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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 last issue of this Year. Moreover, this is my last editorial as Director of this esteemed Institute. Next year there will be a new beginning and new work.

The years that I have spent in JOTRI were very fulfilling. I had a chance to interact with many Judicial Officers across the State. In this process, I had the privilege to learn a lot.

Our Judiciary has been accorded a unique and a very eminent place in our Constitution. Therefore, a very high standard of conduct is expected of the Judges. Judiciary functions in a distinctly different atmosphere than the other wings of the State. The function of the judiciary is divine. Every citizen of this nation has a regard to this wing of the State and looks at it with awe. We should be role models for others. People come to us for vindicating their grievances and for removal of injustice. The Judge wields very high power because of which he is judged with more strictness than the others. We must take utmost care to see that the judiciary does not crack from inside because it will lead to such hue and cry that the people will lose all its confidence in us.

As humans we are also prone to errors. All are not brilliant. Some may have high degree of specialization in some subjects, but lack exposure in others. Some require detailed arguments and explanations depending upon the extent of their acquaintance with the subject. We must all do a little homework by reading the files. It helps a lot in understanding the matter. Undivided attention and concentration in court also helps. We should not feel embarrassed to put questions to clarify our doubts. This is not showing our ignorance but our commitment to justice and thirst for knowledge. Giving proper hearing enables a Judge to absorb all that is needed to arrive at a proper decision in a short span of time. It is better to ask questions, understand the issue and then decide rather than attempting a decision without fully grasping the issues or the finer nuances of law involved. Of course, there are some common qualities required for all types of cases – broad familiarity with the law, thorough study of the facts and sound knowledge of procedure.

Hard work and patience many a times yield better results than brilliance. It is not that brilliance has got no role in dispensing justice. Lack of brilliance is not an obstacle for being a good judge. A good judge should have an open mind, willingness to learn and is ready to read thoroughly the facts and law. Commitment and hard work are good substitutes for brilliance and experience. A Judge can get over inexperience, ignorance and diffidence by developing discipline and thoroughness, self-confidence and humility. While things will become easier with experience, a Judge should be vary of overconfidence. A Judge's functions are not to show off his intellectual brilliance and legal erudity,

but to do justice. We should see that justice should not only be done, but should seem to be done. We must not deny the counsel's satisfaction of having put forth their viewpoints to us. We ought to give fair opportunity of hearing which makes the lawyer realize that the Judge has understood the issue.

Now coming to the activities of the Institute in the month of November, we organized training programme on **Application of Information and Communication Technology to the District Judiciary. The Second Phase Induction Training Programme to the newly appointed Civil Judges Class II of 2011 Batch** is in progress in the Institute. The Institute also had the distinctive pleasure of associating itself with the National Judicial Academy in organizing the **West Zone Regional Conference on Role of Courts in Protection of Human Rights** held from **25th to 27th November, 2011**.

It was a great honour to be a part of this magnificent Academy. With whatever little knowledge and understanding I had at my disposal in the field of law, I was able to contribute it to the various activities of the Institute. Before saying goodbye, I would also like to express my deepest gratitude to all my colleagues who have helped me in my journey as Director in the Institute. Without their constant support and co-operation, I would not have achieved anything. I had the persistent support of Hon'ble the Chief Justice, Hon'ble the Administrative Judge, Hon'ble the Chairman and Members of High Court Training Committee and Hon'ble Judges of the High Court. I had the privilege of getting support from the Registrar General and other Registry Officers of High Court and fellow Judicial Officers of the District Court and experts from other Institutes also. The staff has also played their part. With all humility at my disposal, I had a very satisfying time in the Institute. I hope that this Institute will reach its zenith in the coming years.

Let me wish you all A VERY HAPPY AND PROSPEROUS NEWYEAR with the poem of *William Arthur Ward,* American Scholar, author, editor, pastor and teacher

"Another fresh new year is here . . .
Another year to live!
To banish worry, doubt, and fear,
To love and laugh and give!

This bright new year is given me
To live each day with zest . . .
To daily grow and try to be
My highest and my best!

I have the opportunity
Once more to right some wrongs,
To pray for peace, to plant a tree,
And sing more joyful songs!"

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HON'BLE SHRI JUSTICE ABHAY NAIK, HON'BLE SMT. JUSTICE SUSHMA SHRIVASTAVA, & HON'BLE SMT. JUSTICE INDRANI DUTTA DEMIT OFFICE

Hon'ble Shri Justice Abhay Naik demitted office on His Lordship's attaining superannuation. Was born on 08.09.1949. Practised at Gwalior Bench of the High Court for more than 31 years. Worked as junior of Late Justice Shri H.G. Mishra. Appeared in number of important cases relating to Municipal Corporation, Gwalior, M.P. Housing Board, M.P. Pollution Control Board, M.P. Audhoyogik Kendra Vikas Nigam, M.P. Hastashilp Vikas Nigam, Gwalior Development Authority, State Bank of India, Bank of India, etc. Imparted practical training to final year students of various Colleges affiliated to Jiwaji University, Gwalior. Was also a Member of Editorial Board of Law Journal "M.P. High Court Today". Was designated as Senior Advocate on 27.04.2002. Elevated as Additional Judge of High Court of Madhya Pradesh on 13.04.2005. Took oath as Permanent Judge on 25.11.2005. Was accorded farewell ovation on 07.09.2011.

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Hon'ble Smt. Justice Sushma Shrivastava demitted office on Her Lordship's attaining superannuation. Was born on 12.11.1949. Joined Judicial Service on 18.07.1972, promoted as Civil Judge Class I on 10.12.1983, as CJM on 19.09.1986, as officiating District Judge on 18.07.1988, granted Selection Grade on 28.08.1995, Super-Time Scale on 01.07.2001. Worked as Additional Welfare Commissioner, Bhopal Gas, Bhopal from 11.08.1995 to February 1996 and as Presiding Officer, Special Court, Raisen from 16.02.1996 to April 1997. Was

posted as District & Sessions Judge, Indore. Elevated as Additional Judge of High Court of Madhya Pradesh on 15.05.2006. Took oath as Permanent Judge on 25.11.2008. Was accorded farewell ovation on 11.11.2011.

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Hon'ble Smt. Indrani Dutta demitted office on Her Lordship's attaining superannuation. Was born on 16.11.1949. Joined Judicial Service as Civil Judge Class II on 08.09.1975, promoted as Civil Judge Class I on 14.12.1983, as CJM on 13.06.1988, as officiating District Judge on 10.07.1989, granted Selection Grade on 12.05.1997, Super-Time Scale on 16.06.2003. Worked as Additional District Judge and Presiding Officer, Special Court (SC/ST Act), Dewas in 1997, Special Judge for trial of cases under SC/ST (P.A.) Act, Indore w.e.f. 07.08.2000 and Presiding Officer, Family Court, Indore w.e.f. 14.05.2002. Was District & Sessions Judge, Vidisha prior to her elevation. During her tenure as Judicial Officer, she was posted in various districts like Raipur, Rajnand Gaon, Bilaspur, Durg, Harda, Seoni, Dewas, Indore, Bhopal, Vidisha, etc. Elevated as Additional Judge of the High Court of Madhya Pradesh on 01.07.2008. Took oath as permanent Judge on 15.01.2010. Was accorded farewell ovation on 15.11.2011 at Gwalior.

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

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PART - I

LAW RELATING TO IN-COUNTRY AND INTER-COUNTRY ADOPTION OF A CHILD UNDER JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000*

Judicial Officers
Districts Gwalior, Khandwa
and Chhindwara

One of the basic human rights of children, among others, is to have a family environment for better emotional and physical security. It is the responsibility of the community and of the State to provide both institutional and non-institutional support to orphans and destitute children. Adoption is one of the best non-institutional support for rehabilitation of such children because only a family environment can provide them the best opportunity to fulfill their potential.

'Adoption' as defined in international Encyclopedia of Social Science (Volume-I page 96) is "an institutionalized practice through which an individual belonging by birth to one kinship ties that are socially defined as equivalent to the congenital ties." As per Law Lexicon adoption is "the legal act whereby an adult person takes a minor into the relation of child, and thereby acquires the right and incurs the responsibilities of a parent in respect of such minor." According to Section 2 (aa) of the Juvenile Justice (Care & Protection of Children) Act, 2000 and Rule 2 (b) of the M.P. Juvenile Justice (Care & Protection of Children) Rules, 2003 "adoption means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship." Inter-country or transnational adoption is one in which parents domiciled in another nation in accordance with the laws of the child's nation. Adoption may be either to fulfill the natural desire for a son/daughter with an object of affection and a protector in old age or for humanitarian motive for caring and bringing up an abandoned or destitute child.

ADOPTION LEGISLATIONS IN INDIA AND ENACTMENT OF J.J. ACT:

The existing legislations for adoption or taking a child in custody in India is as under:

Hindu Adoptions and Maintenance Act, 1956 :

The Hindu Adoptions and Maintenance Act, 1956 provides for adoption of Hindu children aged below fifteen years by the adoptive parents belonging to Hinduism. This is not applicable to other communities like Muslims, Christians and Parsis.

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* The Articles received from Gwalior, Khandwa and Chhindwara have been partially edited by the Institute.

One of the features of this Act is that no Hindu person can adopt a son or daughter, if they already have a child of that sex. Often the intentions behind the law are good, but the methods adopted fall short. This Act provides that there should be an age difference of 21 years between the adoptive parents and the adopted child whenever they are of opposite sex. This is intended to prevent sexual abuse. The Act may not apply in situation where a foreign national who is not a Hindu wants to adopt a destitute or orphaned child about whom it is also not clear that he or she is Hindu, therefore, this Act may not be of any utility as far as inter-country adoptions and non-Hindus are concerned.

The Guardians and Wards Act, 1890 :

Personal laws of Muslims, Christians, Parsis and Jews do not recognize complete adoption. As non-Hindus do not have an enabling law to adopt a child legally, the people belonging to these religions who are desirous of adopting a child can only take the child in 'guardianship' under the provisions of the Guardians and Wards Act, 1890. The Statute does not deal with adoption or inter-country adoption as such but mainly with guardianship. The Act confers this jurisdiction on District Court as defined in Section 4 (5) (a). Sections 7, 17 and 26 of this Act are relevant in this respect. Section 7 provides that where the Court is satisfied that it is for the welfare of the minor that an order should be made appointing a guardian of his person or property or both or declaring a person to be such a guardian, the Court may make an order accordingly. Section 17 provides that in appointing guardian of a minor, the Court shall be guided by the law to which the minor is subject and what appears under the circumstances to be for the welfare of the minor. In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the proposed guardian with the minor or his property relation of the proposed guardian and his nearness of kin to the minor, the wishes, if any of a deceased parent and any existing or previous relation of the proposed guardian with the minor or his property. Section 26 provides that a guardian of the person of minor appointed, by the Court shall not, without the leave of the court by which he was appointed, remove the ward from the limits of its jurisdiction, except for such purposes as may be prescribed. The leave to be granted by the Court may be special or general. The practice which has hitherto prevailed is to get oneself appointed as guardian of a child, and then with the permission of the Court to accompany him or her to the country of destination.

The aforesaid enactments remain silent about the orphaned, abandoned and surrendered children. There was no codified legislation dealing with the adoption of the children of these categories. As a result, several misconceptions or irregularities appeared in respect of the custody, guardianship or adoption of these types of children, which were prejudicial to the interest of the children. Considering all the aspects mentioned above laudable attempt were undertaken by the legislature by the stipulations, which have been made in Chapter IV of the Juvenile Justice (Care & Protection of Children) Act, 2000.

This enactment shows that the legislature may be found to have accepted the concept of secular adoption whereby without any reference to the community or religious persuasions of the parents or the child concerned, a right appears to have been granted to all citizens to adopt and all children to be adopted.

The Act introduced an expression "child in need of care and protection" and it has been defined in Section 2 (d) of the Act. This definition covers what is meant by orphaned, abandoned and surrendered children. Section 40 of the J.J. Act provides that the rehabilitation and social integration of a child shall begin during the stay of the child in children's home or special home, but as the family is the best option to provide care and protection for children, adoption is the first alternative for rehabilitation and social reintegration of orphaned, abandoned or surrendered children, to help children in restoring their dignity and self-worth and mainstream them through rehabilitation within the family where possible or otherwise and other alternative care programmes and long term institutional care shall be of last resort.

Legislation/Guidelines/Directives for adoption of orphan, abandoned or surrendered children

The following legislation, guidelines or directives are to be complied with in respect of adoption of orphan, abandoned or surrendered children:

1. Guidelines issued by Central Adoption Resource Authority (CARA) time to time based on the judgment of the Supreme Court on inter-country adoption in ***Laxmi Kant Pandey v. Union of India and others, AIR 1984 SC 469*** and subsequent judgments.
2. Hague Convention on inter-country adoption ratified by India in 2003.
3. Juvenile Justice (Care & Protection of Children) Act, 2000 and Central Model Rules, 2007 promulgated under this Act.

Though under the J.J. Act, 2000 there is no specific law relating to in-country or inter-country adoption but Section 41 provides the path therefor. Sub-section (3) of Section 41 provides that in keeping with the provisions of various guidelines for adoption issued from time to time, by the State Government, or Central Adoption Resource Agency (Authority) and notified by the Central Government, children may be given in Adoption by a Court after satisfying itself regarding the investigation having carried out, as are required for giving such children in adoption.

Similarly Rule 33 (2) of the J.J. Rules provides that for all matters relating to adoption, the guidelines issued by the Central Adoption Resource Agency and notified by the Central Government under sub-section (3) of Section 41 of the Act shall apply.

Relevant provisions for adoption under J.J. Act, 2000 and J.J. Rules, 2007

Section 41 of the J.J. Act, 2000 read with Rule 33 (1) of Juvenile Justice Rules, 2007 expresses the following aspects of adoption:

- The primary aim of adoption is to provide a child who could not be cared by his biological parents with a permanent substitute family. The family of a child has the primary responsibility to provide him care and protection. Orphan, abandoned or surrendered children can be adopted for their rehabilitation through such mechanism as may be prescribed. Such children may be given in adoption by a Court in keeping with the provisions of several guidelines regarding adoption issued by the State Government/ Central Adoption Resource Authority and notified by the Central Government. But the Court should be satisfied with the investigation having carried out which is required for giving such children in adoption.
- For placement of the orphaned, abandoned or surrendered children for adoption in accordance with the said guidelines, the State Government shall recognize in each district one or more institutions or voluntary organizations as specialized adoption agencies.
- The Children's Homes and institutions run by the State Government or voluntary organizations for children in need of care and protection who are orphaned, abandoned or surrendered, should ensure that these children are declared free for adoption by the Committee (Child Welfare Committee) and such cases shall be referred to the adoption agency of that district for their placement in adoption.
- The guidelines issued by CARA and notified by the Central Government under Section 41 (3) of the Act, shall apply for all matters relating to adoption.

Child Welfare Committee (CWC) :

As per Section 2 (f) of the Juvenile Justice Act, 2000 the expression "Committee" means a Child Welfare Committee constituted under Section 29 of the Act. The Committee has the final authority to declare the child in need of care and protection who are orphaned, abandoned or surrendered, free for adoption.

CWC (hereinafter referred as 'Committee') shall determine legal status of all orphaned, abandoned and surrendered children. Functions and powers of the Committee, procedure in relation to the Committee, production of child before committee, procedure for enquiry, procedure related to orphan and abandoned children and procedure related to surrendered children shall be governed as laid down in the Juvenile Justice (Care & Protection of Children) Act, 2000 and its Rules. On clearance from Committee that a particular child is free for adoption, there will be termination of parental right.

Criteria for the Child to be adopted :

Section 41 (5) of the Juvenile Justice (Care & Protection of Children) Act, 2000 provides that a child shall be offered for adoption on fulfillment of the following requirements:

- In case of abandoned child, if two members of the Committee declare the child legally free for placement.

- In case of surrendered child, if the period of two months for reconsideration by the parents has lapsed.
- In case of a child who can understand and express his consent, if his/her consent is obtained in this regard.

To whom child may be given in adoption :

Section 41 (6) of the Juvenile Justice (Care & Protection of Children) Act, 2000 provides that the court is empowered by Section 41 of the Act to allow a child to be given in adoption to the following persons:

- A person irrespective of his/her marital status.
- The parents to adopt a child of the same sex irrespective of the number of existing biological sons or daughters.
- The childless couples.

Which Court shall entertain the adoption matters?

Prior to the amendment of the J.J. Act, 2000, the Juvenile Justice Board was placed instead of the Court for allowing the child to be given in adoption. However, the legislature has consciously amended the expression "Board" and replaced it with the word "Court" by the J.J. (Amendment) Act, 2006. So in case of adoption under the Juvenile Justice Act, the petitions should be filed under Section 41 of the Act before the Court.

According to Rule 33 (5) of the Central Rules under the said Act, the word "Court" implies a civil court, which has jurisdiction in matters of adoption and guardianship and may include the court of District Judge, Family Court and City Civil Court.

In the case of ***Manuel Theodore D'Souza, [II (2000) DMC 292]***, the Bombay High Court has observed that the right to adopt being a fundamental right, must be capable of enforcement through the civil Court as it falls within the ambit of Section 9 of Civil Procedure Code. It was also opined that the District Court or the High Court has the jurisdiction to deal with the question relating to adoption as this Court normally deals with the disputes regarding custody, guardianship etc.

Similar conclusion has been drawn by the Hon'ble High Court of Kerala in the case of ***Andrew Mendez and others v. State of Kerala, 2008 CriLJ 2368***. It minutely interpreted the jurisdiction of the Family Court as mentioned in the Central Rules under J.J. Act and the Family Courts Act and consequently observed that it is only the District Court, which has jurisdiction to entertain an application under Section 41 (6) of Juvenile Justice Act, 2000 amended in 2006 read with Rule 33 (5) of the Central Rules.

In this regard definition of "Court" in Rule 2 (v) of M.P. Juvenile Justice (Care & Protection of Children) Rules 2003 is very specific which provides that "Court" means *Court of Principal Civil Court of the District.*

IN-COUNTRY ADOPTION

(i) Procedure in case of orphaned and abandoned children [refer Rule 33 (3) of Juvenile Justice (Care & Protection of Children) Rules 2007]

The specialized Adoption Agencies shall produce all orphaned and abandoned children who are to be declared legally free for adoption before the Committee within 24 hours of receiving such children, excluding the time taken for journey. A copy of the report should be filed with the police station in whose jurisdiction the child was found abandoned.

A child becomes eligible for adoption when the Committee declares the child legally free for adoption after completion of its inquiry. Such inquiry should be conducted by the Probation Officer or Child Welfare Officer, who shall produce report to the Committee containing the findings within one month.

The specialized adoption agency shall declare stating that there has been no claimant for the child even after making notification in at least one leading national newspaper and one regional language newspaper for children below two years of age and for children above two years, an additional television or radio announcement and notification to the missing persons squad or bureau shall be made.

Time stipulation :

In case of abandoned child below two years, such a declaration shall be done by Committee within a period of sixty days from the time the child is found. For an abandoned child above two years of age, such a declaration shall be done within the period of four months.

