जायेगा जबकि (क) उसने संबंधित गर्भवती महिला को ऐसी प्रक्रियाओं के सभी ज्ञात आनुषंगी प्रभावों और अनुवर्ती प्रभावों को स्पष्ट कर दिया हो, (ख) उसने ऐसी प्रक्रियाएं कराने की लिखित सहमति उस महिला से ऐसी भाषा में जो वह समझती है, विहित प्रारूप में प्राप्त कर ली हो और (ग) उसने ऐसी प्राप्त लिखित सहमति की प्रति गर्भवती महिला को दे दी हो।

इसी प्रकार धारा 5 (2) के अनुसार कोई व्यक्ति जिसमे प्रसव पूर्व निदान प्रकिया कराने वाला व्यक्ति भी भामिल है, संबंधित गर्भवती महिला या उसके नातेदारों या किसी अन्य व्यक्ति को शब्दों, संकेतों या किसी अन्य रीति से भ्रूण का लिंग संसूचित नहीं करेगा।

अधिनियम की धारा 6 के अनुसार जेनेटिक काउंसलिंग सेन्टर, जेनेटिक लेबोरेट्री एवं जेनेटिक क्लीनिक या कोई व्यक्ति भ्रूण के लिंग का अवधारण करने के प्रयोजन से प्रसव पूर्व निदान तकनीकी जिसमें अल्ट्रासोनोग्राफी भी शामिल है, का संचालन नहीं करेगा या नहीं करायेगा। इसी प्रकार कोई व्यक्ति गर्भधारण के पूर्व या पश्चात् लिंग का चयन किसी भी ढंग से नहीं करेगा और न करवाने के लिये अनुज्ञात करेगा।

अधिनियम के क्रियान्वयन हेतु इसके अध्याय 4 एवं 5 में केन्द्रीय व् राज्य स्तरीय सुपरवाइजरी बोर्ड का गठन किया जाना अनिवार्य है। समुचित प्राधिकारी की नियुक्ति और सलाहकार समिति के गठन का भी अधिनियम में प्रावधान किया गया है। इसी प्रकार अध्याय 6 में जेनेटिक काउंसलिंग सेन्टर, जेनेटिक लेबोरेट्री एवं जेनेटिक क्लीनिक के रजिस्ट्रेशन, उसके निरस्ती या निलंबन और इनसे संबंधित अपील के प्रावधान हैं।

## अपराध व शास्तियां –

अधिनियम के अध्याय 7 में अपराध व शास्तियों के संबंध में प्रावधान किये गये है।

धारा–22 के अनुसार गर्भधारण पूर्व एवं प्रसूति पूर्व लिंग निर्धारण से संबंधित विज्ञापन का प्रतिषेध किया गया है तथा उल्लंघन होने पर दण्ड का प्रावधान है। इस धारा के प्रयोजन के लिये विज्ञापन में कोई सूचना, परिपत्र, लेबल, रैपर या कोई अन्य दस्तावेज जिसमें इंटरनेट या कोई अन्य इलेक्ट्रानिक मीडिया या प्रिंट स्वरूप का और होर्डिंग्स, वाल पेंटिंग्स, सिग्नल, प्रकाश, ध्वनि, धुंआ या गैस से होने वाले दृश्य प्रसारण के विज्ञापन सम्मिलित है, उल्लंघन करने पर तीन वर्ष की अवधि तक का कारावास तथा दस हजार रूपये तक के जुर्माने के दण्ड का प्रावधान है।

**धारा 23 की उपधारा (1)** के अनुसार कोई चिकित्सा आनुवांषिकीविज्ञ, स्त्री रोग विशेषज्ञ, रजिस्ट्रीकृत चिकित्सा व्यवसायी या कोई व्यक्ति, जो आनुवांषिकीविज्ञ सलाह केन्द्र, आनुवांषिकी प्रयोगशाला या आनुवंशिकी क्लिनिक का स्वामी है या ऐसे केन्द्र, प्रयोगशाला या क्लिनिक में नियोजित है और ऐसे केंद्र प्रयोगशाला या क्लीनिक में अपनी वृत्तिक या तकनीकी सेवाएं चाहे वे अवैतनिक आधार पर हो या अन्यथा, प्रदान करता है, और जो इस अधिनियम या इसके अधीन बनाए गये नियमों के किन्हीं उपबन्धों का उल्लंघन करेगा, कारावास से, जिसकी अवधि तीन वर्ष तक की हो सकेगी और जुर्माने से, जो दस हजार रूपये तक का हो सकेगा और किसी पश्चात्वर्ती दोषसिद्धि पर कारावास से जिसकी अवधि पांच वर्ष तक की हो सकेगी और जुर्माने से, जो पचास हजार रूपये तक का हो सकेगा, दण्डनीय होगा।

**धारा 23 की उपधारा (2)** के अनुसार रजिस्ट्रीकृत चिकित्सा व्यवसायी का नाम समुचित प्राधिकारी द्वारा सम्बन्धित राज्य आयुर्विज्ञान परिषद् को आवश्यक कार्रवाई करने के लिए, जिसके अन्तर्गत रजिस्ट्रीकरण का निलंबन, यदि न्यायालय द्वारा आरोप विरचित किये जाते है, और मामले के निपटाए जाने तक, और सिद्धदोष ठहराये जाने पर उसके नाम को प्रथम अपराध के लिए पांच वर्ष की अवधि के लिए और पश्चातवर्ती अपराध के लिये स्थायी रूप से परिषद् के रजिस्टर से हटाया जाना भी है, रिपोर्ट किया जाएगा ।

**धारा 23 की उपधारा (3)** के अनुसार कोई व्यक्ति, जो किसी आनुवांशिकी सलाह केन्द्र, आनुवंशिकी प्रयोगशाला या आनुवांशिकी क्लिनिक या अल्ट्रासाउण्ड क्लिनिक या इमेजिंग क्लिनिक की या किसी चिकित्सा आनुवांशिकी विज्ञानी, स्त्रीरोग विशेषज्ञ, सोनोलोजिस्ट, इमेजिंग विशेषज्ञ या रजिस्ट्रीकृत चिकित्सा व्यवसायी या किसी अन्य व्यक्ति की, धारा 4 की उपधारा (2) में विनिर्दिष्ट प्रयोजनों से भिन्न प्रयोजनों के लिए किसी गर्भवती स्त्री पर लिंग चयन के लिए या प्रसवपूर्व निदान तकनीक का उपयोग करने के लिए सहायता लेगा, प्रथम अपराध के लिए कारावास से जिसकी अवधि तीन वर्ष तक की हो सकेगी और जुर्माने से, जो पचास हजार रूपये तक का हो सकेगा और किसी पश्चात्वर्ती अपराध के लिए, कारावास से जिसकी अवधि पांच वर्ष तक की हो सकेगी और जुर्माने से जो एक लाख रूपये तक का हो सकेगा, दण्डनीय होगा।

**धारा 23 की उपधारा (4)** में शंकाओं को दूर करने के लिए, यह उपबन्ध किया गया है कि उपधारा (3) के उपबन्ध ऐसी स्त्री को लागू नहीं होंगे, जिसे ऐसी निदान तकनीक कराने या ऐसा लिंग चयन करने के लिए विवश किया गया हो।

## प्रसव पूर्व निदान–तकनीकी के संचालन की दशा में उपधारणा–

धारा 24 में यह उपबन्ध किया गया है कि भारतीय साक्ष्य अधिनियम, 1872 में किसी बात के होते हुए भी, न्यायालय, जब तक प्रतिकूल साबित नहीं कर दिया जाता है, यह उपधारणा करेगा कि गर्भवती स्त्री प्रसवपूर्व निदान तकनीक का धारा 4 की उपधारा (2) में विनिर्दिष्ट प्रयोजन के लिए उपयोग कराने के लिए, यथास्थिति, उसके पति या किसी अन्य नातेदार द्वारा विवश की गयी थी और ऐसा व्यक्ति धारा 23 की उपधारा (3) के अधीन अपराध के दुष्प्रेरण के लिए दायी होगा और उस धारा के अधीन विनिर्दिष्ट अपराध के लिए दण्डनीय होगा।

## अधिनियम या नियमों के उन उपबन्धों के उल्लंघन के लिए शास्ति जिनके लिए किसी विनिर्दिष्ट दण्ड का उपबन्ध नहीं किया गया है–

धारा 25 के अनुसार जो कोई इस अधिनियम के या इसके अधीन बनाये गये किन्हीं नियमों के उन उपबन्धों का उल्लंघन करेगा, जिसके लिये इस अधिनियम में अन्य किसी शास्ति का उपबन्ध नहीं है, वह कारावास से, जिसकी अवधि तीन मास तक की हो सकेगी या जुर्माने से, जो एक हजार रूपये तक का हो सकेगा या दोनों से और जहां ऐसा उल्लंघन जारी रहता है वहां अतिरिक्त जुर्माने से जो ऐसे प्रत्येक दिन के लिए, जिसके दौरान ऐसा उल्लंघन ऐसे प्रथम उल्लंघन के लिए दोषसिद्धि के पश्चात् जारी रहता है, पांच सौ रूपये तक का हो सकेगा, दण्डनीय होगा।

## कम्पनियों द्वारा अपराध–

धारा 26 की उपधारा (1) के अनुसार जहां इस अधिनियम के अधीन दण्डनीय कोई अपराध किसी कम्पनी द्वारा किया गया है, वहां ऐसा प्रत्येक व्यक्ति, जो उस अपराध के किये जाने के समय उस कम्पनी के कारोबार के संचालन के लिए उस कम्पनी का भारसाधक और उसके प्रति उत्तरदायी था और साथ ही वह कम्पनी भी, ऐसे अपराध के दोषी समझे जाएंगे और तद्नुसार अपने विरूद्ध कार्यवाही किये जाने और दण्डित किये जाने के भागी होंगे।

परन्तु इस उपधारा की कोई बात किसी ऐसे व्यक्ति को दण्ड का भागी नहीं बनाएगी यदि वह यह साबित कर देता है कि अपराध उसकी जानकारी के बिना किया गया था या उसने ऐसे अपराध के किए जाने का निवारण करने के लिए भी सम्यक् तत्परता बरती थी।

धारा 26 की उपधारा (2) के अनुसार उपधारा (1) में किसी बात के होते हुए भी, जहाँ इस अधिनियम के अधीन दण्डनीय कोई अपराध, किसी कम्पनी द्वारा किया गया है और यह साबित हो जाता है कि वह अपराध कम्पनी के किसी निदेशक, प्रबन्धक, सचिव या अन्य अधिकारी की सहमति या मौनानुकूलता से किया गया है या उस अपराध का किया जाना उसकी किसी उपेक्षा के कारण माना जा सकता है वहां ऐसा निदेशक, प्रबन्धक, सचिव या अन्य अधिकारी भी उस

अपराध का दोषी समझा जाएगा और तद्नुसार अपने विरूद्ध कार्यवाही किये जाने और दण्डित किये जाने का भागी होगा।

स्पष्टीकरण – इस धारा के प्रयोजन के लिए–

(क) "कम्पनी" से कोई निगमित निकाय अभिप्रेत है और इसके अन्तर्गत फर्म या व्यक्तियों का अन्यसंगम है; और

(ख) फर्म के सम्बन्ध में "निदेशक" से उस फर्म का भागीदार अभिप्रेत है।

## अपराधों का संज्ञान

**धारा–27** के अनुसार अधिनियम के अधीन प्रत्येक अपराध संज्ञेय, गैर–जमानतीय तथा अशमनीय है।

**धारा–28** के अनुसार मेट्रोपोलिटन मजिस्ट्रेट या प्रथम श्रेणी न्यायिक मजिस्ट्रेट के न्यायालय द्वारा अपराधों का संज्ञान समुचित प्राधिकारी या केन्द्र सरकार या राज्य सरकार, जैसा मामला हो या समुचित प्राधिकारी द्वारा इस बारे में प्राधिकृत व्यक्ति के परिवाद पर ही लिया जा सकता है या किसी व्यक्ति के अथवा किसी समाजिक संगठन द्वारा, परिवाद प्रस्तुती से कम से कम 15 दिन पूर्व लिखित रूप से सूचना पत्र अभिकथित अपराध तथा परिवाद प्रस्तुत करने के आशय के संबंध में समुचित प्राधिकारी को देकर परिवाद प्रस्तुत किये जाने पर अपराध का संज्ञान लिया जा सकता है।

अधिनियम की धारा 17(2) में प्रदत्त शक्तियों के प्रयोग में मध्यप्रदेश शासन द्वारा जिला स्तर पर मुख्य चिकित्सा एवं स्वास्थ्य अधिकारी को समुचित प्राधिकारी नियुक्त किया गया था तत्पश्चात् जिला स्तर पर जिले के कलेक्टर को समुचित प्राधिकारी नियुक्त किया गया है।

अधिनियम के अध्याय 8 में इस अधिनियम और नियमों के अधीन संधारित किये जाने वाले समस्त अभिलेखों एवं दस्तावेजों को दो वर्ष की अवधि तक या ऐसी अवधि तक जो विहित की जाए, परिरक्षित किये जाने का प्रावधान है परंतु यदि किसी जेनेटिक काउंसलिंग सेन्टर, जेनेटिक लेबोरेट्री एवं जेनेटिक क्लीनिक के विरूद्ध कोई आपराधिक या अन्य कार्यवाही संस्थित की जाती है तो ऐसे अभिलेखों / दस्तावेजों को ऐसी कार्यवाही के अंतिम निराकरण तक परिरक्षित किया जायेगा। ऐसे सभी अभिलेखों को समुचित प्राधिकारी या उसकी ओर से इस निमित्त प्राधिकृत व्यक्ति की जांच के लिये सभी युक्तियुक्त समयों पर उपलब्ध कराया जायेगा। (धारा–29)

यदि समुचित प्राधिकारी को यह विश्वास करने का कारण है कि किसी जेनेटिक काउंसलिंग सेन्टर, जेनेटिक लेबोरेट्री एवं जेनेटिक क्लीनिक या किसी अन्य स्थान पर इस अधिनियम के अंतर्गत अपराध किया गया है या किया जा रहा है तो ऐसा समुचित प्राधिकारी या इस निमित्त उसकी ओर से प्राधिकृत अन्य अधिकारी ऐसे नियमों के अधीन रहते हुए जो विहित किये जायें सभी युक्तियुक्त समयों पर ऐसी सहायता के साथ, यदि कोई हो, उसमें प्रवेश कर सकेगा और तलाशी ले सकेगा और वहां पाये गये अभिलेखों आदि की परीक्षा कर सकेगा और उसे अभिगृहीत और सीलबंद कर सकेगा यदि ऐसे प्राधिकारी या अधिकारी के पास ये विश्वास करने का कारण

है कि उससे इस अधिनियम के अधीन दंडनीय किसी अपराध के किये जाने का साक्ष्य मिल सकता है। ऐसी तलाशी और अभिग्रहण में दंड प्रक्रिया संहिता, 1973 के संबंधित उपबंध जहां तक हो सके लागू होंगे। (धारा--30)

इस अधिनियम के अंतर्गत नियम बनाये गये हैं जो दिनांक 14.02.2003 में किये गये संशोधनों सहित, गर्भधारण पूर्व और प्रसव पूर्व निदान तकीनीक (लिंग चयन प्रतिषेध) नियम, 1996 के रूप में प्रभावशील हैं जिनमें उक्त अधिनियम के प्रावधानों से संबंधित केंद्रों प्रयोगशाला एवं क्लीनिकों में कार्यरत अधिकारी, कर्मचारियों की योग्यताओं, रखे जाने वाले आवश्यक उपकरणों, अल्ट्रासाउंड मशीन/इमेजिंग मशीन के विक्रय को विनियमित करने के साथ ही उपरोक्त समस्त स्थानों के रजिस्ट्रेशन आदि की प्रक्रिया उसके नवीनीकरण, रखे जाने वाले अभिलेखों, उनके परिरक्षण, प्रसव पूर्व निदान करने की शर्तें, निरीक्षण के लिये सुविधाएं तथा ऐसे स्थानों की तलाशी तथा अभिगृहण के लिये प्रक्रिया, ऐसे स्थानों पर "भ्रूण का लिंग प्रकट करना विधि के अधीन प्रतिषिद्ध है" की सार्वजनिक सूचना, ऐसे स्थानों पर कार्यरत कर्मचारियों तथा अधिकारियों के लिये आवश्यक आचार संहिता आदि के प्रावधान किये गये हैं।

गर्भ धारण पूर्व एवं प्रसव पूर्व निदान तकनीक (लिंग चयन का प्रतिषेध) अधिनियम, 1994 के प्रावधानों का केन्द्र और राज्य सरकारों द्वारा क्रियान्वयन नहीं किये जाने को माननीय सर्वोच्च न्यायालय ने गंभीरता से लेते हुए ***सेन्टर फॉर इंक्वायरी इन टू हेल्थ एण्ड एलाईड थीम्स (सी. ई.एच.ए.टी.) विरूद्ध यूनियन ऑफ इंडिया, ए.आई.आर 2001 सु.को. 2007*** के मामले में अधिनियम के विभिन्न प्रावधानों के समुचित क्रियान्वयन हेतु केन्द्र सरकार, केन्द्रीय सुपरवायजरी बोर्ड, समस्त राज्य सरकारों और संघ शासित क्षेत्रों एवं समुचित प्राधिकारियों के लिए निर्देश जारी किये है। अधिनियम के अधीन निदान तकनीक और उसके उपकरण प्रयोग करने वाले क्लीनिकों के पंजीयन की अनिवार्यता उपबंधित है। माननीय सर्वोच्च न्यायालय ***सी.ई.एच.ए.टी. विरूद्ध यूनियन ऑफ इंडिया, ए.आई.आर 2002 सु.को. 3689*** के मामले में समस्त राज्यों को निर्देशित किया है कि वे, ऐसे अपंजीकृत क्लीनिक देश के किसी भी भाग में क्रियाशील न हो और अधिनियम के प्रावधानों का पूरी तरह से पालन हो, इसके लिए निरंतर सर्वे करने के लिए समुचित कदम उठायें। अधिनियम के प्रावधानों के प्रभावी क्रियान्वयन हेतु जारी किये गए निर्देशों का संबंधित प्राधिकारियों सरकारों द्वारा अनुपालन सुनिश्चित करने के लिए पुनः माननीय सर्वोच्च न्यायालय ने ***सेन्टर फॉर इंक्वायरी इनटू हेल्थ एण्ड एलाईड थीम्स (सी.ई.एच.ए.टी.) विरूद्ध यूनियन ऑफ इंडिया, ए.आई.आर 2003 सु.को. 3309*** में निर्देश दिये है। तदनुसार अधिनियम के पालन हेतु माननीय सर्वोच्च न्यायालय द्वारा दिये गए उक्त निर्देशों का संबंधित सरकारों एवं समुचित प्राधिकारियों द्वारा अनुपालन किया जाना अपेक्षित है।

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# THE SCOPE OF SECTION 20 OF JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000

**Institutional Article**

## Introduction

The need to treat children differently from adults in relation to commission of offences had been under consideration of the Central Government ever since India achieved independence. With such object in mind, Parliament enacted the Juvenile Justice Act, 1986, in order to achieve the constitutional goals contemplated in Articles 15(3), 39(e) and (f), 45 and 47 of the Constitution imposing on the State a responsibility of ensuring that all the needs of children are met and that their basic human rights are fully protected. Subsequently, in keeping with certain international conventions and in particular the Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985, the Legislature enacted the Juvenile Justice (Care and Protection of Children) Act, 2000, with the object to prescribe a uniform age of eighteen years for both boys and girls and to deal with offences allegedly committed by juveniles on a different footing from adults, and for rehabilitating them.

Section 2(k) of the Act, 2000 defines a juvenile or child as a person who has not completed eighteen years of age. A broad distinction has, however, been made between juveniles in general and juveniles who are alleged to have committed offences. Section 2(l) defines "a juvenile in conflict with law" as a juvenile who is alleged to have committed an offence. Determination of age, therefore, assumes great importance in matters brought before the Juvenile Justice Boards. In fact, Chapter II of the Juvenile Justice Act, 2000, deals exclusively with juveniles in conflict with law and provides a complete code in regard to juveniles who are alleged to have committed offences which are otherwise punishable under the general criminal laws.

One of the problems which has frequently arisen after the enactment of the Act of 2000, is with regard to application of the definition of "juvenile" under Sections 2(k) and (l) in respect of offences alleged to have been committed prior to 1st April, 2001 when the Juvenile Justice Act, 2000 came into force, since under the 1986 Act, the upper age limit for male children to be considered as juveniles was 16 years. The question which has been frequently raised is, whether a male person who was above 16 years on the date of commission of the offence prior to 1st April, 2001, would be entitled to be considered as a juvenile for the said offence if he had not completed the age of 18 years on the said date.

**Legal position before the Amendment Act, 2006 (prior to 22.08.2006)**

On this question two contrary views were expressed by the Apex Court in *Arnit Das v. State of Bihar, (2000) 5 SCC 488 and Umesh Chandra v. State of Rajasthan, AIR 1982 SC 1057.* To settle the divergence of views the matter was referred to the Constitution Bench in *Pratap Singh vs. State of Jharkhand & another, AIR 2005 SC 2731* in which two points for decision were formulated namely:

(a) Whether the date of occurrence will be the reckoning date for determining the age of the alleged offender as juvenile offender or the date when he is produced in the Court/ competent Authority?

(b) Whether the Act of 2000 will be applicable in a case where a proceeding is initiated under the 1986 Act and was pending when the Act of 2000 was enforced with effect from 01.04.2001?

After considering the first question, the Constitution Bench has held that the relevant date for applicability of the Act so far as age of the accused, who claims to be a child, is concerned, is the date of occurrence and not the date of trial. Consequently, the decision in *Arnit Das's case* (supra) was over-ruled and the view taken in *Umesh Chandra's case* (supra) was declared to be the correct law.

On the second point, after considering the provisions of Sections 3 and 20 along with the definition of "juvenile" in Section 2(k) of the Juvenile Justice Act, 2000, as contrasted with the definition of a male juvenile in Section 2(h) of the 1986 Act, the majority view was that the 2000 Act would be applicable to a proceeding in any Court/Authority initiated under the 1986 Act which is pending when the 2000 Act came into force and the person had not completed 18 years of age as on 01.04.2001. In other words, a male offender, who was being proceeded within any Court/Authority initiated under the 1986 Act and had not completed the age of 18 years on 01.04.2001, would be governed by the provisions of Juvenile Justice (Care & Protection of Children) Act, 2000. A legal fiction has, thus, been created in Section 20, by reason of it, a person, although not a juvenile, has to be treated to be one by the Board for the purpose of sentencing which takes care of a situation that the person although not a juvenile in terms of the 1986 Act but still would be treated as such under the 2000 Act for the said limited purpose.

The unanimous view of the Constitution Bench was that the provisions of the Juvenile Justice Act, 2000, have prospective effect and not retrospective effect, except to cover cases where, though the male offender was above 16

years of age at the time of commission of the offence, he was below 18 years of age as on 01.04.2001. Consequently, the said Act would cover earlier cases only where a person had not completed the age of 18 years on the date of its commencement and not otherwise. [Also see: *Bijender Singh v. State of Haryana, AIR 2005 SC 2262*]

**Legal position after the Amendment Act, 2006 (w.e.f. 22.8.2006)**

Subsequently, after the decision of the Constitution Bench in *Pratap Singhs' case* (supra) the legislature amended the provisions of the Act w.e.f. 22.08.2006 by the Amendment Act, 2006, by substituting Section 2(l) to define a "juvenile in conflict with law" as a "juvenile who is alleged to have committed an offence and has not completed eighteen years of age as on the date of commission of such offence" and also included Section 7-A and proviso and Explanation to Section 20.

Section 7-A makes provision for a claim of juvenility to be raised before any Court at any stage, even after final disposal of a case and sets out the procedure which the Court is required to adopt, when such claim of juvenility is raised. It provides for an inquiry, taking of evidence as may be necessary (but not affidavit) so as to determine the age of a person and to record a finding whether the person in question is a juvenile or not. The aforesaid provisions were, however, confined to Courts, and proved inadequate as far as the Boards were concerned. Subsequently w.e.f. 26.10.2007, in the Juvenile Justice (Care and Protection of Children) Rules, 2007, which is a comprehensive guide as to how the provisions of the Juvenile Justice Act, 2000 are to be implemented, Rule 12 was introduced providing the procedure to be followed by the Courts, the Boards and the Child Welfare Committees for the purpose of determination of age in every case concerning a child or juvenile or a juvenile in conflict with law.

**Scope of Section 20**

Section 20 of the Act, 2000, reads as follows :

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

Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.

*Explanation.*- In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (1) of Section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed."

Rule 97 of Juvenile Justice (Care and Protection of Children) Rules, 2007 also deals with pending cases which reads as under:

*"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 or the period of stay or detention of sentence of imprisonment contained in the final order of the court or the Board."

Section 20 of the Act, as quoted above, deals with the special provision in respect of pending cases and begins with non-obstante clause. The sentence "notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any Court in any area on date of which this Act came into force" has great significance. The proceedings in respect of a juvenile pending in any Court referred to in Section 20 of the Act is relatable to proceedings

initiated before the 2000 Act came into force and which are pending when the 2000 Act came into force. The term "any court" would include even ordinary criminal Courts. If the person was a "juvenile" under the 1986 Act, the proceedings would not be pending in criminal Courts. They would be pending in criminal Courts only if the boy had crossed 16 years or girl had crossed 18 years. This shows that Section 20 refers to cases where a person had ceased to be a juvenile under the 1986 Act but had not yet crossed the age of 18 years then the pending case shall continue in that Court as if the 2000 Act has not been passed and if the Court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, shall forward the juvenile to the Board which shall pass orders in respect of that juvenile.

The Proviso and the Explanation to Section 20 were added by the Amendment Act of 2006, to set at rest any doubts that may have arisen with regard to the applicability of the Juvenile Justice Act, 2000, to cases pending on 1st April, 2001, where a juvenile, who was below 18 years at the time of commission of the offence, was involved. The Explanation which was added in 2006, makes it very clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal or any other criminal proceedings, the determination of juvenility of a juvenile would be in terms of Clause (l) of Section 2, even if the juvenile ceased to be a juvenile on or before 1st April, 2001, when the Juvenile Justice Act, 2000, came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. In fact, Section 20 enables the Court to consider and determine the juvenility of a person even after conviction by the regular Court and also empowers the Court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Juvenile Justice Act, 2000. Even the Board may, for any adequate and special reasons to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile. [As held by the Apex Court in *Hari Ram v. State of Rajasthan, (2009) 13 SCC 211* and *Dharambir v. State (NCT of Delhi), AIR 2010 SC 1801*]

The decision of the Constitution Bench in *Pratap Singh's case* (supra) was rendered at a point of time when the amendments to Sections 2(l) and 20 and the introduction of Section 7-A had not yet been effected, nor Rules 12 and 97 of the 2007 Rules were available. The effect of the proviso to Section 7-A introduced by the Amending Act makes it clear that the claim of juvenility may be raised before any Court which 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 the Rules made thereunder which includes the definition of "Juvenile" in Sections 2(k) and 2(l) of the Act even if the Juvenile had ceased to be so on or before the date of commencement of the Act. The said intention of the legislature was reinforced by the amendment effected by the said Amending Act to Section 20 by introduction of the Proviso and the Explanation thereto, wherein also it has been clearly indicated that in any pending case in any Court the determination of juvenility of such a juvenile has to be in terms of clause 2(l) even if the juvenile ceases to be so "on or before the date of commencement of this Act" and it was also indicated that the provisions of the Act would apply as if the said provisions had been in force for all purposes and at all material times when the alleged offence was committed. [See *Hari Ram's case* (supra)]. Rule 97 also made it more explicit and 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.

Apart from the aforesaid provisions of the 2000 Act, Rule 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 has to be read in tandem with Section 20 of the Juvenile Justice Act, 2000, as amended by the Amendment Act, 2006, which provides that even in disposed of cases of juveniles in conflict with law, the State Government or the Board could, either suo motu or on an application made for the purpose, review the case of a juvenile, determine the juvenility and pass an appropriate order under Section 64 of the Act for the immediate release of the juvenile whose period of detention had exceeded the maximum period provided in Section 15 of the Act, i.e. 3 years. (See *Mohan Mali & another v. State of M.P., 2010 Cri. L.J. 2849*)

## CONCLUSION

The law as now crystallized on a conjoint reading of Sections 2(k), 2(l), 7A, 15, 20 and 64 read with Rules 12, 97 and 98, places beyond all doubt that all persons who were below the age of 18 years on the date of commission of the offence even prior to 1st April, 2001, would be treated as juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or before the date of commencement of the Act and they will get all the benefits of the Juvenile Justice (Care and Protection of Children) Act, 2000 and the Rules made thereunder not only in all pending cases including trial, revision, appeal or any other Criminal proceedings in any court, but also in disposed of cases of juveniles in conflict with law who were undergoing sentence upon being convicted.