A child must be produced before the Committee at the time of declaring him/her legally free for adoption.

Subsequently, the child shall be placed in a specialized adoption agency or recognized and certified children's home or in a pediatric unit of a Government hospital followed by production of the child before the Committee within 24 hours.

No child above seven years of age who can understand and express his opinion shall be declared free for adoption without his/her consent.

(ii) Procedure in case of surrendered children [refer Rule 33 (4) of Juvenile Justice (Care & Protection of Children) Rules 2007]

A surrendered child is one who has been declared as such after due process of inquiry by the Committee and in order to be declared legally free for adoption, a surrendered child shall be any of the following:

- Born as a consequence of non-consensual relationship
- Born of an unwed mother or out of wedlock
- Whose one of the biological parents is dead and the living parent is incapacitated to take care

- A child whose parents or guardians are compelled to relinquish him/her due to physical, emotional and social factors beyond their control.

The Committee shall give effort for counselling of the parents, explaining the consequences of adoption and exploring the possibilities of parents retaining the child and if the parents are unwilling to retain, then such children shall be kept initially in foster care or arranged for their sponsorship.

If the surrender is inevitable, a deed of surrender shall be executed on a non-judicial stamp in presence of the Committee.

Time stipulation :

In case of surrendered child, two months reconsideration time shall be given to the biological parent or parents after surrender before declaring the child legally free for adoption.

In this regard provisions of Rule 78 of M.P. Juvenile Justice (Care & Protection of Children) Rules, 2003 are also to be looked into as therein, apart provisions as aforesaid, some additional features in context of establishment of adoption agencies, procedure in case of abandoned or surrendered children, role of licensed or recognized Government and non-Government agencies, for adoption, role of children homes/State run orphanages as placement agencies, guidelines for the preparation of home study report, follow up procedure of child placed within the country, maintenance of records and registers by every recognized children homes and State run orphanages, disruption proceedings required as well as role of Child Welfare Committee in adoption procedure has been prescribed.

In this rule it is also prescribed in sub rule (10) that in keeping with the provisions of the various guidelines for adoption issued from time to time, by the State Government, or the Central Adoption Resource Agency and notified by the Central Government, children may be given in adoption by a Court after satisfying itself regarding the investigations have been carried out as are required for giving such children in adoption.

Though in this Rule under sub rule (11) Juvenile Justice Board has been entrusted for following process for declarating adoption of children. But this is contrary to the present legal position as noticed above while discussing the competency of Court to entertain adoption matters under Rule 33 (5) of Juvenile Justice (Care & Protection of Children) Rules, 2007 as well as specific definition of "Court" in M.P. Juvenile Justice (Care & Protection of Children) Rules, 2003 itself incorporated by 2008 amendments in definition clause as Section 2 (v) which specifies "Court" to be Principal Civil Court of the District. Hence, the provisions under Rule 78 (11) supra can be ignored.

INTER-COUNTRY ADOPTION

In the case of ***Laxmi Kant Pandey*** (surpa), Hon'ble the Supreme Court has laid down following normative and procedural safeguards.:

- All applications for adoption of a child by foreigners shall be sponsored by a social or child welfare agency so recognizned or licensed by the Government of the country to which the foreigner belongs.
- No application by a foreigner for taking a child in adoption shall be entertained or filed directly by any social or welfare agency in India but will be routed through an agency in the country to which the foreigner belongs and which is recognized by CARA.
- Every such application from such social or child welfare agency shall be accompanied and supported by a Home Study Report (HSR) in detail with recent photographs of the family and other particulars showing the social and economic status of the foreigner and declaration that he will maintain the child as his own and provide for his education and upbringing.
- All private adoptions directly or indirectly in any manner are banned and any such adoptions shall be null and void.

GUIDELINES FOR ADOPTION FROM INDIA – 2006 UNDER CARA

Criteria for Foreign Prospective Adoptive Parent/s (FPAP) (Para 4.1) :

- Married couple with 5 years of a stable relationship, age, financial and health status with reasonable income to support the child should be evident in the Home Study Report.
- Prospective adoptive parents having composite age of 90 years or less can adopt infants and young children. These provisions may be suitably relaxed in exceptional cases, such as older children and children with special needs, for reasons clearly stated in the Home Study Report (HSR). However, in no case should the age of any one of the prospective adoptive parents exceed 55 years.
- Single persons (never married, widowed, divorced) upto 45 years can also adopt.
- Age difference of the single adoptive parent and child should be 21 years or more.
- A FPAP in no case should be less than 30 years and more than 55 years.
- A second adoption from India will be considered only when the legal adoption of the first child is completed.
- Same sex couples are not eligible to adopt.

Procedure for Inter-Country Adoption as per CARA guidelines

Inter-country adoption is possible with the involvement of authorised agencies/authorities in both the sending and receiving countries. There can be no direct adoption by any foreign/parent of Indian origin/NRI parents.

Step I – Enlisted Foreign Adoption Agency (EFAA)

The applicants will have to contact or register Enlisted Foreign Adoption Agency (EFAA)/Central Authority/Government Department in their country in which they are resident, which will prepare the Home Study Report (HSR). The validity of HSR will be for the period of two years. HSR prepared before two years will be updated at referral.

The applicants should obtain the permission of the competent authority for adopting a child from India. Where such Central Authorities or Government Departments are not available, then the applications may be sent by enlisted agency with requisite documents including documentary proof that the applicant is permitted to adopt from India.

The adoption application should contain all documents prescribed in Annexure-2. All documents are to be notarized. The signature of the notary is either to be attested by the Indian Embassy/High Commission or the appropriate Govt. Department of the receiving country. If the documents are in any language other than English, then the originals must be accompanied by attested translations.

A copy of the application of the prospective adoptive parents along with the copies of the HSR and other documents will have to be forwarded to Recognized Indian Placement Agency (RIPA) by the Enlisted Foreign Adoption Agency (EFAA) or Central Authority of that country.

Home Study Report (HSR) :

Home Study Report should include (a) Social status and family background; (b) Description of home; (c) Standard of living as it appears in the Home; (d) Current relationship between husband and wife; (e) Current relationship between the parents and children (if any children); (f) Development of already adopted children (if any); (g) Current relationship between the couple and the members of each other's family; (h) Employment status of the couple; (i) Health details such as clinical test, hear condition, past illness, etc. (medical certificate, etc.); (j) Economic status of the couple; (k) Accommodation for the child; (l) Schooling facilities; (m) Amenities in the home; (n) Reasons for wanting to adopt an Indian child; (o) Attitude of grand parents and relatives towards adoption; (p) Anticipated plans for the adoptive child; and (q) Legal status of the prospective adoptive parents.

Step II – Role of Recognized Indian Placement Agency (RIPA)

- On receipt of the documents, the Indian Agency will make efforts to match a child who is legally free for inter-country adoption with the applicant.
- In case no suitable match is possible within 3 months, the RIPA will inform the EFAA and CARA with the reasons therefor.

Step III – Child being declared free for inter-country adoption – Clearance by Adoption Co-ordinate Agency (ACA)

- Before a RIPA proposes to place a child in the inter-country adoption, it must apply to the Adoption Coordinating Agency for assistance for Indian placement.

- The child should be legally free for adoption. ACA will find a suitable Indian prospective adoption. ACA will find a suitable Indian prospective adoptive parent within 30 days failing which it will issue clearance certificate for inter-country adoption.
- ACA will issue clearance for inter-country adoption within 10 days in case of older children above 6 years, siblings or twins and special needs children as per the additional guidelines issued in this regard.
- In case the ACA cannot find suitable Indian parent/parents within 30 days, it will be incumbent upon the ACA to issue a clearance certificate on the 31st day.
- If ACA clearance is not given on 31st day, the clearance of ACA will be assumed unless ACA has sought clarification within the stipulation period of 30 days.
- NRI parent(s) (at least one parent) holding Indian Passport will be exempted ACA clearance, but they have to follow all other procedures as per the guidelines.

Step IV – Matching of the Child Study Report with Home Study Report of FPAP by RIPA

After a successful matching, the RIPA will forward the complete dossier to CARA for issuance of "No Objection Certificate".

Step V – Issuance of No Objection Certificate (NOC) by CARA

- CARA will issue the NOC within 15 days from the date of receipt of the adoption dossier, if complete in all respect.
- If any query or clarification is sought by CARA, it will be replied to by the RIPA within 10 days.
- No Indian Placement Agency can file an application in the competent court for inter-country adoption without a "No Objection Certificate" from CARA.

Step VI – Filing of Petition in Court

- On receipt of the NOC from CARA, the RIPA shall file a petition for adoption/ guardianship in the competent court within 15 days.
- The competent court may issue an appropriate order for the placement of the child with FPAP.
- Judicial courts examine the documents filed and satisfy itself about everything before issuing order. A double check is made by the court about composite, attitude and income of the adoptive couples.
- As per the Hon'ble Supreme Court directions, the concerned Court may dispose the case within 2 months.

Step VII – Passport and Visa

- RIPA has to apply in the Regional Passport Office for obtaining an Indian Passport in favour of child.
- The concerned Regional Passport Officer may issue the passport within 10 days.

- Thereafter, the VISA entry permit may be issued by the Consulate/Embassy/ High Commission of the concerned for the child.

Step VIII – Child Travels to adoptive country

The adoptive parent/parents will have to come to India to accompany the child back to their country.

[**Note :** RIPA, EFAA and ACA referred above are specified in detail under Chapters V, VI and VIII respectively of CARA guidelines, 2006]

OTHER RELEVANT PARTS OF CARA GUIDELINES, 2006

Criteria for eligible children (para 4.2) :

- The child must be legally free for adoption
- Clearance from ACA/State Government is mandatory for all children except wherever exempted under the guidelines
- Siblings/twins/triplets cannot be separated except in exceptional cases.
- Two unrelated children cannot be proposed to a foreign family at a time.
- A child may as far as possible be placed in adoption before it reaches the age of 12.
- The consent of the child has to be obtained wherever applicable.

Where there is no Enlisted Foreign Adoption Agency (EFAA) (para 4.3) :

In the case of an Indian National residing in a country where there is no enlisted agency, CARA may allow an organization or individual recommended by the Indian Embassy to do the Home Study Report (HSR), undertaking as prescribed in the guidelines and other documentation. The said application may be forwarded with the approval of the Indian Embassy to CARA.

Wherever there is no Foreign Adoption Agency enlisted by CARA in any country, the concerned Government Department/Ministry or any authorised body of that country may forward the original application and related documents of the prospective adoptive parents to CARA through the Indian Embassy/High Commission. In case of resident non-citizens where the host Government may not be willing to sponsor the cases, the documentation may be done through the Embassy of the country to which the applicant belongs. Home studies however will have to be prepared by a qualified Agency/Social Worker in all cases. In case CARA receives the papers it will send those papers to any of the Recognized Placement Agencies (RIPA) for further processing the case only after HSR has been approved by it. The procedure to be adopted thereafter shall be the same as indicated in the process.

Foreign nationals living in India (para 4.4) :

In case of foreigners who have been living in India for one year or more, the HSR and other connected documents may be prepared by the RIPA which is processing the application of such foreigners for the guardianship of the child. An undertaking should be given by the concerned Embassy/High Commission

that the child will be legally adopted in that country and also mention an agency/ organization who would send the progress reports and take care of the child in case of any disruption as and when the child is taken abroad. However, a certificate is required from the concerned authority in the country of permanent residence of the FPAP indicating that the child shall be allowed to enter the country and get adopted in due course.

Rights of the child taken abroad (para 4.5) :

When the Court makes an order appointing adoptive parents as the guardians of the child, the order shall contain an undertaking of the adoptive parents that they shall protect and safeguard the best interest of the child and that the child would be legally adopted in the receiving State not later than two years from the date of the order. On such adoption in the receiving State, subject to the Laws of the Country the child would have all rights recognized under International Law.

Follow-up Report (refer para 6.6 Chapter VI of CARA Guidelines 2006)

(a) The EFAA/Central Authority with reference to every child shall send follow-up reports with photographs of the child on a six monthly basis for a period of 2 years or until such time as the legal adoption is completed and citizenship is acquired in the receiving country, to

  (i) CARA

  (ii) Court that awarded the guardianship in India

  (iii) Indian Embassy

  (iv) Concerned RIPA

(b) The EFAA/Central Authority will forward a copy of the legal adoption order of the appropriate Authority in that Country as soon as it is made to

  (i) CARA

  (ii) Court that awarded the guardianship in India

(c) Where the child is not legally adopted by the adoptive parents in the receiving State within two years from the date of order of the Court in India appointing the adoptive parents as guardians either on account of disruption in the family or on account of the adoptive parents failing to get adjusted to the behaviour of the child or otherwise, the foreign EFAA which has processed the adoption of the child in the receiving State should immediately withdraw the child from the adoptive parents for placement of the child in adoption as soon as possible. The foreign agency shall give an undertaking to this effect to the Court processing the case in India.

EFAA or Central Authority in the receiving country may arrange get together of children of Indian origin and their adoptive families from time to time and may also involve concerned Indian Diplomatic Missions.

Priority to In-Country Adoption (Refer Step III, Para 5.5 Chapter V of CARA Guidelines 2006)

Priority has to be given to in-country adoption so that every child gets an opportunity to find a family within its own cultural milieu and an Indian child should be given the adoption according to the following order of priority:

(i) Indian citizens living in India

(ii) Indian citizens living abroad (NRI)

(iii) Both parents of Indian origin abroad (PIO)

(iv) One parent of Indian origin abroad (PIO)

(v) Foreign families.

[**Note :** NRI means Indian citizens who hold Indian passports and are presently residing abroad.

Persons of Indian origin (PIO) means a foreign citizen (not being a citizen of Pakistan, Bangladesh and other countries as may be specified by the Central Government from time to time) if:

(a) he/she at any time held an Indian Passport; or

(b) he/she or either of his parents or grand parents or great grandparents was born in and permanently resided in India as defined in the Government of India Act, 1935 and other territories that became part of India thereafter provided neither was at any time a citizen of any of the aforesaid countries (as referred to) above;

(c) he or she is a spouse of a citizen of India or a person of Indian origin covered under (a) or (b) above.]

CONCLUSION

The enactment of the Juvenile Justice (Care and Protection of Children) Act, 2000 and its subsequent amendment in 2006 is definitely a significant effort of the legislature towards recognition of adoption of orphan, abandoned and surrendered children by people irrespective of their religion. It is more children-oriented unlike other legislations. But it may be mentioned at the same time that some more facts need to be considered specifically by the legislature. As for example, the Act is silent about the criteria for age difference between the adoptee and adoptive parents in case they are of opposite sex. This is an essential factor for adoption, which should be considered seriously for the purpose of preventing child abuse and trafficking. We should never forget the thrust of the National Policy for the Welfare of Children (1974) that "the nation's children are a supremely important asset. Their nurture and solicitude are our responsibility".

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PROTECTION OF FUNDAMENTAL RIGHTS GUARANTEED UNDER CHAPTER III OF THE CONSTITUTION OF INDIA BY WAY OF INJUNCTION ORDER UNDER SPECIFIC RELIEF ACT, 1963

Judicial Officers
Districts Chhindwara and Satna*

INTRODUCTION

The Fundamental Rights incorporated in Part III of the Constitution, as we all know, can be protected by invoking the Writ Jurisdiction of the Supreme Court and the High Courts under Articles 32 and 226 of the Constitution of India whereas the law relating to injunction is found in Part III Chapters VII and VIII of the Specific Relief Act, 1963 consisting of Sections 36 to 42 and Code of Civil Procedure, 1908, Section 94 (c) and Order 39 Rules 1 and 2.

Injunction, as we all know, is a judicial process commanding an act which the Court regards as essential to justice or restraining an act which it thinks contrary to equity or good conscience. It is an equitable relief of preventive nature, the grant or refusal of which lies with the discretion of the Court. While the relief of perpetual injunction, which is governed by the Specific Relief Act, 1963, being a final relief, can be granted only by the decree of the Court after hearing on the merits of the suit, a temporary injunction, which is governed by the CPC, being a relief of interim nature is usually granted during the pendency of a suit for preservation of matter in dispute till the rights asserted by the parties to the suit are determined on merits.

NATURE OF FUNDAMENTAL RIGHTS

Before delving into the problem which has been posed before us, we must have a clear notion about what are "Fundamental Rights" as well as nature thereof. A common man's perception is that the Constitution of India is source of "Fundamental Rights". Is it true? We adopted our Constitution only after independence in 1950. Whether these rights were not in existence before independence? Whether Constitution of India introduced it for the first time? Answer to all these questions is certainly 'No'. The Fundamental Rights are defined as basic human rights which every Indian citizen has for a proper and harmonious development of personality. It guarantees civil liberties such that all Indians can lead their lives in peace and harmony as citizens of India. These include individual rights common to most liberal democracies such as equality before law and freedom of expression, freedom of association, freedom of speech, and peaceful assembly, freedom to practice religion, the right to constitutional remedies for the protection of civil rights by means of writs and habeas corpus.

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* The articles received from Chhindwara and Satna have been compiled by the Institute

In case of *M. Nagraj v. Union of India, AIR 2007 SC 71*, the Apex Court observed:

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

It is very clear that "Fundamental Rights" are the basic rights which a man possessed and no one has right to encroach upon them. The Supreme Court unanimously said that the fundamental rights are a basic structure of the Constitution and cannot be removed or diluted even by the Parliament itself. [See *M. Nagraj* (supra)]

JURISDICTION OF HIGH COURT AND SUPREME COURT RELATING TO FUNDAMENTAL RIGHTS

No doubt Constitution gives very wide power to High Court to issue writ in the nature of prohibition or mandamus, certiorari under Article 226 of the Constitution, Supreme Court may also exercise the same power if the right is hit by the State. Remedy under Article 32 is available only for enforcement of Fundamental Rights, while High Court under Article 226 on the other hand can grant relief for any other purpose also. (See ***Smt. Poonam v. Sumit Tanwar, AIR 2010 SC 1384***). A writ lies only against a person if it is a statutory body or performs a public function or discharges a public or a statutory duty, or a "State" within the meaning of Article 12 of the Constitution. [See ***Anandi Mukta Sadguru Trust v. V.R. Rudani, AIR 1989 SC 1607, VST Industries Ltd. v. VST Industries Workers' Union and anr., (2009) 1 SCC 298*** and ***State of Assam v. Barak Upatyaka U.D. Karamchari Sanstha, AIR 2009 SC 2249***]

Article 32 of the Constitution says "the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this

Part is guaranteed" and sub clause (2) further provides that Supreme Court shall have power to issue directions or orders or writs including writs in the nature of habeous corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. Therefore, the Supreme Court is a guarantor to protect the fundamental rights. Dr. B.R. Ambedkar described Article 32 as the very soul of the Constitution. But rider is that in case of Article 32, people must establish that right infringed is a fundamental right which falls under Part III of the Constitution and encroacher is none other than the "State". In case of Article 226, it is not necessary that right infringed is a fundamental right. It may be other rights also.

RELEVANT PROVISIONS OF SPECIFIC RELIEF ACT, 1963

If any person violates any right of a plaintiff which causes breach of an obligation existing in his favour whether expressly or by implication, plaintiff may knock the door of a Civil Court and pray for grant of injunction and in proper case if the Court deems fit, it can exercise its discretionary jurisdiction in favour of plaintiff and grant a perpetual injunction under Section 38 or mandatory injunction under Section 39 of the Specific Relief Act, 1963, by a decree, as the situation demands in a particular state of affair. And if situation demands may also grant by order a temporary injunction in the form of prohibitory and mandatory both under Section 37 of the Act, but it will be governed by the provision of Section 94 and Order 39 Rules 1 and 2 of the Civil Procedure Code, 1908. No doubt, power is discretionary and of course it can be exercised well within circle of settled judicial norms. As per Section 2 (a) of the Specific Relief Act, 1963, "obligation" includes every duty enforceable by law. As the "Fundamental Rights" are also rights which a man possess as a human being, definitely if these rights are in jeopardy or in danger, one can take shelter of Courts of law. As we are well aware our Constitution makers made the Fundamental Rights enforceable. These rights create obligation in favour of a man. Hence, without any peril of doubt, if any person infringes this obligation injunction can be granted to prevent violation of "Fundamental Rights".

Under the Specific Relief Act, 1963 the public authority may be commanded to do a thing the law requires it to do by mandatory injunction (which is more or less in the nature of writ of mandamus); this may be issued against both administrative authorities and quasi-judicial bodies. Any person having a legal character or right may institute a suit against any person denying his title. This also includes his rights when infringed by an illegal or ultravires action of the administrative authorities e.g. Denial of a right to vote or to stand as a candidate at any election, compulsory retirement, prevention of sale of municipal land in contravention of the statute etc.

WHETHER JURISDICTION OF CIVIL COURTS IS OUSTED BY ARTICLE 226 OR 32 OF THE CONSTITUTION?

Reminding the Courts below of their constitutional duty to give effect to constitutional mandate, in ***New Standard Scale Engineering Works (M/s) v. State of MP and another, 1989 JLJ 314***, Hon'ble T.N. Singh, J in concluding para 20 stated:

> "However, reiterating the view I expressed in ***Nihalsingh v. Ram Bai, 1987 JLJ 44***, I would once again remind the Courts below of their constitutional duty of giving effect to constitutional mandates which are binding on all courts and authorities in India. On account of jurisdictional limitations of territorial and other dimensions District Courts cannot obviously make declarations as respects vires of an enactment but the mandate of Article 13 of the Constitution still obligates them to give appropriate relief to the citizen when in any particular case, any administrative action is challenged as unconstitutional and void. ..... When any administrative order is challenged as lacking in jurisdictional competence or when infringement of any constitutional provision is complained, the Court below has overlooked, a citizen cannot only approach this Court on the writ side but also the Civil Court and the statutory appeal would not be considered as exclusive or efficacious remedy."

By reading of Articles 32 as well as 226, it is no where provided that Civil Court will shut its eyes and leave the subjects on their own fate, if complaint is regarding violation of fundamental rights. Neither these provisions say that if any one comes to move their jurisdiction, Civil Court would show them the roads leading towards High Court or Supreme Court. It is not a hidden fact that more than 85% of the population of this country has no means to go to Delhi or before a High Court. We know that to fight a case in the High Court or Supreme Court is very expensive. More or less 80% of the litigants first come before the Civil Courts. If the Civil Courts would not play a role to protect the fundamental right, dream of the Constitution makers would frustrate. In our view, Civil Courts are the front-line protector of people's Constitutional rights.

Per Contra, Civil Courts exercise their jurisdiction under Section 9 of Civil Procedure Code, 1908, which is declaratory in nature. It declares that the Courts shall, subject to the provisions contained therein have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. Each word and expression casts an obligation on the Court to exercise jurisdiction for enforcement of right. The word 'shall' makes it mandatory.

No Court can refuse to entertain a suit if it is of description mentioned in the Section. That is amplified by use of the expression, 'all suits of civil nature'. The word 'civil' according to dictionary means, 'relating to the citizen as an individual; civil rights'. In *Black's Law Dictionary*, it is defined as, 'relating to provide rights and remedies sought by civil actions as contrasted with criminal proceedings'. In law it is understood as an antonym of criminal. The word 'civil nature' is wider than the word 'civil proceeding'. The section would, therefore, be available in every case where the dispute has the characteristic of affecting one's rights which are not only civil but of civil nature. (See ***Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma, AIR 1995 SC 2001***). **No one can dispute infringement of fundamental right may be dispute of civil nature.**

One of the basic principles of law is that every right has a remedy. *Ubi jus ibi remediem* is the well known maxim. The well-settled rule in this regard is that the Civil Courts have the jurisdiction to try all suits of civil nature except those entertainment whereof is expressly or impliedly barred. The jurisdiction of Civil Courts to try suits of civil nature is very expensive. Any statute which excludes such jurisdiction is, therefore, an exception to the general rule that all disputes shall be triable by a Civil Court. Any such exception cannot be readily inferred by the Courts. The Court would, lean in favour of a construction that would uphold the retention of jurisdiction of the Civil Courts and shift the onus of proof to the party that asserts that Civil Court's jurisdiction is ousted. (See ***Ramesh Gobindram*** **(deceased by LRs)** ***v. Sugra Humayun Mirza Wakf, AIR 2010 SC 2897***) In the case of ***Smt. Ganga Bai v. Vijay Kumar, AIR 1974 SC 1126***, it was held that there is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute, one may, at one's peril, bring a suit of one's choice. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. The expansive nature of the Section is demonstrated by use of phraseology both positive and negative. The earlier part opens the door widely and latter debars entry to only those which are expressly or impliedly barred. Therefore, dispute relating to the fundamental rights can be tried by the Civil Court only rider is that whether any law debars to try such suits. As we have seen that neither Article 226 or 32 bars the jurisdiction of Civil Court and no such enactment is in existence which specifically debars the Civil Court to entertain such dispute. Corollary result is that Civil Courts can entertain such disputes and issue a writ of injunction to prevent the violation of "Fundamental Rights". It appears that Civil Court has wide power than High Court and Supreme Court to prevent violation of fundamental rights since High Court and Supreme Court's power is limited against the 'State' only, while Civil Court can issue injunction against 'State' and individual also.

LIMITATION TO THE JURISDICTION OF CIVIL COURT

One can raise the question that what would be the position when "State" violates fundamental right through an enactment? Whether the Civil Court can declare that enactment or any provision of enactment is ultra virus ? Answer is certainly 'No'. In case of ***Central Bank of India v. Vrajlal Kapurchand Gandhi, AIR 2003 SC 3028*** it was held that **Court or Tribunal constituted under a statute cannot adjudicate upon the constitutional validity of concerned statute.** [See also ***Dhulbhai v. State of Madhya Pradesh, AIR 1969 SC 78*** and ***West Bengal Electricity Regulatory Commission v. CESC Ltd.,(2002) 8 SCC 715.***]

At this juncture it would be apposite to mention here the proviso to Section 113 of CPC which bars the jurisdiction of Civil Court, which runs as under:-

> "Provided that where the Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for the opinion of the High Court."

Article 228 of the Constitution also gives power to High Court to withdraw where the case involves interpretation of any provision of Constitution including fundamental rights

> **"228. Transfer of certain cases to High Court.** If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may
>
> (a) either dispose of the case itself, or
>
> (b) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment."

It is very clear if Civil Court comes to the conclusion that an issue regarding constitutional validity of an Act or any provision therein is raised, and decision on the issue is necessary for the disposal of the case, and also that validity of the Act has not been decided by the High Court or the Supreme Court, the court has no option but to refer the matter following the procedure prescribed under O.46 Rule 1 CPC to the High Court. Civil Court cannot itself decide the virus of the Act or provision of the Act. (See ***Geevarghese George v. K.P.Abraham AIR 1979 Ker 237 and P. Textiles Ltd.v. A.P. S. Financial Corpn. AIR 1971 AP 339.***) Language of Section 113 also Juggests that Civil Court's Jurisdiction is only restricted if the validity of the Act is in question. If the validity of the Act or Regulation is not in question, the Civil Court may adjudicate dispute relating to the fundamental right if the violation is of a civil nature.

CONCLUSION

With the above discussion, it is clear that violation of fundamental rights guaranteed under Chapter III of the Constitution of India can be protected by way of injunction order under Specific Relief Act, 1963 and all the three tiers of the judiciary are competent to do so. But a suit has several advantages over a writ. A suit for injunction may be filed in district Courts which is a less expensive remedy. Furthermore, suits may be accompanied by claim for damages which the superior Courts do not entertain. Therefore, it is concluded that:

1. Fundamental Rights are basic human rights which a person must possess as a human being. It is an obligation in favour of citizen.
2. If these rights are violated by a person or association or the State, people can knock the door of a Civil Court if violation is of civil nature.
3. Civil Court may in a proper case, issue mandatory or prohibitory injunction by decree or temporary injunction by an order against any person or the State, except in such cases where it is barred by any law.
4. However, Civil Court can not give dictum that any Act, Regulation or any provision thereof is against the fundamental rights and therefore, unconstitutional.
5. While in course of adjudication any question regarding interpretation of constitutional validity of any Act or Regulation comes, it must refer to the High Court, if it is necessary to adjudicate the dispute, and its validity has not been decided by the High Court or the Supreme Court.

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SCOPE AND PROCEDURE OF DETERMINATION OF QUESTION AS TO LEGAL REPRESENTATIVE AND EFFECT OF SUCH DETERMINATION ON RIGHT OR TITLE OF THE LEGAL REPRESENTATIVE

Judicial Officers
District Dhar

INTRODUCTION

The Supreme Court in it's one of the leadings decisions of ***S. Amarjit Singh Kalra v. Pramod Gupta, AIR 2003 SC 2588***, observed as follows:

> "A careful reading of the provisions contained in O. 22 of C.P.C. as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation and culmination into an effective adjudication and not to retard the further progress of the proceedings and thereby non-suit the others similarly placed as long as their distinct and independent rights to property or any claim remain in- tact and not lost forever due to the death of one or the other in the proceedings."

Order 22 of the Code of Civil Procedure, 1908 (in short- "CPC") provides for procedure to be followed in case of death, marriage and insolvency of parties. It is ruled that the death of a plaintiff or defendant would not cause abatement of the suit if the right to sue survives. In such a situation, the suit may be proceeded with by a legal representative of the deceased party. Therefore, the question as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant carries importance. Rule 5 of Order 22 of CPC provides for determination of question as to legal representative.

The term legal representative is defined in Section 2 (11) of CPC which is as under:-

> "legal representative" means a person who in law represent the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party who sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

The expression "legal representative" is inclusive in character and its scope is very wide. Executors, Administrators, Reversioners, Hindu Coparceners, Assignees, Legatees, Legatees under a Will, etc. have been held to be included within the definition of legal representatives.

SCOPE AND PROCEDURE

Where a dispute is raised as to whether any person is or is not the legal representative of the deceased party, it should be judiciously determined by the Court under O. 22 R. 5 C.P.C. This question cannot be relegated to subsequent proceedings. When rival parties claim to be legal representatives of a deceased plaintiff or defendant, or when there is only one claimant and his representative character is questioned, the Court must determine that question before a suit is proceeded with. "Court" means the Court before whom the question arises, i.e., the trial Court or the appellate Court if the question arises at appellate stage. The Court has to take a decision as to who is the legal representative of the deceased party and cannot shirk its responsibility by impleading all the parties who are claiming to be the legal representative and leaving the matter to a separate suit.

When there are rival applicants, one claiming under a Will and the other as natural heir, the proper course is to implead both of them as the legal representatives and the dispute *inter se* will have to be decided in separate proceeding. For example, the person claiming through a Will, would be required to establish his rights in the probate proceedings. (see- ***Suresh Kumar Bansal v. Krishna Bansal, AIR 2010 SC 344***).

The question of abatement of suit/appeal does not arise till the question as to who is the legal representative or a legatee, is decided by following the procedure laid down under O.22 R.5 CPC. Provisions of O.22 R. 5 stands complied with when the question of substitution of heirs and legal representatives is decided by the Court and that order cannot be challenged by the same person, who filed the earlier application, claiming a right under a Will. An application under O.22 R.5 of CPC may in substance be treated as an application under R.4. The enquiry should not be postponed to execution stage. Substitution must be limited to the purpose of carrying on the suit and cannot confer any right to heirship or property.

A Full Bench of Punjab and Haryana High Court in ***Mohinder Daur v. Piara Singh, AIR 1981 Punj and Har 130*** has held that determination of the point as to who is the legal representative of the deceased plaintiff or defendant under Order 22 Rule 5 of the Code of Civil Procedure is only for the purposes of bringing legal representatives on record for the conducting of those legal proceedings only and does not operate as *res judicata* and the *inter se* dispute between the rival legal representatives has to be independently tried and decided in separate proceedings. Following this decision another Judge of Punjab and Haryana High Court in ***S. Charanjit Singh v. Bharatinder Singh, AIR 1988 Punj and Har 123*** held that proper course to follow is to bring all the legal representatives on record so that they vouchsafe the estate of the deceased for ultimate benefit of the real legal representatives. (see- ***Vijayalakshmi Jayaram v. M. R. Parasuram, AIR 1995 AP 351***).

In the matter of ***Suresh Kumar Bansal*** (supra), it has been held as under:

> "It is now well settled that determination of the question as to who is the legal representative of the deceased plaintiff or defendant under Order 22 Rule 5 of the Code of Civil Procedure is only for the purpose of bringing legal representatives on record for the conduction of those legal proceedings only and does not operate as *res judicata* and the *inter se* dispute between the rival legal representatives has to be independently tried and decided in probate proceeding. If this is allowed to be carried on for a decision of an eviction suit or other allied suits, the suits would be delayed, by which only the tenants will be benefited.
>
> In order to shorten the litigation and to consider the rival claims of the parties, in our view, the proper course to follow is to bring all the heirs and legal representatives of the deceased-plaintiff on record including the legal representatives who are claiming on the basis of the will of the deceased plaintiff so that all the legal representatives, namely, the appellant and the natural heirs and legal representatives of the deceased plaintiff can represent the estate of the deceased for the ultimate benefit of the real legal representatives. If this process is followed, this would also avoid delay in disposal of the suit."

Determination of the issue relating to a legal representative is summary in nature and the question of application of principle of *res judicata* is not attracted. The determination under O.22 R.5, though held after examination of witnesses is nevertheless a summary in character and merely because the parties have examined witnesses it does not mean that principle of *res judicata* is attracted. It is for the simple reason that the purpose of leading evidence and adjudication is confined only to implead the applicant as a legal representative of the deceased party.

The provisions of Rules 4 and 5 of Order 22 are mandatory. When a respondent in an appeal dies, the Court can neither simply say that it will hear all rival claimants to the estate of the deceased respondent and proceed to dispose of the appeal nor can it implead all persons claiming to be legal representatives, as parties to the appeal without deciding who will represent the estate of the decease, and proceed to hear the appeal on merits. The Court cannot also postpone the decision as to who is the legal representative of the deceased respondent, for being decided along with the appeal on merits. The Code clearly provides that where a question arises as to whether any person is or is not the legal representative of a deceased respondent, such question shall be determined by the Court. The Code also provides that where one of the respondents dies and the right to sue does not survive against the surviving

respondents, the Court shall, on an application made in that behalf, cause the legal representatives of the deceased respondent to be made parties, and then proceed with the case. Though Rule 5 does not specifically provide that determination of legal representative should precede hearing of the appeal on merits, Rule 4 read with Rule 11 makes it clear that the appeal can be heard only after the legal representatives are brought on record.

In the matter of ***Dashrath Rao Kate v. Brij Mohan Srivastava, (2010) 1 SCC 277 = AIR 2010 SC 897***, the Supreme Court has held that as a legal position, it cannot be disputed that normally, an enquiry under Order 22 Rule 5 C.P.C. is of summary nature and findings therein cannot amount to *res judicata*, however, that legal position is true only in respect of those parties, who set up a rival claim against the legatee. For example, here, there were two other persons, they being 'R' and 'A', who were joined in the civil revision as the legal representatives of 'S'. The finding on the Will in the order dated 09-09-1997 passed by the Trial Court could not become final as against them or for that matter, anybody else, claiming a rival title to the property *vis-a-vis* the appellant herein.

In ***Dashrath Rao Kate's*** (supra), the Apex Court, in the facts of the case, opined that it would not be expected that when the question regarding the Will was gone into in a detailed enquiry, where the evidence was recorded not only of the appellant, but also of the attesting witness of the Will and where these witnesses were thoroughly cross-examined and where the defendant also examined himself and tried to prove that the Will was a false document and it was held that he had utterly failed in proving that the document was false, particularly because the document was fully proved by the appellant and his attesting witness, it would be futile to expect the witness to lead that evidence again in the main suit.

EFFECT OF DETERMINATION ON RIGHT OF THE LEGAL REPRESENTATIVE

The Supreme Court in the case of ***Jaladi Suguna v. Satya Sai Central Trust and Others, (2008) 8 SCC 521= AIR 2008 SC 2866***, has laid down the effect of determination of the question O. 22 R. 5 C.P.C. as under :

> "If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the Court and such legal representative is brought on record, it can be said that the estate of the deceased is represented. The determination as to who is the legal representative under Order 22 Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property which is the

subject-matter of the suit, *vis-a-vis* other rival claimants to the estate of the deceased."

The power of the Court while deciding a dispute of legal representative in a suit is for limited purpose and does not confer any right of title/ownership/ interest on the suit property. It may seem to be surprising that after leading evidence, examining witness and conclusion/findings of Court, the parties are required to adjudicate and contest the cause again in an independent suit or proceedings for the purpose of claiming right or title in the subject-matter of suit. The reason for this is very simple that under O.22 R.5, the question of enquiry goes only to the extent of deciding as to who is the legal representative of the deceased plaintiff/defendant and the adjudication is not concerned with full-fledged enquiry of rights and interest in the suit property.

In ***Kalyanmal Mills Ltd. v. Volimohammed, AIR 1965 MP 72***, the Madhya Pradesh High Court has held that the effect of an order passed under Order 22 Rule 5 would not be to confer on the intermeddler any right or title on interest, if there be none. Such an order is only for the purposes of the suit itself. The right of the intermeddler has to be adjudicated upon independently of such order.

WHETHER RIGHT OF HEIRSHIP IS NOT INVOLVED IN DETERMINING THE QUESTION OF LEGAL REPRESENTATIVE?

The Rajasthan High Court in the case of ***Kalu Ram v. Charan Singh, AIR 1994 Raj 31*** has held that though ordinarily all legal heirs are also legal representatives, but the converse is not true; appointment of a legal representative in a proceeding is necessarily limited to that proceeding; it does not confer upon him any right of heirship in to the suit estate; it does not operate as *res judicata* on a the point of heirship in subsequent proceedings. Thus, the right to heirship is not involved in determining as to who is, or is not, a legal representative; the court has only to see whether the person claiming to represent the estate in the lis has sufficient interest in carrying on the ligation and is not an imposter. And if there are rival claimants, it may be necessary to decide as to which of them is really entitled to represent the estate; but even that decision does not determine their rights *inter se* to succeed to the property; that right has still to be established in independent proceedings in accordance with law.