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# विधिक समस्याएं एवं समाधान

न्यायिक दायित्वों के निर्वहन के क्रम में अनेक प्रकार की विधिक समस्याएं 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 विलंब की संभावना बढ़ जाती है अपितु न्याय के हनन का खतरा भी आसन्न रहता है। फरवरी 2006 अंक के साथ प्रारंभ इस स्तंभ के माध्यम से हम ऐसी कुछ महत्वपूर्ण समस्याओं के विषय में नियमित रूप से विचार विमर्श करते रहेंगे। प्रयास यह होगा कि समस्या के सम्यक समाधान के विषय में विश्लेषणात्मक दृष्टिकोण अपनाया जावे।

**अभियुक्त द्वारा जहां चिकित्सा विधिक प्रमाणपत्र (M.L.C.) अथवा शव–परीक्षण प्रतिवेदन (Post Mortem Report) असली होना स्वीकार कर लिया गया है वहां संबंधित चिकित्सक की परीक्षा के बिना क्या उन्हें सारभूत साक्ष्य के रूप में पढ़ा जा सकता है?**

इस समस्या के समाधान हेतु द.प्र.सं. की धारा 294 सुसंगत है जो निम्नवत् है–

> **"294. कुछ दस्तावेजों का औपचारिक सबूत आवश्यक न होना–**
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> (1) जहां अभियोजन या अभियुक्त द्वारा किसी न्यायालय के समक्ष कोई दस्तावेज फाइल की गई है, वहां ऐसी प्रत्येक दस्तावेज की विशिष्टियां एक सूची में सम्मिलित की जाएंगी और, यथास्थिति, अभियोजन या अभियुक्त अथवा अभियोजन या अभियुक्त के प्लीडर से, यदि कोई हों, ऐसी प्रत्येक दस्तावेजों का असली होना स्वीकार या इन्कार करने की अपेक्षा की जाएगी।
>
> (2) दस्तावेजों की सूची ऐसे प्ररूप में होगी जो राज्य सरकार द्वारा विहित की जाए।
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> (3) जहां किसी दस्तावेज का असली होना विवादग्रस्त नहीं है वहां ऐसी दस्तावेज उस व्यक्ति के जिसके द्वारा हस्ताक्षरित होना तात्पर्यित है, हस्ताक्षर के सबूत के बिना इस संहिता के अधीन किसी जांच, विचारण या अन्य कार्यवाही में साक्ष्य में पढ़ी जा सकेगी:
>
> परंतु न्यायालय, स्वविवेकानुसार, यह अपेक्षा कर सकता है कि ऐसे हस्ताक्षर साबित किए जाएं।"

इस प्रकार अभियोजन/अभियुक्त की ओर से विहित प्ररूप में सूची के साथ प्रस्तुत दस्तावेजों के असली होने की स्वीकृति या अस्वीकृति करने की अपेक्षा प्रतिपक्ष से की जाएगी। यदि प्रतिपक्ष द्वारा किसी दस्तावेज का असली होना (Genuineness of document ) स्वीकार कर लिया जाता है वहां उसे द.प्र.सं. की धारा–294 (3) के अधीन, उस दस्तावेज के हस्ताक्षरकर्ता की परीक्षा के बिना, उस दस्तावेज की विशिष्टियों की सत्यता साबित करने हेतु सारभूत साक्ष्य के रूप में पढ़ा जा सकता है।

स्पष्ट है कि जहां अभियुक्त द्वारा चिकित्सा विधिक प्रमाणपत्र (Medico-legal Certificate) या उपहति प्रतिवेदन (Injury Report) अथवा शव परीक्षण प्रतिवेदन (Post Mortem Report) की सत्यता को स्वीकार कर लिया गया है वहां ऐसे प्रतिवेदन की विशिष्टियों की सत्यता प्रमाणित करने हेतु , ऐसे प्रतिवेदन को सारभूत साक्ष्य के रूप में पढ़ा जा सकता है। इस हेतु संबंधित चिकित्सक की परीक्षा किए जाने की कोई आवश्यकता नहीं है। इस बिंदु पर *Akhtar Vs. State of Uttaranchal (2009) 13 SCC 722* के न्यायदृष्टांत में उच्चतम न्यायालय द्वारा प्रतिपादित निम्नलिखित विधि अवलोकनीय है –

> "It has been argued that non-examination of the medical officers concerned is fatal for the prosecution. However, there is no denial of the fact that the defence admitted the genuineness of the injury reports and the post-mortem examination reports before the trial court. So the genuineness and authenticity of the documents stands proved and shall be treated as valid evidence under Section 294 Cr.P.C. It is settled position of law that if the genuineness of any document filed by a party is not disputed by the opposite party it can be read as substantive evidence under sub-section (3) of Section 294 Cr.P.C. Accordingly, the post-mortem report, if its genuineness is not disputed by the opposite party, the said post-mortem report can be read as substantive evidence to prove the correctness of its contents without the doctor concerned being examined.

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**पचास बल्क लीटर से अधिक मदिरा के विनिर्माण, परिवहन, कब्जा, विक्रय आदि से संबंधित मामलों का विचारण किस मजिस्ट्रेट द्वारा किया जा सकता है ?**

मध्यप्रदेश आबकारी अधिनियम, 1915 की धारा–34 (2) के अधीन पचास बल्क लीटर से अधिक मदिरा के विधि विरूद्ध विनिर्माण परिवहन, कब्जा, विक्रय आदि को ऐसे कारावास से जिसकी अवधि एक वर्ष से कम नहीं होगी किंतु जो तीन वर्ष तक की हो सकेगी तथा ऐसे जुर्माने से जो पच्चीस हजार रूपये से कम का नहीं होगा किंतु जो एक लाख रूपये तक का हो सकेगा के दण्ड से दण्डनीय बनाया गया है। इस प्रावधान में कारावास के साथ न्यूनतम पच्चीस हजार रूपये का अर्थदण्ड किया जाना आज्ञापक है । चूंकि द.प्र.सं. की धारा 29(2) के अधीन प्रथम वर्ग मजिस्ट्रेट दस हजार रूपये से अधिक के जुर्माने का दण्डादेश देने हेतु सशक्त नहीं है अतः प्रश्न यह उत्पन्न होता है कि क्या उक्त अपराध का विचारण प्रथम वर्ग मजिस्ट्रेट का न्यायालय कर सकता है या नहीं।

मध्यप्रदेश आबकारी अधिनियम में इस अधिनियम के अधीन दण्डनीय अपराध के विचारण हेतु न्यायालय की अधिकारिता बाबत कोई प्रावधान नहीं है। अतएव इस अधिनियम के अधीन दण्डनीय अपराधों पर दण्ड प्रक्रिया संहिता की धारा 26 (ख)(ii) के सामान्य प्रावधान ही प्रयोज्य होंगे।

यह प्रावधान निम्नवत् है–

"**धारा– 26 न्यायालय, जिनके द्वारा अपराध विचारणीय हैं**– इस संहिता के अधीन रहते हुए–

(क) .....

(ख) किसी अन्य विधि के अधीन किसी अपराध का विचारण, जब उस विधि में इस निमित्त कोई न्यायालय उल्लिखित है, तब उस न्यायालय द्वारा किया जाएगा और जब कोई न्यायालय इस प्रकार उल्लिखित नहीं है तब–

(i) .....

(ii) किसी अन्य ऐसे न्यायालय द्वारा किया जा सकता है जिसके द्वारा उसका विचारणीय होना प्रथम अनुसूची में दर्शित किया गया है।"

संहिता की प्रथम अनुसूची भाग–II में अन्य विधियों के विरूद्ध अपराधों के वर्गीकरण के अधीन तीन वर्ष और उससे अधिक किंतु सात वर्ष से अनधिक के कारावास से दण्डनीय अपराधों को संज्ञेय, अजमानतीय तथा प्रथम वर्ग मजिस्ट्रेट के द्वारा विचारणीय दर्शित किया गया है। इस अनुसूची में जुर्माने के संबंध में ऐसा कोई उल्लेख नहीं है जो विचारण की अधिकारिता के प्रश्न का निर्धारण करता हो। अधिनिमय की धारा 34(2) के अधीन दण्डनीय अपराध हेतु अधिकतम तीन वर्ष के कारावास का दण्ड विहित किया गया है। अतएव यह अपराध प्रथम वर्ग मजिस्ट्रेट की विचारण की अधिकारिता के अधीन होगा। यदि अभियुक्त तथा अभियोजन की साक्ष्य सुनने के पश्चात् ऐसे मजिस्ट्रेट की यह राय है कि अभियुक्त दोषी है तो ऐसी अवस्था में उसे मामले को द.प्र.सं. की धारा 325 के अधीन अपनी राय अभिलिखित करते हुए मामले एवं अभियुक्त को मुख्य न्यायिक मजिस्ट्रेट को भेजना चाहिये। ऐसी स्थिति में प्रथम वर्ग मजिस्ट्रेट द्वारा विरचित आरोप एवं साक्षियों की अंकित की गई साक्ष्य, अवैध नहीं होती है। इस बिंदु पर ***रमेश वि. मध्यप्रदेश राज्य 2003 (1) MPHT 392*** का न्याय दृष्टांत अवलोकनीय है।

यह उल्लेखनीय है कि प्रथम वर्ग मजिस्ट्रेट द्वारा ऐसे मामलों का विचारण अवैध न होने पर भी दोष सिद्धि की अवस्था में उत्पन्न होने वाली कठिनाइयों के निवारणार्थ प्रशासनिक रूप से यह उचित होगा कि ऐसे मामलों का विचारण जहां तक संभव हो सके मुख्य न्यायिक मजिस्ट्रेट या अतिरिक्त मुख्य न्यायिक मजिस्ट्रेट द्वारा सम्पादित किया जाए। सत्र न्यायाधीश एवं मुख्य न्यायिक मजिस्ट्रेट को कार्य विभाजन आदेश जारी करते समय इसे ध्यान में लेना चाहिये।

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**नोट** : स्तंभ 'समस्या एवं समाधान' के लिये न्यायिक अधिकारी अपनी विधि समस्याएं संस्थान को भेज सकते हैं। चयनित समस्याओं के समाधान आगामी अंकों में प्रकाशित किये जाएंगे।

## PART - II

# NOTES ON IMPORTANT JUDGMENTS

**302. CIVIL PROCEDURE CODE, 1908 – Section 2 (2) and Order 21 Rule 11**

**(i) Decree – Execution of – Only final decree is executable – Executing Court cannot execute preliminary decree in absence of final decree – When final decree is part of preliminary decree, preliminary decree is executable.**

**(ii) Final and preliminary decree – Preliminary decree would not convert automatically into final decree.**

### Kasturi Devi Jain (Smt.) v. Union Bank of India and others

**Judgment dated 22.04.2010 passed by the High Court of M.P. in Civil Revision No. 105 of 2006, reported in 2010 (4) MPHT 229.**

Held :

When a specific condition for obtaining a final decree is provided in a preliminary decree and the plaintiff decree holder straight away seeks execution of a preliminary decree (upon a defendant failing to comply with conditions), then the Executing Court could not execute the preliminary decree, in absence of a final decree, as per the Legislative intendment, reflecting in Order 34 Rule 3 of CPC. Similarly, the preliminary decree would not convert automatically into final decree, either by efflux of time or upon further non-compliance of the conditions prescribed by a Court, while setting aside the ex parte preliminary decree, as the same would not have the effect of an appellate order, passed in relation to the preliminary decree and, therefore, a preliminary decree would certainly be required to be made a final decree, by a specific prayer/application of the plaintiff in terms of Rule 3 of Order 34, CPC and only upon drawing of a final decree by the Court (though at time it may be formal in nature), its execution could then be made by putting the hypothecated/charged properties to the auction/sale for the realization of the due amount, described in the decree. (See – *Hasham Abbas Sayyad v. Usman Abbas Sayyad, (2007) 2 SCC 355).*

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**303. CIVIL PROCEDURE CODE, 1908 – Section 24**

**Transfer of suit – Where the disputed property in two suits is the same but nature of dispute and parties to the suits are different – No ground for conduction of a joint trial – Rejection of application for transfer of suit is proper.**

**Power to transfer a case – Must be exercised with due care, caution and circumspection for meeting the ends of justice.**

### Tulsiram and others v. Gambhir Singh and others

**Judgment dated 31.03.2010 passed by the High Court of M.P. in Civil Revision No. 138 of 2009, reported in 2010 (4) MPHT 137**

Held :

The Trial Court while examining the nature of the two suits has found that although the disputed property described in the two suits is comprised in Survey No. 88, but the nature of the dispute and the parties to the suit are different. It is a cardinal principle of law that unless the nature of the two suits pending between identical set of parties are not similar then the two cases either diverse in nature or pending amongst different set of litigation could not be tried together merely on account of commonness of the suit property. Therefore, the judgment cited by the learned counsel for the petitioner in the case of *Gaya Prasad v. Kishorilal, 2000 (1) MPWN 215* shall not help him.

The power of the Court to transfer the suit is certainly wide in terms of Section 24 of CPC which empowers the District Court and the High Court to transfer the suit or appeal for their trial or disposal to any Court subordinate to it and competent to try and dispose of the same, but the Court exercise this power only in such circumstance where it become imperative for the Court to exercise the power for meeting the ends of justice.

The Supreme Court has observed in a case *Kulwinder Kaur v. Kandi Frinds Education Trust, (2008) 3 SCC 659,* that the power to transfer a case must be exercised with due care, caution and circumspection. For ready reference relevant Paragraphs of this judgment are quoted herein below:-

> "22. Although the discretionary power of transfer of cases cannot be imprisoned within a straitjacket of any cast-iron formula unanimously applicable to all situations, it cannot be gainsaid that the power to transfer a case must be exercised with due care, caution and circumspection.
>
> 23. Reading Sections 24 and 25 of the Code together and keeping in view various judicial pronouncements, certain broad propositions as to what may constitute a ground for transfer have been laid down by Courts etc. They are balance of convenience or inconvenience to the plaintiff or the defendant or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues raised by the parties; reasonable apprehension in the mind of the litigant that he might not get justice in the Court in which the suit is pending; important questions of law involved or a considerable section of public interested in the litigation; "interest of justice" demanding for transfer of suit, appeal or other proceeding, etc. Above are some of the instances which are germane in considering the question of transfer of a suit, appeal or other proceeding etc. They are, however, illustrative in nature and by no means be treated as exhaustive. If on the above or other relevant considerations,

the Court feels that the plaintiff or the defendant is not likely to have a "fair trial" in the Court from which he seeks to transfer a case, it is not only the power, but the duty of the Court to make such order."

Therefore, while examining the nature of the two suits and after giving anxious consideration to the rival submission of the ligating parties and looking to the nature of the two suits (as also the two different set of parties) and the dissimilar relief claimed in the two suits, this Court do not find any jurisdictional error in the impugned order passed by the District Judge, Gwalior, while rejecting the application preferred under Section 24 of the Code of Civil Procedure.

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**304. CIVIL PROCEDURE CODE, 1908 – Section 30, Order 12 Rules 2, 2A, 3A & 4 CIVIL COURTS RULES, 1961 (M.P.) – Rule 143**

**Admission of facts and documents – Period and stage at which it is permitted – For admission of facts, the period and stage has been specified under Rule 4 of Order 12 while for admission of the documents no such period and stage has been specified either under Order 12 Rule 2 or Rule 3A of CPC or in the Civil Courts Rules and Orders. Admission of facts may be made within six days after serving such notice within prescribed period – The admission of a document may be made by the parties at any stage, if permitted by the Court.**

**Mohd. Yunus & ors. v. Devjani & ors.**

**Judgment dated 16.07.2010 passed by the High Court of M.P. in W. P. No. 2322 of 2010, reported in ILR (2010) M.P. 2105 (DB)**

Held:

Section 30 of the Code of Civil Procedure confers powers to the Court to pass the orders if necessary or reasonable for admission of the documents and the facts, as per Order 12 of the Code of Civil Procedure.

As per Order 12 Rule 2 of the Code of Civil Procedure, either party may call upon the other party to admit the document within seven days from the date of service of the notice, saving all just exceptions. It has further been specified that on refusal or neglect for such admission the cost to prove any such document shall be paid by such party irrespective to the result of any suit. Under Order 12 Rule 3A, CPC the Court is empowered that in absence of moving an application under Rule 2 of Order 12, CPC at any stage of proceedings, such power may be exercised for admission of the document by the Court.

As per sub clause (1) of rule – 143 of Civil Courts Rules and Orders, the Court is bound to take such recourse on appropriate occasions and to pass appropriate order as per the procedure prescribed therein. Sub-clause (4) of Class 143 emphasis the duty of the Court with the aid of Rule 3A of Order 12, CPC. In default of exercise of such power, the District Judge, while having inspection of the Court, may take note of the working of the Judge for the purpose

of systematic and effective implementation of the provisions of law. In view of the foregoing legal position, it is apparent that invocation of the powers of the Court to record admission has been implicit under rule 3A of Order 12, CPC while under Rule 2 of Order 12 CPC, the parties to the suit are free to take recourse on admission by issuing a notice. Emphasis has been added in the Civil Courts Rules and Orders for strict adherence of such procedure, It is to be noted here, that for the purpose of Rule 2 of Order 12, stage has not been specified while for admission of the fax under rule 4 of order 12, CPC such procedure is required to be followed not later than nine days before the date of hearing fixed by the Court. Thus, for admission of facts, the period has been specified either under Order 12 Rule 2, or 3A of CPC or in the Civil Courts Rules and Orders. In view of the foregoing discussion, it is apparent that the admission of a document may be made by the parties at any stage, if permitted by the Court.

In the present case, the documents which have been exhibited, have been admitted by defendant No. 5 after setting aside the ex-parte proceedings against him on an application moved by the plaintiffs, which is allowed. However, in the opinion of this Court, the trial Court while passing the order dated 24-10-2009 allowing the application under Order 12 Rule 2, CPC of the plaintiffs has not committed any error. In fact the trial Court has rightly observed the procedure as prescribed under the law. The judgment of *Balwant Singh Gill and others v. Gurdev Singh Brar and others, AIR 1980 Punjab and Haryana 139* relied upon by the petitioner is having no application in the present case as it deals the issue of Order 12 Rule 4 of CPC i.e. admission of facts. The language of Order 12 Rule 4 of CPC makes it clear that the admission of the facts may be made by any party by notice in writing at any time not later than nine days before the day fixed for hearing. Thus, while admission of the facts the parties are required to issue notice for admission of the facts within nine days from the date of hearing. While under Order 12 Rule 2 of CPC no such time has been specified. Therefore, the admission of the documents may be made at any stage of the suit.

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**305. CIVIL PROCEDURE CODE, 1908 – Sections 35, 35-A and 151**
**TRANSFER OF PROPERTY ACT, 1882 – Section 52**

**(i) Whether a Court has power to pass an order directing a plaintiff in a suit to file an undertaking that in the event of not succeeding in the suit, he shall pay certain sum by way of damages to the defendant ? Held, No, as no where in law, Courts have been authorized or competent to issue such order.**

**(ii) Where the Court finds that chances of plaintiff succeeding in the suit are remote and defendant's right to enjoy or deal with the property due to pendency of the suit are interfered, the Court may pass an order to bar the objection of Section 52 of T.P. Act because the Court has power in appropriate cases to permit a party to transfer the property which is the subject matter of the**

**suit without being subjected to the rights of any part to the suit by imposing such terms as it deems fit.**

**(iii) Imposition of realistic costs to discourage vexatious, frivolous, malicious or speculative litigation – Provisions of Section 35-A and 35-B of CPC are not sufficient and there is urgent need to revisit the provisions to achieve the goal.**

## Vinod Seth v. Devinder Bajaj and another

**Judgment dated 05.07.2010 passed by the Supreme Court in Civil Appeal No. 4891 of 2010, reported in (2010) 8 SCC 1**

Held:

**(i)** Every person has a right to approach a court of law if he has a grievance for which law provides a remedy. Certain safeguards are built into the Code to prevent and discourage frivolous, speculative and vexatious suits. In this regard relevant provisions are found in Sections 35, 35-A and B, 95 Order 7 Rule 11, Order 14 Rule 2, Order 17 Rules 2 & 3 and Order 25 Rule 1 of CPC.

But the Code, nowhere authorizes or empowers the court to issue a direction to a plaintiff to file an undertaking to pay damages to the defendant in the event of being unsuccessful in the suit. The Code also does not contain any provision to assess the damages payable by a plaintiff to the defendant, when the plaintiff's suit is still pending, without any application by defendant, and without a finding of any breach or wrongful act and without an inquiry into the quantum of damages. There is also no contract between the parties which requires the appellant to furnish such undertaking. None of the provisions of either the TP Act or the Specific Relief Act or any other substantive law enables the court to issue such an interim direction to a plaintiff to furnish an undertaking to pay damages. In the absence of an enabling provision in the contract or in the Code or in any substantive laws a court trying a civil suit, has no power or jurisdiction to direct the plaintiff, to file an affidavit undertaking to pay any specified sum to the defendant, by way of damages, if the plaintiff does not succeed in the suit. In short, law does not contemplate a plaintiff indemnifying a defendant for all or any losses sustained by the defendant on account of the litigation, by giving an undertaking at the time of filing a suit or before trial, to pay damages to the defendants in the event of not succeeding in the case.

We are also of the view that a court trying a civil suit, cannot, in exercise of inherent power under section 151 of the Code, make an interim order directing the plaintiff to file an undertaking that he will pay a sum directed by the court to the defendant as damages in case he fails in the suit.

The direction to the plaintiff to furnish an undertaking to pay Rs. 25 lakhs to defendants in the event of losing the case, is an order in terrorem. Such an order, punishing a litigant for approaching the court, on the ground that the court is not able to decide the case expeditiously, is unwarranted, unauthorized and beyond the power and jurisdiction of the court in a civil suit governed by the

Code. Such orders are likely to be branded as judicial highhandedness, or worse, judicial vigilantism.

**(ii)** The reason for the High Court directing the plaintiff to furnish an undertaking to pay damages in the event of failure in the suit, is that Section 52 of the Transfer of Property Act would apply to the suit property and the pendency of the suit interfered with the defendant's right to enjoy or deal with the property. Section 52 of TP Act provides that during the pendency in any court of any suit in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the court and on such terms as it may impose.

It is well-settled that the doctrine of lis pendens does not annul the conveyance by a party to the suit, but only renders it subservient to the rights of the other parties to the litigation. Section 52 will not therefore render a transaction relating to the suit property during the pendency of the suit void but render the transfer inoperative insofar as the other parties to the suit. Transfer of any right, title or interest in the suit property or the consequential acquisition of any right, title or interest, during the pendency of the suit will be subject to the decision in the suit.

The principle underlying section 52 of TP Act is based on justice and equity. The operation of the bar under section 52 is however subject to the power of the court to exempt the suit property from the operation of section 52 subject to such conditions it may impose. That means that the court in which the suit is pending, has the power, in appropriate cases, to permit a party to transfer the property which is the subject-matter of the suit without being subjected to the rights of any part to the suit, by imposing such terms as it deems fit. Having regard to the facts and circumstances, we are of the view that this is a fit case where the suit property should be exempted from the operation of Section 52 of the TP Act, subject to a condition relating to reasonable security, so that the defendants will have the liberty to deal with the property in any manner they may deem fit, inspite of the pendency of the suit.

**(iii)** The provisions of Sections 35, 35-A and 35-B of CPC for costs are intended to achieve the following goals:

> (a) It should act as a deterrent to vexatious, frivolous and speculative litigations or defences. The spectre of being made liable to pay actual costs should be such, as to make every litigant think twice before putting forth a vexatious, frivolous or speculative claim or defence.
>
> (b) Costs should ensure that the provisions of the Code, Evidence Act and other laws governing procedure are scrupulously and strictly complied with and that parties do not adopt delaying tactics or mislead the court.

(c) Costs should provide adequate indemnity to the successful litigant for the expenditure incurred by him for the litigation. This necessitates the award of actual costs of litigation as contrasted from nominal or fixed or unrealistic costs.

(d) The provision for costs should be an incentive for each litigant to adopt alternative dispute resolution (ADR) processes and arrive at a settlement before the trial commences in most of the cases. In many other jurisdictions, in view of the existence of appropriate and adequate provisions for costs, the litigants are persuaded to settle nearly 90% of the civil suits before they come up to trial.

(e) The provisions relating to costs should not however obstruct access to courts and justice. Under no circumstances the costs should be a deterrent, to a citizen with a genuine or bonafide claim, or to any person belonging to the weaker sections whose rights have been affected, from approaching the courts.

At present these goals are sought to be achieved mainly by sections 35,35A and 35B read with the relevant civil rules of practice relating to taxing of costs.

Section 35 of the Code vests the discretion to award costs in the courts. It provides that normally the costs should follow the event and court shall have full power to determine by whom or out of what property, and to what extent such costs are to be paid. Most of the costs taxing rules, including the rules in force in Delhi provide each party should file a bill of cost immediately after the judgment is delivered setting out: (a) the court fee paid; (b) process fee spent; (c) expenses of witnesses; (d) advocate's fee; and (e) such other amount as may be allowable under the rules or as may be directed by the court as costs.

As Section 35 of the Code does not impose any ceiling the desired object can be achieved by the following: (i) courts levying costs, following the result, in all cases (non-levy of costs should be supported by reasons); and (ii) appropriate amendment to Civil Rules of Practice relating to taxation of costs, to make it more realistic in commercial litigation.

The provision relating to compensatory costs (Section 35A of the Code) in respect of false or vexatious claims or defences has become virtually infructuous and ineffective, on account of inflation. Under the said section, award of compensatory costs in false and vexatious litigation, is subject to a ceiling of Rs. 3,000/-. This requires a realistic revision keeping in view, the observations in *Salem Advocates Bar Association* (supra). Section 35B providing for costs for causing delay is seldom invoked. It should be regularly employed, to reduce delay.

The lack of appropriate provisions relating to costs has resulted in a steady increase in malicious, vexatious, false, frivolous and speculative suits, apart from rendering Section 89 of the Code ineffective. Any attempt to reduce the

pendency or encourage alternative dispute resolution processes or to streamline the civil justice system will fail in the absence of appropriate provisions relating to costs. There is therefore an urgent need for the legislature and the Law Commission of India to re-visit the provisions relating to costs and compensatory costs contained in Section 35 and 35A of the Code.

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**306. CIVIL PROCEDURE CODE, 1908 – Section 89 and Order 10 Rule 1-A**

**(i) Section 89 of CPC – Interpretation of – To meet with anomalies and draftman's errors, the Apex Court made changes in Section 89 by interpretation process, which shall remain in force till the legislature corrects the mistake.**

**(ii) ADR process – Object of Section 89 CPC is that settlement should be attempted by adopting an appropriate ADR process – Having a hearing after completion of pleadings, to consider recourse to ADR process, is mandatory – But actual reference to an ADR process in all cases is not mandatory – The Apex Court enumerated illustrative categorisation of 'suitable' and 'unsuitable' cases to an ADR process.**

**(iii) ADR process – Proper stage and procedure – The stage at which the Court should explore whether the matter should be referred to ADR process, is after the pleadings are complete, and before framing the issues, when the matter is taken up for preliminary hearing for examination of parties under Order 10 of CPC – However, if for any reason, the Court had missed the opportunity to consider and refer the matter to ADR process before framing issues, nothing prevents the Court from resorting to Section 89 even after framing issues – But once evidence is commenced, the Court will be reluctant to refer the matter to the ADR processes lest it becomes a tool for protracting the trial – The procedure to be adopted by a Court under Section 89 CPC has been laid down by the Apex Court.**

## Afcons Infrastructure Limited and another v. Cherian Varkey Construction Company Private Limited and others

**Judgment dated 26.07.2010 passed by the Supreme Court in Civil Appeal No. 6000 of 2010, reported in (2010) 8 SCC 24**

Held:

If Section 89 is to be read and required to be implemented in its literal sense, it will be a Trial Judge's nightmare. It puts the cart before the horse and lays down an impractical, if not impossible, procedure in sub-section (1). It has mixed up the definitions in sub-section (2). In spite of these defects, the object behind section 89 is laudable and sound. Resort to alternative disputes resolution (for short 'ADR') processes is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon the courts. As

ADR processes were not being resorted to with the desired frequency, Parliament thought it fit to introduce Section 89 and Rules 1-A to 1-C in Order X in the Code, to ensure that ADR process was resorted to before the commencement of trial in suits.

In view of its laudable object, the validity of section 89, with all its imperfections, was upheld in *Salem Advocate Bar Association (I) v. Union of India, (2003)1 SCC 49* [for short, *Salem Bar (I)*] but referred to a Committee, as it was hoped that section 89 could be implemented by ironing the creases. In *Salem Advocate Bar Association (II) v. Union of India, (2005) 6 SCC 344* [for short, *Salem Bar (II)*], this Court applied the principle of purposive construction in an attempt to make it workable.

Proper interpretation of section 89 of the Code requires two changes from a plain and literal reading of the section. Firstly, it is not necessary for the court, before referring the parties to an ADR process to formulate or re-formulate the terms of a possible settlement. It is sufficient if the court merely describes the nature of dispute (in a sentence or two) and makes the reference. Secondly, the definitions of 'judicial settlement' and 'mediation' in clauses (c) and (d) of section 89(2) shall have to be interchanged to correct the draftsman's error. Clauses (c) and (d) of section 89(2) of the Code will read as under when the two terms are interchanged:

> (c) for "mediation", the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authorities Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;
>
> (d) for "judicial settlement", the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.
>
> The above changes made by interpretative process shall remain in force till the legislature corrects the mistakes, so that section 89 is not rendered meaningless and infructuous.

**Whether the reference to ADR Process is mandatory?**

Section 89 starts with the words "where it appears to the court that there exist elements of a settlement". This clearly shows that cases which are not suited for ADR process should not be referred under section 89 of the Code. The court has to form an opinion that a case is one that is capable of being referred to and settled through ADR process. Having regard to the tenor of the provisions of Rule 1A of Order 10 of the Code, the civil court should *invariably* refer cases to ADR process. Only in certain recognized excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR processes, the court will have to briefly record

the reasons for not resorting to any of the settlement procedures prescribed under section 89 of the Code. Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process under section 89 of the Code, is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be reference to ADR process. In all other case reference to ADR process is a must.

The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:

(i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).

(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.

(v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.

(vi) Cases involving prosecution for criminal offences.

All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes:

(i) *All cases relating to trade, commerce and contracts,* including

- disputes arising out of contracts (including all money claims);
- disputes relating to specific performance;
- disputes between suppliers and customers;
- disputes between bankers and customers;
- disputes between developers/builders and customers;
- disputes between landlords and tenants/licensor and licensees;
- disputes between insurer and insured;

(ii) *All cases arising from strained or soured relationships,*

including - disputes relating to matrimonial causes, maintenance, custody of children;

- disputes relating to partition/division among family members/co-parceners/co-owners; and
- disputes relating to partnership among partners.

(iii) *All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes,* including

- disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);
- disputes between employers and employees;
- disputes among members of societies/associations/ Apartment owners' Associations;

(iv) *All cases relating to tortious liability* including

- claims for compensation in motor accidents/other accidents; and

(v) *All consumer disputes* including

- disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or product popularity.

The above enumeration of 'suitable' and 'unsuitable' categorization of cases is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/Tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process.

**How to decide the appropriate ADR process under Section 89?**

Section 89 refers to five types of ADR procedures, made up of one adjudicatory process (arbitration) and four negotiatory (non adjudicatory) processes – conciliation, mediation, judicial settlement and Lok Adalat settlement. The object of section 89 of the Code is that settlement should be attempted by adopting an appropriate ADR process before the case proceeds to trial. Neither section 89 nor Rule 1A of Order 10 of the Code is intended to supersede or modify the provisions of the Arbitration and Conciliation Act, 1996 or the Legal Services Authorities Act, 1987. On the other hand, section 89 of the Code makes it clear that two of the ADR processes – Arbitration and Conciliation, will be governed by the provisions of the AC Act and two other ADR Processes - Lok Adalat Settlement and Mediation will be governed by the Legal Services Authorities Act. As for the last of the ADR processes - judicial settlement, section 89 makes it clear that it is not governed by any enactment and the court will follow such procedure as may be prescribed (by appropriate rules).

Rule 1A of Order 10 requires the court to give the option to the parties, to choose any of the ADR processes. This does not mean an individual option, but

a joint option or consensus about the choice of the ADR process. On the other hand, section 89 vests the choice of reference to the court. There is of course no inconsistency. Section 89 of the Code gives the jurisdiction to refer to ADR process and Rules 1A to IC of Order 10 lay down the manner in which the said jurisdiction is to be exercised. The scheme is that the court explains the choices available regarding ADR process to the parties, permits them to opt for a process by consensus, and if there is no consensus, proceeds to choose the process.

Having regard to the provisions of Section 89 and Rule 1-A of Order 10, the stage at which the court should explore whether the matter should be referred to ADR processes, is after the pleadings are complete, and before framing the issues, when the matter is taken up for preliminary hearing for examination of parties under Order 10 of the Code. However, if for any reason, the court had missed the opportunity to consider and refer the matter to ADR processes under Section 89 before framing issues, nothing prevents the court from resorting to Section 89 even after framing issues. But once evidence is commenced, the court will be reluctant to refer the matter to the ADR processes lest it becomes a tool for protracting the trial.

Though in civil suits, the appropriate stage for considering reference to ADR processes is after the completion of pleadings, in family disputes or matrimonial cases, the position can be slightly different. In those cases, the relationship becomes hostile on account of the various allegations in the petition against the spouse. The hostility will be further aggravated by the counter-allegations made by the respondent in his or her written statement or objections. Therefore, as far as Family Courts are concerned, the ideal stage for mediation will be immediately after service of respondent and *before* the respondent files objections/written statements. Be that as it may.

We may summarize the procedure to be adopted by a court under section 89 of the Code as under:

(a) When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of the dispute between the parties.

(b) The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes. If it finds that the case falls under any excluded category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial.

(c) In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.

(d) The court should first ascertain whether the parties are willing for arbitration. The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.

(e) If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeable for reference to conciliation which will be governed by the provisions of the AC Act. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the court can refer the matter to conciliation in accordance with section 64 of the AC Act.

(f) If parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three ADR processes: (a) Lok Adalat; (b) mediation by a neutral third party facilitator or mediator; and (c) a judicial settlement, where a Judge assists the parties to arrive at a settlement.

(g) If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat. In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation. Where the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.

(h) If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.

(i) If the settlement includes disputes which are not the subject matter of the suit, the court may direct that the same will be governed by Section 74 of the AC Act (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). If the settlement is through mediation and it relates not only to disputes which are the subject-matter of the suit but also other disputes involving persons other than the parties to the suit, the Court may adopt the principle underlying Order 23 Rule 3 of the Code. This will be necessary as many settlement agreements deal with not only the disputes which are the subject matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject matter of the suit.

(j) If any term of the settlement is *ex facie* illegal or unenforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability.

The Court should also bear in mind the following consequential aspects, while giving effect to Section 89 of the Code:

(i) If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need be stated in the order sheet.

(ii) If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may be. There is no need for an elaborate order for making the reference.

(iii) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process.

(iv) If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for Judicial Settlement to another Judge.

(v) If the court refers the matter to an ADR process (other than Arbitration), it should keep track of the matter by fixing a hearing date for the ADR Report. The period allotted for the ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of the alternative forum, the nature of case etc.). Under no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on the proceedings.

(vi) Normally the court should not send the original record of the case when referring the matter for an ADR forum. It should make available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However if the case is referred to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary.

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**307. CIVIL PROCEDURE CODE, 1908 – Section 148**

**Extension of time – Where non-making of the deposit of sum as damages would result in a civil consequence like a decree of eviction against the appellant – Considerations therefor – Two aspects need to be examined on extension of time – The first is whether extension can be legally granted – The second is whether in the facts and circumstances of a given case, extension of time is justified for making of the deposit, and if so, on what terms – Position reiterated.**

**D.V. Paul v. Manisha Lalwani**

**Judgment dated 18.08.2010 passed by the Supreme Court in Civil Appeal No. 6734 of 2010, reported in (2010) 8 SCC 546**

Held:

The fact of the matter was that the appellant had not made the deposit in the manner required in the decree passed by the High Court in which the High Court modified the decree passed by the Trial Court to the effect that the appellant shall deposit a sum of Rs. 10,000/- by way of compensation in the Trial Court within four months from the date of judgment of the High Court for payment to the landlord. In case the appellant failed in it, the Trial Court was directed to pass a decree for eviction of the tenant under Section 12 (1) (m) of the M.P. Accommodation Control Act, 1961. Whether or not the alternative mode for payment was equally good, may not have called for any consideration, if the parties had agreed to accept the alternative mode, as a satisfactory compliance with the decree to give quietus to the controversy. Where alternative mode is not accepted as a satisfactory solution by the parties, as in the present case the only remedy left to the party required to do an act like making of a deposit was to do so in accordance with the terms of the decree and in case there was a delay in the doing of the act, seek extension of time on grounds that would justify such extension.

Two aspects need to be examined on the question of extension of time. The first is whether extension can be legally granted in a case like the one at hand where non making of the deposit would result in a civil consequence like a decree of eviction against the appellant. The second is whether in the facts and circumstances of the case, extension of time is justified for making of the deposit, and if so, on what terms.

In so far as the first aspect is concerned Section 148 of the CPC, in our opinion, clearly reserves in favour of the Court the power to enlarge the time required for doing an act prescribed or allowed by the Code of Civil Procedure.

A plain reading of the provision of 148 of the Code would show that when any period or time is granted by the Court for doing any act, the Court has the discretion from time to time to enlarge such period even if the time originally fixed or granted by the Court has expired. It is evident from the language employed in the provision that the power given to the Court is discretionary and intended to be exercised only to meet the ends of justice.

The power to fix the time for doing of an act must in our opinion carry with it the power to extend such period, depending upon whether the party in default makes out a case to the satisfaction of the Court who has fixed the time. There is nothing in Section 148 of the CPC or in any other provisions of the Code to suggest that such a power of extension of time cannot be exercised in a case like the one at hand. The argument that the power to extend time cannot be exercised where the act in question is stipulated in a conditional decree has not

impressed us. We see no reason to draw a distinction depending on whether the prayer for extension is in regard to a conditional order or a conditional decree. The heart of the matter is that where the Court has the power to fix time and that power is not regulated by any statutory limits, it has in appropriate cases the power to extend the time fixed by it. It is common ground that neither the CPC nor the provisions of M.P. Accommodation Control Act places any limitation on the power of the Court in case like the one in hand.

Coming then to the second aspect, namely, whether the appellant has made out a case for extension, our answer is in the affirmative. That the appellant had misunderstood the order of the High Court leading to the preparation of the bank draft of Rs. 10,000 in the name of the respondent and its dispatch under Registered AD cover to the respondent has not been seriously disputed before us. We are satisfied that the appellant did get a bank draft prepared and dispatched to the address of the respondent. This may not have been a strict compliance with the direction issued by the High Court regarding the deposit before the Trial Court but this certainly establishes the bona fides of the appellant, which is a weighty consideration while examining the request for extension of time. It is true that the respondent denied the receipt of the bank draft but that is not of much significance. What is important is whether the appellant has made out a case for extension based on what he had done in discharge of his obligation no matter on an erroneous understanding of the direction of the Court.

That apart the fact that the appellant had offered to deposit the amount of Rs. 10,000 afresh also shows that there was no deliberate inaction on his part so as to disentitle him to the relief of extension of time.

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***308. CIVIL PROCEDURE CODE, 1908 – Section 151 and Order 8 Rule 1**
**Substitution of Written Statement – Previously joint W.S. was filed with signatures of applicant – Later on, applicant filed an application for allowing him to withdraw the W.S. and to file fresh W.S. alleging that his signatures were obtained wrongfully and fraudulently – Held, no provision of C.P.C. permits substitution of one written statement with another – There cannot be two written statements on record – Hence, permission to file fresh W.S. can not be given – Trial Court's order of allowing substitution of W.S. was set aside with liberty to submit the facts and subsequent events by way of affidavit.**

**Sameermal Runwal v. Prakashchandra Kothari and others**
**Judgment dated 30.04.2010 passed by the High Court in Writ Petition No. 5169 of 2009, reported in (2010) 4 MPHT 464 (DB)**

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***309. CIVIL PROCEDURE CODE, 1908 – Order 9 Rule 13**

*Ex parte* **decree – Application for setting aside of – On the ground that defendant not attended further proceedings in view of the settlement out of the Court – However, plaintiff pursued the matter and** *ex parte* **decree was passed – Defendants submitted that they came to know about the** *ex parte* **decree when they were served with the execution notice – The aforesaid application filed within 30 days from the knowledge of passing of decree.**

**Under such circumstances, the High Court should not have taken the hyper-technical view that no separate application was filed under Section 5. The application under Order IX Rule 13 CPC itself had all the ingredients of the application for condonation of delay in making that application. Procedure is after all handmaid of justice. Here was a party which bona fide believed the assurance given in the compromise panchanama that the respondent No. 1/plaintiff would get his suit withdrawn or dismissed. The said compromise panchanama was made before the elders of the village. Writing was also effected, displaying that compromise. The witnesses were also examined. Under such circumstances, the non-attendance of the appellants/defendants, which was provided in the further proceedings, was quite justifiable. The appellants/defendants, when ultimately came to know about the decree, had moved the application within 30 days. In our opinion, that was sufficient.**

**Bhagmal & Ors. v. Kunwar Lal & Ors.**

**Judgment dated 27.07.2010 passed by the Supreme Court in Civil Appeal No. 5875 of 2005, reported in AIR 2010 SC 2991**

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**310. CIVIL PROCEDURE CODE, 1908 – Order 10 Rules 1 and 2**
**CRIMINAL PROCEDURE CODE, 1973 – Section 340**
**INDIAN PENAL CODE, 1860 – Section 195**

**(i) What is the scope and ambit of examination of parties under Order 10 Rule 2 of CPC, explained.**

**(ii) Whether on the basis of answers given during the aforesaid examination, the Court can prosecute the party under Section 340 of Cr.P.C. r/w/s 195 of IPC? Held, No.**

**M/s Kapil Corepacks Pvt. Ltd. & Ors. v. Haribans Lal (since deceased) through L.Rs.**

**Judgment dated 03.08.2010 passed by the Supreme Court in Civil Appeal No. 6207 of 2010, reported in AIR 2010 SC 2809**

Held:

The provisions of Order 10 Rule 1 enables the court to ascertain from each of the parties (or his pleader), at the first hearing whether he admits or

denies such of those allegations of fact made in the pleadings of the other party, which were not expressly or by necessary implication admitted or denied by him. In other words, if the defendant in his written statement fails to expressly or by necessary implication admit or deny any of the plaint allegations, the court can ascertain from the defendant, whether he admits or denies the said plaint allegations. Similarly, if the defendant has made some allegations against the plaintiff in his written statement, and no reply is filed thereto by the plaintiff, the court can ascertain whether plaintiff admits or denies those allegations. Resort to Rule 1 of Order 10 is necessary only in cases where the court finds that the plaintiff or the defendant has failed to expressly or impliedly admit or deny any of the allegations made against him, by the other party. Examination under Order 10 Rule 1 of the Code will not be necessary where the pleadings of each party have been fully and clearly traversed by the other party.

On the other hand, the examination under Rule 2 of Order 10 of the Code, need not be restricted to allegations in the pleadings of the other party, but can relate to elucidating any matter in controversy in the suit. Further, under Rule 1 of Order 10, the court can examine only the parties and their advocates, that too at the 'first hearing'. On the other hand, Rule 2 enables the court to examine not only any party, but also any person accompanying either party or his pleader, to obtain answer to any material question relating to the suit, either at the first hearing or subsequent hearings. The object of oral examination under Rule 2 of Order 10 is to ascertain the matters in controversy in suit, and not to record evidence or to secure admissions. The statement made by a party in an examination under Rule 2 is not under oath, and is not intended to be a substitute for a regular examination under oath under Order 18 of the Code. It is intended to elucidate what is obscure and vague in the pleadings. In other words, while the purpose of an examination under Rule 1 is to clarify the stand of a party in regard to the allegations made against him in the pleadings of the other party, the purpose of the oral examination under Rule 2 is mainly to elucidate the allegations even in his own pleadings, or any documents filed with the pleadings. The power under Order 10 Rule 2 of the Code, cannot be converted into a process of selective cross-examination by the court, before the party has an opportunity to put forth his case at the trial.

The above position of law is well settled. We need refer only to two decisions in this behalf. In *Manmohan Das v. Mt. Ramdei & Anr., AIR 1931 PC 175* the Privy Council observed:

> "No doubt under Order 10, Rule 2, any party present in Court may be examined orally by the Court at any stage of the hearing, and the Court may if it thinks fit put in the course of such examination questions suggested by either party. *But this power is intended to be used by the Judge only when he finds it necessary to obtain from such party*

*information on any material questions relating to the suit and ought not to be employed so as to supersede the ordinary procedure at trial as prescribed in Order 18."*

A Division Bench of the Madras High Court in *Arunagiri Goundan v. Vasantharoya Koundan & Ors., AIR 1949 Madras 707,* held as follows referring to Order 10 Rule 2 of the Code:

> "At the outset it must be pointed out that this (Order 10 Rule 2) does not provide for an examination on oath. This provision was intended to be used to elucidate the matters in controversy in suit before the trial began. This is not a provision intended to be used to supersede the usual procedure to be followed at the trial." (emphasis supplied)

The object of Order 10, Rule 2 is not to elicit admissions. Nor does it provide for or contemplate admissions. The admissions are usually contemplated (i) in the pleadings (express or constructive under Order 8 Rule 5 of the Code); (ii) during examination of a party by the court under Order 10 Rule 1 of the Code; (iii) in answers to interrogatories under Order 11, Rule 8 of the Code; (iv) in response to notice to admit facts under Order 12 Rule 4 of the Code; (v) in any evidence or in an affidavit, on oath; and (vi) when any party voluntarily comes forward during the pendency of a suit or proceedings to make an admission.

The power of court to call upon a party to admit any document and record whether the party admits or refuses or neglects to admit such document is traceable to Order 12, Rule 3A rather than Order 10, Rule 2 of the Code. Nothing however comes in the way of the court combining the power under Order 12 Rule 3A with its power under Order 10 Rule 2 of the Code and calling upon a party to admit any document when a Party is being examined under Order 10 Rule 2. But the court can only call upon a party to admit any document and cannot cross-examine a party with reference to a document.

The power under section 340 CrPC read with section 195 IPC can be exercised only where someone fabricates false evidence or gives false evidence. By no stretch of imagination, a party giving an answer to a question put under Order 10 Rule 2 of the Code when not under oath and when not being examined as a witness, can attract section 195 of IPC and consequently cannot attract section 195(1)(b) and section 340 of Cr.P.C.

Consequently, the decision of the court to consider initiation of proceedings under section 340 Cr.P.C. read with section 195 IPC in regard to an answer to a question put under Order 10 Rule 2 of the Code is ill-conceived and wholly without jurisdiction.

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**311. CIVIL PROCEDURE CODE, 1908 – Order 13 Rules 3 & 4 and Order 41 Rule 27 (1) (b)**

**Admissibility of document – To be decided at the stage of admission itself instead of leaving it to be decided subsequently – Production of additional evidence at appellate stage where trial court admitted in evidence the photocopy subject to objection of proof and admissibility and marked the photocopy as exhibit instead of rejecting it in the beginning but ultimately dismissed the suit – In such circumstances, production of original document at appellate stage as additional evidence would be permissible under Order 41 Rule 27 CPC – However, opportunity should be given to the opposite party to produce evidence in rebuttal, if so desired.**

**Shalimar Chemical Works Limited v. Surendra Oil and Dal Mills (Refineries) and others**

**Judgment dated 27.08.2010 passed by the Supreme Court in Civil Appeal No. 52 of 2005, reported in (2010) 8 SCC 423**

Held:

On a careful consideration of the whole matter, we feel that serious mistakes were committed in the case at all stages. The trial court should not have "marked" as exhibits the Xerox copies of the certificates of registration of trade mark in face of the objection raised by the defendants. It should have declined to take them on record as evidence and left the plaintiff to support its case by whatever means it proposed rather than leaving the issue of admissibility of those copies open and hanging, by marking them as exhibits subject to objection of proof and admissibility. The appellant, therefore, had a legitimate grievance in appeal about the way the trial proceeded.

The learned Single Judge rightly allowed the appellant's plea for production of the original certificates of registration of trade mark as additional evidence because that was simply in the interest of justice and there was sufficient statutory basis for that under clause (b) of Order 41, Rule 27. But then the single judge seriously erred in proceeding simultaneously to allow the appeal and not giving the respondent-defendants an opportunity to lead evidence in rebuttal of the documents taken in as additional evidence.

The Division Bench was again wrong in taking the view that in the facts of the case, the production of additional evidence was not permissible under Order 41, Rule 27. As shown above the additional documents produced by the appellant were liable to be taken on record as provided under Order 41, Rule 27 (b) in the interest of justice. But it was certainly right in holding that the way the learned single judge disposed of the appeal caused serious prejudice to the respondent-defendants. In the facts and circumstances of the case, therefore, the proper course for the division bench was to set aside the order of the learned single judge without disturbing it insofar as it took the originals of the certificates of registration produced by the appellant on record and to remand the matter to

give opportunity to respondent-defendents to produce evidence in rebuttal if they so desired. We, accordingly, proceed to do so.

The judgment and order dated 24.04.2003 passed by the Division Bench is set aside and the matter is remitted to the learned single judge to proceed in the appeal from the stage the original of the registration certificates were taken on record as additional evidence. The learned single judge may allow the respondent-defendents to lead any rebuttal evidence or make a limited remand as provided under Order 41, Rule 28.

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***312. CIVIL PROCEDURE CODE, 1908 – Order 17 Rule 3**

**One of the defendants' witnesses was Government official and his immediate officer declined him leave to go out of station which resulted in its non-appearance in the trial Court – Witness could not be produced not because of any neglect or inaction on the part of the defendant – Closure of defendants evidence on this ground when such witness was the only attesting witness to the *will* propounded by the defendant, held unjustified and one more opportunity be given to produce evidence.**

**Amrit Lal Kapoor and another v. Kusum Lata Kapoor and others**
**Judgment dated 06.05.2010 passed by the Supreme Court in Civil Appeal No. 4258 of 2010, reported in (2010) 6 SCC 583**

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***313. CIVIL PROCEDURE CODE, 1908 – Order 22 Rule 9 (2) & (3)**
**LIMITATION ACT, 1963 – Section 5**

**(i) Application for bringing LRs on record – Delay of more than 2 years – Condonation there of – Except for a vague averment that the LRs were not aware of the pendency of the appeal, no other justiciable reason stated in the application and the same does not contain correct and true facts – Applicants have miserably failed in showing "sufficient cause" for condonation of delay of 778 days of filing the application for bringing the LRs on record – Application dismissed.**

**(ii) Liberal construction of the term "sufficient cause" connotation thereof – Held, it must squarely act within the concept of reasonable time and proper conduct of the party concerned – Liberal construction cannot be equated with doing injustice to the other party.**

**Balwant Singh (dead) v. Jagdish Singh and others**
**Judgment dated 08.07.2010 passed by the Supreme Court in Civil Appeal No. 1166 of 2006, reported in (2010) 8 SCC 685**

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**314. CIVIL PROCEDURE CODE, 1908 – Order 37 Rules 1, 2 and 3**

**Purpose of summary suit reiterated – It is required to be examined whether defence taken in an application for leave to defend makes out a case which if established would be a plausible defence in regular suit – In a case for dishonour of cheque, this principle becomes more relevant as cheques are issued normally for liquidation of admitted dues – Where defendant does not make out any triable issue, rejection of application for leave to defend is justified.**

## V.K. Enterprises and another v. Shiva Steels

**Judgment dated 04.08.2010 passed by the Supreme Court in SLP (C) No. 25144 of 2009, reported in (2010) 9 SCC 256**

Held:

Order 37 C.P.C. has been included in the Code of Civil Procedure in order to allow a person, who has a clear and undisputed claim in respect of any monetary dues, to recover the dues quickly by a summary procedure instead of taking the long route of a regular suit. The Courts have consistently held that if the affidavit filed by the defendant discloses a triable issue that is at least plausible, leave should be granted, but when the defence raised appears to be moonshine and sham, unconditional leave to defend cannot be granted.

What is required to be examined for grant of leave is whether the defence taken in the application under Order 37 Rule 3 C.P.C. makes out a case, which if established, would be a plausible defence in a regular suit. In matters relating to dishonour of cheques, the aforesaid principle becomes more relevant as the cheques are issued normally for liquidation of dues which are admitted. In the instant case, the defence would have been plausible had it not been for the fact that the allegations relating to the interpolation of the cheque is without substance and the ledger accounts relating to the dues, clearly demonstrated that such dues had been settled between the parties. Moreover, the issuance of the cheque had never been disputed on behalf of the Petitioner whose case was that the same had been given on account of security and not for presentation, but an attempt had been made to misuse the same by dishonest means.

Against such cogent evidence produced by the plaintiff/respondent, there is only an oral denial which is not supported by any corroborative evidence from the side of the Petitioner. On the other hand, the ledger book maintained by the Respondent and settled by the Petitioner had been produced on behalf of the Respondent in order to prove the transactions in respect of which the cheque in question had been issued by the petitioner.

In our view, the defence raised by the Petitioner does not make out any triable issue and the High Court, has dealt with the matter correctly and has justifiably rejected the Petitioner's application under Order 37 Rule 3 C.P.C. and the same does not call for interference by this Court.

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***315. CIVIL SERVICES (MEDICAL ATTENDANCE RULES, 1958 (M.P.) – Rule 1 (3)**

**Rule 1 (3) of the 1958 Rules does not apply to retired Government servant – But if a Government servant, while in service, is admitted in hospital due to ailment and attains the age of superannuation during the treatment in hospital, then he is entitled to reimbursement of the entire expenses including the period after the date of superannuation.**

**L. P. Sanodia v. The State of M.P. and others**

**Judgment dated 15.04.2010 passed by the High Court of M.P. in W. P. No. 11076 of 2004, reported in 2010 (4) MPHT 188.**

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**316. CONSTITUTION OF INDIA – Article 16**

**EMPLOYMENT EXCHANGES (COMPULSORY NOTIFICATION OF VACANCIES) ACT, 1959 – Section 4**

**Employment under the Government or Public Sector – Employer bound to notify the vacancies to Employment Exchange in pursuance of Section 4 (1-A) of the Act – However, the employer is not under obligation to recruit any person merely through the Employment Exchange to fill any vacancy.**

**Union of India & Ors. v. Miss. Pritilata Nanda**

**Judgment dated 16.07.2010 passed by the Supreme Court in Civil Appeal No. 5646 of 2010, reported in AIR 2010 SC 2821**

Held:

We consider it necessary to observe that the condition embodied in the advertisement that the candidate should get his/her name sponsored by any special employment exchange or any ordinary employment exchange cannot be equated with a mandatory provision incorporated in a statute, the violation of which may visit the concerned person with penal consequence. The requirement of notifying the vacancies to the employment exchange is embodied in the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 (for short, 'the 1959 Act'), but there is nothing in the Act which obligates the employer to appoint only those who are sponsored by the employment exchange. Section 4 of the 1959 Act, which provides for notification of vacancies to employment exchanges reads as under:

> "4(1) After the commencement of this Act in any State or area thereof, the employer in every establishment in public sector in that State or area shall, before filling up any vacancy in any employment in that establishment, notify that vacancy to such employment exchanges as may be prescribed.
>
> (2) The appropriate government may, by notification in the Official Gazette, require that from such date as may be

specified in the notification, the employer in every establishment in private sector or every establishment pertaining to any class or category of establishments in private sector shall, before filling up any vacancy in any employment in that establishment, notify that vacancy to such employment exchanges as may be prescribed, and the employer shall thereupon comply with such requisition.

(3) The manner in which the vacancies referred to in sub-section (1) or sub-section (2) shall be notified of the employment exchanges and the particulars of employments in which such vacancies have occurred or are about to occur shall be such as may be prescribed.

(4) Nothing in sub-sections (1) and (2) shall be deemed to impose any obligation upon any employer to recruit any person through the employment exchanges to fill any vacancy merely because that vacancy has been notified under any of those sub-sections."

A reading of the plain language of Section 4 makes it clear that even though the employer is required to notify the vacancies to the employment exchanges, it is not obliged to recruit only those who are sponsored by the employment exchanges. *In Union of India v. N. Hargopal, AIR 1987 SC 1225,* this Court examined the scheme of the 1959 Act and observed:

*"It is evident that there is no provision in the Act which obliges an employer to make appointments through the agency of the Employment Exchanges. Far from it, Section 4(4) of the Act, on the other hand, makes it explicitly clear that the employer is under no obligation to recruit any person through the Employment Exchanges to fill in a vacancy merely because that vacancy has been notified under Section 4(1) or Section 4(2).* In the face of Section 4(4), we consider it utterly futile for the learned Additional Solicitor General to argue that the Act imposes any obligation on the employers apart from notifying the vacancies to the Employment Exchanges."

xxx xxx xxx xxx

"It is, therefore, clear that the object of the Act is not to restrict, but to enlarge the field of choice so that the employer may choose the best and the most efficient and to provide an opportunity to the worker to have his claim for appointment considered without the worker having to knock at every door for employment. *We are, therefore, firmly of the view that the Act does not oblige any employer to employ those persons only who have been sponsored by*

*the Employment Exchanges."*

In *Excise Superintendent, Malkapatnam, Krishna District, Andhra Pradesh* v. *K.B.N. Visweshwara Rao, 1996 AIR SCW 3979* a three-Judge Bench of this Court considered a similar question, referred to an earlier judgment in *Union of India v. N. Hargopal* (supra) and observed:

> "It is common knowledge that many a candidate is unable to have the names sponsored, though their names are either registered or are waiting to be registered in the employment exchange, with the result that the choice of selection is restricted to only such of the candidates whose names come to be sponsored by the employment exchange. Under these circumstances, many a deserving candidate is deprived of the right to be considered for appointment to a post under the State. Better view appears to be that it should be mandatory for the requisitioning authority/ establishment to intimate the employment exchange, and employment exchange should sponsor the names of the candidates to the requisitioning departments for selection strictly according to seniority and reservation, as per requisition. In addition, the appropriate department or undertaking or establishment should call for the names by publication in the newspapers having wider circulation and also display on their office notice boards or announce on radio, television and employment news bulletins; and then consider the cases of all the candidates who have applied. If this procedure is adopted, fair play would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates."

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**317. CONSTITUTION OF INDIA – Articles 16 (4) (1) and 15 (3) Reservation policy for public employment – Difference and applicability of horizontal and vertical reservation – Explained.**

**Public Service Commission, Uttaranchal v. Mamta Bisht & Ors. Judgment dated 03.06.2010 passed by the Supreme Court in Civil Appeal No. 5987 of 2007, reported in AIR 2010 SC 2613**

Held:

In fact, the High Court allowed the writ petition only on the ground that the horizontal reservation is also to be applied as vertical reservation in favour of reserved category candidates (social) as it held as under:

> "In view of above, Neetu Joshi (Sl.No.9, Roll No.12320) has wrongly been counted by the respondent No.3/Commission against five seats reserved for Uttaranchal Women General

Category as she has competed on her own merit as general candidate and as 5th candidate the petitioner should have been counted for Uttaranchal Women General Category seats."