In ***Vidyawati v. Man Mohan and others, AIR 1995 SC 1653***, the Supreme Court considered the question whether a person impleaded as a legal representative of the deceased defendant can independently claim title to and interest in the property under a Will. The Supreme Court observed that whether the petitioner has independent right, title and interest dehors the claim of the first defendant is a matter to be gone into at a later proceeding. It is true that when the petitioner was impleaded as a party-defendant, all rights under O. 22 R. 4 (2), and defences available to the deceased defendant became available to her. In addition, if the petitioner had any independent right, title or interest in the property, then she had to get herself impleaded in the suit as a party-defendant. Thereafter, she

could resist the claim made by the plaintiff or challenge the decree that may be passed in the suit. It is open to the petitioner to implead herself in her independent capacity under Order 1 Rule 10 or retain the right to file independent suit asserting her own right.

The right of a legal representative to make any defence is not absolute but restricted to his character as legal representative of the deceased. In ***J.C. Chatterjee v. Kishan Tandon, AIR 1972 SC 2526***, the Apex Court held as under

> ".....any person so made a party as a legal representative of the deceased respondent was entitled to make any defence appropriate to his character as legal representative of the deceased respondent. In other words, the heirs and the legal representative could urge all contentions which the deceased could have urged except only those which were personal to the deceased. Indeed this does not prevent the legal representatives from setting up also their own independent title, in which case there could be no objection to the court impleading them not merely as the legal representatives of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the independent title."

CONCLUSION

Where any such application is moved by the parties averting to be the legal representative of the deceased, it is the duty of the Court to decide the dispute first and then the matter/case should be further proceeded. A Court cannot postpone this issue for deciding the dispute at the stage of passing judgment. Such a course has been denounced by the Supreme Court, as it leads in multiplicity of proceedings. The parties may be permitted to lead evidence if desired so by them. The procedure adopted should be summary in nature and merely, if the parties have lead evidence it does not mean that the provisions/ principles of *res judicata* are attracted. The findings arrived by the Court for deciding this dispute does not lead to the conclusion that it had bearing on the rights or title of the legal representatives over the property of the deceased party. A decision under O.22 R.5 C.P.C. is limited for the purpose of carrying the suit and does not have the effect of conferring right to heirship or to property. However, it should be borne in mind that such a person is free to implead himself as a party defendant to claim his right, title or interest in suit property or to file independent suit for this purpose.

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"सिविल मृत्यु" "जाति" और "जन्मतिथि" की केवल घोषणा के लिये वादों की वैधानिकता, पोषणीयता एवं विचारणीय बिन्दु

न्यायिक अधिकारीगण
जिला शिवपुरी, नरसिंहपुर एवं मंडला

धारा 9 सिविल प्रक्रिया संहिता 1908 के अनुसार व्यवहार न्यायालय सभी व्यवहार प्रकृति के वादों के विचारण की अधिकारिता रखते है जब तब की वादों का संज्ञान अभिव्यक्त या विवक्षित रूप से वर्जित न हो।

धारा 34 विनिर्दिष्ट अनुतोष अधिनियम, 1963 के अनुसार किसी विधिक हैसियत या किसी संपत्ति के बारे में कोई अधिकार का हकदार कोई व्यक्ति किसी व्यक्ति के विरूद्ध कोई वाद संस्थित कर सकेगा जो ऐसी हैसियत या अधिकार पर उसके हक को इंकार कर रहा हो या इंकार करने में हितबद्ध हो तब न्यायालय स्वविवेकानुसार घोषणा कर सकेगा कि वह व्यक्ति इस प्रकार हकदार है और ऐसे वाद में वादी के लिये यह आवश्यक नहीं है कि वह कोई अतिरिक्त अनुतोष के लिये मांग करें :

परंतु कोई न्यायालय ऐसी कोई घोषणा नहीं करेगा जहां वादी हक की घोषणा के अतिरिक्त अनुतोष मांगने के लिये समर्थ होते हुये भी ऐसा करने में लोप करता है।

उक्त वैधानिक स्थिति के प्रकाशन में क्रमवार हम सिविल मृत्यु, जाति और जन्म तिथि की घोषणा के बारे में विचार करेंगे :–

सिविल मृत्यु (Civil Death)

कई बार ऐसी स्थिति उत्पन्न होती है कि कोई व्यक्ति ऐसी परिस्थितियों में लापता होता है कि उसके जीवित होने या न होने का निश्चित तौर पर कहना कठिन हो जाता है और उसके वैध प्रतिनिधियों के सामने पेंशन, भविष्य निधि की राशि, बैंक या पोस्ट ऑफिस में जमा राशि आदि पर अधिकारों का प्रश्न उत्पन्न होता है संबंधित विभाग उस व्यक्ति का मृत्यु प्रमाण पत्र मांगता है जो मिलना संभव नहीं होता है ऐसे में उस व्यक्ति की केवल सिविल मृत्यु के संबंध में घोषणा के वाद धारा 108 भारतीय साक्ष्य अधिनियम के प्रावधान के आधार पर प्रस्तुत होते है जो प्रचलन योग्य नहीं होते है क्योंकि ऐसे वादों में केवल सिविल मृत्यु की घोषणा ही पर्याप्त नहीं होती है बल्कि उससे जुड़े अतिरिक्त अनुतोष की मांग भी की जाना चाहिये अन्यथा धारा 34 विनिर्दिष्ट अनुतोष अधिनियम, 1963 के परंतुक की बाधा आती है अतः ऐसे वादों में यह सावधानी पूर्वक देख लेना चाहिये की वादी ने सिविल मृत्यु की घोषणा से जुड़े अतिरिक्त अनुतोष की मांग की है या नहीं।

इन मामलों में यह भी देख लेना चाहिये कि सभी विधिक प्रतिनिधियों को पक्षकार बनाया गया है या नहीं। साक्ष्य के समय भी संबंधित गवाहों से न्यायालय प्रश्न पूछकर इस संबंध में पता लगा सकती है कि जिस व्यक्ति के संबंध में सिविल मृत्यु की घोषणा चाही जा रही है उसके कौन–कौन वैध प्रतिनिधि है।

इन मामलों के विचारण व निराकरण के समय संबंधित व्यक्ति के संबंध में गुमशुदा होने की रिपोर्ट, उस व्यक्ति को पता लगाने के लिये किये गये प्रयास जैसे समाचार पत्रों, रेडियो, दूरदर्शन आदि के माध्यम से किये गये प्रयास। संभावित रिश्तेदारों के यहां की गई खोज–बीन व उनकी साक्ष्य महत्वपूर्ण हो सकती है अतः न्यायालय को साक्ष्य लिपिबद्ध करते समय इन सभी बातों पर आवश्यक प्रश्न पूछकर समाधान का प्रयास करना चाहिये।

इन वादों के विचारण के समय धारा 107 एवं 108 भारतीय साक्ष्य अधिनियम, 1872 के प्रावधान भी ध्यान में रखना चाहिये।

धारा 107 भारतीय साक्ष्य अधिनियम, 1872 के अनुसार जब प्रश्न यह हो कि कोई मनुष्य जीवित है या मर गया है और यह दर्शित किया गया है कि वह तीस वर्ष के भीतर जीवित था तब यह प्रमाणित करने का भार कि वह मर गया है उस व्यक्ति पर होता है जो इस तथ्य को प्रतिज्ञात करता है।

धारा 108 भारतीय साक्ष्य अधिनियम, 1872 के अनुसार जब प्रश्न यह हो कि कोई मनुष्य जीवित है या मर गया है और यह साबित किया गया है कि उसके बारे में सात वर्ष से उन लोगों ने कुछ नहीं सुना है जिन्होंने उसके बारे में यदि वह जीवित होता तो स्वाभाविक रूप से सुना होता तब यह प्रमाणित करने का भार कि वह व्यक्ति जीवित है उस व्यक्ति पर चला जाता है जो इस तथ्य को प्रतिज्ञात करता है।

धारा 107 एवं 108 के उक्त प्रावधान प्रमाणभार और उनसे जुड़ी उपधारणा के बारे में है।

माननीय सर्वोच्च न्यायालय ने न्यायदृष्टांत ***एन. जयलक्ष्मी अम्माल विरूद्ध आर. गोपाला पाथर, ए.आई.आर. 1995 एस.सी. 995*** में यह प्रतिपादित किया है कि धारा 108 भारतीय साक्ष्य अधिनियम, 1872 के तहत् यह उपधारित नहीं किया जा सकता कि कोई व्यक्ति किसी विशिष्ट दिनांक को मरा है।

माननीय मध्यप्रदेश उच्च न्यायालय ने न्यायदृष्टांत ***स्टेट ऑफ एम.पी. विरूद्ध किरण सेंगर, 2006 (3) एम.पी.एल.जे. 518*** में यह प्रतिपादित किया है कि धारा 108 भारतीय साक्ष्य अधिनियम के तहत् सात वर्ष की अवधि की समाप्ति पर उपधारणा लेने के प्रावधान है लेकिन मृत्यु के समय या किसी विशिष्ट समय के भीतर मृत्यु होने की उपधारणा नहीं ली जा सकती है इस न्यायदृष्टांत में माननीय प्रीविकॉसिल के न्यायदृष्टांत ***लालचंद विरूद्ध महंत राम रूपगिर, ए.आई.आर. 1926 पी. सी. 9*** का उल्लेख भी किया गया है जिसमें यही मत लिया गया है।

न्यायदृष्टांत ***नेशनल इंश्योरेंश कंपनी लिमिटेड विरूद्ध शांति देवी, 2008 (4) एम.पी.एल. जे. 328*** में भी माननीय मध्यप्रदेश उच्च न्यायालय ने यह प्रतिपादित किया है कि धारा 108 भारतीय साक्ष्य अधिनियम की उपधारणा केवल मृत्यु के तथ्य तक सीमित है मृत्यु की तारीख और समय के बारे में कोई उपधारणा नहीं ली जा सकती है न्यायदृष्टांत ***एम.पी. स्टेट कॉपरेटिव मार्केटिंग फेडरेशन लिमिटेड विरूद्ध अरूणा प्यासी, 2003 (4) एम.पी.एल.जे. 463*** भी इस संबंध में अवलोकनीय है।

न्यायदृष्टांत ***टी.आर. रहमान विरूद्ध के. वरदा राजू, ए.आई.आर. 1970 आंध्रप्रदेश 246*** में यह प्रतिपादित किया गया है कि किसी एक मामले में धारा 107 और धारा 108 दोनों को साथ–साथ लागू नहीं किया जा सकता दोनों धारणाएं खण्डन योग्य है।

जाति (Caste)

कोई व्यक्ति किसी जाति विशेष का है इस बावत् घोषणा का व्यवहारवाद या ऐसा वाद जिसमें विशुद्ध रूप से किसी व्यक्ति के किसी जाति विशेष का होने के संबंध में प्रश्न निहित हो वह वाद प्रचलन योग्य नहीं होता है।

माननीय सर्वोच्च न्यायालय ने न्यायदृष्टांत ***कुमारी माधुरी पटेल विरूद्ध एडिशनल कमिश्नर ट्रायबल डिपार्टमेंट, ए.आई.आर. 1995 एस.सी. 95*** में किसी व्यक्ति के सामाजिक प्रास्थिति प्रमाण पत्र Social Status Certificate के जारी किये जाने उसकी छान–बीन व अनुमोदन की प्रक्रिया निर्णय के पद क्रमांक 12 में निर्धारित की है उसी के अनुसार किसी व्यक्ति को अपनी जाति संबंधी प्रमाण पत्र के लिये या सामाजिक प्रास्थिति प्रमाण पत्र के लिये कार्यवाही करना होती है इस निर्णय में शासन को एक समिति बनाने के निर्देश दिये गये है जिसका निर्णय अंतिम व निश्चायक होगा और उस निर्णय को भारतीय संविधान के अनुच्छेद 226 के तहत् याचिका लगाकर ही चुनौती दी जा सकती है व कोई वाद अन्य कार्यवाही किसी भी प्राधिकारी के समक्ष नहीं लाया जा सकेगा।

माननीय सर्वोच्च न्यायालय ने न्यायदृष्टांत ***स्टेट ऑफ तमिलनाडू विरूद्ध ए. गुरू स्वामी, ए.आई.आर. 1997 एस.सी. 1199*** में यह प्रतिपादित किया है कि राष्ट्रपति ने संविधान के अनुच्छेद 341 व 342 के तहत् अनुसूचित जाति एवं अनुसूचित जनजाति की सूची घोषित की है वह सूची, संसद द्वारा संविधान के अनुच्छेद 341 (2) व अनुच्छेद 342 (2) के तहत् संशोधन के अधीन रहते हुये, निश्चायक होती है व्यवहार न्यायालय द्वारा संज्ञान लिया जाना व जाति बावत् घोषणा देना प्रतिषेध है।

माननीय सर्वोच्च न्यायालय की तीन न्यायमूर्तिगण की पीठ ने न्यायदृष्टांत ***नित्यानंद शर्मा विरूद्ध स्टेट ऑफ बिहार, ए.आई.आर. 1996 एस.सी. 2306*** में यह प्रतिपादित किया है कि न्यायालय सामाजिक प्रास्थिति के बारे में घोषणा नहीं कर सकता है।

माननीय सर्वोच्च न्यायालय ने न्यायदृष्टांत ***एस. स्वीगरडोस विरूद्ध जोनल मैनेजर एफ.सी.आई., ए.आई.आर. 1996 एस.सी. 1182*** में भी यह प्रतिपादित किया है कि घोषणा का ऐसा वाद कि वादी अनुसूचित जाति का है प्रचलन योग्य नहीं है।

माननीय सर्वोच्च न्यायालय के 5 न्यायमूर्तिगण की पीठ ने न्यायदृष्टांत ***भैया लाल विरूद्ध हरिकिशन सिंह, ए.आई.आर. 1965 एस.सी. 1557*** में यह प्रतिपादित किया है कि जब यह प्रश्न उत्पन्न हो कि कोई जाति अनुसूचित जाति है संविधान के अनुच्छेद 341 के तहत् जारी नोटिफिकेशन को देखना होता है यह जांच अनुमत नहीं है कि कोई उप जाति किसी जाति में शामिल है या नहीं। इस संबंध में न्यायदृष्टांत ***स्टेट ऑफ महाराष्ट्र विरूद्ध मिलिंद, ए.आई.आर. 2008 एस.सी. 393*** भी अवलोकनीय है।

जिन मामलों में विशुद्ध रूप से जाति का प्रश्न निहित न हो वहां व्यवहार वाद प्रचलन योग्य होता है जैसे किसी जाति का कोई सदस्य यह वाद ला सकता है कि उसे जाति के प्रबंधक द्वारा रखी गई लेखा पुस्तकों के निरीक्षण और उनकी प्रतियाँ लेने का अधिकार है। ऐसी घोषणा का वाद की किसी व्यक्ति का उसकी जाति से निकाला जाना उचित नहीं है या उसे प्रार्थना सभा में प्रवेश करने का अधिकार है या सार्वजनिक मंदिर में पूजा करने का अधिकार है ऐसे मामले प्रचलन योग्य होते है क्योंकि इनमें मूल प्रश्न किसी व्यक्ति की जाति की घोषणा का नहीं होता है बल्कि उसके अन्य अधिकार जिनका की उपर उल्लेख किया गया है उनकी घोषणा का होता है। ऐसे मामलों में न्यायालय को अनुतोष देते समय सतर्क रहना चाहिये और उन अधिकारों की घोषणा के अनुतोष ही देना चाहिये जाति संबंधी घोषणा नहीं करना चाहिये विचारण के समय भी सतर्कता रखना चाहिये कि जाति की जांच संबंधी साक्ष्य न आवे क्योंकि ऐसी जांच अनुमत नहीं है।

जन्मतिथि (Date of Birth)

जब कभी किसी व्यक्ति की जन्मतिथि के संबंध में विवाद उत्पन्न होता है तब सही जन्मतिथि की घोषणा के वाद व्यवहार न्यायालय में प्रस्तुत होते है ऐसे वाद प्रचलन योग्य होते है।

माननीय सर्वोच्च न्यायालय की तीन न्यायमूर्तिगण की पीठ ने न्यायदृष्टांत ***ईश्वर सिंह विरूद्ध नेशलन फर्टीलाइजर, ए.आई.आर. 1991 एस.सी. 1546*** में यह प्रतिपादित किया है कि जन्म दिनांक में संशोधन का व्यवहार वाद यदि नियोक्ता द्वारा लाया जाता है तो व्यवहार न्यायालय ऐसा अनुतोष देने में समक्ष है।

माननीय सर्वोच्च न्यायालय ने न्यायदृष्टांत ***सेकेट्री ऑफ कमिश्नर हॉम डिपार्टमेंट विरूद्ध आर. किरूबाकरण, ए.आई.आर. 1993 एस.सी. 2647*** में यह प्रतिपादित किया है कि जन्म दिनांक की सुधार की याचिका में यदि ऐसा अंतरिम अनुतोष मांगा जाता है कि सेवा में निरंतर कर्मचारी को रहने दिया जाये तब न्यायालय को ऐसा अंतरिम अनुतोष देने से सामान्यतः बचना चाहिये जब तक कि प्रथम दृष्ट्या अखण्डनीय Unimpeachable प्रकृति का साक्ष्य अभिलेख पर न हो न्यायालय को यह भी ध्यान देना चाहिये कि ऐसा विवाद सेवा काल के अंतिम प्रक्रम पर ही क्यों उठाया गया पहले क्यों नहीं उठाया गया।

माननीय सर्वोच्च न्यायालय ने न्यायदृष्टांत ***स्टेट ऑफ असम विरूद्ध दक्षप्रसाद डेका, ए.आई.आर. 1971 एस.सी. 173*** में यह प्रतिपादित किया है कि एक लोक सेवक को उसके सेवा अभिलेख में उल्लेखित जन्म दिनांक के संबंध में विवाद उठाने का अधिकार है और वह अभिलेख में सुधार का आवेदन कर सकता है लेकिन जब तब अभिलेख में सुधार न हो जावे तब तक वह सेवा निवृत्ति का मूल अभिलेख के आधार पर समय आ जाने पर भी सेवा में निरंतर उसके द्वारा बताये गये जन्म तिथि के आधार पर सेवा में रहने का दावा नहीं कर सकता।

माननीय कर्नाटक उच्च न्यायालय की खण्ड पीठ ने न्यायदृष्टांत ***स्टेट ऑफ कर्नाटक विरूद्ध टी. श्रीनिवास, ए.आई.आर. 1988 कर्नाटक 67*** में यह प्रतिपादित किया है कि सही जन्म तिथि की घोषणा का वाद व्यवहार न्यायालय में प्रचलन योग्य है लीगल कारेक्टर व सिविल नेचर शब्द पर भी

प्रकाश डाला गया है इस संबंध में न्यायदृष्टांत ***के.एम. शास्त्री विरूद्ध डायरेक्टर पोस्ट ग्रेजुएट सेंटर आनंतपुर, ए.आई.आर. 1982 ए.पी. 176 डी.बी.*** भी अवलोकनीय है।