The view taken by the High Court on application of horizontal reservation is contrary to the law laid down by this Court in *Rajesh Kumar Daria Vs. Rajasthan Public Service Commission & Ors., AIR 2007 SC 3127,* wherein dealing with a similar issue this Court held as under:

> "9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are "vertical reservations". Special reservations in favour of physically handicapped, women, etc., under Articles 16(1) or 15(3) are "horizontal reservations". Where a vertical reservation is made in favour of a Backward Class under Article 16(4), the candidates belonging to such Backward Class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their number will not be counted against the quota reserved for respective Backward Class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved forSC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under open competition category. (Vide *Indra Sawhney v. Union of India, AIR 1993 SC 477, R.K. Sabharwal v. State of Punjab, AIR 1995 SC 1371, Union of India v. Virpal Singh Chauhan, AIR 1996 SC 448 and Ritesh R. Sah v. Dr.Y.L. Yamul., AIR 1996 SC 1378).* **But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations.** Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of "Scheduled Caste women". **If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota.** Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding

number of candidates from the bottom of the list relating to Scheduled Castes. **To this extent, horizontal (special) reservation differs from vertical (social) reservation.** Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women."

In view of the above, it is evident that the judgment and order of the High Court is not in consonance with law laid down by this Court in *Rajesh Kumar Daria* (supra). The judgment and order impugned herein is liable to be set aside and all consequential orders become unenforceable and inconsequential.

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***318. CONSTITUTION OF INDIA – Articles 233 and 235**
**SERVICE LAW:**

**(i) Appointment of Judicial Officers – Verification of character and antecedents must be done before making appointment – The Apex Court directed that all the High Courts would ensure that "reports of police verification", conducted in accordance with law, are received by the authority concerned before an order of appointment/posting in the State Judicial Service is issued by the said authority.**

**(ii) Confirmation in service – Automatic or deemed confirmation – Applicability of – This question will always depend upon the facts of the case and relevant rules applicable to that service.**

**(iii) Confidential reports – Significance of – Held, highly competitive standard of service discipline and values are expected to be maintained by the Judicial Officers as that alone can help them for better advancement of their service career – It is mandatory that such confidential reports should be elaborate and written timely to avoid any prejudice to the administration as well as the officer concerned.**

**Kazia Mohammed Muzzammil v. State of Karnataka and another**
**Judgment dated 08.07.2010 passed by the Supreme Court in Civil Appeal No. 596 of 2007, reported in (2010) 8 SCC 155**

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**319. CONSTITUTION OF INDIA – Article 311**
**CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1966 (M.P.) – Rule 14 (8)**
**Departmental proceedings – Delinquent cannot be permitted to engage legal practitioner under the aforesaid Rule on the ground that Presenting Officer is a Judge and is not a legal practitioner.**

**Dinesh Chandra Pandey v. High Court of Madhya Pradesh & Anr.**
**Judgment dated 08.07.2010 passed by the Supreme Court in Civil**

**Appeal No. 2622 of 2005, reported in AIR 2010 SC 3055**

Held:

A Judge may be law graduate holding a Bachelor Degree in Law from any University established by law in India but this by itself would not render him as a 'legal practitioner'. On the contrary, there is definite restriction upon the Judge from practicing law. Such an implied inclusion would not only lead to absurdity but would even offend laws in force in India. The expression 'legal practitioner' is a well defined and explained term. It, by any stretch of imagination, cannot include a serving Judge who might have been appointed as a presenting officer in the departmental proceedings. Thus where in departmental proceedings against a Judicial Officer of subordinate judiciary a Addl. District Judge was appointed as Presenting Officer, the delinquent cannot claim to be represented through lawyer under R. 14(8) though the Rule permits representation though lawyer if Presenting Officer is so. The rule uses the expression 'may'. The expression 'may' used in R. 14(8) cannot be read as 'shall'. The normal rule is that a delinquent officer would be entitled to engage another officer to present his case. But if the Presenting Officer is a 'legal practitioner', he may normally be permitted to engage a legal practitioner. It is, therefore, not absolutely mandatory that the disciplinary authority should permit the engagement of a legal practitioner irrespective of facts and circumstances of case. There is some element of discretion vested with the authority which, of course, has to be exercised properly and in accordance with the settled principles of service jurisprudence.

Moreover no prejudice has been caused to delinquent as after rejection of his claim he did not challenge the order but participated in proceedings without protest. Even the charge against the delinquent was not of a very complicated nature, which a person having qualification and experience of the Judge would not be able to defend. All the more after having given up the right, he cannot now be permitted to turn back and raise a grievance in that regard.

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**320. COURT FEES ACT, 1870 – Section 7 (iv) (c)**

**What is the court fee payable in regard to the prayer for declaration that the sale deeds are void and are not binding on the coparcenary and for consequential relief of joint possession and injunction? Held, the suit is not for cancellation of sale deed resultantly, the court fee need not be paid on sale consideration mentioned in the sale deeds – Computation of court fee is required to be made u/s 7(iv) (c) of the Act.**

**Suhrid Singh @ Sardool Singh v. Randhir Singh & Ors.**

**Judgment dated 29.03.2010 passed by the Supreme Court in Civil Appeal No. 2811 of 2010, reported in AIR 2010 SC 2807**

Held:

The appellant filed a suit (Case No. 381/2007) on the file of the Civil Judge, Senior Division, Chandigarh for several reliefs. The plaint contains several elaborate prayers, summarizes below:

(i) for a declaration that two houses and certain agricultural lands purchased by his father S. Rajinder Singh were co-parcenary properties as they were purchased from the sale proceeds of ancestral properties, and that he was entitled to joint possession thereof;

(ii) for a declaration that the *Will* dated 14.7.1985 with the codicil dated 17.8.1988 made in favour of the third defendant, and gift deed dated 10.9.2003 made in favour of fourth defendant were void and nonest "qua the coparcenary";

(iii) for a declaration that the sale deeds dated 20.4.2001, 24.4.2001 and 6.7.2001 executed by his father S. Rajinder Singh in favour of the first defendant and sale deed dated 27.9.2003 executed by the alleged power of attorney holder of S.Rajender Singh in favour of second defendant, in regard to certain agricultural lands (described in the prayer), are null and void qua the rights of the "co-parcenary", as they were not for legal necessity or for benefit of the family; and

(iv) for consequential injunctions restraining defendants 1 to 4 from alienating the suit properties.

Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or *nonest*, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to 'A' and 'B' – two brothers. 'A' executes a sale deed in favour of 'C'. Subsequently 'A' wants to avoid the sale. 'A' has to sue for cancellation of the deed. On the other hand, if 'B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by 'A' is invalid/void and *nonest*/ illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If 'A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If 'B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of Second Schedule of the Act. But if 'B', a non- executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an advalorem court fee as provided under Section 7(iv)(c) of the Act. Section 7(iv)(c) provides

that in suits for a declaratory decree with consequential relief, the court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The proviso thereto makes it clear that where the suit for declaratory decree with consequential relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of Section 7.

In this case, there is no prayer for cancellation of the sale deeds. The prayer is for a declaration that the deeds do not bind the "coparcenery" and for joint possession. The plaintiff in the suit was not the executant of the sale deeds. Therefore, the court fee was computable under section 7(iv)(c) of the Act. The trial Court and the High Court were, therefore, not justified in holding that the effect of the prayer was to seek cancellation of the sale deeds or that, therefore, court fee had to be paid on the sale consideration mentioned in the sale deeds.

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**321. COURT FEES ACT 1870 – Section 7(iv) (c) and Schedule II, Entry 3 of Article 17**

**Whether *ad valorem* court fee is required to be paid when plaintiff alleges that 'document in question is void on the ground that document was forged and does not bear the signature of the executant'? Held, No.**

**Sunil Radhelia v. Awadh Narayan and others**

**Judgment dated 08.09.2010 passed by the High Court In Writ Petition No. 14679 of 2006, reported in (2010) 4 MPHT 477 (FB)**

Held:

A Division Bench of this Court has referred following question for consideration of Full Bench: –

(i) Whether ad valorem Court fee is not payable when the plaintiff/plaintiffs make an allegation that the instrument is void and hence, not binding upon him/ them?

(ii) "Whether the decision rendered in *Narayan Singh, W. P. No. 11583 of 2008,* decided on *06.11.2008,* lays down the law correctly that the plaintiff, a party to the instrument, is not required to pay *ad valorem* Court fee as he has made an allegation that the instrument is void?"

In *Narayan Singh* (supra), the plaintiffs had filed suit with the averment that the sale deed in question was illegal and void. In was a forged document and also without consideration. The plaintiffs were in possession of the land, a relief for declaration was prayed and fixed Court fee was paid. The defendants moved an application under Order 7 Rule 11 of CPC for rejecting the plaint on the ground that though the plaintiffs had assailed the sale deed but had not

paid ad valorem Court fee which ought to have been paid. The Trial Court had rejected the application which orders was assailed before the Division Bench. The Division Bench held that the case of the plaintiffs was that the document was a forged one and it does not bear the signature of Sitaram though Sitaram was party to the sale deed. Plaintiffs had claimed their possession over the suit land. The suit was for permanent injunction and declaration. When the document was alleged to be illegal, void and executant had not signed the document, it was not necessary for them to made payment of *ad valorem* Court fee. The document in the plaint was shown to be void and not voidable, so *ad valorem* Court fee was not required and a fixed Court fee was found to be adequate.

The Division Bench further held that if the document, as per averments made in the plaint, is pleaded to be a void document so it is not necessary for the plaintiffs to avoid document by claiming relief to set aside and a fixed Court fee under Article 17 (iii) of Schedule II of the Court Fees Act was sufficient. In the light of the discussion, while deciding the question No. 1, we have also held so and accordingly we find that the law laid down by the Division Bench in *Narayan Singh* (supra), has been correctly laid down.

The questions referred to this Court is answered thus:-

(i) Ad valorem Court fee is not payable when the plaintiff makes an allegation that the instrument is void and hence, not binding upon him.

(ii) The decision rendered in *Narayan Singh* (Supra), lays down the law correctly that the plaintiff a party to the instrument is not required to pay *ad valorem* Court fee as he had made an allegation that the instrument was void on the ground that the document was forged one and it does not bear the signature of the executant.

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**322. CRIMINAL PROCEDURE CODE, 1973 – Sections 156 (3), 173, 190, 200 and 202**

**(i) Power to direct investigation – Exercise of – To proceed under Section 156 (3) of Cr.P.C. what is required is a bare reading of the complaint and if it discloses a cognizable offence, then the Magistrate instead of applying his mind to the complaint for deciding whether or not there is sufficient ground for proceeding, may direct the police for investigation – Legal position reiterated.**

**(ii) 'Charge-sheet' and 'Final report', meaning of – Held, neither the charge-sheet nor final report, has been defined in Cr.P.C. – Charge-sheet or final report, whatever may be the nomenclature, only means a report under Section 173 of the Code, which has to be filed by police officer on completion of investigation –**

**Legal position explained.**

## Srinivas Gundluri and others v. Sepco Electric Power Construction Corporation and others

**Judgment dated 30.07.2010 passed by the Supreme Court in Criminal Appeal No. 1377 of 2010, reported in (2010) 8 SCC 206**

Held:

A perusal of the provisions, particularly, Section 156 (3) and Sections 200 and 202 of the Code would reveal that Chapter XII of the Code contains provisions relating to information to the police and their powers to investigate whereas Chapter XV, which contains Section 202, deals with provisions relating to the steps which a Magistrate has to adopt while and after taking cognizance of any offence on a complaint. As rightly observed by the learned single Judge of the High Court, the provisions of the above two Chapters deal with two different facets altogether.

In *Devarapalli Lakshminarayana Reddy v. V. Narayana Reddy, (1976) 3 SCC 252,* a bench of three Hon'ble Judges have explained the power of the Magistrate under Section 156 (3) and Sections 200 and 202. The following discussion and ultimate conclusion are relevant which read as under:-

> "13. It is well settled that when a Magistrate receives a complaint, he is not bound to take cognizance if the facts alleged in the complaint, disclose the commission of an offence.
>
> This is clear from the use of the words "may take cognizance" which in the context in which they occur cannot be equated with "must take cognizance". The word "may" gives a discretion to the Magistrate in the matter. If on a reading of the complaint he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156(3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence, himself."
>
> 14. This raises the incidental question: What is meant by "taking cognizance of an offence" by a Magistrate within the contemplation of Section 190? This expression has not been defined in the Code. But from the scheme of the Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a court only when the court takes cognizance of the offence

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

15. This position of law has been explained in several cases by this Court, the latest being *Nirmaljit Singh Hoon v. State of West Bengal, (1973) 3 SCC 753.*

16. The position under the Code of 1898 with regard to the powers of a Magistrate having jurisdiction, to send a complaint disclosing a cognizable offence – whether or not triable exclusively by the Court of Session – to the police for investigation under Section 156(3), remains unchanged under the Code of 1973. The distinction between a police investigation ordered under Section 156(3) and the one directed under Section 202, has also been maintained under the new Code; but a rider has been clamped by the first proviso to Section 202(1) that if it appears to the Magistrate that an offence triable exclusively by the Court of Session has been committed, he shall not make any direction for investigation.

17. Section 156(3) occurs in Chapter XII, under the caption : 'Information to the Police and their powers to investigate'; while Section 202 is in Chapter XV which bears the heading: 'Of complaints to Magistrates'. 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(I)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3). It may be noted further that an order made under sub-section (3) of Section 156, is in the nature of a peremptory 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.

18. In the instant case the Magistrate did not apply his mind to the complaint for deciding whether or not there is sufficient ground for proceeding; but only for ordering an investigation under Section 156(3). He did not bring into motion the machinery of Chapter XV. He did not examine the complainant or his witnesses under Section 200 CrPC, which is the first step in the procedure prescribed under that chapter. The question of taking the next step of that procedure envisaged in Section 202 did not arise. Instead of taking cognizance of the offence, he has, in the exercise of his discretion, sent the complaint for investigation by police under Section 156."

In *Tula Ram v. Kishore Singh, (1977) 4 SCC 459* again this Court considered order for investigation under Section 156 (3) on a complaint. After considering various earlier decisions, the Court on a careful consideration of the facts and circumstances of the case propounded the following legal propositions:-

"1. That a Magistrate can order investigation under S. 156 (3) only at the pre-cognizance stage, that is to say, before taking cognizance under Sections 190, 200 and 204 and where a

Magistrate decides to take cognizance under the provisions of Chapter 14 he is not entitled in law to order any investigation under Section 156 (3) though in cases not falling within the proviso to Section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by Sec. 202 of the Code.

2. Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives:

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

(b) The Magistrate can postpone the issue of process and direct an enquiry by himself.

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

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

4. Where a Magistrate orders investigation by the police before taking cognizance under S. 156 (3) of the Code and receives the report thereupon he can act on the report and discharge the accused or straightaway issue process against the accused or apply his mind to the complaint filed before him and take action under Section 190 as described above."

To make it clear and in respect of doubt raised by the leraned counsel for appellants to proceed under Section 156 (3) of the Code, what is required is a bare reading of the complaint and if it discloses a cognizable offence, then the Magistrate instead of applying his mind to the complaint for deciding whether or not there is sufficient ground for proceeding, may direct the police for investigation. In the case on hand, the learned single Judge and Division Bench of the High Court rightly pointed out that the Magistrate did not apply his mind to the complaint for deciding whether or not there is sufficient ground for proceeding and, therefore, we are of the view that the Magistrate has not committed any illegality in directing the police for investigation. In the facts and circumstances, it cannot be said that while directing the police to register FIR, the Magistrate has committed any illegality. As a matter of fact, even after receipt of such report, the Magistrate under Section 190 (1) (b) may or may not take

cognizance of offence. In other words, he is not bound to take cognizance upon submission of the police report by the Investigating Officer, hence, by directing the police to file chargesheet or final report and to hold investigation with a particular result cannot be construed that the Magistrate has exceeded his power as provided in sub-section 3 of Section 156.

Neither the chargesheet nor the final report has been defined in the Code. The chargesheet or final report whatever may be the nomenclature, it only means a report under Section 173 of the Code which has to be filed by the police officer on completion of his investigation. In view of our discussion, in the case on hand, we are satisfied that the Magistrate in passing the impugned order has not committed any illegality leading to manifest injustice warranting interference by the High Court in exercise of extraordinary jurisdiction conferred under Article 226 of the Constitution of India. We are also satisfied that learned single Judge as well as the Division Bench rightly refused to interfere with the limited order passed by the Magistrate. We also hold that challenge at this stage by the appellants is pre-mature and the High Court rightly rejected their request.

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***323. CRIMINAL PROCEDURE CODE, 1973 – Section 164**

**Statement recorded under Section 164 of the Code, use of – Such statement is not substantive evidence and can be utilized only as a previous statement to corroborate or contradict the statement made in the Court by the witness – Where prosecutrix not giving any evidence in Court, conviction cannot be based on mere statement recorded u/s 164 Cr.P.C.**

**Baij Nath Sah v. State of Bihar**

**Judgment dated 29.04.2010 passed by the Supreme Court in Criminal Appeal No. 1475 of 2003, reported in (2010) 6 SCC 736**

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**324. CRIMINAL PROCEDURE CODE, 1973 – Section 167 (2)**

**Police remand – Whether a second application for police remand is maintainable after the dismissal of the first? Held, Yes – However, within the first 15 days of arrest, the Magistrate may remand the accused either to judicial custody or police custody for a given number of days, but once the period of 15 days expires, the Magistrate cannot pass order for police remand – Position explained.**

**Devender Kumar and another v. State of Haryana and others**

**Judgment dated 05.05.2010 passed by the Supreme Court in Criminal Appeal No. 988 of 2010, reported in (2010) 6 SCC 753**

Held:

As to the second branch of the learned counsel of appellants submissions that a second application for police remand was not maintainable after the dismissal of the first, reference was made to a decision of this Court in *CBI v.*

*Anupam J. Kulkarni, (1992) 3 SCC 141* wherein the provisions of Section 167 CrPC were gone into in some detail and the very question which is now, before us was also considered and it was held that within the first 15 days' period of remand, the Magistrate could direct police custody other than judicial custody, but if the investigation was not completed within the first 15 days' period of remand, no further police remand could be made. It was emphasized that police remand would only be made during the first 15 days after arrest and production before the Magistrate and not otherwise, although, judicial remand could extend to 60 days from the date of arrest and in special cases, to within 90 days.

With regard to the second point which was urged by the learned counsel for the appellants, the same was considered in depth and was settled in *Anupam J. Kulkarni case* (Supra) referred to hereinabove. What is clear is that fact that police remand can only be made during the first period of remand after arrest and production before the Magistrate, but not after the expiry of the said period.

Of course, we do not agree with the submissions made by the learned counsel for the appellants that the second application for police remand is not maintainable even if made during the first 15 days' period after arrest. The said point has also been considered and decided in the above case. Within the first 15 days of arrest the Magistrate may remand the accused either to judicial custody or police custody for a given number of days, but once the period of 15 days expires, the Magistrate cannot pass orders for police remand.

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**325. CRIMINAL PROCEDURE CODE, 1973 – Sections 215 and 464**
**Error in framing of charge – Prejudice to the accused – How to be judged, explained.**

## Main Pal v. State of Haryana

**Judgment dated 07.09.2010 passed by the Supreme Court in Criminal Appeal No. 1696 of 2010, reported in AIR 2010 SC 3292**

Held:

The object of framing a charge is to enable an accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet. The charge must also contain the particulars of date, time, place and person against whom the offence was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged. The accused is entitled to know with certainty and accuracy, the exact nature of the charge against him, and unless he has such knowledge, his defence will be prejudiced. Where an accused is charged with having committed offence against one person but on the evidence led, he is convicted for committing offence against another person, without a charge being framed in respect of it, the accused will be prejudiced,

resulting in a failure of justice. But there will be no prejudice or failure of justice where there was an error in the charge and accused was aware of the error. Such knowledge can be inferred from the defence, that is, if the defence of the accused showed that he was defending himself against the real and actual charge and not the erroneous charge. In judging a question of prejudice, as of guilt, the Courts must act with a broad vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself.

In this instant case, the charge was that the appellant committed trespass into the house of 'P' for assaulting 'P' and assaulted the said 'P' and outraged her modesty. The accused concentrated his cross-examination with reference to the said charge and elicited answers showing that he did not assault or outrage the modesty of 'P'. He did not try to challenge the evidence let in to show that he had tried to outrage the modesty of 'S', also present in house of 'P' as he was not charged with such an offence. The evidence of prosecution witnesses was that the appellant did not touch or tease or abuse 'P'. Their evidence was that he touched/caught the hand of 'S' and when she raised an alarm he ran away. When the charge was that the accused attempted to commit trespass into the house of 'P' with intent to outrage her modesty holding that there was no failure of justice even if the accused is punished for the offence of having assaulted 'S' and outraging her modesty, is opposed to principles of fair play and natural justice embodied in Ss. 211, 212, 215 and 464 of Code. One of the fundamental principles of justice is that an accused should know what is the charge against him so that he can build his defence in regard to that charge. An accused cannot be punished for committing an offence against 'Y' when he is charged with having committed the offence against 'X' and the entire defence of the accused was with reference to charge of having committed offence against 'X'.

The Illustrations under a provision of a Statue offers relevant and valuable indications as to meaning and object of the provision and are helpful in the working and application of the provision. Illustration (e) under Section 215 of the Code, as contrasted from illustration (d) under that section, throws some light on this issue. The guidance offered by said illustrations make it clear that when two persons were present in the house at the time of the incident namely 'P' and 'S' and the accused is charged with trespassing into the house of 'P' and assaulting and outraging her modesty and the witnesses refer only to the assault and outraging the modesty of 'S' the Court will have to infer that the accused was prejudiced if the accused had solely concentrated and focused his defence and entire cross-examination to show that he did not commit the offences against 'P'.

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***326. CRIMINAL PROCEDURE CODE, 1973 – Section 311**

**Recalling of Prosecution Witnesses – The witnesses have deposed that they have witnessed the incident – After six months, an application u/s 311 of Cr.P.C. has been filed for recalling them alongwith their affidavits in which they denied witnessing the incident – Held, once a witness is examined as prosecution witness, he cannot be allowed to perjure himself by resiling from testimony given in the Court on Oath – These witnesses cannot be permitted to change their previous version – Trial Court rightly rejected the application.**

*(Yakub Ismailbhai Patel v, State of Gujarat, AIR 2004 SC 4209* **relied on)**

**Hari Singh v. State of M.P.**

**Judgment dated 17.03.2010 passed by the High Court of M.P. in Cri. Rev. No. 9 of 2010, reported in 2010 (4) MPLJ 103**

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***327. CRIMINAL PROCEDURE CODE, 1973 – Section 313**
**INDIAN PENAL CODE, 1860 – Sections 302, 34 and 149**
**CRIMINAL TRIAL:**

**(i) Murder trial – Applicability of Section 34 – Held, to show common intention to commit crime, it is not necessary for the prosecution to establish, as a matter of fact, that there was pre-meeting of minds and planning before commission of crime – If intention is proved but no overt act is committed, the section can still be invoked.**

**(ii) Unlawful assembly – Determination of its common object – Relevant considerations therefor – Conduct of each of the members of the unlawful assembly before attack, at the time of attack and thereafter, as well as motive for crime are relevant considerations – However, time of forming unlawful intent is not material – Furthermore, it is not even expected from prosecution to assign particular or independent roles played by each accused.**

**(iii) Related witness – Reliability of – There is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before Court – Where deceased was attacked in presence of his brothers, who were unable to interfere because of fear of gunfire and manner in which the incident occurred – It is but natural for prosecution to produce them as eyewitnesses.**

**(iv) Interested witness – Close relative of the deceased does not,** *per se,* **become an interested witness – An interested witness is one who is interested in securing conviction of a person out of vengeance or enmity or due to disputes and deposes before Court only with that intention and not to further the cause of justice – However, version of interested witness cannot be thrown overboard, but has to be examined carefully before accepting the same.**

(v) **Motive – Necessity to prove – Held, it is not always necessary for prosecution to establish definite motive for commission of crime to secure conviction of accused – It would always be relatable to facts and circumstances of a given case – Absence of motive does not essentially result in acquittal of accused if he is otherwise found guilty by cogent and reliable evidence.**

(vi) **Examination of accused – Purpose and mode of conducting examination – Section 313 of Cr.P.C. is to provide opportunity to accused to explain circumstances appearing against him and for Court to have an opportunity to examine accused and to elicit an explanation from him, which may be free from fear of being trapped by an embarrassing admission or statement – Such statement can be used by Court to the extent that it is in line with case of prosecution but same cannot be the sole basis for convicting an accused.**

**Dharnidhar v. State of Uttar Pradesh and others**
**Judgment dated 08.07.2010 passed by the Supreme Court in Criminal Appeal No. 239 of 2005, reported in (2010) 7 SCC 759**

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***328. CRIMINAL PROCEDURE CODE, 1973 – Section 313**
**EVIDENCE ACT, 1872 – Section 27**
**CRIMINAL TRIAL:**

(i) **Examination of accused – Significance of – The statement of accused can be used to test the veracity of exculpatory nature of the admission, if any, made by the accused – However, such statements should not be considered in isolation but in conjunction with evidence adduced by the prosecution – Thus, conviction of the accused cannot be based merely on the statement made under Section 313 of CrPC as it cannot be regarded as substantive piece of evidence.**

(ii) **Recoveries made pursuant to disclosures made by accused – Admissibility in evidence – Condition necessary for bringing Section 27 of Evidence Act into operation restated.**

(iii) **Case of circumstantial evidence – An accused can be convicted on the basis of circumstantial evidence subject to the satisfaction of the accepted principles in that regard – Principles regarding circumstantial evidence laid down in the cases of** *Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC* **and** *Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116* **restated.**

**Sanatan Naskar and another v. State of West Bengal**
**Judgment dated 08.07.2010 passed by the Supreme Court in Criminal Appeal No. 686 of 2008, reported in (2010) 8 SCC 249**

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***329. CRIMINAL PROCEDURE CODE, 1973 – Section 320 (2)**

**As the offence u/s 324 IPC was compoundable with the permission of the Court on the date of commission u/s 320 (2) Cr.P.C., it would be compoundable despite subsequent amendment in Section 320 Cr.P.C. in 2005, which made it non-compoundable.**

**Hirabhai Jhaverbhai v. State of Gujarat and others**

**Judgment dated 09.04.2010 passed by the Supreme Court in Criminal Appeal No. 749 of 2010, reported in (2010) 6 SCC 688**

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***330. CRIMINAL PROCEDURE CODE, 1973 – Section 451**

**Application by complainant for supurdgi of gun, subject matter of robbery, dismissed by CJM holding that the gun is subject matter of evidence during trial – Revision also dismissed by ASJ – Held, where stolen or looted articles are seized by police it should be released on supuradnama to the person who *prima facie* establish his possession over the articles – Petition allowed.**

**Om Prakash Chaturvedi v. State of M.P.**

**Judgment dated 03.05.2010 passed by the High Court of M.P. in M. Cr. C. No. 1214 of 2010, reported in ILR (2010) M.P. 1998**

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**331. CRIMINAL PROCEDURE CODE, 1973 – Sections 451 and 457**
**MOTOR VEHICLES ACT, 1988 – Section 158 (6)**

**Disposal of seized vehicles – To avoid natural decay and loss of roadworthiness of the seized vehicles upon being kept in open with the police/investigating agency, the Apex Court has issued further directions with regard to the disposal of such vehicles in order to ensure full and complete compliance of the earlier directions issued in *Sunderbhai Ambalal Desai v. State of Gujarat, (2002) 10 SCC 283* regarding implementation of Sections 451 and 457 of the Cr.P.C. and in *General Insurance Council v. State of AP, (2007) 12 SCC 354* regarding compliance of Section 158(6) of the M.V. Act.**

**General Insurance Council and others v. State of Andhra Pradesh and others**

**Judgment dated 19.04.2010 passed by the Supreme Court in writ Petition (c) No. 14 of 2008, reported in (2010) 6 SCC 768**

Held:

According to the petitioners, the report of 2005 of NCRB, 84,675 vehicles were reported lost, out of which 24,918 vehicles were recovered by the police and out of these, only 4,676 vehicles were finally coordinated. As a result, several hundred crores worth of assets were lost. Further, by the time the recovered vehicles are released, the same are reduced to junk at the respective police stations. In other

words the petitioners have prayed that national waste that is being caused could be substantially reduced, curbed and eliminated to a great extent. Keeping in view the aforesaid facts in mind, they have filed this writ petition.

In *Sunderbhai Ambalal Desai v. State of Gujarat, (2002) 10 SCC 283*, the Supreme Court was primarily dealing with provisions of Sections 451 and 457 of the Code. While quoting the aforesaid two provisions of the Act in the judgment, it was observed in para 7 as under:-

> "7. In our view, the powers under Section 451 Cr PC should be exercised expeditiously and judiciously. It would serve various purposes, namely:
>
> 1. owner of the article would not suffer because of its remaining unused or by its misappropriation;
> 2. court or the police would not be required to keep the article in safe custody;
> 3. if the proper panchnama before handing over possession of the article is prepared, that can be used in evidence instead of its production before the court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail; and
> 4. this jurisdiction of the court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles."

To safeguard the interests of the prosecution, it was directed that following measures should be adopted giving instances contained in para 12 reproduced hereinbelow: (*Surendrabhai Ambala Desai case* (supra), SCC p. 288)

> "12. For this purpose, if material on record indicates that such articles belong to the complainant at whose house theft, robbery or dacoity has taken place, then seized articles be handed over to the complainant after:
>
> 1. preparing detailed proper panchnama of such articles;
> 2. taking photographs of such articles and a bond that such articles would be produced if required at the time of trial; and
> 3. after taking proper security."

While dealing with the seized vehicles from time to time by the police either in commission of various offences or abandoned vehicles or vehicles which are recovered during investigation of complaint of thefts, the Court observed as under: (*Surendrabhai Ambala Desai case* (supra), SCC p. 289-90 paras 17-18)

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

18. In case where the vehicle is not claimed by the accused, owner, or the insurance company or by a third person, then such vehicle may be ordered to be auctioned by the court. If the said vehicle is insured with the insurance company then the insurance company be informed by the court to take possession of the vehicle which is not claimed by the owner or a third person. If the insurance company fails to take possession, the vehicles may be sold as per the direction of the court. The court would pass such order within a period of six months from the date of production of the said vehicle before the court. In any case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchnama should be prepared."

Since it appeared to the Petitioners that despite the said directions, the requirements of the Petitioners were not being fulfilled, they were constrained to file W.P (C) No. 282 of 2007 titled *General Insurance Council v. State of Andhra Pradesh, (2007) 12 SCC 354* decided on 09.07.2007 by a coordinate Bench of two learned Judges of this Court.

In this second round of litigation before this Court, a direction was sought with regard to compliance of Section 158 (6) of the Motor Vehicles Act, 1988 (in short 'the M.V. Act') and Rule 159 of the Central Motor Vehicles Rules, 1989 (in short 'the Rules').This Court in the said matter after considering the issue came to the following conclusion: (*General Insurance Council case (supra)* SCC p. 358, paras 9-10)

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

10. It is, therefore, directed that all the State Governments and the Union Territories shall instruct, if not already done, all police officers concerned about the need to comply with the requirement of Section 158 (6) keeping in view the requirement indicated in Rule 150 and in Form 54.

Periodical checking shall be done by the Inspector General of Police concerned to ensure that the requirements are being complied with. In case there is non-compliance, appropriate action shall be taken against the erring officials. The Department of Road Transport and Highways shall make periodical verification to ensure that action is being taken and in case of any deviation immediately bring the same to the notice of the concerned State Government/ Union Territories so that necessary action can be taken against the officials concerned."

Despite the aforesaid directions having been issued by this Court in the aforesaid two matters, grievance is still being made by the Petitioners, that the police, investigating agency and the prosecuting agency are not taking appropriate and adequate steps for compliance of aforesaid directions issued by this Court. Therefore, a need has arisen for giving further directions so as to clear the clouds and iron out the creases.

The petitioners have submitted that information with regard to all insured vehicles in the country is available with the Insurance Information Bureau created by IRDA. This information could be utilised to assist the police to identify the insurer of the vehicle. Upon recovery of the vehicle in police station, insurer/ complainant can call an all – India toll free number to be provided by Insurance Information Bureau to give the information of the recovered vehicle. Thereafter, the insured vehicle database would be searched to identify the respective insurer. Upon such identification, this information can be communicated to the respective insurer and concerned police stations for necessary coordination.

In our considered opinion, the aforesaid information is required to be utilised and followed scrupulously and has to be given positively as and when asked for by the Insurer. We also feel, it is necessary that in addition to the directions issued by this Court in *Sunderbhai Ambalal Desai* (supra) considering the mandate of Section 451 read with Section 457 of the Code, the following further directions with regard to seized vehicles are required to be given.

"(A) Insurer may be permitted to move a separate application for release of the recovered vehicle as soon as it is informed of such recovery before the jurisdictional Court. Ordinarily, release shall be made within a period of 30 days from the date of the application. The necessary photographs may be taken duly authenticated and certified, and a detailed panchnama may be prepared before such release.

(B) The photographs so taken may be used as secondary evidence during trial. Hence, physical production of the vehicle may be dispensed with.

(C) Insurer would submit an undertaking/guarantee to remit the proceeds from the sale/auction of the vehicle conducted by the Insurance Company in the event that the Magistrate finally adjudicates that the rightful ownership of the vehicle does not vest with the insurer. The undertaking/guarantee would be furnished at the time of release of the vehicle, pursuant to the application for release of the recovered vehicle. Insistence on personal bonds may be dispensed with looking to the corporate structure of the insurer."

It is a matter of common knowledge that as and when vehicles are seized and kept in various police stations, not only do they occupy substantial space of the police stations but upon being kept in open, are also prone to fast natural decay on account of weather conditions. Even a good maintained vehicle loses its roadworthiness if it is kept stationary in the police station for more than fifteen days. Apart from the above, it is also a matter of common knowledge that several valuable and costly parts of the said vehicles are either stolen or are cannibalised so that the vehicles become unworthy of being driven on road. To avoid all this, apart from the aforesaid directions issued hereinabove, we direct that all the State Governments/Union Territories/Director Generals of Police shall ensure macro implementation of the statutory provisions and further direct that the activities of each and every police stations, especially with regard to disposal of the seized vehicles be taken care of by the Inspector General of Police of the Division/Commissioner of Police of the concerned cities/Superintendent of Police of the concerned district.

In case any non-compliance is reported either by the Petitioners or by any of the aggrieved party, then needless to say, we would be constrained to take a serious view of the matter against an erring officer who would be dealt with iron hands. With the aforesaid directions, this writ petition stands finally disposed of.

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**332. CRIMINAL TRIAL:**

**Plea of alibi – Burden and degree of proof – Plea of alibi has to be proved with absolute certainty so as to completely exclude the possibility of the presence of the accused at the relevant time – Such plea should be established by positive evidence – But the failure of the plea of alibi would not necessarily lead to the success of the prosecution case which has to be independently proved by the prosecution beyond reasonable doubt – Position explained.**

**Shaikh Sattar v. State of Maharashtra**

**Judgment dated 27.08.2010 passed by the Supreme Court in Criminal Appeal No. 928 of 2007, reported in (2010) 8 SCC 430**

Held:

The appellant claimed false implications as well as being absent form the

scene of the crime at the relevant time. The trial court as well as the High Court upon due appreciation of the evidence have concluded that the appellant was unhappy or even annoyed at the inability of the in-laws to pay him an amount of Rs. 40,000/- for starting a business. It has also come in evidence that two days prior to the incident, he had left the house of the in-laws after having expressed his annoyance at their inability to arrange for the funds. He had left the house without even joining them for the meal.

It has also been found by both the Courts that appellant was residing separately with his wife (the deceased) and his son at Naigaon in the rented accommodation. It is further to be noticed that the specific case of the appellant is that he was earning a meager amount in the region of Rs. 500/-. Therefore he could not possibly afford the luxury of renting another room at Chikalthana. Therefore, he would have undoubtedly returned to his residence after his disgraceful departure from his in-laws house two days earlier. He then cooked up a story that he had been to Chikalthana to read Koran, the night before his wife suffered a fatal accident. He came to know about her accidental death on his return to his home at 7:00 a.m, on the following day.

The trial court and the High Court have found the explanation to be false. It has been noticed by both the Courts that Chikalthana is only 12 to 15 Kms. away from Naigaon. It is also noticed that the evening Namaj would have taken place just before sunset of the previous evening. Therefore, it is unimaginable that he could not have come back to his residence during the night.

Both the Courts also noticed that Sk. Shamsher is said to have learnt about the accidental death of the wife of the appellant from a discussion among the villagers. He was unable to identify any particular villager who had given him the information. He, thereafter, passed on the information to Sk. Nawab who made a Report (Ex.36) at the police station. Both of them have no personal knowledge about the "accidental death". It is also noticed that the Report Ex. 36, actually contains two versions which are both unbelievable. One version is that the victim was asleep when the stone rolled over and fell on her head. The other is that whilst she was withdrawing the quilt, the stone on the roof rolled over and fell on her head.

Except for making a bald assertion about his absence from his rented premises, the appellant miserably failed to give any particulars about any individual in whose presence, he may have read the Namaj in the morning. He examined no witness from Chikalthana before whom he may have read the Koran in the evening prior to the incident. He examined nobody, who could have seen him in the masjid during the night of the incident. Therefore, the trial court as also the High Court concluded that this plea of being away from the rented premises at the relevant time was concocted.

Undoubtedly, the burden of establishing the plea of alibi lay upon the appellant. The appellant herein has miserably failed to bring on record any facts or circumstances which would make the plea of his absence even probable, let

alone, being proved beyond reasonable doubt. The plea of alibi had to be proved with absolute certainty so as to completely exclude the possibility of the presence of the appellant in the rented premises at the relevant time. When a plea of alibi is raised by an accused it is for the accused to establish the said plea by positive evidence which has not been led in the present case.

But it is also correct that, even though, the plea of alibi of the appellant is not established, it was for the prosecution to prove the case against the appellant. To this extent, the submission of the learned counsel for the appellant was correct. The failure of the plea of alibi would not necessarily lead to the success of the prosecution case which has to be independently proved by the prosecution beyond reasonable doubt.

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**333. DOWRY PROHIBITION ACT, 1961 – Section 2**
**INDIAN PENAL CODE, 1860 – Section 304-B**
**Dowry – Meaning of the expressions 'demand of dowry in connection with the marriage' cover demand of dowry both before or after the marriage except any customary demand of such nature that would not attract on the face of it.**
**Offence of dowry death – Interpretation of 'soon before death' – It cannot be given restricted meaning – The concept of reasonable time is the best criterion – There must be proximity link between the acts of cruelty along with the demand and the death.**

## Ashok Kumar v. State of Haryana

**Judgment dated 08.07.2010 passed by the Supreme Court in Criminal Appeal No. 1489 of 2004, reported in AIR 2010 SC 2839**

Held:

The expressions 'or any time after marriage' and 'in connection with marriage of the said parties' are of wide meaning and scope. The expression 'in connection with the marriage' cannot be given a restricted or a narrower meaning. The expression 'in connection with the marriage' even in common parlance and on its plain language has to be understood generally. The object being that everything which is offending at any time i.e., at, before or after the marriage would be covered under this definition but the demand of dowry has to be 'in connection with the marriage' and not so customary that it would not attract on the face of it the provisions of this section.

The expressions 'soon before her death' cannot be given a restricted or a narrower meaning. They must be understood in their plain language and with reference to their meaning in common parlance. There are the provisions relating to human behaviour and, therefore, cannot be given such a narrower meaning which would defeat the very purpose of the provisions of the Act. Of course these are penal provisions and must receive strict construction. But even the rule of strict construction requires that the provisions have to be read in

conjunction with other relevant provisions and scheme of the Act. Further the interpretation given should be one which would avoid absurd results on the one hand and would further the object and cause of the law so enacted on the other. The concept of reasonable time is the best criteria to be applied for appreciation and examination of such cases. However there must be existence of proximate link between the acts of cruelty along with the demand of dowry and the death of the victim. For want of any specific period the concept of reasonable period would be applicable. Thus the cruelty, harassment and demand of dowry should not be so ancient whereafter the couple and the family members have lived happily and that it would result in abuse of the said protection. Such demand or harassment may not strictly and squarely fall within the scope of these provisions unless definite evidence was led to show to the contrary. These matters of course will have to be examined on the facts and circumstances of a given case.

The concept of deeming fiction is hardly applicable to the criminal jurisprudence. In contradistinction to this aspect the legislature has applied the concept of deeming fiction to the provisions of S.304-B, therefore for constituting an offence under S.304-B of the Code the Court has to attach specific significance to the time of alleged cruelty and harassment to which the victim was subjected to and the time of her death as well as whether the alleged demand of dowry was in connection with the marriage. Once these ingredients are satisfied it would be called the 'dowry death' and then by deemed fiction of law, the husband or the relatives would be deemed to have committed that offence.

In the present case, there is definite evidence to show that nearly 20-22 days prior to her death the deceased had come to her parental home and informed her father about the demand of Rs. 5,000/- and harassment and torture to which she was subjected to by the accused and her in-laws. Her father had consoled her ensuring that he would try to arrange for the same and thereafter took her at her matrimonial home 7-8 days prior to the incident.

On face of the aforesaid evidence read in conjunction with the statement of DW-3, we are convinced that ingredients of Section 304B have been satisfied in the present case.

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**334. ELECTRICITY ACT, 2003 – Sections 135, 150 and 151**

**Whether Sub-Engineer is authorised to file complaint regarding offence punishable under the Electricity Act, 2003? Held, Yes – As per Notification No. 2495-13-2004, dated 17.05.04 and the amended notification No. F-01-004/2007/thirteen, dated 11.09.07 issued by the Department of Energy, Sub-Engineer is authorised to file the complaint.**

**Rehmat Ali and others v. M.P.W.R.E.C. Ltd., Indore**

**Judgment dated 9.3.2010 passed by the High Court of M.P. in Cri. Rev. No.1319 of 2009, reported in 2010 (4) MPHT 416**

Held:

From perusal of the record it is evident that in the complaint filed by respondent it was alleged that the complaint is being filed by Mr. Bhushan Kulkarni, Sub-Engineer who is authorised to file the complaint. Alongwith the complaint letter dated 31-03-09 issued by Sub-Engineer (Revenue) in favour of Mr. Bhushan Kulkarni who is respondent herein, is filed wherein it is mentioned that as per notification No. 3495-13-2004, dated 17-05-04 and the amended notification No. F-01-004/2007/thirteen, dated 11-09-07 respondent is authorised to file the complaint against the petitioners.

Notification dated 17.05.04 is on record. As per said notification Secretary (Department of Energy) in exercise of powers confirmed by sub-section (2) of Section 135 of the Electricity Act has authorised the Sub-Engineer to file the complaint. Notification dated 11-09-07 is also on record, whereby notification dated 17.05.04 is amended. Thus, keeping in view the aforesaid notification this Court is of the view that Mr. Bhushan Kulkarni, Sub-Engineer was duly authorised to file the complaint.

So far as law laid down in the matter of *Bupupuri v. Madhya Pradesh Vidyut Vitran Company Ltd. 2009 (2) MPHT 88 = 2009 (2) MPLJ (Cri) 109* (Supra) is concerned, in that case where was nothing on record to who that the Junior Engineer was authorised to file the complaint. As per Section 151, Electricity Act, Court shall take cognizance of the offence upon the complaint filed by any of the Officer authorised to file the complaint. Since the complaint has been filed by duly Authorised Officer of the respondent, therefore, this Court is of the opinion that no illegality has been committed by the learned Court below in taking cognizance of the offence.

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***335. ELECTRICITY ACT, 2003 – Section 164**
**TELEGRAPH ACT, 1885 – Section 10**
**Whether consent of landowner is required for laying transmission lines and erecting tower on his land? Held, if such action has been taken as per prescribed procedure under Statutes concerned, no consent is required for the same – If any damage is caused, party concerned may take action to get compensation.**
**(***G.V.S. Rama Krishna v. A.P. Transco, AIR 2009 AP 158, Rajak and others v. National Thermal Corp. Ltd., AIR 1988 MP 172 and Jayantkumar Bhagubhai Patel and another v. State of Gujarat and another, AIR 2007 Gujarat 32* **relied on)**

**Vijay Ramchandra Agrawal v. Power Grid Corporation of India Ltd. and another**

**Judgment dated 22.07.2010 passed by the High Court of M.P. in W. P. No. 6412 of 2010, reported in 2010 (4) MPLJ 73**

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*336. EVIDENCE ACT, 1872 – Section 32 (1) – Dying declaration – Principle of dying declaration restated.

(i) The Courts below have to be extremely careful when they deal with a dying declaration, as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there, is extremely dangerous.

(ii) The Court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration.

(iii) Number of times, a young girl or a wife who makes the dying declaration could be under the impression that she would lead a peaceful, congenial, happy and blissful married life only with her husband and, therefore, has tendency to implicate the inconvenient parents-in-law or other relatives. Number of times the relatives influence the investigating agency and bring about a dying declaration. The dying declarations recorded by the investigating agencies have to be very scrupulously examined and the Court must remain alive to all the attendant circumstances at the time when the dying declaration comes into being.

(iv) When there are more than one dying declarations, the intrinsic contradictions in those dying declarations are extremely important. It cannot be that a dying declaration which supports the prosecution alone can be accepted while the other innocuous dying declarations have to be rejected. Such a trend will be extremely dangerous. However, the Courts below are fully entitled to act on the dying declarations and make them the basis of conviction, where the dying declarations pass all the above tests.

(v) It is extremely difficult to reject a dying declaration merely because there are few factual errors committed. The Court has to weight all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the Court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The Courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect and, therefore, a mechanical approach to the law of dying declaration has to be shunned.

**(vi) Dying declaration is the only piece of untested evidence and must like any other evidence, satisfy the Court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it a basis of conviction, even if there is no corroboration.**

**Puran Chand v. State of Haryana**

**Judgment dated 13.05.2010 passed by the Supreme Court in Criminal Appeal No. 1818 of 2009, reported in (2010) 6 SCC 566**

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**337. EVIDENCE ACT, 1872 – Section 32 (1)**

**Dying declaration – While recording dying declaration, factors such as mental condition of the maker, alertness of mind and memory, evidentiary value etc., have to be taken into account – Principles laid down earlier by the Apex Court governing the dying declaration analysed and restated.**

**Atbir v. Government of NCT of Delhi**

**Judgment dated 09.08.2010 passed by the Supreme Court in Criminal Appeal No. 870 of 2006, reported in (2010) 9 SCC 1**

Held:

This Court in a series of decisions enumerated and analysed that while recording the dying declaration factors such as mental condition of the maker, alertness of mind and memory, evidentiary value, etc. have to be taken into account.

In *Paras Yadav v. State of Bihar, (1999) 2 SCC 126,* this Court held that lapse on the part of the Investigation Officer in not bringing the Magistrate to record the statement of the deceased should not be taken in favour of the accused. This Court further held that a statement of the deceased recorded by a police officer in a routine manner as a complaint and not as a dying declaration can also be treated as dying declaration after the death of the injured and relied upon if the evidence of the prosecution witnesses clearly establishes that the deceased was conscious and was in a fit state of health to make the statement.

The effect of dying declaration not recorded by the Magistrate was considered and reiterated in *Balbir Singh & Anr. v. State of Punjab, (2006) 12 SCC 283.* Paragraph 23 of the said judgment is relevant which reads as under:

> "23. However, in *State of Karnataka* v. *Shariff, (2003) 2 SCC 473,* this Court categorically held that there was no requirement of law that a dying declaration must necessarily be made before a Magistrate. This Court therein noted its earlier decision in *Ram Bihari Yadav v. State of Bihar,*

*(1998) 4 SCC 517,* wherein it was also held that the dying declaration need not be in the form of questions and answers. [See also *Laxman v. State of Maharashtra, (2002) 6 SCC 710*]."

It is clear that merely because the dying declaration was not recorded by the Magistrate, by itself cannot be a ground to reject the whole prosecution case. It also clarified that where the declaration is wholly inconsistent or contradictory statements are made or if it appears from the records that the dying declaration is not reliable, a question may arise as to why the Magistrate was not called for, but ordinarily the same may not be insisted upon. This Court further held that the statement of the injured, in event of her death may also be treated as FIR.

After analyzing earlier decisions in *Munnu Raja v. State of M.P., (1976) 3 SCC 104, State of Rajasthan v. Wakteng, (2007) 14 SCC 550, Bijoy Das v. State of W.B., (2008) 4 SCC 511, Muthu Kutty v. State, (2005) 9 SCC 113, Panneerselvam v. State of T.N., (2008) 17 SCC 190* and *Paniben v. State of Gujarat, (1992) 2 SCC 474* and cases referred above, the Apex Court enunciated the principles as under:

(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the Court.

(ii) The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

(iii) Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

(v) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eye-witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration.

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***338. EVIDENCE ACT, 1872 – Sections 32 (1) and 60**
**INDIAN PENAL CODE, 1860 – Sections 304-B and 498-A**

**(i) In Indian law, even if the deceased was no where near expectation of death, still his/her statement would become admissible under Section 32 (1) of Evidence Act provided it satisfies one of the two conditions set forth in this Section, as to the cause of his/her death or as to any of the circumstances of the transaction which resulted in his/her death, in cases in which the cause of that person's death comes into question are themselves relevant fact. In this case the cause of death of the deceased was a question to be decided and the statements made by the deceased before PW 4 and PW 5 that the appellant used to taunt the deceased in connection with the demand of a scooter or Rs. 25,000/- within a couple of months before the death of the deceased are statements as to "the circumstances of the transaction which resulted in her death" within the meaning of Section 32 (1) of the Evidence Act.**

**(ii) Dowry death – Nature of proof required – A prosecution witness who merely uses the word "harassed" or "tortured" and does not describe the exact conduct of the accused which, according to him, amounted to harassment or torture, may not be believed by the court in cases under Sections 498-A and 304-B IPC.**

**In** *Kans Raj v. State of Punjab, (2000) 5 SCC 207* **this Court cautioned that in cases where accusations of dowry deaths are made, the overt acts attributed to persons other than the husband are required to be proved beyond reasonable doubt and by mere conjectures and implications such relations cannot be held guilty for the offence relating to dowry deaths. A tendency has developed for roping in all relations of the in-laws of the deceased wife, in the matters of dowry deaths which, if not discouraged, is likely to affect the case of the prosecution even against the real culprits.**

**Amar Singh v. State of Rajasthan**
**Judgment dated 03.08.2010 passed by the Supreme Court in Criminal Appeal No. 854 of 2004, reported in (2010) 9 SCC 64**

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**339. EVIDENCE ACT, 1872 – Sections 41, 42 and 43**

**Finding in civil proceedings – Whether binding in a subsequent criminal proceeding founded upon the same allegations? Held, No – The finding of fact recorded by the Civil Court do not have any bearing so far as the criminal case is concerned and vice versa – However, there may be cases where the provisions of Sections 41 to 43 of the Evidence Act with the relevancy of previous judgment in subsequent case may be taken into consideration – Position restated.**

**Kishan Singh (dead) through LRs. v. Gurpal Singh and others**
**Judgment dated 12.08.2010 passed by the Supreme Court in Criminal Appeal No. 1500 of 2010, reported in (2010) 8 SCC 775**

Held:

The issue as to whether the findings recorded by Civil Court are binding in criminal proceedings between the same parties in respect of the same subject matter, is no more res integra.

In *M/s Karam Chand Ganga Prasad v. Union of India, AIR 1971 SC 1244* this Court, while dealing with the same issue, held as under:-

> "4. ...It is well established principle of law that the decisions of the civil courts are binding on the criminal courts. The converse is not true."

The said Judgment was delivered by a three-Judge Bench of this Court without taking note of the Constitution Bench Judgment in *M.S. Sherrif v. State of Madras., AIR 1954 SC 397* on the same issue, wherein this Court has held as under:- (AIR p. 399, paras 15-16)

> "15. As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.
>
> 16. Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the

public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust.

This, however, is not a hard and fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just."

In *Syed Aksari Hadi Ali Augustine Imam & Anr. v. State (Delhi Admn), (2009) 5 SCC 528,* this Court considered all the earlier Judgments on the issue and held that while deciding the case in *Karam Chand* (supra), this Court failed to take note of the Constitution Bench Judgment in *M.S. Sherrif* (supra) and, therefore, it remains per incuriam and does not lay down the correct law. A similar view has been reiterated by this Court in *Vishnu Dutt Sharma v. Daya Prasad, (2009) 13 SCC 729,* wherein it has been held by this Court that the decision in *Karamchand* (supra) stood overruled in *K.G. Premshankar v. Inspector of Police, AIR 2002 SC 3372.*

Thus, in view of the above, the law on the issue stands crystallized to the effect that the findings of fact recorded by the Civil Court do not have any bearing so far as the criminal case is concerned and vice-versa. Standard of proof is different in civil and criminal cases. In civil cases it is preponderance of probabilities while in criminal cases it is proof beyond reasonable doubt. There is neither any statutory nor any legal principle that findings recorded by the court either in civil or criminal proceedings shall be binding between the same parties while dealing with the same subject matter and both the cases have to be decided on the basis of the evidence adduced therein. However, there may be cases where the provisions of Sections 41 to 43 of the Indian Evidence Act, 1872, dealing with the relevance of previous Judgments in subsequent cases may be taken into consideration.

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***340. EVIDENCE ACT, 1872 – Section 45**

**Evidence of handwriting expert – When Trial Court relied on report of handwriting expert, it ought to have examined handwriting expert in order to give accused opportunity of cross examining the expert – Without examining handwriting expert, as a witness in Court, no reliance could be placed on his opinion.**

**Keshav Dutt v. State of Haryana**

**Judgment dated 19.08.2010 passed by the Supreme Court in Criminal Appeal No. 1560 of 2010, reported in (2010) 9 SCC 286**

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**341. EVIDENCE ACT, 1872 – Sections 45 and 67**

**(i) Application for examination of disputed signature by hand writing expert – The application filed at the stage of final arguments – The applicant denied execution of the document as well as signature on the document in his pleadings – The application rejected by the trial Court – Held, it was necessary to arrive at a proper conclusion as to whether applicant has executed the document and put his signature on it – In absence of any specific bar in CPC for filing such application at the time of final arguments, rejection of the application by the trial court was not proper.**

**(ii) Mode of proving a document – Law explained.**

**L. S. Trading Company, Gwalior and another v. Manish Mishra**
**Judgment dated 24.06.2010 passed by the High Court of M.P. in W. P. No. 2497 of 2010 (I), reported in 2010 (4) MPLJ 228 (DB)**

Held:

On going through plaint averments, it is gathered that a promissory note has been executed by the defendants in favour of plaintiff/respondent. However, in the written statement there is total denial of the defendants not only in respect to the execution of the promissory note but also with respect to the signature of the defendant Laxman Agrawal on the said document. The learned trial Court also framed necessary issue in that regard and the parties led their evidence. True, the defendants/petitioners voluntarily closed their evidence and at the stage of final arguments an application under section 45 of the Evidence Act was filed to get the disputed signature examined by the handwriting expert. The learned Trial Judge has simply dismissed the application on the ground that it is filed at the fag end of the trial. Learned counsel for the respondent could not point out any specific bar in filing such type of application at the time of final arguments. In order to take out the grain from the chaff and to arrive at a proper conclusion as to whether the document was executed by the defendants and further that on the disputed document of promissory note the signature was put by defendant Laxman Agrawal or not, it was necessary to examine the handwriting expert and, therefore, according to us the doors of justice cannot be shut merely on the ground that the application was moved by defendants at the fag end of the trial.

There are several modes to get a document proved. While examining the scope of Section 67 of the Evidence Act we find that there cannot be any straight jacket formula or any particular mode of proving a particular document or handwriting or signature. Section 67 of the Evidence Act is the relevant provision in respect to the proof of signature and handwriting of a person. According to us, following are the modes for proving a document:-

"(i) By calling a person who signed or wrote a document;

(ii) By calling a person in whose presence the documents are signed or written;

(iii) By calling handwriting expert;

(iv) By calling a person acquainted with the handwriting of the person by whom the document is supposed to be signed or written;

(v) *By comparing in Court, the disputed signatures or handwriting with some admitted signatures or* writing;

(vi) By proof of an admission by the person who is alleged to have signed or written the document that he signed or write it;

(vii) By the statement of a deceased professional scribe, made in the ordinary course of business, that the signature on the documents is that of a particular person;

A signature is also proved to have been made, if it is shown to have been made at the request of a person by some other person, e.g. by the scribe who signed on behalf of the executant;

(viii) By other circumstantial evidence."

In this context we may profitably place reliance on the Single Bench decision of this Court in *Kishan Prasad v. M.P. Government through Collector, Vidisha, 1983 MPLJ 355 = 1983 JLJ 474* in which the other Single Bench decision of this Court *Ramibai v. Life Insurance Corporation of India, 1981 MPLJ 192 = 1981 JLJ 388* has been placed reliance. Indeed, this exercise ought to have been done by the plaintiff, but if the defendants have moved an application under section 45 of the Evidence Act to get the handwriting examined, in absence of any specific bar in Civil Procedure Code, according to us, learned trial Court has arbitrarily dismissed the application without applying its proper mind on the facts and circumstances of the case.

For the reason stated hereinabove we are of the view that the impugned order cannot be allowed to remain stand and the same is hereby set aside and the application (Annexure P/7) dated 26-4-2010 filed by defendants/petitioners stands allowed. The learned Trial Court shall give an opportunity to the petitioners to get the impugned document of promissory note examined by the handwriting expert and will also permit the defendants to get the handwriting examined in the Court.

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**342. HINDU MARRIAGE ACT, 1955 – Section 16**

**Illegitimate children born out of live-in relationship are entitled to claim share only in self-acquired property of their parents – They cannot claim share in ancestral coparcenary property of their parents.**

**Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors.**

**Judgment dated 17.05.2010 passed by the Supreme Court in Civil Appeal No. 7108 of 2003, reported in AIR 2010 SC 2685**

Held:

It is evident that Section 16 of the Hindu Marriage Act intends to bring about social reforms, conferment of social status of legitimacy on a group of children, otherwise treated as illegitimate, as its prime object.

In *S.P.S. Balasubramanyam v. Suruttayan @ Andali Padayachi & Ors., AIR 1992 SC 756,* this Court held that if man and woman are living under the same roof and cohabiting for a number of years, there will be a presumption under Section 114 of the Evidence Act that they live as husband and wife and the children born to them will not be illegitimate.

In *S. Khushboo v. Kanniammal & Anr., 2010 AIR SCW 2770* this Court, placing reliance upon its earlier decision in *Lata Singh v. State of U.P. & Anr., AIR 2006 SC 2522,* held that live-in-relationship is permissible only in unmarried major persons of heterogeneous sex. In case, one of the said persons is married, man may be guilty of offence of adultery and it would amount to an offence under Section 497 IPC.

In *Smt. P.E.K. Kalliani Amma & Ors. v. K. Devi & Ors., AIR 1996 SC 1963,* this Court held that Section 16 of the Act is not ultra vires of the Constitution of India. In view of the legal fiction contained in Section 16, the illegitimate children, for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate. They cannot, however, succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the properties of the parents.

In *Rameshwari Devi v. State of Bihar & Ors., AIR 2000 SC 735,* this Court dealt with a case wherein after the death of a Government employee, children born illegitimately by the woman, who had been living with the said employee, claimed the share in pension/gratuity and other death-cum-retiral benefits along with children born out of a legal wedlock. This Court held that under Section 16 of the Act, children of void marriage are legitimate. As the employee, a Hindu, died intestate, the children of the deceased employee born out of void marriage were entitled to share in the family pension, death-cum-retiral benefits and gratuity.