न्यायदृष्टांत ***भैरू लाल विरूद्ध ग्रेसिम इंडस्ट्रिस लिमिटेड बिरला ग्राम, नागदा, आई.एल. आर. 2011 एम.पी. 659*** में माननीय मध्यप्रदेश उच्च न्यायालय की खण्ड पीठ ने यह प्रतिपादित किया है कि जन्म तिथि में परिवर्तन के मामलों में बतलाई गई परिवर्तित जन्म तिथि पर विचार करते समय यह ध्यान रखना चाहिये की परिवर्तित जन्म तिथि यदि सही मान ले तो सेवा में प्रवेश के समय वादी की उम्र न्यूनतम निर्धारित उम्र से कम तो नहीं आ रही है। न्यायदृष्टांत वाले मामले में परिवर्तित जन्म तिथि के हिसाब से वादी की उम्र सेवा में प्रवेश के समय 11 वर्ष आ रही थी इस न्यायदृष्टांत में माननीय सर्वोच्च न्यायालय के न्यायदृष्टांत ***स्टेट ऑफ एम.पी. विरूद्ध मोहन लाल शर्मा, 2002 (7) एस.सी.सी. 719*** का उल्लेख किया गया है जिसमें माननीय सर्वोच्च न्यायालय ने यह प्रतिपादित किया है कि जन्म तिथि के किसी अर्थान्वयन या पुनरीक्षण के समय यह ध्यान रखना चाहिये क्या जन्म तिथि नियोक्ता को सेवा में प्रवेश के समय सेवा में प्रवेश से अयोग्य तो नहीं कर देगी जैसे न्यूनतम निर्धारित उम्र से कम उम्र तो नहीं हो जायेगी ऐसी जन्म तिथि स्वीकार नहीं की जाना चाहिये और इसे निरूत्साहित किया जाना चाहिये।

न्यायदृष्टांत ***स्टेट ऑफ गुजरात विरूद्ध वली मोहम्मद, ए.आई.आर. 2006 एस.सी. 2735*** में माननीय सर्वोच्च न्यायालय ने यह प्रतिपादित किया है कि जन्म तिथि में सुधार का आवेदन नियम एवं आदेश द्वारा यदि कोई समय सीमा नियत की गई हो तो उसमें दिया जाना चाहिये और यदि ऐसी समय सीमा नियत नहीं की गई हो तो युक्तियुक्त समय के भीतर दिया जाना चाहिये यदि आवेदन सेवा निवृत्ति का समय आ जाने पर दिया गया हो तब न्यायालय या अधिकरण को अंतरिम अनुतोष या सतत् सेवा में बने रहने का अनुतोष देने से बचना चाहिये जब तब की प्रथम दृष्ट्या अखण्डनीय प्रकृति का साक्ष्य अभिलेख पर न हो।

न्यायदृष्टांत ***स्टेट ऑफ पंजाब विरूद्ध मोहिन्दर सिंह, ए.आई.आर. 2005 एस.सी. 1868*** में माननीय सर्वोच्च न्यायालय ने यह प्रतिपादित किया है कि जन्म तिथि की घोषणा में जन्म पत्रिका के बजाय स्कूल रिकार्ड का अधिक महत्व होता है।

न्यायदृष्टांत ***स्टेट ऑफ यू.पी. विरूद्ध शिवनारायण, ए.आई.आर. 2005 एस.सी. 4192*** में सर्वोच्च न्यायालय ने यह प्रतिपादित किया है कि कर्मचारी ने सेवा पुस्तिका पर हस्ताक्षर किया जिसमें जन्म तिथि का उल्लेख था उसे कभी चुनौती नहीं दी और सेवा निवृत्ति के पश्चात् जारी दस्तावेज प्रस्तुत किये न्यायालय को ऐसे मामले में अन्य कर्मचारियों की सेवाएँ प्रभावित होने के तथ्य को भी ध्यान में रखना चाहिये क्योंकि जन्म तिथि में ऐसे सुधार से अन्य कर्मचारियों की सेवाएँ भी प्रभावित होती हैं।

न्यायदृष्टांत ***यूनियन ऑफ इंडिया विरूद्ध सी. रामास्वामी, ए.आई.आर. 1997 एस.सी. 2055*** में माननीय सर्वोच्च न्यायालय ने यह प्रतिपादित किया है कि यदि सेवा अभिलेख में कोई सद्भाविक त्रुटि सेवा में प्रवेश के समय हुई हो तो ही जन्म तिथि में परिवर्तन किया जाना चाहिये ऐसे मामलों में विबंध का सिद्धांत लागू होता है।

न्यायदृष्टांत ***ब्रजमोहन विरूद्ध प्रिय व्रतनारायण, ए.आई.आर. 1965 एस.सी. 285, पी. नागमुनी विरूद्ध गवरमेंट ऑफ ए.पी., ए.आई.आर. 1981 एस.सी. 864, बर्न स्टेण्डर्ड कंपनी विरूद्ध दीनबंधु मजूमदार, ए.आई.आर. 1995 एस.सी. 1499*** भी इस संबंध में अवलोकनीय है।

जन्म तिथि की घोषणा के वादों में विचारण के समय न्यायालय को जो भी साक्ष्य प्रस्तुत हो उस पर अत्यंत सावधानी से विचार करना चाहिये। उक्त न्यायदृष्टांत **सेकेट्री ऑफ कमिश्नर** में माननीय सर्वोच्च न्यायालय द्वारा जिस प्रकृति की साक्ष्य पर बल दिया है वैसी साक्ष्य अभिलेख पर होना चाहिये इन मामलों में अंतरिम अनुतोष भी अत्यंत सावधानी से देना चाहिये और ऐसे अंतरिम अनुतोष देते समय आदेश 39 नियम 1 एवं 2 सिविल प्रक्रिया संहिता, 1908 के मध्यप्रदेश संशोधन को भी ध्यान में रखना चाहिये जिसके अनुसार :–

> "किसी व्यक्ति, जो लोक सेवा या राज्य के मामले से संबंधित पद पर नियुक्त किया गया हो, जिसमें राज्य सरकार के स्वामित्व में या राज्य सरकार के द्वारा नियंत्रित किसी कंपनी या निगम का कर्मचारी भी शामिल है, के स्थानांतरण, निलंबन, पदावनति, अनिवार्य सेवा निवृत्ति, पदच्युति, पद से हटाने या सेवा के अन्यथा पर्यवसान या प्रभार ग्रहण करने के लिये आदेश के प्रवृत्तन को स्थागित करने के लिये कोई व्यादेश मंजूर नहीं किया जायेगा"

इन प्रावधानों के अनुसार उक्त स्थितियों में अस्थायी व्यादेश नहीं दिया जायेगा।

इस प्रकार यह स्पष्ट होता है कि :–

1. ऐसे वाद जिनमें विशुद्ध रूप से किसी व्यक्ति के जाति विशेष का होने संबंधी प्रश्न निहित हो या जाति की घोषणा बावत् वाद प्रचलन योग्य नहीं होते है।
2. कोई व्यक्ति जन्मतिथि की घोषणा के संबंध में वाद ला सकता है ऐसे वाद प्रचलन योग्य होते है। इन वादों में अंतरिम अनुतोष देते समय न्यायालय को अत्यंत सतर्क रहना चाहिये।
3. सिविल मृत्यु की घोषणा संबंधी वाद प्रचलन योग्य होते है लेकिन वादी को उक्त घोषणा से जुड़े अतिरिक्त अनुतोष की मांग करना चाहिये अन्यथा उसे धारा 34 विनिर्दिष्ट अनुतोष अधिनियम, 1963 के परंतुक की बाधा आती है।
4. जन्मतिथि की घोषणा और सिविल मृत्यु की घोषणा के वादों के विचारण और निराकरण के समय विचारण न्यायालयों को उपरोक्त सावधानियाँ रखना चाहिये।

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PART - II

NOTES ON IMPORTANT JUDGMENTS

***348. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (e)**

Whether plaintiff is entitled for decree of eviction under Section 12 (1) (e) of the Act in absence of pleading that he is not having any other alternative suitable accommodation in his possession?

Held, Yes – If the parties to the suit are aware of the plea involved and proceeded with the Trial Court on that basis, the question of absence of the plea cannot be raised by any of the parties – Pleading need not contain the exact statutory language or expression – In this case defendant did not take any objection about absence of the pleading even at the stage of First Appeal – Plaintiff's evidence proved that he has no other alternative accommodation – Defendant also admitted in his evidence that he is not aware that any alternative accommodation is available to the plaintiff – In the situation no prejudice was caused to defendant and hence appeal dismissed (*Ram Sarup Gupta's v. Bishun Narain Inter College (1987) 2 SCC 555, Vishwamitra Ram Kumar v. Vesta Time Company, (2007) 14 SCC 374* and *Sree Swayam Prakash Ashsaram v. G. Anandavally Amma, (2010) 2 SCC 689* relied on).

Shri Ram Verma v. Mukesh Kumar Pandey

Judgment dated 27.01.2011, passed by the M.P. High Court in S.A. No. 681 of 2008, reported in 2011 (4) MPHT 29

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349. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 23-J (iv)

(i) Who is physically handicapped person? Explained.

(ii) It is necessary for the plaintiff to plead and prove that he is physically handicapped – Physical disability neither exhibited nor proved – Application under Section 23-J (iv) not maintainable – Bonafide need also not proved.

Dilip Baghela v. Virendra Kumar Choubey

Judgment dated 16.08.2011 passed by the High Court of M.P. in Civil Revision No. 503 of 2010, reported in 2011 (4) MPLJ 191

Held:

On bare perusal of the eviction application, it is seen that what type of physical disablement the landlord is having has not been pleaded by him in his eviction application. Simply he has pleaded that he is a disabled person as envisaged under Section 23-J (iv) of the Act. Further in para 4 of his application of eviction, it has been repeated that he is physically handicapped person. The term "physical handicapped" has not been defined under the Act and therefore from various dictionaries, the meaning of this term "physical handicapped" is to be seen.

"(1) 'Handicapped':

(i) crippled or physically disabled:

(ii) mentally deficient;

(iii) (of a constant) marked by; being under, or having a handicap person;

The Random House Dictionary of the English Language- (The Unabridged Edn.)

(2) 'Handicap': A disadvantage that makes achievement unsusually difficult esp. a physical disability that limits the capacity to work.

Webseter's Third New International Dictionary- (The Unabridged Edn.

(3) 'Handicap': A person specifically children physically or mentally defective.

- A supplement to the Oxford English Dictionary (Vol. 12)"

This Court in *Krishna Kumar Baori v. Ganga Prasad Singh, 1996 JLJ 386* has held that words "physically handicapped" occurring in section 23-J (iv) mean that a person claiming himself to be within the meaning of words 'physically handicapped' must be such a person suffering from a disease which may prevent him from following ordinary daily pursuits of his life. At this juncture, if testimony of landlord is x-rayed, this Court finds that he can ride the bicycle and can walk properly and thus, he is able to perform his normal life. Looking to this admission of landlord, I am of the view that learned Rent Controlling Authority has wrongly held that landlord is a "physically handicapped" person and is a specified landlord under section 23-J(iv) of the Act.

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350. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 2 (b) and 11

(i) Maintainability of application for appointment of arbitrator by Society – When a development agreement has been signed by a person on behalf of the Society as a President and not in his individual capacity then Society may file application for appointment of Arbitrator.

(ii) If validity of a development agreement is being challenged, it will not affect the arbitration clause which is contained in the same agreement.

M/s. Khivraj Motors v. M/s. The Guanellian Society

Judgment dated 04.07.2011, passed by the Supreme Court in Civil Appeal No. 4926 of 2011, reported in AIR 2011 SC 2826

Held:

An examination of the photocopy of the joint development agreement shows clearly that it was not executed by Father A.John Bosco in his individual capacity.

The document describes 'Father A. John Bosco, President, Gaunellian Society' as the first party or the owner. The signature of the first party/owner on each page of the document is as under:

"For The Gaunellian Society
[Sd/- Fr. A.John Bosco]
President"

The said agreement is also signed by Mr. Pushpchand Chordia as the power of attorney holder of the partners of the appellant. There are only the said two signatories to the agreement, that is the Society represented by its President and the appellant represented by its Attorney Holder. Fr. A. John Bosco has not executed the joint development agreement in his personal capacity. The power of attorney is also executed by the Society. Thus the respondent Society is the first party under the joint development agreement and not Father A.John Bosco. We may also note that if Father A. John Bosco was executing the joint development agreement in his personal capacity, there was no need for him to describe himself as the "President of the Gaunellian Society" and sign the document for and on behalf of the Gaunellian Society, as its President. Therefore the application under Section 11 of the Act filed by the Society against the respondent was maintainable as the petitioner and the respondent in the application under Section 11 were parties to the joint development agreement containing a provision (Clause 18) for settlement of disputes arising out of the agreement by arbitration.

The respondent Society has no doubt contended that the contract was concluded with unconscionable and unfair terms and that the Managing Committee of the Society had not authorized its President – Father A. John Bosco to enter into any such joint development agreement. These allegations no doubt relate to the validity of the joint development agreement, but will have no bearing on the validity of the arbitration agreement (Clause 18 of the agreement), which is an independent agreement incorporated and rolled into the joint development agreement. The Arbitrator will examine the validity and binding nature of the joint development agreement. There is nothing in the claims and contentions of the Society which excludes the operation of the arbitration agreement or necessitates rejection of the request for appointment of an arbitrator.

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***351. ARBITRATION AND CONCILIATION ACT, 1996 – Section 34**
INTEREST ACT, 1978 – Section 3
CONTRACT ACT, 1872 – Sections 23 and 76

(i) If an arbitration award is contrary to substantive provisions of law or provisions of Act of 1996 or against the terms of the contract or public policy, it would be patently illegal and if it affects the rights of the parties, it would be open to the Court to interfere under Section 34 (2) of the Arbitration and Conciliation Act, 1996.

(ii) **The Arbitral Tribunal cannot go behind the terms of reference but in exceptional circumstances where the party pleads that the demand of a party is beyond the terms of contract and statutory provisions, the Tribunal may examine by the terms of contract as well as the statutory provisions – In the absence of proper pleadings and objections, such a course may not be permissible.**

(iii) **In the light of Section 3 of the Interest Act, 1978, the Court is empowered to award interest at the rate prevailing in the banking transactions – Thus, impliedly, the Court has power to vary the rate of interest agreed by the parties for the recovery of any debt or damages.**

(iv) **If a person has not complied with the terms of the contract and has acted in contravention to the terms of agreement he cannot claim the amount without carrying out the obligation to execute the work just on technicalities.**

M/s. MSK Projects (I) (JV) Ltd. v. State of Rajasthan & Anr.
Judgment dated 21.07.2011 passed by the Supreme Court in Civil Appeal No. 5416 of 2011, reported in AIR 2011 SC 2979

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352. **ARMS ACT, 1959 – Section 39**

Sanction for prosecution – Production of arms – Sanctioning Authority is required to see that on the date accused was found to be in possession of firearm, he was without a valid license – For grant of sanction under Section 39 of the Act, production of seized instrument/firearm/arm/arms is/are not mandatory.

Gurudev Singh @ Goga v. State of M.P.
Judgment dated 22.09.2010, passed by the High Court of M.P. in Cr. Rev. No. 1 of 2004, reported in I.L.R. (2011) M.P. 2053 (D.B.)

Held :

The Supreme Court in case of *Gunwantlal v.State of MP, AIR 1972 SC 1756* has held as under while considering Sec. 39 of the Act in para 6 (placitinun C):-

> "All that is required for sanction under Section 39 is, that the person to be prosecuted was found to be in possession of the firearm, the date or dates on which he was so found in possession and that the possession of the firearm was without a valid licence. Where all the elements were contained in the sanction it was not an illegal sanction nor could it be said that the charge travelled beyond that sanction".

It is clear from the above mentioned observations by the Supreme Court that sanctioning authority is required to see that accused was found to be in possession of the firearm, the date or dates on which he was found in possession

without having valid license. For these facts, the physical production of the firearm/object before the sanctioning authority does not appears to be necessary and authority was also not required to look into it.

In case of *Md. Rosen & Others v. The State,[1984(i) Crimes 838*, learned Single Judge has held that for prosecution of the accused Under Section 25(a), if it was not mentioned in the sanction order that the materials gathered in the course of investigation against accused had been placed before the sanctioning authority and sanctioning authority had considered the materials before according sanction, the sanction had not duly been accorded after proper application of mind for prosecution in respect of the offence punishable under Arms Act. In this judgment, nowhere it is held that production or placing seized firearm or prohibited article was necessary before the sanctioning authority and sanctioning authority is under obligation to look into it. Placing of materials before the sanctioning authority and considering the same does not mean the seized article must be produced before the sanctioning authority. The sanctioning authority can apply its mind after going through the FIR, seizure memo, statements of the witnesses, expert report etc. On this basis, the authority can satisfy itself and would be able to accord sanction. In Section 39 (ibid) also nowhere it is mentioned that production of the seized firearm is necessary for granting sanction or as to how sanction should be granted by the authority. The authority while granting sanction should satisfy itself from the facts of each case whether prima-facie case for constituting an offence is made out or not. In case *Gokulchand Dwarkadas Morarka v. The King (AIR 1948 PC 82)*, it is held that charge must be with respect to commission of an offence with reference to the facts of the case whether a prima facie case is made out against the accused. A sanction for prosecution should have substance to justify as to what provision had been contravened.

Sanction is a wholesome safeguard against false, frivolous and inexpedient prosecution and as such sanction should be accorded if prosecution is reasonable and in public interest. The sanction should disclose that the authority had applied its mind to the prima facie case of contravention of provisions of law, although minute details of the evidence is not obligatory to be gone into. While interpreting the provisions of section 39, unnecessary embargo should not be put before authority who is required to grant sanction.

In case of *Raju Dubey v. State of MP,1998 (1) JLJ 236*, for the first time learned Single Judge of Gwalior Bench has held that unless the sanctioning authority looks itself the instrument in respect of which sanction is sought, he cannot be said to have any idea as to whether possession of the instrument was illegal or the instrument was actually recovered within the definition given in Section 2 and held that production of the instrument is mandatory.

We do not agree with this preposition. The authority can satisfy itself on the basis of seizure memo, expert report, statements of witnesses and other material. If production of instrument is made mandatory, then it can be said that sanctioning authority must operate it and see whether it is in working condition

or not, therefore, in our view this is an unnecessary embargo for the authority to grant sanction.

If such view is correct, then in a case of disproportionate asset, at the time of granting sanction for prosecution punishable under the provisions of Prevention of Corruption Act, all the seized movable property is required to be produced before the sanctioning authority and for immovable property, authority must go on spot and verify the same with seizure memos and inventory available in the case diary. If production of articles for granting sanction before the authority is made mandatory for prosecution of a public servant for taking bride, the currency notes and sealed bottles of sodium carbonate solution turning into pink colour when on notes phenolphthalein powder is used, must be required to be produced before the authority. Same can be the situation in case of granting sanction for prosecution under the provisions of Prevention of Food Adulteration Act as also granting sanction - for prosecution as per provision under section 197 of the Cr.P.C. It is clear from these illustrations that production of instrument, article or property is not practically possible, before the sanctioning authority. In the light of these facts, in our considered view, there is absolutely no logic for production of instrument/seized firearm before the sanctioning authority for grant of sanction. In sum and substance, sanction order must disclose reasonable application of mind by the sanctioning authority on the basis of the material facts available in the case to make out a prima facie case.