In *Jinia Keotin & Ors. v. Kumar Sitaram Manjhi & Ors., (2003) 1 SCC 730,* this Court held that while engrafting a rule of fiction in Section 16 of the Act, the illegitimate children have become entitled to get share only in self-acquired properties of their parents. The Court held as under:-

> *"4.....Under the ordinary law, a child for being treated as legitimate must be born in lawful wedlock. If the marriage itself is void on account of contravention of the statutory prescriptions, any child born of such marriage would have the effect, per se, or on being so declared or annulled, as the case may be, of bastardising the children born of the parties to such marriage. Polygamy, which was permissible*

*and widely prevalent among the Hindus in the past and considered to have evil effects on society, came to be put an end to by the mandate of the Parliament in enacting the Hindu Marriage Act, 1955. The legitimate status of the children which depended very much upon the marriage between their parents being valid or void, thus turned on the act of parents over which the innocent child had no hold or control. But for no fault of it, the innocent baby had to suffer a permanent set back in life and in the eyes of society by being treated as illegitimate. A laudable and noble act of the legislature indeed in enacting Section 16 to put an end to a great social evil. At the same time, Section 16 of the Act, while engrafting a rule of fiction in ordaining the children, though illegitimate, to be treated as legitimate, notwithstanding that the marriage was void or voidable chose also to confine its application, so far as succession or inheritance by such children are concerned to the properties of the parents only.*

*5. So far as Section 16 of the Act is concerned, though it was enacted to legitimise children, who would otherwise suffer by becoming illegitimate, at the same time it expressly provide in sub-section (3) by engrafting a provision with a non-obstante clause stipulating specifically that nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage, which is null and void or which is annulled by a decree of nullity under Section 12, 'any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of this not being the legitimate child of his parents'. In the light of such an express mandate of the legislature itself there is no room for according upon such children who but for Section 16 would have been branded as illegitimate any further rights than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting Section 16 of the Act. Any attempt to do so would amount to doing not only violence to the provision specifically engrafted in sub-section (3) of Section 16 of the Act but also would attempt to court relegislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself. Consequently, we are unable to countenance the submissions on behalf of the appellants...."*

This view has been approved and followed by this Court in *Neelamma and others v. Sarojamma and others, (2006) 9 SCC 612.*

Thus, it is evident that in such a fact-situation, a child born of void or voidable marriage is not entitled to claim inheritance in ancestral coparcenery property but is entitled only to claim share in self acquired properties, if any.

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**343. INDIAN PENAL CODE, 1860 – Sections 34 and 149**

**"Common intention" and "common object" – Both Sections 34 and 149 IPC deal with combinations of persons who become punishable as sharers in an offence – The dominant feature of Section 34 is the element of intention and participation in action – This participation need not in all cases be by physical presence whereas in a case where Section 149 applies, a constructive liability arises in respect of those persons who do not actually commit the offence – Legal position reiterated.**

**Virendra Singh v. State of Madhya Pradesh**

**Judgment dated 09.08.2010 passed by the Supreme Court in Criminal Appeal No. 1316 of 2002, reported in (2010) 8 SCC 407**

Held:

Under the Indian Penal Code, a person is responsible for his own act. A person can also be vicariously responsible for the acts of others if he had a common intention to commit the acts or if the offence is committed by any member of the unlawful assembly in prosecution of the common object of that assembly, then also he can be vicariously responsible. Under the Indian Penal Code, two sections, namely, sections 34 and 149, deal with the circumstances when a person is vicariously responsible for the acts of others.

The vicarious or constructive liability under section 34 IPC can arise only when two conditions stand fulfilled, i.e., the mental element or the intention to commit the criminal act conjointly with another or others; and the other is the actual participation in one form or the other in the commission of the crime.

The common intention postulates the existence of a pre-arranged plan implying a prior meeting of the minds. It is the intention to commit the crime and the accused can be convicted only if such an intention has been shared by all the accused. Such a common intention should be anterior in point of time to the commission of the crime, but may also develop on the spot when such a crime is committed. In most of the cases it is difficult to procure direct evidence of such intention. In most of the cases, it can be inferred from the acts or conduct of the accused and other relevant circumstances. Therefore, in inferring the common intention under section 34 IPC, the evidence and documents on record acquire a great significance and they have to be very carefully scrutinized by the court. This is particularly important in cases where evidence regarding development of the common intention to commit the offence graver, then, the one originally designed, during execution of the original plan, should be clear and cogent.

The dominant feature of section 34 is the element of intention and participation in action. This participation need not in all cases be by physical presence. Common intention implies acting in concert.

The other section under which a person can be vicariously responsible for the acts of others is section 149 in the Indian Penal Code.

Both sections 34 and 149 IPC deal with combinations of persons who become punishable as sharers in an offence. In both these sections, the persons are vicariously responsible for the acts of others. Simultaneously, there is a basic resemblance in both these sections and to some extent they also overlap.

There is a substantial difference between these two sections with which we would deal in the later part of this judgment. When several persons, numbering five or more, do an act or intend to do it, both sections 34 and 149 IPC may apply. Section 149 IPC is of wider scope than section 34 IPC and in a case where section 149 applies, a constructive liability arises in respect of those persons who do not actually commit the offence.

Distinction between Section 34 and Section 149 of the Indian Penal Code

(i) Section 34 does not by itself create any specific offence, whereas section 149 does so;

(ii) Some active participation, especially in crime involving physical violence, is necessary under section 34, but section 149 does not require it and the liability arises by reason of mere membership of the unlawful assembly with a common object and there may be no active participation at all in preparation and commission of the crime;

(iii) Section 34 speaks of common intention, but section 149 contemplates common object which is undoubtedly wider in its scope and amplitude than intention; and

(iv) Section 34 does not fix a minimum number of persons who must share the common intention, whereas section 149 requires that there must be at least five persons who must have the same common object.

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***344. INDIAN PENAL CODE, 1860 – Sections 141 and 149**

**Conviction under Section 141 and 149 of the Code – Where large number of persons are implicated collectively, the Courts should categorically scrutinize evidence – Mere presence of the persons at the scene of offence itself would not be enough to convict them and punish with the aid of Section 149 IPC unless it is established that each one of them was part of the unlawful assembly and they committed the offence in prosecution of the common object of the assembly – In all such cases the question as to who had committed the overt act is of no consequence – The courts have to be very careful**

**in case where general allegations are made against a large number of persons and the courts should categorically scrutinize the evidence and hesitate to convict the large number of persons if the evidence available on record is vague – There must be reasonable circumstances which lend assurance to the story of prosecution.**

**Debashis Daw and others v. State of West Bengal**

**Judgment dated 05.08.2010 passed by the Supreme Court in Criminal Appeal No. 1679 of 2005, reported in (2010) 9 SCC 111**

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**345. INDIAN PENAL CODE, 1860 – Section 300**
**EVIDENCE ACT, 1872 – Section 3**
**Murder – Appreciation of evidence – Where there are multiple testimonies and equally large number of witnesses testifying before the Court – There must be a string joining evidence of all witnesses and thereby satisfying test of consistency in evidence amongst all the witnesses.**
**In a given case, there is consistency in the evidence of witnesses regarding five accused/appellants about the role played by them, therefore, they are liable to be convicted – However, evidence inconsistent about two other appellants, they are entitled to be acquitted.**

**C. Magesh & Ors. etc. v. State of Karnataka**

**Judgment dated 30.04.2010 passed by the Supreme Court in Criminal Appeal No. 1028 of 2008, reported in AIR 2010 SC 2768**

Held:

Narration of facts of the aforesaid criminal appeals arising out of common judgment and order passed by High court of Karnataka, Bangalore, in three criminal appeals, one preferred by convicted accused, other two by State of Karnataka, would reveal shocking and sad plight as to how a labour dispute can turn hostile culminating into a civil disobedience. Accused appellants members of striking trade union. Alleged to be involved in incident of setting ablaz bus carrying workers leading to death of two workers and injuries to many others. Witnesses, injured passengers of ill fated bus.

After having gone through the entire evidence critically, we have absolutely no doubt in our mind that there has been a great consistency in the evidence of PW 1 to PW15 with regard to different roles attributed to A1-R. Srinivas, he has been identified by the witnesses as one of the instigators who started shouting slogans against management of the Company and loyal workers, moreover PW 12 & 14 have attributed "pelting of stones" on A-1 R.Srinivas A2-T.K.S. Kutti, was also attributed more or less the same role as that of A1- R. Srinivas by the PWs. A15-N.V. Ravi, was correctly identified by all the witnesses, who have deposed about him. He has been attributed role of "pouring kerosene on the

bus" except PW 4 & 14 did not depose about the same role played by him. He has further been attributed with the "role of shouting slogans" and "preventing remaining occupants from alighting from the bus". A32-Dharanesh has been assigned with similar role as that of A-15 with the only difference that PW2 & 11 could not identify him correctly. He has been attributed the role of "passing of kerosene jars", "blocking the exit of the bus" and "pelting of stones". A33-Jagadish has been correctly identified by all the PWs, in deposition before Court. Further majority of the witnesses have assigned him the role of "pouring of kerosene" and PW-15 also mentions that "he set the bus on fire". In addition to this A-33 has been assigned the role of "pelting stones", "shouting slogans" and "blocking the exit of the bus" as well. Thus, there cannot be any escape for the aforesaid 5 accused from avoiding conviction and sentence awarded to them by Trial Court and confirmed in appeal by High Court. Even otherwise, there are concurrent findings of fact recorded against them, which cannot be interfered with in this appeal.

However, on account of inconsistency, improper identification and in absence of specific role being attributed to A25-R. Ramesh and A46-Sharath Kumar, we are of the considered view that their conviction cannot be upheld.

Then the question arises before us is whether a case has been made out for recording acquittal of A25- R.Ramesh and A46-Sharath Kumar. Following inconsistencies have been noticed by us.

PW2, PW5, PW6, PW10 did not identify A25-Ramesh correctly. PW7, PW13 and PW14 did not identify him at all. PW8 identified him but does not assign any role to him. PW1, PW2, PW4, PW9, PW12, PW13, PW14, PW15 assigned him the role of shouting slogans. However PW4, PW12, PW13, PW14, assigned him further role, in addition to shouting slogans. PW3, PW5 and PW11 assigned him some other roles, different from shouting slogans.

Coming to the case of A46-Sharath Kumar, all have identified him correctly but PW3, PW4, PW5 PW6, PW8, PW10, PW12 and PW14 did not depose about him at all.

The majority of witnesses assigned him the role of assaulting with clubs. However, PW9, PW13 assigned different role to him but Doctor's evidence does not disclose anywhere that the injuries sustained by any of the injured persons could have been caused with clubs, meaning thereby there was no mention with regard to cause of injury. Thus, he can also be given benefit of doubt. In view of the aforesaid inconsistencies available on record, it would not be safe to convict him.

It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasise, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled *Suraj Singh v. State of U.P., 2008 AIR SCW 5578* has held:-

"The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy. The probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that "no man is guilty until proven so", hence utmost caution is required to be exercised in dealing with situations where there are multiple testimonies and equally large number of witnesses testifying before the court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses.

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**346. INDIAN PENAL CODE, 1860 – Section 302**

**CRIMINAL TRIAL:**

**(i) Murder trial – Corpus delicti – Necessity of – It is not essential to establish corpus delicti; the fact of the death of the deceased must be established like any other fact by direct or circumstantial evidence although the dead body may not be traced – Legal position explained.**

**(ii) Testimony of hostile witness – Appraisement of – Evidence of such a witness remains admissible and there is no legal bar to have a conviction upon testimony of hostile witness if corroborated by other reliable witness – Position restated.**

## Prithi v. State of Haryana

**Judgment dated 27.07.2010 passed by the Supreme Court in Criminal Appeal No. 1835 of 2009, reported in (2010) 8 SCC 536**

Held:.

Since the question of factum of death of Ami Lal has been raised, we have to see what is the proof of death of Ami Lal. In other words, the question relates to the proof of 'corpus delicti'. The expression 'corpus delicti' has been subject of judicial comments from time to time. The term, 'corpus delicti' generally means; when applied to any particular offence, the actual commission by some one of the particular offence charged (Words and Phrases, Vol. 9A, 2nd reprint, 1976, West Publishing Co.) In a murder case, 'corpus delicti' consists of proof of the death of a person alleged to have been murdered and that such death has been caused by commission of crime by some one. It is sound principle in criminal jurisprudence that one does not begin to inquire whether the prisoner is guilty of a crime until one has established that a crime has been committed.

Sometimes, there may not be any distinction between proof of the fact of the crime and the proof of the actor of it. The evidence of the corpus delicti and the guilt of the person charged of an offence, many a time is so inter-connected that one cannot be separated from the other. The same evidence often applies to both the fact of the crime and the individuality of the person who committed it.

As regards the evidence of PW-6, it was vehemently contended by the learned senior counsel for the appellant that his evidence should be either accepted as it is or rejected in its entirety. PW-6 has deposed that he lodged the FIR; he was injured in the incident; he saw white gypsy at the place of the incident and that some persons came out of ambush and fired shots as a result of which he sustained injuries and Ami Lal died. It is true that he did not name the assailants. The fact that an incident occurred in which he sustained injuries and Ami Lal died is amply established by his evidence as well. That PW-6 sustained injuries is also established from the evidence of Dr. Ajay Kumar (PW-1) who medically examined him immediately after the incident. Merely because he did not name the assailants, his evidence cannot be thrown over-board in its entirety.

Section 154 of the Evidence Act, 1872 enables the court in its discretion to permit the person who calls a witness to put any questions to him which might be put in cross- examination by the adverse party. Some High Courts had earlier taken the view that when a witness is cross-examined by the party calling him, his evidence cannot be believed in part and disbelieved in part, but must be excluded altogether. However this view has not found acceptance in later decisions. As a matter of fact, the decisions of this Court are to the contrary. In *Khujji v. State of M.P., (1991) 3 SCC 627,* a 3-Judge Bench of this Court relying upon earlier decisions of this Court in *Bhagwan Singh v. State of Haryana, (1976) 1 SCC 389, Rabindra Kumar Dey v. State of Orissa, (1976) 4 SCC 233* and *Syad Akbar v. State of Karnataka, (1980) 4 SCC 30* reiterated the legal position that: (Khujji case, SCC p. 635, para 6)

> "6. ...the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on careful scrutiny thereof."

In *Koli Lakhmanbhai Chanabhai v. State of Gujarat, (1999) 8 SCC 624,* this Court again reiterated that testimony of a hostile witness is useful to the extent to which it supports the prosecution case. It is worth noticing that in *Bhagwan Singh* (supra) this Court held that when a witness is declared hostile and cross-examined with the permission of the court, his evidence remains admissible and there is no legal bar to have a conviction upon his testimony, if corroborated by other reliable evidence.

The submission of the learned senior counsel for the appellant that the testimony of PW-6 should be either accepted as it is or rejected in its entirety, thus, cannot be accepted in view of settled legal position as noticed above.

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**347. INDIAN PENAL CODE, 1860 – Section 304-B**

**Dowry death – Body of deceased hurriedly cremated before investigation – But absence of corpus delicti does not vitiate, as other evidences established that the death was unnatural due to burning within 7 years of marriage – Along with that the deceased was subjected to cruelty in connection with demand of dowry by husband and relations – Conviction for destruction of evidence also proved.**

**Dasrath v. State of M.P.**

**Judgment dated 29.07.2010 passed by the Supreme Court in Criminal Appeal No. 1645 of 2009, reported in AIR 2010 SC 2592**

Held:

The question is, in the absence of corpus delicti, could it be presumed that the accused persons alone were responsible for the death of Pinki. We must hasten to add here that the accused persons have already been acquitted of the murder charge. What remains to be seen is as to whether Pinki died an unnatural death within seven years of her marriage and whether her death was attributable to the demand of dowry and further whether she was dealt with cruelly soon before her death. If these ingredients are proved by the prosecution then the conviction of the accused under Section 304-B, IPC will be complete.

There can be no dispute that Pinki had died an unnatural death. In fact there is enough evidence to suggest that Pinki suffered the burn injuries. It is not the defence of the accused that she died a natural death. Both the Courts have very specifically held that Pinki suffered burn injuries and died because of the same. In fact Jitendra Singh (PW-8) was specific in his evidence that Pinki was burning on account of the kerosene having been poured on her body. In fact it is apparent from his cross-examination that when Pinki shouted, neighbours rushed to her house. There can be no dispute that this witness has been disbelieved and rightly so, insofar as his evidence about the accused deliberately burning Pinki is concerned. However, there can be no dispute that Pinki was burnt and it was clear that she had died an unnatural death. Again, it is clear from the report of the chemical analyzer that the kerosene residues were found from Packet-A which contained the clothes of Pinki which were seized during the investigation. Therefore, it is clear that Pinki's death was caused because of the burns and not in the normal circumstances. The finding of the Trial Court and the appellate Court in that behalf is correct. For this reason we are not impressed by the argument of the Learned Counsel that in the absence of corpus delicti, the conviction could not stand. Similarly, there can be no dispute

that Pinki died within seven years of her marriage. Gandharv Singh (PW-1) had specifically asserted that the marriage was performed 3-4 years prior to the incident. Though this witness was declared hostile, at least the fact that marriage had taken place 3-4 years prior to the incident can be safely accepted. According to PW-2, Bhagwati Saran also the marriage had taken place within 5-6 years prior to trial. Again even this witness was declared hostile. However, that claim remained un-controverted. Third witness PW-3, Hari Saran asserted that the marriage was performed 6-7 years earlier to the date of his evidence. His evidence was in May, 1997 and even taking that the marriage took place somewhere in the year 1990, it would still be within seven years. Vadehi Saran, the father also said that the marriage had taken place 6-7 years prior to the date of his evidence which was again 30.09.1997. Therefore, according to his evidence even if the marriage could date back to the year 1987, it would still put the death of Pinki within seven years of her marriage.

Therefore, it is certain that Pinki died an un-natural death by burning within seven years of her marriage. As regards dowry, Learned Counsel for the defence pointed out that there was no specific evidence nor was any allegation made in the First Information Report. We are not much impressed as we have seen from the evidence that there were demands of Buffalo made to Vadehi Saran, father of Pinki who did not accept that demand. Vadehi Saran has also specifically stated in his evidence that after 1½ years of the marriage when he went to the house of Pinki in the month of Shravan, door was closed and the appellants were beating Pinki and that the floor was smeared with blood and blood was also oozing out from the mouth of Pinki. He also asserted about the demand of a large size television as the television which was given in marriage was a small colour television. This evidence of torture is well supported by the evidence of Pratibha (PW-6), Anant Ram Singh (PW-7) and Uttam Singh (PW-9). In view of this, the Trial Court and the appellate Court have recorded that, firstly, Pinki died an un-natural death because of burning within seven years of her marriage and, secondly concluded that she was subjected to cruelty and harassment by her husband and/or relatives in connection with the demand for dowry and that she was subjected to cruelty soon before her death.

Similar is the case as regards the offence under Section 201, IPC. In fact it was incumbent upon the accused persons to firstly, inform the police about the un-natural death of Pinki. They did not do so. On the other hand, even after her death, they did not inform either the police or even the relatives like her father etc., though they could have done so. In stead they hurriedly conducted the funeral thereby causing destruction of evidence.

In *State of Rajasthan v. Jaggu Ram, AIR 2008 SC 982* this Court has considered the circumstance about the non-information to the parents and the hurried cremation. This was also a case where accused persons were tried for offence under Section 304B, IPC, where the accused, after the death of the unfortunate lady did not bother to inform her parents. In paragraph 26, this

Court took a serious note of the manner in which the body was disposed of. The Court observed "the disposal of the dead body in a hush-hush manner clearly establishes that the accused had done so with the sole object of concealing the real cause of death of Shanti @ Gokul."

In that case, the funeral was conducted in the wee hours. In this case, funeral was conducted in the evening.

From all this, it is clear that the prosecution has not only proved the offence under Section 304B, IPC with the aid of Section 113B, Indian Evidence Act but also the offence under Section 201, IPC.

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***348. INDIAN PENAL CODE, 1860 – Section 376**
**CRIMINAL PROCEDURE CODE, 1973 – Section 154**
**EVIDENCE ACT, 1872 – Sections 35 and 114 Ill. (e)**

**(i) Rape case – Delay in lodging FIR, effect of – The delay in lodging FIR in sexual offences has to be considered with a different yardstick – Ordinarily the family of the victim would not intend to get a stigma attached to the victim – Delay in lodging the FIR in a case of this nature is a normal phenomenon.**

**(ii) Determination of the age of the prosecutrix – Entry in respect of date of birth in the school register – Admissibility and probative value there of – Held, that the entry made in official record by the official or person authorised in performance of his official duty is admissible under Section 35 of the Evidence Act but the party may still ask the Court/authority to examine its probative value – The authenticity of the entry would depend as to on whose instruction/information such entry stood recorded and what was his source of information.**

**(iii) Consent of prosecutrix, appreciation of – An act of helplessness in the face of inevitable compulsions is not consent in law – More so, it is not necessary that there should be actual use of force – Threat of use of force is sufficient.**

**Satpal Singh v. State of Haryana**
**Judgment dated 28.07.2010 passed by the Supreme Court in Criminal Appeal No. 763 of 2008, reported in (2010) 8 SCC 714**

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***349. INDIAN PENAL CODE, 1860 – Section 376 (2) (g)**
**EVIDENCE ACT, 1872 – Sections 9 and 114-A**

**(i) Sole evidence of prosecutrix – The statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration – The Court may convict the accused on the sole testimony of the prosecutrix.**

(ii) Test Identification Parade – Is not substantive piece of evidence – It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant.

(iii) Discrepancies and inconsistencies in the testimony of witnesses – Minor discrepancies on trivial matter, which do not affect the core of the prosecution case, may not prompt the Court to reject the evidence in its entirety.

(iv) Injury on the person of the prosecutrix – Considerations there of – Held, the absence of injury or mark of violence on the body of the prosecutrix is of no consequence when the prosecutrix is minor and would merely suggest want of violent resistance on the part of the prosecutrix.

(v) Determination of age – Can be determined by examining the teeth (dental age), height, weight, general appearance (minor signs) i.e. secondary sex characters, ossification of bones and producing the birth and death/school registers, etc.

(vi) Evidence of rustic/illiterate villager – Appreciation there of – The Apex Court observed that in a case like rape, "it is impossible to lay down with precision the chain of events, more particularly when illiterate villagers with no sense of time are involved" – Such witness may not be able to give precise account of incident – However, that cannot be a ground to reject his testimony.

(vii) Presumption of non-consensus – Where prosecutrix stated that she has been forcibly caught, threatened at knife-point and thereafter subjected to gang rape – Under the provisions of Section 114-A of Evidence Act, the Court shall presume that she did not consent.

**Vijay alias Chinee v. State of Madhya Pradesh**
**Judgment dated 27.07.2010 passed by the Supreme Court in Criminal Appeal No. 660 of 2008, reported in (2010) 8 SCC 191**

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**350. INDIAN PENAL CODE, 1860 – Section 420**
**Cheating in case of agreement for sale of land – If the allegation in complaint *prima facie* shows that at the very initiation of the negotiations there was intention to cheat, then issuance of process and going for trial in the case is proper – Any triable issues of defence raised by accused persons could only be determined by leading evidence at the trial.**

**S.P. Gupta v. Ashutosh Gupta**
**Judgment dated 13.05.2010 passed by the Supreme Court in SLP (Crl.) No. 1953 of 2008, reported in (2010) 6 SCC 562**

Held:

Positive assertion in the complaint that an assurance had been given by the Petitioner to the complainant that the property in question was free from all encumbrances and that the Accused No. 1 was the sole owner of the property.

Had not such a representation been made relating to the status of ownership of the property in question, the complainant may not have entered into the transaction at all. Whether or not the Petitioner was truly mistaken with regard to the information given by him is a question of utmost importance in answering a charge of the nature indicated in the complaint. Merely because the Petitioner had received part-payment of the consideration amount and had made over the same to Accused 1 and merely because possession of the land had been handed over by him to the complainant, cannot form the basis of a presumption that he had no knowledge that there was a dispute regarding the ownership of the property, as to whether the same belongs to a HUF or not.

It is true that the illustration (g) of Section 415 IPC clearly indicates that if at the very initiation of the negotiations it was evident that there was no intention to cheat, the dispute would be of a civil nature. But such a conclusion would depend on the evidence to be led at the time of trial.

The Petitioner may have discharged his functions as a constituted attorney for Accused 1 by acting as a liaison between the Accused 1 and the father of the respondent, but that does not in itself indicate that he did not have any knowledge of the status of ownership of the land forming the subject-matter of the transaction.

Hence, the complainant had made out *prima facie* case to go for trial.

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**351. INDIAN PENAL CODE, 1860 – Section 498-A**

**Cruelty to wife – Relative of husband – Foster sister of husband does not come within the purview of the relative of husband as she is not related by blood, marriage or adoption – Therefore, she cannot be tried for an offence under Section 498-A of IPC.**

## Vijeta Gajra v. State of NCT of Delhi

**Judgment dated 08.07.2010 passed by the Supreme Court in Criminal Appeal No. 1182 of 2010, reported in AIR 2010 SC 2712**

Held:

In *U. Suvetha v. State By Inspector of Police & Anr, (2009) 6 SCC 757,* it was specifically held that in order to be covered under Section 498A, IPC one has to be a 'relative' of the husband by blood, marriage or adoption. He pointed out that the present appellant was not in any manner a 'relative' as referred to in Section 498A, IPC and, therefore, there is no question of any allegation against her in respect of the ill-treatment of the complainant. The Court in this case examined the ingredients of Section 498A, IPC and noting the specific language of the Section and the Explanation thereof came to the conclusion that the word

'relative' would not include a paramour or concubine or so. Relying on the dictionary meaning of the word 'relative' and further relying on *R. Ramanatha Aiyar's Advance Law Lexicon, Volume 4, 3rd Edition*, the Court went on to hold that Section 498A, IPC being a penal provision would deserve strict construction and unless a contextual meaning is required to be given to the statute, the said statute has to be construed strictly. On that behalf the Court relied on the judgment in *T. Ashok Pai v. CIT, (2007) 7 SCC 162.* A reference was made to the decision in *Shivcharan Lal Verma & Anr. v. State of M.P., (2007) 15 SCC 369.* After quoting from various decisions of this Court, it was held that reference to the word 'relative' in Section 498A, IPC would be limited only to the blood relations or the relations by marriage.

The argument is undoubtedly correct, though opposed by the Learned Counsel appearing for the State. We are of the opinion that there will be no question of her prosecution under Section 498A, IPC. Therefore, we hold that the FIR insofar as it concerned Section 498A, IPC, would be of no consequence and the appellant shall not be tried for the offence under Section 498A, IPC.

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**352. INSECTICIDES ACT, 1968 – Sections 24 (3) and (4)**

**(i) Shelf life of an insecticide – Insecticides are substances specified in Schedule to the Insecticides Act – Many of the substances with the passage of time may lose their identity if exposed or come into contact with other substances – Thus, the shelf life of the insecticides shall have its bearing when they are tested or analysed in the laboratory after the expiry of shelf life.**

**(ii) Accused's right to get the sample of the insecticide tested and analysed by Central Insecticides Laboratory (C.I.L) – Held, merely notifying the intention to adduce evidence in controversion of the report of the Insecticide Analyst confers on the accused the right and clothes the Court with the jurisdiction to send the sample for analysis by the C.I.L – It was further held that the accused is not required to demand in specific terms that the sample be sent for analysis to the C.I.L – Mere intention to adduce evidence in controversion of the report, implies demand. to send the sample to the C.I.L for test and analysis – Legal position explained.**

**Northern Mineral Limited v. Union of India and another**
**Judgment dated 07.07.2010 passed by the Supreme Court in Criminal Appeal No. 766 of 2003, reported in (2010) 7 SCC 726**

Held:

The submission advanced necessitates examination of scope and ambit of Section 24(3) & (4) of the Act, the same read as follows:

"24. *Report of Insecticide Analyst.* – * * *

(3) Any document purporting to be a report signed by an Insecticide Analyst shall be evidence of the facts stated therein, and such evidence shall be conclusive unless the person from whom the sample was taken has within twenty-eight days of the receipt of a copy of the report notified in writing the Insecticide Inspector or the court before which any proceedings in respect of the sample are pending that he intends to adduce evidence in controversion of the report.

(4) Unless the sample has already been tested or analysed in the Central Insecticides Laboratory, where a person has under sub-section(3) notified his intention of adducing evidence in controversion of the Insecticide Analyst's report, the court may, of its own motion or in its discretion at the request either of the complainant or of the accused, cause the sample of the insecticide produced before the Magistrate under sub-section (6) of section 22 to be sent for test or analysis to the said laboratory, which shall, within a period of thirty days, make the test or analysis and report in writing signed by, or under the authority of, the Director of the Central Insecticides Laboratory the result thereof, and such report shall be conclusive evidence of the facts stated therein."

From a plain reading of Section 24(3) of the Act, it is evident that an accused within 28 days of the receipt of the copy of the report of the Insecticide Analyst to avoid its evidentiary value is required to notify in writing to the Insecticide Inspector or the Court before which the proceeding is pending that it intends to adduce evidence in controversion of the report. Section 24(4) of the Act provides that when an accused had notified its intention of adducing evidence in controversion of the Insecticide Analyst report under Section 24(3) of the Act, the court may of its own motion or in its discretion at the request either of the complainant or the accused cause the sample to be sent for analysis to the Central Insecticides Laboratory.

Under the scheme of the Act when the accused had notified its intention to adduce evidence in controversion of the report of the Insecticide Analyst, the legal fiction that the report of the Insecticide Analyst shall be conclusive evidence of the facts stated in its report loses its conclusive character. The Legislature has used similar expression i.e. the "intention to adduce evidence in controversion of the report" in both sub-section (3) and sub-section (4) of Section 24 of the Act, hence both the expression has to be given one and the same meaning. Notification of an intention to adduce evidence in controversion of the report takes out the report of the Insecticide Analyst from the class of "conclusive evidence" contemplated under sub-section (3) of Section 24 of the Act. Further,

the intention of adducing evidence in controversion of the Insecticide Analyst's report clothes the Magistrate the power to send the sample for analysis to the Central Insecticides Laboratory either on its own motion or at the request of the complainant or the accused.

In face of the language employed in Section 24(4) of the Act, the act of the accused notifying in writing its intention to adduce evidence in controversion of the report in our opinion shall give right to the accused and would be sufficient to clothe the Magistrate the jurisdiction to send the sample to Central Insecticide Laboratory for analysis and it is not required to state that it intends to get sample analysed from the Central Insecticides Laboratory. True it is that report of the Insecticides Analyst can be challenged on various grounds but the accused can not be compelled to disclose those grounds and expose his defence and he is required only to notify in writing his intention to adduce evidence in controversion. The moment it is done, the conclusive evidentiary value of the report gets denuded and the statutory right to get the sample tested and analysed by the Central Insecticides Laboratory gets fructified.

The decisions of this Court in the cases of *State of Punjab v. National Organic Chemical Industries Ltd., (1996) 11 SCC 613, State of Haryana v. Unique Farmaid (P) Ltd.,(1999) 8 SCC 190* and *Gupta Chemicals (P) Ltd. v. State of Rajasthan, (2010) 7 SCC 735* in our opinion do support the contention of the learned counsel for the appellants. True it is that in first two cases, the accused, besides sending intimation that they intend to adduce evidence in controversion of the report the accused persons have specifically demanded for sending the sample for anlaysis by the Central Insecticides Laboratory. However, the ratio of the decision does not rest on this fact. While laying down the law, this Court only took into consideration that accused had intimated its intention to adduce evidence in controversion of the report and that conferred him the right to get sample tested by Central Insecticides Laboratory. The decision of this Court in the case of *Gupta Chemicals* (supra) is very close to the facts of the present case. In the said case "on receipt of the information about the State Analyst's Report the appellants sent intimation to the Inspector expressing their intention to lead evidence against the report" and this intimation was read to mean "their intention to have the sample tested in the Central Insecticides Laboratory".

From the language and the underlying object behind Sections 24(3) and (4) of the Act as also from the ratio of the aforesaid decisions of this Court, we are of the opinion that mere notifying intention to adduce evidence in controversion of the report of the Insecticide Analyst confers on the accused the right and clothes the court jurisdiction to send the sample for analysis by the Central Insecticides Laboratory and an accused is not required to demand in specific terms that the sample be sent for analysis to Central Insecticides Laboratory. In our opinion the mere intention to adduce evidence in controversion of the report, implies demand to send the sample to Central Insecticides Laboratory for test and analysis.

Section 24(3) of the Act gives right to the accused to rebut the conclusive nature of the evidence of Insecticide Analyst by notifying its intention to adduce evidence in controversion of the report before the Insecticide Inspector or before Court where proceeding in respect of the samples is pending. Further the Court has been given power to send the sample for analysis and test by the Central Insecticides Laboratory of its own motion or at the request of the complainant or the accused.

No proceeding was pending before any Court, when the accused was served with Insecticide Analyst's Report, the intention was necessarily required to be conveyed to the Insecticide Inspector, which was so done by the appellant and in this background Insecticide Inspector was obliged to institute complaint forthwith and produce the sample and request the court to send the sample for analysis and test to the Central Insecticides Laboratory. The Appellant did whatever was possible for it. Its right has been defeated by not sending the sample for analysis and report to Central Insecticides Laboratory.

It may be mentioned herein that shelf life of the insecticides had expired even prior to the filing of the complaint. The position therefore which emerges is that by sheer inaction the shelf life of the sample of insecticides had expired and for that reason no step was possible to be taken for its test and analysis by Central Insecticides Laboratory. Valuable right of the appellant having been defeated, we are of the opinion that allowing this criminal prosecution against the appellant to continue shall be futile and abuse of the process of Court.

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**353. JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000 – Section 2 (k)**
**INDIAN PENAL CODE, 1860 – Section 364-A**
**CRIMINAL PROCEDURE CODE, 1973 – Section 472**
**Determination of juvenility in case of continuing offence – Held, offence under Section 364-A IPC does not come to an end only on account of death of the victim since ransom calls have been made even though victim had been killed – Even after the death of the victim, every time a ransom call was made, a fresh period of limitation commenced – Accordingly, it would be the date on which the last ransom call was made which has to be taken to be the date of commission of offence and accordingly Juvenile Justice (Care & Protection of Children) Act, 2000 was no longer applicable to the accused who had attained the age of 18 years by then.**

**Vikas Chaudhary v. State (NCT of Delhi) and another**
**Judgment dated 11.08.2010 passed by the Supreme Court in SLP (Crl.) No. 8628 of 2009, reported in (2010) 8 SCC 508**

Held:

The question which, therefore, calls for an answer is whether the High

Court was right in holding that the making of ransom calls, even after the death of the victim was a continuing offence so as to attract the provisions of Section 364-A I.P.C.

There is little doubt that the main object of the offence committed by the accused was to extort money from the parents of the deceased victim by way of ransom even after the death of the victim, as will be evident from the subsequent phone calls made right upto 11.03.2003, asking for ransom. The offence under Section 364-A did not come to an end only on account of the death of the victim since ransom calls had been made even though the victim had been killed.

It is no doubt true that if the initial date of abduction, namely, 18.01.2003, is taken to be the date on which the offence under Section 364-A had been committed, as an isolated event, the petitioner would have been a minor within the meaning of the Juvenile Justice Act, 2000. However, if 11.03.2003, being the date on which the last ransom call was made, is taken as the date on which the aforesaid offence was committed, then the petitioner would have ceased to be a minor and the above-mentioned Act would not apply to him.

Section 472 Cr.P.C., supports the submissions made both by learned Additional Solicitor General and Senior Advocate. We are unable to accept Senior Advocate's submission that the offence under Section 364-A I.P.C. stood abrogated upon the death of the victim. On the other hand, the continuation of ransom calls being made, even after the death of the victim, converts the offence into a continuing offence within the meaning of Section 472 Cr.P.C. The provisions of Section 364-A I.P.C. which are extracted hereinbelow, will make the position clear:

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

Section 364-A I.P.C. states that apart from keeping a person in detention after kidnapping or abducting him or threatening to cause death or hurt to such person or by his conduct giving rise to a reasonable apprehension that such person may be put to death or hurt, and also that if the person involved in the kidnapping or abduction, actually causes hurt or death to such person for a ransom, he shall be punishable with death or imprisonment for life and shall also be liable to fine.

Section 364-A, therefore, contemplates even the death of the abducted person, for the purpose of demanding ransom. Section 472 Cr.P.C., which defines continuing offence, reads as follows:

> "**472. Continuing offence.**– In the case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues."

If Section 364-A I.P.C. and Section 472 Cr.P.C. are to be read together, it has to be held that even after the death of the victim every time a ransom call was made a fresh period of limitation commenced. Accordingly, it would be the date on which the last ransom call was made, i.e., 11.03.2003, which has to be taken to be the date of commission of the offence and, accordingly, the Juvenile Justice Act was no longer applicable to the petitioner, who had attained the age of 18 years by then.

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***354. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 – Section 12**
**SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 18**
**Whether provisions of Section 12 of Juvenile Justice Act, 2000 have overriding effect over the provisions of Section 18 of SC & ST (P.A.) Act ? Held, No – Scope of application of both provisions is different therefore, provision of Section 12 of the Juvenile Justice Act, does not have any overriding effect over the provision of Section 18 of the SC & ST (P.A.) Act.**

**Kapil Durgwani v. State of M.P.**
**Judgment dated 06.08.2010 passed by the High Court of M.P. in M. Cr. C. No. 388 of 2010, reported in ILR (2010) M.P. 2003**

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**355. LIMITATION ACT, 1963 – Section 5**
**Condonation of delay – Considerations therefor – Held, unless mala fides writ large on the conduct of the party, generally as a normal rule, delay should be condoned – Position explained.**

**Improvement Trust, Ludhiana v. Ujagar Singh and others**
**Judgment dated 09.06.2010 passed by the Supreme Court in Civil Appeal No. 2395 of 2008 reported in (2010) 6 SCC 786**

Held:

We are of the opinion that the delay in filing the first appeal before District Judge, Ludhiana, for setting aside the sale has not been so huge warranting its dismissal on such hypertechnical ground. In fact, according to us, the appellant had taken all possible steps to prosecute the matter within time. Had there been an intimation sent to the appellant by Mr. P.K. Jain, its erstwhile Advocate, and if even

thereafter the appellant had acted callously then we could have understood the negligent attitude of the appellant but that was not the case here. No sooner the appellant came to know about the dismissal of its objection filed before the executing court, under Order 21 Rule 90 of the CPC it made enquiries and filed the appeal.

While considering the application for condonation of delay no straightjacket formula is prescribed to come to the conclusion if sufficient and good grounds have been made out or not. Each case has to be weighed from its facts and the circumstances in which the party acts and behaves. From the conduct, behaviour and attitude of the appellant it cannot be said that it had been absolutely callous and negligent in prosecuting the matter.

After all, justice can be done only when the matter is fought on merits and in accordance with law rather than to dispose it of on such technicalities and that too at the threshold.

It is pertinent to point out that unless mala fides are writ large on the conduct of the party, generally as a normal rule, delay should be condoned. In the legal arena, an attempt should always be made to allow the matter to be contested on merits rather than to throw it on such technicalities.

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**356. LIMITATION ACT, 1963 – Section 13 and Article 123**
**CIVIL PROCEDURE CODE, 1908 – Order 9 Rule 13**
**Application for setting aside ex parte decree – Exclusion of time requisite for obtaining a copy of judgment/decree in Computation of limitation – Held, because no such certified copy is required to be filed along with the application, provision of Section 12 (3) of the Limitation Act which provides exclusion of time for obtaining certified copy, is not applicable in the case.**

## Shri Jagat Guru Shankrachariya v. Siddhu Engineering Works and others

**Judgment dated 13.08.2010 passed by the High Court of M.P. in Civil Revision No. 350 of 2009, reported in 2010 (4) MPHT 334 (DB)**

Held:

The reference has been made by learned Single Judge vide order dated 26-03-2010. Following question has been referred for consideration:-

> "Whether the view of the learned Single Bench of this Court in the matter of *Mohan @ Munna Pachauri v. Jagdish Chandra Dubey, ILR 2008 MP 1402,* that the period spent for obtaining certified copy of ex parte decree cannot be excluded for calculating the limitation under Article 123 of the Limitation Act is the correct view or the earlier contrary view of the Single Bench of this Court in the matter of *Shakuntala Singh v. Basant Kumar Thakur and others, 2003 (3) MPLJ 414* is correct?"

In *Shakuntala Singh* (supra), the Single Bench of this Court has correctly opined that while filing application under Order 9 Rule 13 to set aside ex parte decree, filing of certified copy of judgment and decree is not necessary. We find that there is no conflict of opinion of *Mohan @ Munna Pachauri* (supra) and *Shakuntala Singh* (supra), in proposition that certified copy is not required to be filed along with the application filed under Order 9 Rule 13 of CPC, hence the period spent in obtaining certified copy cannot be excluded under Section 12 of the Limitation Act.

Coming to the question as to so called conflict in aforesaid decision in *Shakuntala Singh* (supra), and *Mohan @ Munna Pachauri* (supra), whether delay can be condoned or not; in case certified copy has been applied for, in our opinion, various aspects have to be considered including the effect of non-filing of the application under Section 5 of Limitation Act seeking condonation of delay. Overall conduct of the applicant has to be considered during the trial, circumstances in which he was proceeded ex parte. Mere filing of certified copy is not enough to condone the delay. These aspects on merits have to be considered by the Single Bench.

In view of the aforesaid discussion our answer to the question referred is that the view expressed in *Mohan @ Munna Pachauri* (supra), that the period spent for obtaining certified copy of the ex parte decree cannot be excluded for calculating the limitation under Article 123 of Limitation Act is correct view, In case summons were served limitation of file applicable under Order 9 Rule 13 is 30 days from the date of decree. In our opinion, in *Shakuntala Singh* (supra), also this Court has correctly opined that certified copy is not necessary to be filed along with application under Order 9 Rule 13 the decision with respect to condonation of delay depends upon the facts of each case. In *Shakuntala Singh* (supra), very service of summon was disputed, decision has to be read in that context. In our opinion, period spent for obtaining certified copy of the ex parte decree cannot excluded under Section 12 of the Limitation Act for the purpose of filing application under Order 9 Rule 13 of CPC. Section 12 of the Limitation Act has no application to the proceedings under Order 9 Rule 13 of CPC.

In view of the aforesaid answer to the question, let matter be placed before the Single Bench for deciding the case in accordance with law.

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**357. LIMITATION ACT, 1963 – Article 58**

**Suit for declaration – Limitation – Right to sue accrues when there is a clear and unequivocal threat to infringe the right of plaintiff by the defendant – Suit filed within 3 years from the date of infringement of such right, is not barred by limitation.**

**Daya Singh & Anr. v. Gurdev Singh through L.Rs.**

**Judgment dated 07.01.2010 passed by the Supreme Court in Civil Appeal No. 5339 of 2002, reported in AIR 2010 SC 3240**

Held:

As noted herein earlier, the only question, therefore, to be decided is whether the mere existence of an adverse entry in the revenue records had given rise to cause of action as contemplated under Article 58 or it had accrued when the right was infringed or threatened to be infringed. Let us, therefore, consider whether the suit was barred by limitation in view of Article 58 of the Act in the background of the facts stated in the plaint itself. Part III of the schedule which has prescribed the period of limitation relates to suits concerning declarations. Article 58 of the Act clearly says that to obtain any other declaration, the limitation would be three years from the date when the right to sue first accrues. In support of the contention that the suit was filed within the period of limitation, the learned senior counsel appearing for the plaintiffs/appellants before us submitted that there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. In support of this contention the learned senior counsel strongly relied on a decision of the Privy Council *Mt. Bolo v. Mt. Koklan and others, AIR 1930 PC 270.* In this decision their Lordships of the Privy Council observed as follows:-

> *"There can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted."*

A similar view was reiterated in the case of *C. Mohammad Yunus v. Syed Unnissa and others, AIR 1961 SC 808* in which this Court observed :

> *"the period of 6 years prescribed by Article 120 has to be computed from the date when the right to sue accrued and there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right."*

In the case of *C. Mohammad Yunus* (supra), this Court held that the cause of action for the purposes of Article 58 of the Act accrues only when the right asserted in the suit is infringed or there is atleast a clear and unequivocal threat to infringe that right. Therefore, the mere existence of an adverse entry into the revenue record cannot give rise to cause of action.

Keeping these principles in mind, let us consider the admitted facts of the case. In para 16 of the plaint, it has been clearly averred that the right to sue accrued when such right was infringed by the defendants about a week back when the plaintiffs had for the first time come to know about the wrong entries in the record of rights and when the defendants had refused to admit the claim of the plaintiffs. Admittedly, the suit was filed on 21st of August, 1990. According to the averments made by the plaintiffs in their plaint, as noted hereinabove, if this statement is accepted, the question of holding that the suit was barred by

limitation could not arise at all. Accordingly, we are of the view that the right to sue accrues when a clear and unequivocal threat to infringe that right by the defendants when they refused to admit the claim of the appellants, i.e. only seven days before filing of the suit. Therefore, we are of the view that within three years from the date of infringement as noted in Paragraph 16 of the plaint, the suit was filed. Therefore, the suit which was filed for declaration on 21st of August, 1990, in our view, cannot be held to be barred by limitation.

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**358. MOTOR VEHICLES ACT, 1988 – Sections 140 and 166**

**No fault compensation – Under Section 140 of the Motor Vehicles Act, victim or legal representative is entitled for compensation even if the accident is caused on account of fault of the victim – The amount of compensation paid under this section by the insurance company cannot be ordered to be refunded by the claimants on dismissal of claim under Section 166 of the Act.**

**Indra Devi & Ors. v. Bagada Ram & Anr.**

**Judgment dated 18.08.2010 passed by the Supreme Court in Civil Appeal No. 1508 of 2004, reported in AIR 2010 SC 2913**

Held:

In the operative portion of the judgment, the tribunal ordered as follows:

> "According to the above analysis, this claim is dismissed. An amount of Rs. 50,000/- has been given to the applicants by The New India Assurance Co. Ltd. as an interim relief and The India Assurance Co. Ltd. will be entitled to have it back with 9% interest p.a."

The impugned direction is clearly erroneous and unsustainable in law. The Tribunal has completely failed to realize the true nature and character of the compensation in terms of section 140 of the Act. The marginal heading to section 140 describes it as based 'on the principle of no fault'. As the expression 'no fault' suggests the compensation under section 140 is regardless of any wrongful act, neglect or default of the person in respect of whose death the claim is made.

We have examined the nature of the 'no fault compensation' payable under section 140 of the Act in *Eshwarappa @ Maheshwarappa and Anr. vs. C.S. Gurushanthappa and Anr. (AIR 2010 SC 2907) (Civil Appeal No. 7049 of 2002)*, the judgment in which is pronounced today. We, therefore, do not wish to elaborate the point further. Suffice to say that in view of our judgment in Civil Appeal No. 7049 of 2002, the Tribunal was patently in error, in directing for the refund of the amount of 'no fault compensation' already paid to the claimants, to the insurance company. The High Court was equally in error in missing out this grave mistake in the judgment and order passed by the Tribunal and not setting it right.

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**359. MOTOR VEHICLES ACT, 1988 – Sections 163-A and 166**

**(i) Death of housewife/mother not having regular income in motor accident – Approach of computing compensation by comparing gratuitous service for a housewife/mother with work of a skilled worker, house keeper, servant or employee is highly unfair, unjust and inappropriate – The contribution made by the wife to the house is invaluable and cannot be computed in terms of money – Gratuitous service rendered by deceased with true love and affection to her children as mother, and to her husband as wife, cannot be equated with service rendered by others – However, for the purpose of award of compensation to the dependents some pecuniary estimate has to be made of the services of the housewife/mother.**

**(ii) Section 163-A does not apply to cases in which claims for compensation are filed under Section 166 – However, in absence of any other definite criteria for determination of compensation to dependents of non-earning housewife/mother, even in a claim under Section 166, it is reasonable to rely upon criteria specified in Schedule II Clause 6 and then apply appropriate multiplier.**

**Arun Kumar Agrawal and another v. National Insurance Company Limited and others**

**Judgment dated 22.07.2010 passed by the Supreme Court in Civil Appeal No. 5843 of 2010, reported in (2010) 9 SCC 218**

Held:

In *Kemp and Kemp on Quantum of Damages,* (Special Edn. 1986), the authors have identified various heads under which the husband can claim compensation on the death of his wife. These include loss of the wife's contribution to the household from her earnings, the additional expenses incurred or likely to be incurred by having the household run by a housekeeper or servant, instead of the wife, the expenses incurred in buying clothes for the children instead of having them made by the wife, and similarly having his own clothes mended or stitched elsewhere than by his wife, and the loss of that element of security provided to the husband where his employment was insecure or his health was bad and where the wife could go out and work for a living.

In *Regan v. Williamson, (1976) 2 All ER 241, Watkins, J. observed* that "the word 'services' has been too narrowly construed. It should, at least, include an acknowledgment that a wife and mother does not work to set hours and, still less, to rule. She is in constant attendance, save for those hours when she is, if that is the fact, at work. During some of those hours she may well give the children instruction on essential matters to do with their upbringing and possibly, with such things as their homework. This sort of attention seems to be as much of a service, and probably more valuable to them, than the other kinds of service conveniently so regarded.

In *Mehmet v. Perry (1977) 2 All ER 529(DC),* the pecuniary value of a wife's services were assessed and granted under the following heads:-

(a) Loss to the family of the wife's housekeeping services.

(b) Loss suffered by the children of the personal attention of their mother, apart from housekeeping services rendered by her.

(c) Loss of the wife's personal care and attention, which the husband had suffered, in addition to the loss of her housekeeping services.

In India the Courts have recognised that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and is required to attend the employer's work for particular hours. She takes care of all the requirements of husband and children including cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maidservant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean etc., but she can never be a substitute for a wife/ mother who renders selfless service to her husband and children.

It is not possible to quantify any amount in lieu of the services rendered by the wife/mother to the family i.e. husband and children. However, for the purpose of award of compensation to the dependents, some pecuniary estimate has to be made of the services of housewife/mother. In that context, the term 'services' is required to be given a broad meaning and must be construed by taking into account the loss of personal care and attention given by the deceased to her children as a mother and to her husband as a wife. They are entitled to adequate compensation in lieu of the loss of gratuitous services rendered by the deceased. The amount payable to the dependants cannot be diminished on the ground that some close relation like a grandmother may volunteer to render some of the services to the family which the deceased was giving earlier.

In *Lata Wadhwa v. State of Bihar, (2001) 8 SCC 197* this Court considered the various issues raised in the writ petitions filed by the petitioners including the one relating to payment of compensation to the victims of fire accident which occurred on 3.3.1989 resulting in the death of 60 persons and injuries to 113. By an interim order dated 15.12.1993, this Court requested former Chief Justice of India, Shri Justice Y.V. Chandrachud to look into various issues including the amount of compensation payable to the victims. Although, the petitioners filed objection to the report submitted by Shri Justice Y.V. Chandrachud, the Court overruled the same and accepted the report. On the issue of payment of compensation to housewife, the Court observed: (SCC pp. 209-10, para 10)

"10. So far as the deceased housewives are concerned, in the absence of any data and as the housewives were not earning any income, attempt has been made to determine the compensation on the basis of services rendered by them to the house. On the basis of the age group of the housewives, appropriate multiplier has been applied, but the estimation of the value of services rendered to the house by the housewives, which has been arrived at Rs.12,000 per annum in cases of some and Rs.10,000 for others, appears to us to be grossly low. It is true that the claimants, who ought to have given data for determination of compensation, did not assist in any manner by providing the data for estimating the value of services rendered by such housewives. But even in the absence of such data and taking into consideration the multifarious services rendered by the housewives for managing the entire family, even on a modest estimation, should be Rs.3000 per month and Rs.36,000 per annum. This would apply to all those housewives between the age group of 34 to 59 and as such who were active in life. The compensation awarded, therefore, should be recalculated, taking the value of services rendered per annum to be Rs.36,000 and thereafter, applying the multiplier, as has been applied already, and so far as the conventional amount is concerned, the same should be Rs.50,000 instead of Rs.25,000 given under the Report. So far as the elderly ladies are concerned, in the age group of 62 to 72, the value of services rendered has been taken at Rs.10,000 per annum and the multiplier applied is eight. Though, the multiplier applied is correct, but the values of services rendered at Rs.10,000 per annum, cannot be held to be just and, we, therefore, enhance the same to Rs.20,000 per annum. In their case, therefore, the total amount of compensation should be re-determined, taking the value of services rendered at Rs.20,000 per annum and then after applying the multiplier, as already applied and thereafter, adding Rs.50,000 towards the conventional figure."

In *A. Rajam v. M. Manikya Reddy, 1989 ACJ 542 (Andhra Pradesh HC), M. Jagannadha Rao, J.* (as he then was) advocated giving of a wider meaning to the word 'services' in cases relating to award of compensation to the dependents of a deceased wife/mother. Some of the observations made in that judgment are extracted below:

"The loss to the husband and children consequent upon the death of the housewife or mother has to be computed by estimating the loss of 'services' to the family, if there was reasonable prospect of such services being rendered freely in the future, but for the death. It must be remembered that any substitute to be so employed is not likely to be as economical as the housewife. Apart from the value of obtaining substituted services, the expense of giving accommodation or food to the substitute must also be computed. From this total must be deducted the expense the family would have otherwise been spending for the deceased housewife.

While estimating the 'services' of the housewife, a narrow meaning should not be given to the meaning of the word 'services' but it should be construed broadly and one has to take into account the loss of 'personal care and attention' by the deceased to her children, as a mother and to her husband, as a wife. The award is not diminished merely because some close relation like a grandmother is prepared to render voluntary services."

In *National Insurance Company Ltd. v. Mahadevan, (2009) ACJ 1373,* the learned Single Judge referred to the Second Schedule of the Act and observed that quantifying the pecuniary loss at the same rate or amount even after 13 years after the amendment, ignoring the escalation in the cost of living and the inflation, may not be justified.

In *Amar Singh Thukral v. Sandeep Chhatwal, (2004) 112 DLT 476,* the learned Single Judge of Delhi High Court adopted the yardstick of minimum rates of wages for the purpose of award of compensation in the case of death of a housewife and then proceeded to observe 'since there is no scientific method of assessing the contribution of a housewife to her household, in cases such as the present, resort should be had to the wages of a skilled worker as per the minimum rates of wages in Delhi. Although, this may sound uncharitable, if not demeaning to a housewife, there is hardly any option available in the absence of statutory guidelines'.

In our view, it is highly unfair, unjust and inappropriate to compute the compensation payable to the dependents of a deceased wife/mother, who does not have regular income, by comparing her services with that of a housekeeper or a servant or an employee, who works for a fixed period. The gratuitous services rendered by wife/mother to the husband and children cannot be equated with the services of an employee and no evidence or data can possibly be produced for estimating the value of such services. It is virtually impossible to measure in terms of money the loss of personal care and attention suffered by the husband and children on the demise of the housewife. In its wisdom, the

legislature had, as early as in 1994, fixed the notional income of a non-earning person at Rs.15,000/- per annum and in case of a spouse, 1/3rd income of the earning/surviving spouse for the purpose of computing the compensation.

Though, Section 163A does not, in terms apply to the cases in which claim for compensation is filed under Section 166 of the Act, in the absence of any other definite criteria for determination of compensation payable to the dependents of a non-earning housewife/mother, it would be reasonable to rely upon the criteria specified in clause (6) of the Second Schedule and then apply appropriate multiplier keeping in view the judgments of this Court in *Kerala SRTC v. Susamma Thomas, (1994) 2 SCC 176, U.P. SRTC v. Trilok Chandra, (1996) 4 SCC 362, Sarla Verma v. DTC, (2009) 6 SCC 121* and also take guidance from the judgment in *Lata Wadhwa's case* (supra). The approach adopted by different Benches of Delhi High Court to compute the compensation by relying upon the minimum wages payable to a skilled worker does not commend our approval because it is most unrealistic to compare the gratuitous services of the housewife/mother with work of a skilled worker.

Reverting to the facts of this case, we find that while in his deposition, appellant No.1 had categorically stated that the deceased was earning Rs.50,000/- per annum by paintings and handicrafts, the respondents did not lead any evidence to controvert the same. Notwithstanding this, the Tribunal and the High Court altogether ignored the income of the deceased. The Tribunal did advert to the Second Schedule of the Act and observed that the income of the deceased could be assessed at Rs.5,000/- per month (Rs.60,000/- per annum) because the income of her spouse was Rs.15,416/- per month and then held that after making deduction, the total loss of dependency could be Rs.6 lacs. However without any tangible reason, the Tribunal decided to reduce the amount of compensation by observing that the deceased was actually non-earning member and the amount of compensation would be too much. The High Court went a step further and dismissed the appeal by erroneously presuming that neither of the claimants was dependent upon the deceased and the services rendered by her could be estimated as Rs.1250/- per month.

In our view, the reasons assigned by the Tribunal for reducing the amount of compensation are wholly untenable and the approach adopted by the High Court in dealing with the issue of payment of compensation to the appellants was ex facie erroneous and unjustified.

In the result, the appeal is allowed. The impugned judgment as also the award of the Tribunal are set aside and it is held that the appellants are entitled to compensation of Rs.6 lacs.

●

**360. MOTOR VEHICLES ACT, 1988 – Sections 163-A, 168 and 169**
**Claim for compensation – Claims Tribunal is required to follow summary procedure – It cannot determine issues arising in claim cases in piecemeal – The issue relating to maintainability is required to be considered along with other issues.**

**Bimlesh and Ors. v. New India Assurance Co. Ltd.**
**Judgment dated 03.08.2010 passed by the Supreme Court in Civil Appeal No. 2164 of 2004, reported in AIR 2010 SC 2591**

Held:

Section 169 makes a provision that the Claims Tribunal shall follow the summary procedure subject to any rules that may be made in this behalf. The Code of Civil Procedure, 1908 is not applicable to the proceedings before the Claims Tribunal except to the extent provided in sub-section (2) of Section 169 and the rules. The whole object of summary procedure is to ensure that claim application is heard and decided by the Claims Tribunal expeditiously. The inquiry under Section 168 and the summary procedure that the Claims Tribunal has to follow do not contemplate the controversy arising out of claim application being decided in piecemeal. The Claims Tribunal is required to dispose of all issues one way or the other in one go while deciding the claim application. The objection raised by the Insurance Company about maintainability of claim petition is intricately connected with its liability which in the facts and circumstances of the case is dependent on determination of the effect of the additional premium paid by the insured to cover the risk of the driver and other terms of the policy including terms of the policy contained in para 5. Since all issues (points for determination) are required to be considered by the Claims Tribunal together in light of the evidence that may be let in by the parties and not in piecemeal, we do not think it proper to consider the rival contentions on merits at this stage. Suffice it to say that matter needs to be sent back to the Claims Tribunal.