In view of the above, we answer the reference as under: –

> "that for grant of sanction under section 39 of the Indian Arms Act before the sanctioning authority, for prosecution, production of seized instrument/ firearm/ arm/ arms is/are not mandatory".

In the result, judgments rendered in case of *Raju Dubey(supra), Smt. Jaswant Kaur and Anr. v. State of MP [1999 Cr.LR. (MP) 80]* and *Prabhudayal and another v. State of MP [2002 Cr.L.R. (MP) 192]* are hereby overruled.

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353. CIVIL PRACTICE:

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Section 12

Whether a judgment and decree of a competent Civil Court can be declared null and void in collateral proceedings? Held, No.

Application under Section 12 of Act of 2005, maintainability of – The application was filed on 12.06.2009 after dissolution of marriage by decree of mutual consent on 20.03.2008 – It was alleged in the application that the decree was null and void because it was obtained by fraud and they continued to live together as husband and wife – A civil case was also filed for declaration that the decree was null and void – Held, the applicant was not in a domestic relationship with non-

applicant because the decree for divorce still subsists, hence the application amounts to abuse of process of Court and not maintainable.

Inderjit Singh Grewal v. State of Punjab & anr.
Judgment dated 23.08.2011, passed by the Supreme Court in Criminal Appeal No. 1635 of 2011, reported in III (2011) DMC 7 (SC).

Held :

In *M. Meenakshi & Ors. v. Metadin Agarwal (Dead) by LRs. & Ors., (2006) 7 SCC 470*, this Court considered the issue at length and observed that if the party feels that the order passed by the Court or a statutory authority is *non est* void, he should question the validity of the said order before the appropriate Forum resorting to the appropriate proceedings. The Court observed as under:

> "It is well settled principle of law that even a void order is required to be set aside by a competent Court of Law, inasmuch as an order may be void in respect of one person but may be valid in respect of another. A void order is necessarily not non est. An order cannot be declared to be void in collateral proceedings and that too in the absence of the authorities who were the authors thereof."

Similar view has been reiterated by this Court in *Sneh Gupta v. Devi Sarup & Ors. (2009) 6 SCC 194.*

From the above, it is evident that even if a decree is void *ab initio*, declaration to that effect has to be obtained by the person aggrieved from the competent Court. More so, such a declaration cannot be obtained in collateral proceedings.

In the facts and circumstances of the case, the submission made on behalf of respondent No. 2 that the judgment and decree of a Civil Court granting divorce is null and void and they continued to be the husband and wife, cannot be taken note of at this stage unless the suit filed by the respondent No. 2 to declare the said judgment and decree dated 20.03.2008 is decided in her favour. In view thereof, the evidence adduced by her particularly the record of the telephone calls, photographs attending a wedding together and her signatures in school diary of the child cannot be taken into consideration so long as the judgment and decree of the Civil Court subsists. On the similar footing, the contention advanced by her Counsel that even after the decree of divorce, they continued to live together as husband and wife and therefore the complaint under the Act, 2005 is maintainable, is not worthier acceptance at this stage.

In *D. Velusamy v. D. Patchaiammal, (2010) 10 SCC 469*, this Court considered the expression "domestic relationship" under Section 2(f) of the Act, 2005 placing reliance on earlier judgment in *Savitaben Somabhai Bhatiya v. State of Gujarat & Ors., (2005) 3 SCC 636*, and held that relationship "in the nature of marriage" is akin to a common law marriage. However, the couple must hold themselves out to society as being akin to spouses in addition to fulfilling all other requisite conditions for a valid marriage.

The said judgments are distinguishable on facts as those cases relate to live-in relationship without marriage. In the instant case, the parties got married and the decree of Civil Court for divorce still subsists. More so, a suit to declare the said judgment and decree as a nullity is still pending consideration before the competent Court.

In view of the above, we are of the considered opinion that permitting the Magistrate to proceed further with the complaint under the provisions of the Act, 2005 is not compatible and in consonance with the decree of divorce which still subsists and thus, the process amounts to abuse of the process of the Court. Undoubtedly, for quashing a complaint, the Court has to take its contents on its face value and in case the same discloses an offence, the Court generally does not interfere with the same. However, in the backdrop of the factual matrix of this case, permitting the Court to proceed with the complaint would be travesty of justice. Thus, interest of justice warrants quashing of the same.

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354. CIVIL PROCEDURE CODE, 1908 – Section 9
COMPANIES ACT, 1956 – Sections 84 (4) and 111
SPECIFIC RELIEF ACT, 1963 – Section 41 (h)
Jurisdiction of Civil Court – Bag containing all the share certificates of the plaintiff along with transfer deeds were misplaced and lost – Suit filed by plaintiffs to declare that defendant should not transfer the share certificates to any other person and also to issue duplicate share certificates – Held, Civil Court is not having any jurisdiction to try such type of suit.
Injunction should be refused when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust – Plaintiffs are having an efficacious remedy to file necessary application before the Registrar of Company under Section 84 of the Companies Act.

Kamalkant Goyal & Ors. v. M/s Lupin Laboratories Ltd.
Judgment dated 11.05.2011, passed by the High Court of M.P. in F.A. No. 109 of 1996, reported in I.L.R. (2011) M.P. 2191

Held :

Having heard learned counsel for the plaintiffs/appellants and also considering the plaint averments and the relief claimed in it and also after hearing learned counsel appearing for the interveners, I am of the view that this appeal deserves to be dismissed.

Although initially I was going to remand the matter to the learned Trial Court to decide this point if any objection in this regard is submitted by the defendant or any or any intervention application made before that Court because the suit has been dismissed at its threshold even without issuing summon to the defendant, but looking to the dictum of the Supreme Court in the decision of

Shripal Jain v. Torrent Pharmaceuticals Ltd., 1995 Supp (4) 590, since it has been held in it that the subject matter of issuance of duplicate share certificates on account of loss of original ones, Civil Court is not a competent Court but Registrar under the Companies Act should have held an enquiry in that regard under Section 84(4) read with Companies (Issue of Share Certificates) Rules, 1960 (hereinafter referred to as the Rules of 1960) and to pass necessary orders. Although the approach of learned Trial Court applying Section 111 of the Companies Act was wrong but the suit has been rightly dismissed. Indeed, in the present case, Section 84(4) of the Companies Act and the Rules of 1960 are applicable which speaks about the certificate of shares. In the case of *Shripal Jain* (supra) also the share certificates were stolen. Eventually, the appellant of that case approached the Registrar for issuance of duplicate certificates, however, the Registrar directed the appellant to have a direction in this respect from the Civil Court as a result of which a civil suit was filed, but, the Civil Court did not allow the relief and the revision which was filed before the High Court was also dismissed in *limine*. The appellant of that case approached the Apex Court wherein the Apex Court specifically held that the Registrar of Company was in patent error in referring the appellant to the Civil Court by further holding that Registrar should have himself held an enquiry in the matter under section 84(4) of the Companies Act read with Rules of 1960 to take decision in the matter. The Supreme Court ultimately set aside the order of the High Court passed in revision as well as of the Civil Court and remanded the case back to the Registrar to decide the matter in accordance with law.

Indeed, in the present case also, looking to the plaint averments and the relief claimed by the plaintiffs which is akin to that of the case of *Shripal Jain* (supra), it is gathered that in the present case also the plaintiffs share certificates have been lost and therefore, it has been prayed that duplicate share certificates be issued to them and their lost share certificates may not be transferred to any other person. Thus, according to me, the Civil Court is not having any jurisdiction to try such type of suit.

Apart from what I have held herein above, it would be condign to go through the relief clause of the plaint again. Although suit for declaration has been filed, but indeed, the suit is for mandatory injunction to issue duplicate share certificates and a prohibitory injunction that lost share certificates should not be transferred to any other person. According to me, such type of injunction should be refused by the Court in view of Section 41(h) of the Specific Relief Act, 1963 which speaks that injunction be refused when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust. Since, the plaintiffs are having an efficacious remedy to file necessary application before the Registrar of Company under Section 84 of the Companies Act, therefore for this additional ground also, the relief claimed in the pliant cannot be granted to the plaintiffs.

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355. CIVIL PROCEDURE CODE, 1908 – Section 24

An eviction suit filed by respondent Nos. 11 and 12 against petitioner on 04.02.2008 in the Court of Civil Judge Class II – Thereafter, a suit was filed by the petitioner on 05.02.2010 for specific performance of contract in the Court of Additional District Judge – There is a transfer application by petitioner to transfer the eviction suit from the Court of Civil Judge Class II to the Court of Additional District Judge – Held, suit filed by the petitioner for specific performance is pending in a Court which is a Court of appeal against the judgment which shall be passed in the civil suit filed by respondent Nos. 11 and 12 – No illegality is committed by the District Judge in dismissing the transfer petition of the petitioner.

Bhagwan Singh v. Late Shri Harishchandra Rao through L.Rs.

Judgment dated 25.03.2011 passed by the High Court of M.P. in Civil Revision No. 289 of 2010, reported in 2011 (3) MPLJ 685

Held :

Keeping in view the facts of the case and the course of action and the fact that suit filed by the petitioner for specific performance is pending in a Court which is a Court of appeal against the judgment which shall be passed in the Civil Suit filed by respondent Nos. 11 and 12, this Court is of the view that no illegality has been committed by the learned Court below in dismissing the application.

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356. CIVIL PROCEDURE CODE, 1908 – Section 96

It is the duty of First Appellate Court to consider all issues of law and fact, where it reversed the judgment of the Trial Court.

State Bank of India & Anr. v. M/s Emmsons International Ltd. & Anr.

Judgment dated 18.08.2011 passed by the Supreme Court in Civil Appeal No. 1709 of 2007, reported in AIR 2011 SC 2906

Held :

Having regard to the controversy set up by the parties in the course of trial, in our view, it cannot be said that issue no. 5 is immaterial or finding of the trial court on that issue is inconsequential. The High Court was hearing the first appeal and, as a first appellate court it ought to have considered and addressed itself to all the issues of fact and law before setting aside the judgment of the trial court. The judgment of the High Court suffers from a grave error as it ignored and overlooked the finding of the trial court on issue no. 5 that the seller accepted the encashment of bill and document on collection basis. The High Court was required to address itself to issue no. 5 which surely had bearing on the final outcome of the case.

In our view, the High Court failed to follow the fundamental rule governing the exercise of its jurisdiction under Section 96 of the Code of Civil Procedure, 1908 that where the first appellate court reverses the judgment of the trial court, it is required to consider all the issues of law and fact. This flaw vitiates the entire judgment of the High Court. The judgment of the High Court, therefore, cannot be sustained. For the above reasons, we accept the appeal, set aside the impugned judgment of the High Court and restore First Appeal No. 225 of 2002 for re-hearing and fresh decision. All contentions of the parties are kept open to be agitated at the time of the hearing of the first appeal.

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357. CIVIL PROCEDURE CODE, 1908 – Section 152

Amendment of Judgment or Order – Right to make an application under Section 152 is to be confined to parties to the suit.

Arkey Investment Pvt. Ltd. v. Kausar Sultan Alias Kosar Shafique & Ors.

Judgment dated 05.07.2011, passed by the High Court of M.P. in W.P. No. 13268 of 2008, reported in I.L.R. (2011) M.P. 2147

Held :

From perusal of Section 152 of the C.P.C., it is apparent that power under Section 152 can be exercised by the Court either suomotu or on the application of any of the parties. It is well settled rule of statutory interpretation that when words of statute are clear, plain or unambiguous i.e. they are susceptible to only one meaning the Courts are bound to give effect to that hearing irrespective of consequences. [See Principles of Statutory Interpretation Justice G.P. Singh 12th Edition Page 50] It is true that the phrase 'person aggrieved' is wider than the phrase 'party aggrieved'. However, legislature has used the expression 'parties' in Section 152. Thus the right to make an application under section 152 C.P.C. has to be confined to parties to the suit.

Admittedly, respondent No. 1 was not a party to the judgment and decree passed in favour of the petitioner. Therefore, at her instance, the application under Section 152 of C.P.C. could not have been entertained. Similar view has been taken by a Division Bench decision of Andhra Pradesh High Court in the case of *Waman Rao v. Daulat Rao, AIR 1953 Hyderabad 3.*

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358. CIVIL PROCEDURE CODE, 1908 – Order 3 Rule 2 and Order 41 Rule 23
LAND ACQUISITION ACT, 1894 – Section 18
COURT FEES ACT, 1870 – Section 13

Evidence of parties – Where all the affairs of a party are completely managed, transacted and looked after by an attorney, who happens to be a close family member, it may be possible to accept the evidence of such attorney-holder even with reference to certain facts which require to be proved by the plaintiff.

Refund of Court-fee – Where a decision is found to be erroneous and the matter is remanded back to the Reference Court for a fresh decision, the appellant become entitled for refund of the court-fee.

Fatehchand v. The Land Acquisition & Rehabilitation Officer & Ors.

Judgment dated 26.04.2011, passed by the High Court of M.P. in F.A. No. 47 of 2009, reported in I.L.R. (2011) M.P. 2020 (D.B.)

Held :

Reference Court found that the applicant/appellant had not examined himself but his power of attorney son Anil Kumar was examined. The Reference Court by referring two judgments of the Apex Court in *Vidhyadhar v. Manikrao, AIR 1999 SC 1441* and *Janki Vasudeo Bhojwani v. Indusind Bank Ltd. AIR 2005 SC 439*, arrived at a finding that it was necessary on the part of the appellant to examine himself and the power of attorney could have done all other work except participation in the judicial proceedings and he was not competent to examine himself to prove the case in reference. The appellant ought to have examined himself and if he was old and infirm, then a commission could have been got issued under Order 26 of the Code of Civil Procedure, failing which the case was not proved and the Reference Court dismissed the reference on this solitary ground. This order is under challenge in this appeal.

To appreciate the contention of the appellant, it would be appropriate if the recent pronouncement of the Apex Court in *Man Kaur v. Hartar Singh Sangha (2010) 10 SCC 512* is referred. The Apex Court after considering earlier judgments of the Apex Court including *Vidhyadhar* (Supra) and *Janki Vasudeo Bhojwani* (Supra) in paras 14 and 15 of the judgment, summarized, in paras 17 and 18 of the judgment, the principles in respect of examination of power of attorney. The Apex Court has also considered the question when a deposition by power of attorney can be relied. For ready reference, para 18 of the judgment of the Apex Court may be reproduced in which all the aforesaid principles have been categorized by the Apex Court:-

> 18. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:
>
> (a) An attorney-holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.
>
> (b) If the attorney-holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney-holder alone has personal knowledge of such acts and transactions and not

the principal, the attorney-holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney-holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney-holder, necessarily the attorney-holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorised managers/attorney-holders or persons residing abroad managing their affairs through their attorney-holders.

(e) Where the entire transaction has been conducted through a particular attorney-holder, the principal has to examine that attorney-holder to prove the transaction, and not a different or subsequent attorney-holder.

(f) Where different attorney-holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney-holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an attorney-holder. A landlord who seeks eviction of his tenant, on the ground of his "bona fide" need and a purchaser seeking specific performance who has to show his "readiness and willingness" fall under this category. There is however a recognised exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or "readiness and willingness". Examples of such attorney-holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.

In this case, from the perusal of statement of Anil Kumar, it is apparent that he has specifically stated that he is son of the appellant and also power of attorney holder. His father is 70 years old and he is an old and infirm person and since last 20 years, he is sick and he is residing at Bhopal. He has appointed his son Anil Kumar as power of attorney holder. Being son, he was taking care of agricultural, bank affairs and was managing properties. In the year 1986, he was appointed as general power of attorney and was having personal knowledge in respect of agriculture, agricultural land and trees standing on the land. He has also stated that he was involved in the agricultural work. In subsequent paras, he has stated in respect of the details of agricultural land, trees standing on the land, acquisition of the land, value of the land and the trees which were standing on the land. From the perusal of the cross-examination by the respondents, we find that aforesaid statement made in para 1 of the affidavit was not controverted by the respondent, in absence of which, statement made by Anil Kumar in respect of the aforesaid facts remained uncontroverted. Though he was cross-examined in respect of the value of the land, nature of the land, yield of the land, condition of the trees and profits from the land, but in respect of power of attorney, personal knowledge of Anil Kumar, sickness of his father, appellant herein, nothing was challenged, in absence of which the Reference Court ought to have evaluated the evidence of Anil Kumar in the light of the judgment of the Apex Court by which it has been held that where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not a power of attorney-holder. But there is a recognised exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney who happens to be a close family member, it may be possible to accept the evidence of such attorney-holder even with reference to certain facts which require to be proved by the plaintiff. The Apex Court has also considered the characters of such persons like husband/wife exclusively managing the affairs of his/her spouse, son/daughter exclusively managing the affairs of an old and infirm parent, father/mother exclusively managing the affairs of a son/daughter living abroad. In the present case, Anil Kumar who is power of attorney of his father Fatehchand has specifically stated that since last 20 years, he was managing the affairs of his father. He was taking care of agricultural activities and was having personal knowledge in respect of the issues involved in the case. In these circumstances, the trial Court ought to have considered the evidence and ought not to have rejected the reference merely on the ground that Fatehchand had not appeared in the witness box and only Fatehchand was having personal knowledge of certain facts of which his son Anil Kumar was not having any knowledge.

In view of the aforesaid, the impugned order is not sustainable under the law and is hereby set aside. The matter is remanded back to the Reference Court to redecide the matter after hearing both parties and appreciating the

evidence produced by the parties in respect of reference under Section 18 of the Act.

Now the question arises whether the appellant who has paid ad valorem court fee in this appeal is entitled for refund of the court-fee. In this case, it is not in dispute that the power of attorney appeared in the evidence who on oath had stated that his father Fatehchand was sick since last 20 years and he himself was taking care of all the agriculture, property and bank affairs of his father. In these circumstances, apparently the dismissal of reference was unjustified.

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359. CIVIL PROCEDURE CODE, 1908 – Order 3 Rule 4 and Order 23 Rule 3

(i) A counsel, who was duly authorized by a party to appear by executing Vakalatnama and in terms of Order 3 Rule 4, empowers the counsel to continue on record until the proceedings in the suit are duly terminated.

(ii) A counsel, who was duly authorized by a party has power to make a statement on instructions from the party to withdraw the appeal – If a counsel making a statement on instructions either for withdrawal of appeal or for modification of the decree is well within his competence.

(iii) If a counsel has not acted in the interest of the party or against instructions of the party, necessary remedy is elsewhere.

(iv) In order to safeguard the present reputation of the counsel and to uphold the prestige and dignity of legal profession, it is always desirable to get instructions in writing as pointed out in *Byram Pestonji Gariwal v. Union Bank of India and others, AIR 1991 SC 2234.*

Bakshi Dev Raj and Anr. v. Sudheer Kumar

Judgment dated 04.08.2011 passed by the Supreme Court in Civil Appeal No. 4641 of 2009, reported in AIR 2011 SC 3137

Held:

The analysis of the above decisions make it clear that the counsel who was duly authorized by a party to appear by executing Vakalatnama and in terms of Order III Rule 4, empowers the counsel to continue on record until the proceedings in the suit are duly terminated. The counsel, therefore, has power to make a statement on instructions from the party to withdraw the appeal. In such circumstance, the counsel making a statement on instructions either for withdrawal of appeal or for modification of the decree is well within his competence and if really the counsel has not acted in the interest of the party or against the instructions of the party, the necessary remedy is elsewhere. Though learned counsel for the appellant vehemently submitted that the statement of the counsel before the High Court during the course of hearing of Second Appeal No. 19 of 2005 was not based on any instructions, there is no such material to substantiate the same. No doubt, the learned counsel for appellants has placed

reliance on the fact that the first appellant was bedridden and hospitalized, hence, he could not send any instruction. According to him, the statement made before the Court that too giving of certain rights cannot be sustained and beyond the power of the counsel. It is true that at the relevant time, namely, when the counsel made a statement during the course of hearing of second appeal one of the parties was ill and hospitalized. However, it is not in dispute that his son who was also a party before the High Court was very much available. Even otherwise, it is not in dispute that till filing of the review petition, the appellants did not question the conduct of their counsel in making such statement in the course of hearing of second appeal by writing a letter or by sending notice disputing the stand taken by their counsel. In the absence of such recourse or material in the light of the provisions of the CPC as discussed and interpreted by this Court, it cannot be construed that the counsel is debarred from making any statement on behalf of the parties. No doubt, as pointed out in *Byram Pestonji Gariwala v. Union Bank of India and others, AIR 1991 SC 2234* in order to safeguard the present reputation of the counsel and to uphold the prestige and dignity of legal profession, it is always desirable to get instructions in writing.

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360. CIVIL PROCEDURE CODE, 1908 – Order 7 Rules 6A and 11

Facts pertaining to counter-claim must be mentioned in W.S. and independent counter-claim is not permissible.

Parties to the counter-claim – Counter-claim filed against power of attorney holder of plaintiff who was also sub-tenant of a portion of the suit premises – Legislature has provided the right of counter-claim against the claim of the plaintiff and not against the plaintiff alone – The counter-claim held, maintainable.

Gulzarilal Jain v. Ravikant Shirke

Judgment dated 24.09.2010, passed by the High Court of M.P. in Writ Petition No. 464 of 2010, reported in 2011 (4) MPHT 194 (DB)

Held :

Reliance by learned Counsel for the petitioner is placed on the decision of the Hon'ble Supreme Court of India in the case of *Ramesh Chand Ardawatiya v. Anil Panjwani, (2003) 7 SCC 350*, to contend that separate counter claim is not permissible in law. In the case of *Ramesh Chand Ardawatiya* (supra), no written statement was filed by the defendant. Paragraph 26 from the judgment is being quoted below for ready reference: –

> "26. A perusal of the above said provisions shows that it is the Amendment Act of 1976, which has conferred a statutory right on a defendant to file a counter-claim. The relevant words of Rule 6-A are –
>
> "A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, ... before the defendant

has delivered his defence or before the time limited for delivering his defence has expired ...."

These words go to show that a pleading by way of counter-claim runs with the right of filing a written statement and that such right to set up a counter claim is in addition to the right of pleading a set-off conferred by Rule 6. A set off has to be pleaded in the written statement. The counter claim must necessarily find its place in the written statement. Once the right of the defendant to file written statement has been lost or the time limited for delivery of the defence has expired then neither can the written statement be filed as of right nor a counter claim can be allowed to be raised, for the counter-claim under Rule 6-A must find its place in the written statement. The Court has discretion to permit a written statement being filed belatedly and, therefore, has a discretion also to permit a written statement containing a plea in the nature of set-off or counter claim being filed belatedly but needless to say such discretion shall be exercised in a reasonable manner keeping in view all the facts and circumstances of the case including the conduct of the defendant, and the fact whether a belated leave of the Court would cause prejudice to the plaintiff or take away a vested right which has accrued to the plaintiff by lapse of time."

In the case in hand, learned Trial Judge had fixed 03.03.06 for submission of written statement. Before expiry of time for submission of the written statement, defendant submitted written statement with a specific mention in Paragraph 3 of the written statement that counter claim is also being duly submitted. Copy of the written statement as well as of counter claim were furnished to the plaintiff on 27.03.2006. Issues were also raised by the learned Trial Judge taking into consideration the plaint, written statement, counter-claim and written statement to counter claim. Thereafter, the plaintiff/petitioner adduced the evidence in the light of averments contained in the plaint as well as in the counter claim. Written statement as well as counter claim were submitted before expiry of the date fixed by the Trial Court for filing of written statement and there was no delay on the part of the defendant. Thus, the decision in the case of *Ramesh Chand Ardawatiya* (supra), being distinguishable on facts cannot be invoked by the petitioner.

Further contention of the learned Counsel for the petitioner is that the defendant has claimed relief in the counter claim not against the plaintiff alone but also against Ashish Kumar Jain joining him as defendant No. 2 in the counter claim. Reliance for this purpose is placed on Division Bench decision of this Court in the case of *Mukund Lal and another v. Ghanshyam and others, 2009 (3) MPHT 265 (DB) = 2009 (3) MPLJ 239.* This Court has observed: –

"6. ..... It is apparent from the bare reading of aforesaid provision that counter-claim is maintainable by defendants against the claim of the plaintiff not inter se defendants. Same is the view taken by this court in *Udhavas Tyagi v. Srimurthi Radhakrishna Mandir, Dehrighat, 2002 (1) MPWN Note No. 31* and by High Court of Patna in *Hem Narain Thakur v. Deo Kant Mishra and others, AIR 2000 No C 23 (Patna).* We have no hesitation to hold that counter-claim filed by defendant Nos. 3 to 11 as against defendant Nos. 1 and 2, 15 and 16 could not be said to be maintainable under Order 8 Rule 6-A of Civil Procedure Code."

Relevant portion of sub-rule (1) of Rule 6-A of Order VIII, CPC is as follows: –

"Rule 6-A. Counter-claim by defendant. –

(1) A defendant in a suit may, in addition to his right of pleading a set off under Rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not :

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court."

(Note : Underlined by this Court)

Perusal of the aforesaid goes to show that the Legislature has provided the right of counter claim against the claim of the plaintiff and not against the plaintiff alone. Plaintiff's claim in the suit is for declaration that he be declared a tenant in occupation of the suit premises and defendant be restrained from depriving him of facility of electricity and evicting him forcibly.

The suit has admittedly been instituted by Ashish Kumar Jain in the capacity of Power of Attorney of the plaintiff which has been signed and verified by Ashish Kumar Jain. Affidavit has been submitted in support of the plaint by Ashish Kumar Jain as Power of Attorney of the plaintiff. Vakalatnama has also been signed by Ashish Kumar Jain to engage a lawyer on behalf of the plaintiff. Plaintiff did not appear personally in the witness box but it was Ashish Kumar Jain who has been examined on behalf of the plaintiff.

Defendant in the counter claim has pleaded that the suit premises is a non-residential premises and its portion has been sublet to Ashish Kumar Jain. Eviction has been sought on ground under Section 12 (1) (b) of M.P. Accommodation Control Act, 1961. This apart, eviction has also been sought on the *bonafide* non-residential need of the defendant on the ground that he is

running a Computer Coaching Centre in rented accommodation and he needs the suit premises *bonafide* for his own business. In the totality of the facts and circumstances of the case, Ashish Jain @ Ashish Kumar Jain is not absolutely stranger to the plaintiff because he appears to be *de facto* plaintiff who has instituted a suit under his own signatures and is conducting the suit in place of the plaintiff. Relief against him has not been sought independently. He is virtually related to the plaintiff with reference to the suit premises and the averments made in the counter claim are to be construed in this context. Thus, the relief in the counter claim is not claimed merely against the co-defendant independent of plaintiff.

Hon'ble Supreme Court of India in the case of *Rohit Singh and others v. State of Bihar (*Now *State of Jharkhand), AIR 2007 SC 10,* has observed in Paragraph 18, which is quoted below for ready reference: –

> "18. Normally, a counter-claim, though based on a different cause of action than the one put in suit by the plaintiff could be made. But, it appears to us that a counter-claim has necessarily to be directed against the plaintiff in the suit, though incidentally or along with it, it may also claim relief against co-defendants in the suit. But a counter-claim directed solely against the co-defendants cannot be maintained."

Considering the law settled by the Hon'ble Apex Court, the counter claim against the plaintiff as well as Ashish Kumar Jain is found maintainable. Impugned order is, thus, found to have suffered from no infirmity.

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361. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11
PARTNERSHIP ACT, 1932 – Section 69
Rejection of Suit – Suit of plaintiff is for enforcement of right arising out of the contract of partnership and not independent of it – Plaintiff nowhere pleaded that the firm is already dissolved – Partnership firm between the plaintiff and defendant is still running even as per plaint averments – Held, the suit of the plaintiff is not covered by any of the exceptions provided in Section 69 of the Act – Plaint is liable to be rejected.

Ashish Verma v. Neeraj Vyas & Ors.
Judgment dated 12.07.2011, passed by the High Court of M.P.in C. R. No. 96 of 2011, reported in I.L.R. (2011) M.P. 2305

Held :

From perusal of the plaint averments and reliefs claimed therein, it is clear that the suit for share in the business of partnership firm has arisen from a contract of partnership. Plaintiff has claimed money from the defendant/revisionist as his share in the partnership business. Further, in view of the status of the plaintiff as partner, he has claimed right to participate in the said partnership business. Thus, obviously, the suit of the plaintiff is for enforcement of a right

arising out of the contract of partnership and not independent of it. Plaintiff has nowhere pleaded that the firm is already dissolved. Thus, the suit of the plaintiff is not covered by any of the exceptions provided in Section 69 of the Act. In the case of *Krishna Motor Services by its Partners v. H.B. Vittala Kamath, (1996) 10 SCC 88*, the partnership between the parties was already dissolved. In the case of *Prakash Rajmalji Jain and others v. Vijay Saxena and another, 2001 (1) MPLJ 148*, suit was against unregistered firm for rendition of accounts of dissolved firm. In the case in hand, the partnership firm between the plaintiff and defendant is still running even as per plaint averments.

The question of law raised in the case of *Jagat Mittar Saigal v. Kailash Chander Saigal, AIR 1983 Delhi 134* under Section 8(b) read with Section 20(4) of the Arbitration Act, 1940 was as to whether such a petition is barred at the instance of a partner of an unregistered partnership firm. This being not a situation in the present case, the respondent does not get any assistance from the Delhi High Court's decision.

This Court in the case of *Madanlal and others v. Smt. Badambai* reported in *ILR (2008) M.P. 3249*, has clearly held that the suit for rendition of accounts is not maintainable in the absence of registration of the firm by virtue of Section 69 (supra).

Thus, the learned trial Judge has committed an illegality in treating the suit to have not arisen from the partnership agreement. The plaintiff thus does not get assistance from any of the rulings cited by him.

In the result, civil revision succeeds and the same is hereby allowed. Impugned order is set aside. It is held that the plaint is liable to be rejected under Order 7 Rule 11 CPC. Learned trial Judge has acted with an illegality in holding otherwise.

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362. CIVIL PROCEDURE CODE, 1908 – Order 8 Rules 1 and 9
ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (a) (c)

(i) Counter-claim, how to be filed? It may be filed with the Written Statement, may be by way of amendment in the Written Statement subject to permission of the Court and may also be by subsequent pleading under Order 8 Rule 9.

(ii) A counter-claim not produced with written statement may be refused to be taken on record if issues have been framed and the case is set down for trial and more so when trial has already commenced.

(iii) A suit based on contract of tenancy, the question of title cannot be gone into like a regular suit based on title and is incidentally decided.

Sushila Devi v. Khalil Ahmed

Judgment dated 13.04.2011 passed by the High Court of M.P. in W.P. No. 4487 of 2010, reported in 2011 (3) MPLJ 526

Held :

I have considered the submissions made by learned Counsel for the parties. A close scrutiny of the provision of Order 8 reveals that there are three modes of setting up a counter-claim in a civil suit. Firstly, the written statement filed under Order 8, Rule1, may itself contain a counter-claim. Secondly, a counter-claim may be preferred by way of amendment in the written statement subject to the leave of the Court. Thirdly, a counter-claim may be filed by way of a subsequent pleading under Order 8, Rule 9. In the latter two case the counter-claim though referable to Rule 6-A, cannot be brought on record as of right but shall be governed by the discretion vested in the Court, either under Order 6, Rule 17 of the Code of Civil Procedure, if sought to be introduced by way of amendment or subject to exercise of discretion conferred on the Court under Order 8, Rule 9 of the Code of Civil Procedure if sought to be placed on record by way of subsequent pleading. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be, prolonging of the trial, complicating the smooth flow of proceedings or causing a delay in the progress of the suit, the Court would be justified in exercising its discretion not in favour of permitting the belated counter-claim. Generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case is set down for trial, and more so when the trial has already commenced. Refusal on the part of the Court to entertain the belated counter-claim by way of subsequent pleading may not prejudice the defendant because in spite of the counter-claim having been refused to be entertained, the defendant is always at liberty to file his suit based on the cause of action of counter-claim. (See : *Ramesh Chand Ardawatiya v. Anil Panjwani, (2003) 7 SCC 350*)

In the backdrop of the aforesaid legal position, the facts of the case may be seen. In the instant case, the suit has been filed by the petitioner for eviction of the respondent under the provisions of the M.P. Accommodation Control Act, 1961 on the grounds enumerated under section 12(1)(a) and 12(1) (c) of the Act. It is well settled in law that in a suit based on contract of tenancy the question of title cannot be gone into like a regular civil suit based on title and is incidentally decided. In the instant case, the cause of action admittedly has arisen after filing of the written statement. Thus, the counter-claim falls within the purview of Order 8, Rule 9 of the Code of Civil Procedure. The issues have already been framed in the civil suit filed by the petitioner and the trial has already commenced. If the counter-claim is allowed at this stage, it will have the effect of prolonging the trial. Thus, in view of the law laid down by the Supreme Court in *Ramesh Chand Ardawatiya* (supra) the order of the trial Court cannot be sustained in the eye of law.

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363. CIVIL PROCEDURE CODE, 1908 – Order 11

Principle of *Res Judicata* applicability of – The principle is also applicable to the subsequent stage of the same proceedings even in respect of interlocutory order.

Smt. Kunti Bai and others v. M.P.S.R.T.C. and others

Judgment dated 18.02.2011, passed by the High Court of M.P. in Civil Rev. No. 323 of 2008, reported in 2011 (4) MPHT 212

Held :

From perusal of the order dated 28.06.2002, it is apparent that the Tribunal has rejected the contention of the judgment debtor that the amount deposited by him should be first appropriated towards the principal. It is well settled in that an order is effective *inter partes* until it is successfully avoided or challenged in a higher forum. [See : *State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (dead) and others, (1996) 1 SCC 435*]. Admittedly, the aforesaid order has not been challenged in any higher forum therefore, the same is binding between the parties. Apart from this, if an order is passed by the Court in course of proceeding, the same is binding on the subsequent stage of the proceeding. It is well settled in law that the principle of res judicata applies to subsequent stage of proceeding even in respect of interlocutory orders. [See : *Satyadhyan Ghosal and others v. Smt. Deorajin Debi and another, AIR 1960 SC 941* and *Arjun Singh v. Mohindra Kumar and others, AIR 1964 SC 993*].

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***364. CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 10**

Interest in execution of money decree – During the pendency of execution proceedings, original decree holder died – An application was filed by heirs of the decree-holder to continue execution proceedings against judgment debtor – J.D. raised an objection that the applicants should obtain succession certificate and then only they can proceed with execution – This objection was accepted by the Executing Court – Hence, they obtained succession certificate and proceeded with execution – In execution proceedings, J.D. objected that the heirs are not entitled for interest for the period they spent for obtaining succession certificate – Held, the heirs obtained succession certificate on objection of J.D. and hence, J.D. is responsible for the same.

Municipal Corporation, Gwalior and another v. Jai Kishan Das Pamnani and others

Judgment dated 26.03.2010, passed by the High Court of M.P. in Writ Petition (I) No. 1414 of 2010, reported in 2011 (4) MPHT 403 (DB)

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365. CIVIL PROCEDURE CODE, 1908 – Order 33 Rule 1 and Order 44 Rule 1 Indigent person – How to be determined? Person's employment status, total income including retirement benefits in the form of pension, ownership of realizable unencumbered assets, financial assistance received from family members or close friends can be taken into account.

Mathai M. Paikeday v. C.K. Anthony

Judgment dated 11.07.2011 passed by the Supreme Court in Civil Appeal No. 5493 of 2011, reported in AIR 2011 SC 3221

Held:

Admittedly the respondent is a retired Deputy Conservator of Forest, Government of Kerala and drawing a pension of ₹ 10,500. It was also stated by him in his deposition before the High Court on 03.01.2008 that his son is employed abroad and does not regularly send him money and in response to a suggestion, whether his bank account discloses the amount of money sent by his son, he does not deny the suggestion. However, it is noteworthy to mention that respondent has never denied that his son sends him money. Furthermore, the respondent had failed to establish that the amount of money received from his son is not substantial or insufficient to pay court fee by not producing passbook of his bank account. In our considered opinion, non-production of bank account transaction details, amounts to suppression of the facts and in view of this, an adverse inference can be drawn against the respondent that he is receiving a substantial or sufficient amount of money from his son. Therefore, the amount of money received by the respondent from his son and by way of pension amounts to a sufficient means to pay court fee which disentitles him to be an indigent person under Order 33 Rule 1 and Order 44 Rule 1 of the Code of Civil Procedure.

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366. CIVIL PROCEDURE CODE, 1908 – Order 39 Rule 1
SPECIFIC RELIEF ACT, 1963 – Sections 41 and 42
Temporary injunction – *Prima facie* case – Petitioner and respondent firm entered into an agreement for development of land and construction of flats/houses – Respondent filed a suit for permanent injunction and declaration on the ground that in breach of the agreement petitioner is selling various plots covered in the agreement – Temporary injunction was also sought for to inject petitioner from alienating the plots indicated in the agreement – Held, plaintiff is not claiming specific performance of the agreement, but is only claiming injunction – Suit itself being not maintainable, the question of existence of *prima facie* case does not arise – Prayer for injunction is unsustainable

Ajay Narang v. M/s Ram Enterprizes

Judgment dated 15.07.2011, passed by the High Court of M.P. in W.P. No. 6464 of 2010, reported in I.L.R. (2011) M.P. 2162

Held :

If the prayer made by the plaintiff in the plaint is seen, the prayer is declaratory in nature and the plaintiff only wants a declaration to the effect that petitioner/defendant should not alienate the plots during the pendency of the proceedings. The question as to whether such a decree could be granted without seeking specific performance of the agreement in the light of the provisions of Sections 41 and 42 of the Specific Relief Act, is considered by a Bench of this court in the case of *M/s Jawahar Theatres Private Limited v. Smt. Kasturi Bai and another, AIR 1961 MP 102*, and after evaluating the principle and taking note of the provisions of Specific Relief Act, 1877 as was then applicable, the law laid down is that a suit for mere negative injunction without claiming specific performance is not maintainable.