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**361. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 7, 8, 9, 138 and 142**
**Cognizance of the matter can be taken only upon complaint in writing by the payee or holder of cheque in due course – Cheque was issued in favour of father of non-applicant – Nowhere in complaint it was stated that payee has died and who are the legal representatives – Nowhere stated that how non-applicant is entitled for the cheque amount – The complaint is not maintainable.**

**Kishore Goyal v. Hanif Patel**
**Judgment dated 26.03.2010 passed by the High Court of M.P. in M. Cr. C. No. 5342 of 2009, reported in ILR (2010) M.P. 1994**

Held :

As per Section 142 of NI Act coginizance of the offence can be taken upon the complaint in writing to payee or the holder in due course of the cheque. The

words "Payee", "Holder" and "Holder in due course" are defined in Sections 7, 8 and 9 of NI Act which read as under :-

> 7.....
>
> *"Payee"* The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the "payee"
>
> 8. *"Holder"* – The "holder" of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.
>
> Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.
>
> 9. *"Holder in due course"* – means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if [payable to order] before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

In the present case cheque is in favour of deceased/Kudrat Patel. In the complaint it is no where stated that when Kudrat Patel has died. Similarly except in title no where it has been stated by the respondent that how the respondent is entitled for the cheque amount. It is also not mentioned in the complaint that who are the legal representatives of deceased/Kudrat Patel and prior to his death any will was executed by the deceased or not ? Since the complaint has been filed by a person in whose favour no cheque was issued by the petitioner, therefore, in the opinion of this Court no cognizance could have been taken against the petitioner for an offence alleged to have been committed by the petitioner keeping in view sub-section (a) of Section 142 of NI Act. In view of this, the petition filed by the petitioner is allowed and the impugned order passed by learned trial Court and also the complaint filed by the respondent stands quashed.

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**362. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138**

**Complaint about dishonour of cheque – Maintainable only against drawer of cheque – Company and its Directors cannot be made liable under Section 138 of the Act, if cheque is drawn by employee of the company on his personal account even for discharge of dues of the company.**

**P.J. Agro Tech. Ltd. & Ors. v. Water Base Ltd.**

**Judgment dated 28.07.2010 passed by the Supreme Court in Criminal Appeal No. 1357 of 2010, reported in AIR 2010 SC 2596**

Held:

The short point for decision in this Appeal is whether a complaint under Section 138 of the 1881 Act would be maintainable against a person who was not the drawer of the cheque from an account maintained by him, which ultimately came to be dishonoured on presentation.

From a reading of the said section, it is very clear that in order to attract the provisions thereof a cheque which is dishonoured will have to be drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part of any debt or other liability. It is only such a cheque which is dishonoured which would attract the provisions of Section 138 of the above Act against the drawer of the cheque.

In the instant case, the cheque which had been dishonoured may have been issued by the Respondent No. 11 for discharging the dues of the Appellant No. 1 Company and its Directors to the Respondent No. 1 Company and the Respondent. Company may have a good case against the Appellant No. 1 Company for recovery of its dues before other fora, but it would not be sufficient to attract the provisions of Section 138 of the 1881 Act. The Appellant Company and its Directors cannot be made liable under Section 138 of the 1881 Act for a default committed by the Respondent No. 11. An action in respect of a criminal or a quasi-criminal provision has to be strictly construed in keeping with the provisions alleged to have been violated. The proceedings in such matters are in personam and cannot be used to foist an offence on some other person, who under the statute was not liable for the commission of such offence.

Having regard to the above, we allow the Appeal and set aside the order passed by the High Court and quash the complaint filed by the Respondent No. 1 Company as far as the Appellants and other Proforma Respondents are concerned. In the event, any of the Appellants and/or Proforma Respondents have been released on bail, they shall stand discharged from their bail bonds forthwith.

●

**363. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 145**

**Object and scope in context of incorporation of Section 145 of N.I. Act, stated – No need to summon witness again for his examination-in-chief despite affirming affidavit in that behalf.**

## Radhey Shyam Garg v. Naresh Kumar Gupta

**Judgment dated 05.05.2009 passed by the Supreme Court in Criminal Appeal No. 912 of 2009, reported in (2009) 13 SCC 201**

Held:

Section 145 of NI Act contains a non obstante clause. The provisions of the Code of Criminal Procedure, 1973 are, thus, not attracted. The Court, subject to just exceptions, may allow the complainant to give evidence by way of an

affidavit. Such an evidence by way of an affidavit had been made admissible in evidence in any enquiry, trial or other proceedings under the Code.

If an affidavit in terms of the provisions of Section 145 of the Act is to be considered to be an evidence, it is difficult to comprehend as to why the court will ask the deponent of the said affidavit to examine himself with regard to the contents thereof once over again. The provision seeks to attend a salutary purpose. The Statement of Objects and Reasons for enacting the said provision, inter alia, reads as under:

> "4. Keeping in view the recommendations of the Standing Committee on Finance and other representations, it has been decided to bring out, inter alia, the following amendments in the Negotiable Instruments Act, 1881, namely–
>
> (i) to (iii) * * *
>
> (iv to prescribe procedure for dispensing with preliminary evidence of the complainant;
>
> (v) * * *
>
> (vi) to provide for summary trial of the cases under the Act with a view to speeding up disposal of cases;"

The object of enactment of the said provision is for the purpose of expedition of the trial. A criminal trial even otherwise is required to be expeditiously held. We, therefore, do no find any justification for arriving at a finding that a witness can again be summoned for his examination-in-chief in the court despite affirming affidavit in that behalf.

●

**364. PREVENTION OF CORRUPTION ACT, 1947 – Section 5 (1) (d) r/w/s 5 (2) and Section 6 (1) (c)**

**Order granting sanction for prosecution – Validity thereof – Held, while granting sanction, officer concerned is not required to indicate that he had personally scrutinized the file and arrived at the satisfaction for granting sanction.**

## State of Madhya Pradesh v. Harishankar Bhagwan Prasad Tripathi

**Judgment dated 13.08.2010 passed by the Supreme Court in Criminal Appeal No. 1513 of 2010, reported in (2010) 8 SCC 655**

Held:

Having carefully considered the submissions made on behalf of the respective parties, we are unable to agree with the reasoning of both the learned Special Judge as also the High Court in dismissing the case of the prosecution on the ground that proper sanction had not been obtained to prosecute the accused persons. Both the Courts have come to an erroneous finding that

although the trap which had been laid had been proved, the circumstances in which a sum of Rs. 200 was recovered from the sole Respondent, had not been properly considered. No attempt has been made by the defence to explain as to how the tainted currency came to be in the possession of the sole Respondent, except for the statement that the same had been handed over to him by Ghanshyamdas. Unless there was an understanding between the sole Respondent and Ghanshyamdas, since deceased, there can be no reason for Ghanshyamdas to have given the sole Respondent a part of the money which he had received by way of illegal gratification.

Even with regard to the grant of sanction, it is quite clear that the records of the Lokayukt's Office had been examined by the Principal Secretary, Government of Madhya Pradesh, while granting such sanction for prosecution. As has been indicated by this Court in *State of Maharashtra v. Ishwar Piraji Kalpatri, (1996) 1 SCC 542* while granting sanction the officer concerned is not required to indicate that he had personally scrutinized the file and had arrived at the satisfaction for granting sanction. The narration of events granting sanction for prosecution clearly indicates the case and the reason for grant of such sanction. In the present case also the order granting sanction does not, in our view, suffer from any infirmity which prompted the Courts below to acquit the accused persons.

●

***365. PROBATION OF OFFENDERS ACT, 1958 – Section 12**
**SERVICE LAW:**
**WORDS & PHRASES:**

**(i) Word "disqualification" contained in Section 12 of the Probation of Offenders Act – Application thereof – It applies only in respect of a disqualification that goes with a conviction under the law which provides for the offence and its punishment – Therefore, an employee cannot claim the right to continue in service merely on the ground that he had been given the benefit of probation. [Also See :** *Harichand v. Director of School Education, (1998) 2 SCC 383*].

**(ii) Dismissal/removal from service – Conviction of an employee for an offence involving moral turpitude permits the authority to take appropriate steps for his dismissal/removal from service on the basis of such conviction inspite of the fact that the benefit of the provision of the Probation of Offenders Act had been granted by the criminal Court to such an employee.**

**(iii) "Moral turpitude", meaning of – Anything contrary to honesty, modesty or good morals – It means violence and depravity – In fact, the conviction of a person in a crime involving moral turpitude impeaches his credibility as he has been found to have been indulged in shameful, wicked and base activities. [Also See :** *Pawan Kumar v. State of Haryana, AIR 1996 SC 3300*]

**Sushil Kumar Singhal v. Regional Manager, Punjab National Bank**
**Judgment dated 10.08.2010 passed by the Supreme Court in Civil Appeal No. 6423 of 2010, reported in (2010) 8 SCC 573**

●

*366. **PROPERTY LAW:**

**SPECIFIC RELIEF ACT, 1963 – Sections 5 and 34**

**Legal position of subsequent purchaser restated – Petitioner/plaintiff buying property from DW4 who had already sold it to respondent/ defendant by registered sale deed, who has been in possession and enjoyment of the property since then – Held, DW 4 was no longer competent to execute the subsequent sale deed in respect of the same property as she has already divested herself of title of the said property.**

**Atla Sidda Reddy v. Busi Subba Reddy and others**
**Judgment dated 06.05.2010 passed by the Supreme Court in SLP (C) No. 4549 of 2008, reported in (2010) 6 SCC 666**

●

367. **SPECIFIC RELIEF ACT, 1963 – Sections 13 (1) (c) and 20**

(i) **Suit for specific performance – Where contract for sale of immovable property with an imperfect title and the property is encumbered for an amount not exceeding the purchase money, the purchaser has the right to compel the seller to redeem the mortgage and obtain a valid discharge and then specifically perform the contract – Legal position explained.**

(ii) **Discretion of the Court to decree a suit for specific performance – Exercise there of – The Court's discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void – Legal principles re-stated.**

**Laxman Tatyaba Kankate and another v. Taramati Harishchandra Dhatrak**
**Judgment dated 08.07.2010 passed by the Supreme Court in Civil Appeal No. 6509 of 2005, reported in (2010) 7 SCC 717**

Held:

The learned counsel appearing for the appellants drew our attention to Section 13(1)(c) of the Specific Relief Act, 1963 (for short "the Act"), which clearly postulates that where a person contracts to sell immovable property with an imperfect title and the property is encumbered for an amount not exceeding the purchase money, the purchaser has the right to compel the seller to redeem the mortgage and obtain a valid discharge and then specifically perform the contract in its favour. Even from this point of view, the right of the present respondent is fully protected.

It will also be useful to refer to the provisions of Section 20 of the Act which vests the court with a wide discretion either to decree the suit for specific performance or to decline the same. Reference in this regard can also be made to *Bal Krishna v. Bhagwan Das, (2008) 12 SCC 145* where this Court held as under: (SCC pp. 152-53, paras 13-14).

> "13. ... The compliance with the requirement of Section 16(c) is mandatory and in the absence of proof of the same that the plaintiff has been ready and willing to perform his part of the contract suit cannot succeed. The first requirement is that he must aver in plaint and thereafter prove those averments made in the plaint. The plaintiff's readiness and willingness must be in accordance with the terms of the agreement. The readiness and willingness of the plaintiff to perform the essential part of the contract would be required to be demonstrated by him from the institution of the suit till it is culminated into decree of the court.
>
> 14. It is also settled by various decisions of this Court that by virtue of Section 20 of the Act, the relief for specific performance lies in the discretion of the court and the court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific performance of the contract. While exercising the discretion, the court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some hardship on the defendant, which he did not foresee. In other words, the court's discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void."

Similar view was taken by this Court in *Mohammadia Coop. Building Society Ltd. v. Lakshmi Srinivasa Coop. Building Society Ltd., (2008) 7 SCC 310* where the Court reiterated the principle that jurisdiction of the court to grant specific performance is discretionary and the role of the plaintiff is one of the most important factor to be taken into consideration.

We may also notice that in *Parakunnan Veetill Joseph's Son Mathew v. Nedumbara Kuruvila's Son, AIR 1987 SC 2328* this Court further cautioned that while exercising discretionary jurisdiction in terms of Section 20 of the Act, the court should meticulously consider all facts and circumstances of the case. The court is expected to take care to see that the process of the court is not used as an instrument of oppression giving an unfair advantage to the plaintiff as opposed to the defendant in the suit.

The discretion of the court has to be exercised as per the settled judicial principles. All the aforesaid principles are squarely satisfied in the present case and it is the appellants before us who have taken advantage of the pendency of the proceedings. They have used the sum of Rs 10,000, which was given as earnest money for all this period, as well as, have enjoyed the fruits of the property. The present case does not fall within the ambit of any of the aforesaid cases specified under Section 20(2) of the Act. In the present case, it is not only lawful but even equity and facts of the case demand that a decree for specific performance should be granted in favour of the respondent. Besides all this, the respondent before us has agreed to pay much higher consideration than what was payable in terms of the agreement to sell between the parties.

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**368. SUCCESSION ACT, 1925 – Section 90**
**REGISTRATION ACT, 1908 – Section 47**

**(i) Interpretation of *will* – Deeming provisions of Section 90 of the Succession Act – In the absence of contrary intention in the *will*, the description of the properties in the *will* shall be deemed to refer to and include the property answering that description at the death of the testator – Legal position explained.**

**(ii) Operation of registered documents – It operates from the date of execution and not from the date of its registration.**

## Ittianam and others v. Cherichi alias Padmini

**Judgment dated 27.07.2010 passed by the Supreme Court in Civil Appeal No. 7226 of 2002, reported in (2010) 8 SCC 612**

Held:

The District Judge granted the letters of administration in respect of all the items of property in the Will. An appeal was taken to the High Court whereupon by the impugned judgment the High Court upheld the genuineness of the Will but modified the grant of letters of administration only to items 1 to 3. The High Court declined to grant the letters of administration in respect of items 4 to 7 and the reasoning given by the High Court inter alia was that on the date of the Will i.e. 8.5.67 the testator's title to half of the property, namely over item Nos. 4 to 7 was not perfected. It was perfected only on the registration of sale deed, which is after the execution of the Will, even though the sale deed was executed on 2.5.1967.

The correctness of the finding of the High Court is questioned in this appeal.

Admittedly, the parties are Christians and are governed by the Act. Along with the application for additional grounds a translated copy of the Will was also filed.

Section 90 of the Act provides:

> *"90. Words describing subject refer to property answering description at testator's death.* – The description contained in a Will of property, the subject of gift, shall, unless a contrary intention appears by the Will, be deemed to refer to and comprise the property answering that description at the death of the testator."

This Section is based on Section 24 of the English Wills Act. Prior to the English Wills Act under the common law, testamentary disposition of real property spoke from the date of the Will. But the English Wills Act changed that by a statutory presumption to the effect, that unless a contrary intention appears from the recitals of the Will, the Will speaks from the date of the testator's death.

Section 90 of the Act uses the legal fiction "deemed" and that is used with the specific purpose of raising a presumption against intestacy. Therefore, on an analysis of the provisions of Section 90 it is clear that the property described in the Will shall be deemed to refer to and comprise the property answering that description at the death of the testator.

In this case assuming but not admitting that the testator had not acquired title in respect of half of the property, namely, items 4 to 7 of the property bequeathed by him in the Will on 8.5.1967, but the sale deed having been registered on 08.05.1967, the title reverts back to the date of execution of the sale deed on 02.05.67 under Section 47 of the Registration Act. And the testator died on 20.07.71. Therefore, much before his death, the testator acquired full title over items 4 to 7 of the property. Therefore, the High Court was in clear error in not appreciating the effect of Section 90 on the interpretation of the Will.

●

**369. SUCCESSION AND INHERITENCE:**

*Will* – **Nature and extent of occupation rights – Ultimate beneficiary will get the property only upon cessation of occupancy rights – Since the right of occupation was given to all the four sons during their life time, the ultimate beneficiaries of the entire building, the four grandsons, will be entitled to joint or separate possession of the property only after the death of four sons.**

**Dilip D. Chowdhari and another v. Maharashtra Executor and Trustee and others**

**Judgment dated 29.04.2010 passed by the Supreme Court in Civil Appeal No. 113 of 2002, reported in (2010) 6 SCC 633**

Held:

The testator, Shri Dattatraya executed his last Will, by which right of residence was given to his wife and right of occupation was given to his four sons by giving one independent flat each on second floor to Shri Suryakant and one flat to Shri Ashok. The rest of the third floor except one room which was given to Bapu, was kept for occupation for himself, his wife and the appellant and his family. The Will specifically provides that the ultimate beneficiaries of the entire building are the four grandsons, namely, Rajesh, Arun, Vikram and Ojas. Since the right of occupation was given to all the four sons, during their life time the Grand sons are not entitled to the joint or separate possession and only after the death of all the four sons, the grandsons will be entitled to joint/ separate possession of the suit property.

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**370. WAKF ACT, 1995 – Sections 6, 7, 83 and 85**
**CIVIL PROCEDURE CODE, 1908 – Section 9**
**Whether the Wakf Tribunal is competent to entertain a suit/dispute regarding eviction of the tenant from the Wakf property? Held, no – Such suit can be filed only before the Civil Court. (Decision of the M.P. High Court rendered in *Wakf Imambara, Imlipura v. Khursheeda Bi, AIR 2009 MP 238* overruled)**

**Ramesh Gobindram (dead) through L.Rs. v. Sugra Humayun Mirza Wakf**

**Judgment dated 01.09.2010 passed by the Supreme Court in Civil Appeal No. 1182 of 2006, reported in (2010) 8 SCC 726**

Held:

Whether or not the Wakf Tribunal can entertain and adjudicate upon a dispute regarding eviction of a tenant holding Wakf property under the Wakf Board, would depend upon the scheme of the Wakf Act, 1995 and express or implied exclusion of the jurisdiction of the Civil Courts to entertain any such dispute. If the Act excludes the jurisdiction of the Civil Courts whether such exclusion is absolute and all pervasive or limited only to a particular class of disputes is also an incidental question that may have to be addressed. There is a cleavage in the judicial opinion expressed on these questions by different High Courts in the country.

The High Courts of Andhra Pradesh, Rajasthan, Madhya Pradesh, Kerala and Punjab & Haryana have taken the view that Tribunal established under Section 83 of the Wakf Act is competent to entertain and adjudicate upon all kinds of disputes so long as the same relate to any wakf property.

Contrary view has been expressed by the High Courts of Karnataka, Madras, Allahabad and Bombay. They are of the view that in cases where the

dispute is not regarding the nature of the property, it is a civil dispute which can be determined only by the competent Civil Court and not by the Tribunal constituted under Section 83 of the Act.

From a conjoint reading of the provisions of Sections 6 and 7 of the Wakf Act, 1995 act, 1995 it is clear that the jurisdiction to determine whether or not a property is a wakf property or whether a wakf is a Shia wakf or a Sunni wakf rests entirely with the Tribunal and no suit or other proceeding can be instituted or commenced in a Civil Court in relation to any such question after the commencement of the Act. What is noteworthy is that under Section 6 read with Section 7 the institution of (sic suit in) the Civil Court is barred only in regard to questions that are specifically enumerated therein. The bar is not complete so as to extend to other questions that may arise in relation to the wakf property.

The exclusion of the jurisdiction of the Civil Courts to adjudicate upon disputes whether a particular property specified in the wakf list is or is not a wakf property or whether a wakf specified in list is a Shia wakf or a Sunni wakf is clear and presents no difficulty whatsoever. The difficulty, however, arises on account of the fact that apart from Section 6(5) which bars the jurisdiction of the Civil Courts to determine matters referred to in Section 6(1), Section 85 of the Act also bars the jurisdiction of the Civil Courts to entertain any legal proceedings in respect of any dispute, question or matter relating to a wakf property.

Section 85 of the Act reads:

> "85. *Bar of jurisdiction of Civil Courts* – No suit or other legal proceedings shall lie in any Civil Court in respect of any dispute, question or other matter relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal."

A plain reading of the above would show that the Civil Court's jurisdiction is excluded only in cases where the matter in dispute is required under the Act to be determined by the Tribunal. The words "which is required by or under this Act to be determined by Tribunal" holds the key to the question whether or not all disputes concerning the wakf or wakf property stand excluded from the jurisdiction of the Civil Court.

Whenever a question arises whether "any dispute, question or other matter" relating to "any wakf or wakf property or other matter" falls within the jurisdiction of a Civil Court the answer would depend upon whether any such dispute, question or other matter is required under the Act to be determined by the Tribunal constituted under the Act. If the answer be in the affirmative, the jurisdiction of Civil Court would be excluded qua such a question, for in that case the Tribunal alone can entertain and determine any such question. The bar of jurisdiction contained in Section 85 is in that sense much wider than that contained in Section 6(5) read with Section 7 of the Wakf Act. While the latter

bars the jurisdiction of the Civil Court only in relation to questions specified in Sections 6(1) and 7(1), the bar of jurisdiction contained in Section 85 would exclude the jurisdiction of the Civil Courts not only in relation to matters that specifically fall in Sections 6 and 7 but also other matters required to be determined by a Tribunal under the Act. There are a host of such matters in which the Tribunal exercises original or appellate jurisdiction.

To illustrate the point we may usefully refer to some of the provisions of the Act where the bar contained in the said section would get attracted. Section 33 of the Act deals with the power of inspection by a Chief Executive Officer or person authorized by him. In the event of any failure or negligence on the part of a mutawalli in the performance of his duties leading to any loss or damage, the Chief Executive Officer can with the prior approval of the Board pass an order for the recovery of the amount or property which has been misappropriated, misapplied or fraudulently retained. Sub-section (4) of Section 33 then entitles the aggrieved person to file an appeal to the Tribunal and empowers the Tribunal to deal with and adjudicate upon the validity of the orders passed by the Chief Executive Officer. Similarly under Section 35 the Tribunal may direct the mutawalli or any other person concerned to furnish security or direct conditional attachment of the whole or any portion of the property so specified.

Section 47 of the Act requires the accounts of the wakfs to be audited whereas Section 48 empowers the Board to examine the audit report, and to call for an explanation of any person in regard to any matter and pass such orders as it may think fit including an order for recovery of the amount certified by the auditor under Section 47(2) of the Act. The mutawalli or any other person aggrieved by any such direction has the right to appeal to the Tribunal under Section 48. Similar provisions giving powers to the Wakf Board to pass orders in respect of matters stipulated therein are found in Sections 51, 54, 61, 64, 67, 72 and 73 of the Act. Suffice it to say that there are a host of questions and matters that have to be determined by the Tribunal under the Act, in relation to the wakf or wakf property or other matters.

Section 85 of the Act clearly bars jurisdiction of the Civil Courts to entertain any suit or proceedings in relation to orders passed by or proceedings that may be commenced before the Tribunal. It follows that although Section 85 is wider than what is contained in Sections 6 and 7 of the Act, the exclusion of jurisdiction of Civil Courts even under Section 85 is not absolute. It is limited only to matters that are required by the Act to be determined by a Tribunal. So long as the dispute or question raised before the Civil Court does not fall within four corners of the powers vested in the Tribunal, the jurisdiction of the former to entertain a suit or proceedings in relation to any such question cannot be said to be barred.

The High Courts of Andhra Pradesh, Rajasthan, Madhya Pradesh, Punjab and Haryana have in the decisions taken the view that the jurisdiction of the Civil Courts is barred in respect of disputes that concerns with any wakf or wakf property. The decisions rendered by these High Courts draw support for that conclusion from Section 83 of the Wakf Act, 1995. The language employed in Section 83 of the Act has been understood to be so wide as to include any dispute, question or other matter relating to a wakf or wakf property. Section 83 of the Act, however, does not deal with the exclusion of the jurisdiction of the Civil Courts to entertain civil suits generally or suit of any particular class or category. The exclusion of Civil Court's jurisdiction is dealt with by Section 6(5) and Section 85 of the Act. To interpret Section 83 as a provision that excludes the jurisdiction of the Civil Courts is not, therefore, legally correct, for that provision deals with constitution of Tribunals, the procedure which the Tribunals would follow and matters relating thereto.

It is noteworthy that the expression "for the determination of any dispute, question or other matter relating to a wakf or wakf property" appearing in Section 83(1) also appears in Section 85 of the Act. Section 85 does not, however, exclude the jurisdiction of the Civil Courts in respect of any or every question or disputes only because the same relates to a wakf or a wakf property. Section 85 in terms provides that the jurisdiction of the Civil Court shall stand excluded in relation to only such matters as are required by or under this Act to be determined by the Tribunal.

The crucial question that shall have to be answered in every case where a plea regarding exclusion of the jurisdiction of the Civil Court is raised is whether the Tribunal is under the Act or the Rules required to deal with the matter sought to be brought before a Civil Court. If it is not, the jurisdiction of the Civil Court is not excluded. But if the Tribunal is required to decide the matter the jurisdiction of the Civil Court would stand excluded.

In the cases at hand the Act does not provide for any proceedings before the Tribunal for determination of a dispute concerning the eviction of a tenant in occupation of a wakf property or the rights and obligations of the lessor and the lessees of such property. A suit seeking eviction of the tenants from what is admittedly wakf property could, therefore, be filed only before the Civil Court and not before the Tribunal.

In the result the appeal succeeds and the decision of High Court of Madhya Pradesh rendered in *Wakf Imambara, Imlipura* (supra) does not lay down the law correctly and to that extent it was overruled.

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**NOTE:** Asterisk (*) denotes brief notes.

# PART - III

## CIRCULARS/NOTIFICATIONS

### NOTIFICATION REGARDING DATE OF ENFORCEMENT OF CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 2008

*Ministry of Home Affairs Notification No. S.O. 2687 (E) dated the 30th October, 2010.*

In exercise of the powers conferred by sub-section (2) of Section 1 of the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), the Central Government hereby appoints the 1st day of November, 2010, as the date on which the provisions of Section 5, Section 6 and clause (b) of Section 21 of the said Act, shall come into force.

*[Published in Gazette of India (Extraordinary) Part II Section 3 (ii) dated 30.10.2010 Page 1]*

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### NOTIFICATION REGARDING DATE OF ENFORCEMENT OF CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 2010

*Ministry of Home Affairs Notification No. S.O. 2689 (E) dated the 1st November, 2010.*

In exercise of the powers conferred by sub-section (2) of Section 1 of the Code of Criminal Procedure (Amendment) Act, 2010 (41 of 2010), the Central Government hereby appoints the 2nd day of November, 2010, as the date on which the provisions of the said Act, shall come into force.

*[Published in Gazette of India (Extraordinary) Part II Section 3 (ii) dated 01.11.2010 Page 1]*

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# NOTIFICATION REGARDING AMENDMENT IN THE MADHYA PRADESH CIVIL COURTS RULES, 1961

*Notification No. E-3786-III-I-5-57-Chapter-I-A dated the 10th September, 2010.–* In exercise of the powers conferred by Article 227 of the Constitution of India read with Section 23 of Madhya Pradesh Civil Courts Act, 1958 (N0. 19 of 1958), the High Court of Madhya Pradesh, hereby makes the following amendment in the Madhya Pradesh Civil Courts Rules, 1961, namely:–

**Amendment**

In the said rules, in rule 1, –

(a) in sub-rule (1), the following proviso shall be added, namely:-

"Provided that the High Court may, by notification, extend the working hours of any court so as to make the scheme of Evening Courts functional in order to reduce the pendency and expedite trial of certain class of cases as specified in the notification",

(b) in sub-rule (2), the following proviso shall be added, namely:-

"Provided that the courts notified for extended working hours under the proviso to sub-rule (1) may observe another interval of 30 minutes duration".

(c) after sub-rule (2), the following new sub-rule shall be added namely:-

"(3) Judicial Officer working in court notified for extended working hours under the proviso to sub-rule (1) shall be entitled for such remuneration as may be fixed by the Government of Madhya Pradesh, in consultation with the High Court of Madhya Pradesh."

*[Published in M.P. Rajpatra (Asadharan) dated 15.09.2010 Page 905-906]*

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# PART - IV

## IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

## THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 2010

**NO 41 OF 2010**

[21st September, 2010]

*[Received the assent of the President on 21st September, 2010 and Act published in the Gazette of India (Extraordinary) Part II Section 1 dated 22.09.2010 Pages 1-2]*

**An Act further to amend the Code of Criminal Procedure, 1973.**

Be it enacted by Parliament in the Sixty-first Year of the Republic of India as follows: –

**1. Short title and commencement.** – (1) This Act may be called the Code of Criminal Procedure (Amendment) Act, 2010.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

**2. Amendment of Section 41.** – On and from the date of commencement of Section 5 of the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), in Section 41 of the Code of Criminal Procedure, 1973 (2 of 1974) [as amended by Section 5 of the Code of Criminal Procedure (Amendment) Act, 2008], in sub-section (1), in clause (b), the following proviso shall be inserted at the end, namely–

> "Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest."

**3. Amendment of Section 41-A.** – On and from the date of commencement of Section 6 of the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), in Section 41-A of the Code of Criminal Procedure, 1973 (2 of 1974) [as inserted by section 6 of the Code of Criminal Procedure (Amendment) Act, 2008], –

(a) in sub-section (1), for the words "The police officer may", the words "The police officer shall" shall be substituted;

(b) for sub-section (4), the following sub-section shall be substituted, namely: —

"(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.".

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Just as treasures are uncovered from the earth, so virtue appears from good deeds, and wisdom appears from a pure and peaceful mind. To walk safely through the maze of human life, one needs the light of wisdom and the guidance of virtue.

– BUDDHA

A life spent in making mistakes is not only more honourable but more useful than a life spent in doing nothing.

– GEORGE BERNARD SHAW