In the present case also, plaintiff is not claiming specific performance of the agreement, but is only claiming injunction. If the principle laid down in the case of *M/s Jawahar Theatres Private Limited* (supra) is applied to the facts and circumstances of the present case, the suit itself being not maintainable, the question of existence of prima facie case does not arise.

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***367. CONSUMER PROTECTION ACT, 1988 – Sections 3, 13, 18 and 22**

(i) Proceedings before Consumer Forum – Such proceedings come within the sweep of the term "suit".

(ii) Proceedings under the Consumer Protection Act – Application of CPC – The provisions of the CPC are applicable to a limited extent and not all the provisions of CPC are made applicable to the proceedings of Consumer Protection Act, being a later and Special Act.

(iii) Claim of sovereign immunity under Section 86 of the CPC – Sovereign immunity is not available to contractual and commercial activities and obligations undertaken by the foreign State or its instrumentality in India – Hence, no bar to proceed against a foreign country or its instrumentality under the Consumer Protection Act, 1988.

Ethiopian Airlines v. Ganesh Narain Saboo

Judgment dated 09.08.2011 passed by the Supreme Court in Civil Appeal No. 7037 of 2004, reported in (2011) 8 SCC 539

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368. CONTRACT ACT, 1872 – Section 14
CIVIL PROCEDURE CODE, 1908 – Section 100

(i) If a sale deed has been executed by the plaintiff in favour of the defendant without coercion, undue influence, misrepresentation and mistake and there was no fraud played by the defendant, it cannot be said that there was no free consent of plaintiff to execute it.

(ii) It is not at all permissible for a Court to make an altogether new case for a party in the shadow of probabilities and preponderance.

Shatrughan Prasad v. Ramprasad and another

Judgment dated 18.08.2011 passed by the High Court of M.P. in S.A. No. 624 of 1994, reported in 2011 (4) MPLJ 124

Held :

The learned trial court in para - 19 of the impugned judgment came to hold that looking to the circumstances that because there is no one in the family of the plaintiff and he (plaintiff) is issue-less, the defendant might have succeeded to pacify the plaintiff that instead of selling one Survey number, he (plaintiff) should sell the entire suit property but it will only be a nominal sale and the plaintiff shall remain in possession of the suit property. Indeed, an altogether new case, which is not at all of plaintiff, the learned trial Court has made for him, which according to me, is not at all permissible. According to me, the probabilities and preponderance cannot be stretched upto the extent that it would turn into conjectures and surmises. The case of plaintiff is that the sale deed was executed by defendant by playing fraud upon him. It is not his case that without free consent he executed the sale deed and therefore, learned trial Court erred in substantial error of law and by making out a new case for the plaintiff and thereby decreed his suit on the grounds which were not even pleaded by him. Specifically by deciding issue No. 2 against the plaintiff it has been held by learned trial Court that fraud was not played by the defendant while executing the sale deed.

Since the learned trial Court has come to a conclusion that sale deed was not executed with the free consent of the plaintiff, I am required to see the law in this regard. Section 14 of the Indian Contract Act, 1872 has defined the term "Free consent" and according to this section a Consent is said to be free when it is not caused by –

"(1) coercion, as defined in section 15, or

(2) undue influence, as defined in section 16, or

(3) fraud, as defined in section 17, or

(4) misrepresentation, as defined in section 18, or

(5) mistake, subject to the provisions of sections 20, 21 and 22."

The case of plaintiff is not of coercion or undue influence or misrepresentation

as defined under sections 15, 16 and 18 of the Contract Act. His case is not even of mistake subject to the provisions of sections 20, 21 and 22 of the said Act. The learned trial Court in paras 21 and 26 has specifically held that fraud has not been played by the defendant upon plaintiff. Since the case of plaintiff is not of coercion, undue influence, misrepresentation and mistake and further because the fraud has not been played by defendant upon the plaintiff, therefore, it cannot be said that there was no free consent of plaintiff to execute the sale deed in question. On the other hand, it would be deemed that there was free consent of the plaintiff when the disputed sale deed was being executed. The finding of learned trial Court holding that there was no free consent of the plaintiff is contrary to section 14 of the Contract Act as well as it is not the case of plaintiff and thus, it is perverse. The learned First Appellate Court has concurred with the view of learned trial Court and the findings recorded by it have not been reversed except by reversing the findings of learned trial Court on Issue No. 2 that fraud was not played, the learned First Appellate Court has held that defendant played fraud upon the plaintiff and therefore the finding of learned First Appellate Court is also perverse.

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369. COURT FEES ACT, 1870 – Section 7(vi) (c) & (d), Article 17 Schedule II SUITS VALUATION ACT, 1887 – Section 8

Consequential relief – Plaintiff claiming declaration that the land encroached by the defendants is of the ownership of plaintiff alongwith mandatory injunction to remove the wall constructed by the defendants – The relief of mandatory injunction is not independent, but is consequential to the relief of declaration.

Proper valuation of Court Fee – Plaintiff himself put valuation in respect of property by which he sought relief of mandatory injunction – Held, plaintiff was required to make payment of *ad valorem* Court fee.

A.K. Ghosh v. Dhruv Kumar Haryani & Anr.

Judgment dated 01.07.2011, passed by the High Court of M.P. in W.P. No. 16432 of 2005, reported in I.L.R. (2011) M.P. 2141 (DB)

Held :

In this case the plaintiff is claiming declaration in respect of land which is encroached by the defendants by raising construction of wall and in para 6 of the plaint, the plaintiff has specifically pleaded thus:-

> "6. That as aforesaid the area of the encroach portion is 265 (Two hundred sixty five) sq.ft., and presently the rate of sale per sq.ft., is not less ₹ 150 per sq.ft., with the result the value of the encroach portion would be at ₹ 39,750 (Rs. Thirty nine thousand seven hundred fifty). Hence it is necessary for the plaintiff to have a declaration of ownership of encroached plot and mandatory injunction

against the defendants, to this effect the defendants served with the notice dated 01.10.2003 which was refused."

The aforesaid pleadings specifically states that the land was encroached by the defendants. The plaintiff is claiming declaration that the land encroached by the defendants is of the ownership of plaintiff and a mandatory injunction has been prayed against the defendants to remove the wall constructed by the defendants. Until and unless it is declared that plaintiff is owner of the land encroached by defendant, a decree for mandatory injunction cannot be granted. The relief of mandatory injunction is not an independent, but is a consequential to the relief of declaration. In fact the suit of plaintiff ought to have been for possession and relief of mandatory injunction is apparently for removal of wall constructed by the defendants by encroaching land of plaintiff. In these circumstances also, the plaintiff was required to value the suit as per value of subject matter and ought to have paid the court fees, but in place of this the plaintiff has sought relief of declaration and mandatory injunction. By the mandatory injunction the plaintiff is praying for removal of wall and possession over the encroached area. In these circumstances even if the title of plaintiff is not disputed by the defendants, even then the plaintiff was required to put valuation of land encroached by the defendant. In this regard the plaintiff in para 6 of the plaint has specifically averred. If the aforesaid pleadings are taken into consideration there is no iota of doubt that even for the relief of mandatory injunction the plaintiff is required to put a proper valuation of suit and to make payment of ad-valorem court fees. Section 7(iv) (c) provides for a declaratory decree and consequential relief. Section 7(iv) (d) provides a decree for an injunction. The section provides that in all such suits the plaintiff shall state the amount on which he values the relief sought. Section 8 of the Suits Valuation Act specifically provides that where any suit other than those provides that court fees valued and jurisdictional value shall be the same, except those which are referred in paragraphs v, vi, & ix of section 7 of the Court Fees Act. The present suit is undoubtedly covered under section 7(iv) (c) or (d) and in both the conditions the plaintiff has to value suit for the purpose of jurisdiction and Court fees same.

Article 17 of Schedule II, specifically provides that to obtain a declaratory decree where no consequential relief is prayed, fixed Court fees is provided. Similarly where it is not possible to estimate at a money-value of the subject matter in dispute, fixed Court fees is provided.

But in the present case, the plaintiff has put valuation in respect of property by which, petitioner is seeking relief of mandatory injunction. When the plaintiff himself has put the valuation of property and sought a relief of mandatory injunction, then as per the valuation put by the plaintiff he was required to make payment of ad-valorem Court fee.

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370. CRIMINAL PROCEDURE CODE, 1973 – Section 125

Expiration of the period of *iddat* – Wife's right to maintenance does not cease to operate and she is entitled to claim maintenance – The petition for monthly maintenance by the divorced wife after divorce till her remarriage against her husband and the petition for monthly maintenance for minor children against their father is maintainable.

Asif Saied v. Smt. S.M. Unnissan Rana & Ors.

Judgment dated 08.07.2011, passed by the High Court of M.P. in Cr. Rev. No. 241 of 2010, reported in I.L.R. (2011) M.P. 2233

Held :

Recently, the Hon. Apex Court in the case of *Shabana Bano v. Imran Khan, AIR 2010 SC 305* has resolved the controversy raised in this case in the following manner :-

> "The appellant's petition under Section 125 of the Cr.P.C. would be maintainable before the family Court as long as appellant does not remarry. The amount of maintenance to be awarded under Section 125 of the Cr.P.C. cannot be restricted for the iddat period only. Cumulative reading of the relevant portions of judgments of this Court in *Danial Latifi, 2001 AIR SCW 3932* (Supra) and *Iqbal Bano, 2007 AIR SCW 3880* (Supra) would make it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women. It is held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of the Cr.P.C. after the expiry of period of iddat, also, as long as she does not remarry."

Further, a Constitution Bench of this Court in the case of *Danilal Latif and Anr. v. Union of India, (2001) 7 SCC 746* observed as follows:

> "A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. It was stated that Parliament seems to intend that the divorced woman gets sufficient means of livelihood after the divorce and, therefore, the word "provision" indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs.

> Reasonable and fair provision may include provision for her residence, her food, her clothes, and other articles. The expression "within" should be read as "during" or "for" and this cannot be done because words cannot be construed contrary to their meaning as the word "within" would mean "on or before", "not beyond" and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but nowhere has Parliament provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time."

In the Case of *Hazi Farzand Ali v. Neerjahan, 1988 Cri.L.J. 142* the High Court of Rajasthan held in this manner:-

> "Having read the petition, I am of the opinion that the amount of maintenance has been claimed by the non-petitioner for herself as well as for her three minor children. This is a joint application moved by her on her behalf and on behalf of her children and a prayer has been made for the award of maintenance to the tune of ₹ 500 for her minor children and herself. Thus, the application can be treated as an application for maintenance by each of her minor children u/s 125, Cr.P.C."

In the light of the decisions extracted above, in the opinion of this court, on the expiration of the period of iddat the wife's right to maintenance does not cease to operate and she is entitled to claim maintenance under any circumstances. Hence, the petition for monthly maintenance by the divorced wife after divorce till her remarriage against her husband and the petition for monthly maintenance for minor children against their father is maintainable. So far as the quantum of maintenance amount is concerned, the standard of life enjoyed by her during her marriage and in the present scenario of the sky rocketing prices, the basic need of the grownup children and the liabilities of the respondent-wife, all these factors should be kept in mind at the time of determining the amount of monthly maintenance. Looking to the evidence adduced before the trial Magistrate, it appears that the petitioner/husband is working as teacher in Madarsa and getting regular income with annual increments on salary and there is further provision of timely revision of pay scales by the State under the relevant rules. Hence, there appears to be no illegality committed by the Revisional court in passing the impugned Award.

For these reasons, the revision petition is dismissed confirming the order passed by the Revisional court. It is needless to add that it would be open to the parties to make an application under Section 127(1) of the Cr.P.C. on proof of a change in the circumstances as envisaged by that Section.

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371. CRIMINAL PROCEDURE CODE, 1973 – Section 154
EVIDENCE ACT, 1872 – Section 3
INDIAN PENAL CODE, 1860 – Sections 368 and 376 (2) (g)

(i) In gang rape case, it may not be necessary for the prosecution to adduce evidence of a complete act of rape by each one of the accused – The provision embodies a principle of joint liability and the essence of that liability is existence of common intention – That common intention pre-supposes prior concern – There must be meeting of minds which may be determined from the conduct of the accused revealed during the course of the incident.

(ii) The appellant had provided space and cot – There is no evidence on record that appellant had known the fact of kidnapping and committing rape by co-accused – So,no evidence of common intention is on record – Conviction of the appellant under Section 376 (2) (g) IPC is set aside and conviction under Section 368 IPC is maintained.

Om Prakash v. State of Haryana

Judgment dated 07.07.2011, passed by the Supreme Court in Criminal Appeal No. 421 of 2007, reported in AIR 2011 SC 2682

Held :

There is some delay in lodging the FIR but that delay has been well explained. A young girl who has undergone the trauma of rape is likely to be reluctant in describing those events to any body including her family members. The moment she told her parents, the report was lodged with the police without any delay. Once a reasonable explanation is rendered by the prosecution then mere delay in lodging of a first information report would not necessarily prove fatal to the case of the prosecution.

A plain reading of Section 376(2)(g) with Explanation I thereto shows that where a woman is raped by one or more of a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of Section 376 (2)(g) of the IPC. In other words, the act of gang rape has to be in furtherance of their common intention before the deeming fiction of law can be enforced against the accused. This Court in the case of *Ashok Kumar v. State of Haryana, AIR 2003 SC 777* had occasion to dwell on Explanation 1 to Section 376(2)(g), IPC while examining whether the appellant Ashok Kumar could be convicted under the same because at the crucial time, he happened to be in the house of the co-accused Anil

Kumar in whose case the judgment of conviction under Section 376(2)(g) had attained finality. The Court observed that the prosecution must adduce evidence to show that more than one accused has acted in concert and in such an event, if rape had been committed by even one of the accused all will be guilty irrespective of the fact that she has not been raped by all of them. Therefore, it may not be necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. The provision embodies a principle of joint liability and the essence of that liability is existence of common intention. That common intention pre-supposes prior concert as there must be meeting of minds, which may be determined from the conduct of the offenders which is revealed during the course of action. After examining the circumstances relied upon by the prosecution to indicate concert, the Court in *Ashok Kumar* (supra) concluded that mere presence of the appellant could not establish that he had shared a common intention with the co-accused to rape the prosecutrix. A similar view was taken in the case of *Bhupinder Sharma v. State of Himachal Pradesh, AIR 2003 SC 4684.*

Another Bench of this Court in the case of *Pardeep Kumar v. Union Administration, Chandigarh, AIR 2006 SC 2992* after noticing the judgment of this Court in the case of *Ashok Kumar* (supra), *Bhupinder Sharma* (supra) and *Priya Patel v. State of M.P., AIR 2006 SC 2639* while elaborating the ingredients of the offence under Section 376(2)(g) of the I.P.C. stated the law as follows:

> "10. To bring the offence of rape within the purview of Section 376(2)(g) IPC, read with Explanation 1 to this section, it is necessary for the prosecution to prove:
>
> (i) that more than one person had acted in concert with the common intention to commit rape on the victim;
>
> (ii) that more than one accused had acted in concert in commission of crime of rape with pre-arranged plan, prior meeting of mind and with element of participation in action. Common intention would be action in concert in pre-arranged plan or a plan formed suddenly at the time of commission of offence which is reflected by the element of participation in action or by the proof of the fact of inaction when the action would be necessary. The prosecution would be required to prove pre-meeting of minds of the accused persons prior to commission of offence of rape by substantial evidence or by circumstantial evidence; and
>
> (iii) that in furtherance of such common intention one or more persons of the group actually committed

offence of rape on victim or victims. Prosecution is not required to prove actual commission of rape by each and every accused forming group.

11. On proof of common intention of the group of persons which would be of more than one, to commit the offence of rape, actual act of rape by even one individual forming group, would fasten the guilt on other members of the group, although he or they have not committed rape on the victim or victims.

12. It is settled law that the common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances."

In the case of *Smt. Saroj Kumari v. The State of U.P., AIR 1973 SC 201,* this Court while explaining the constituents of an offence under Section 368 of the IPC clearly held that when the person in question has been kidnapped, the accused knew that the said person had been kidnapped and the accused having such knowledge, wrongfully conceals or confines the person concerned then the ingredients of Section 368 of the IPC are said to be satisfied. The prosecution evidence and particularly the statement of the prosecutrix shows that the act of kidnapping with the intention to rape and actual commission of rape of the prosecutrix were completed by Jai Prakash himself. The appellant had rendered the help of providing a room but there is nothing on the record, including the statement of the prosecutrix, to show that she overheard Jai Prakash telling the appellant that he had kidnapped her and/or that the appellant had any knowledge of the fact that she had been kidnapped. The possibility of the appellant being informed by the Jai Prakash that she had come of her own will and had travelled a long distance of 15-20 km without protest does not appear to be unreasonable. As noticed, according to the prosecutrix, it was under threat but the prosecution was expected to produce evidence to show that the factum of kidnapping as well as intent to commit a rape was known to the appellant either directly or at least by circumstantial evidence. As per the evidence of the prosecution, the room where the prosecutrix was raped belonged to one Shri Moti Ram, the uncle of the appellant who had died. Except the statement of DW1, no other defence had been led by the appellant to prove that he is innocent or has been falsely implicated. Though DW1 had made a vague statement that on the date of occurrence, no girl had come to that room, that statement cannot be said to be truthful and it does not inspire confidence.

Even in the cases where the statement of prosecutrix is accepted as truthful, it is expected of the prosecution to show some basic evidence of common intention or concert prior to commission of the offence. In the present case, it is an undisputed fact that Jai Prakash alone at the knife point had taken away the prosecutrix across a distance of more than 15 km and it is only after he reached Gulab Nagar that he met the appellant. Except providing a space and cot and helping the accused in wrongfully detaining the prosecutrix, no further act or common intention is attributable. There is no evidence that there was a common concert or common intention or meeting of minds prior to commission of the offence between the two accused.

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372. CRIMINAL PROCEDURE CODE, 1973 – Section 174
INDIAN PENAL CODE, 1860 – Section 4

(i) If an offence is committed by Indian citizen outside India, cognizance of such offence could be taken without previous sanction of the Central Government but inquiry or trial shall not be done without such previous sanction.

(ii) A series of offences were committed in same transaction some of which were committed within India and some outside India – A criminal Court can try the offences which were committed within India, without any previous sanction of the Central Government.

Thota Venkateswarlu v. State of A.P. & Anr.

Judgment dated 02.09.2011 passed by the Supreme Court in Special Leave Petition (Crl.) No. 7640 of 2008, reported in AIR 2011 SC 2900

Held:

The language of Section 188 Cr.P.C. is quite clear that when an offence is committed outside India by a citizen of India, he may be dealt with in respect of such offences as if they had been committed in India. The proviso, however, indicates that such offences could be inquired into or tried only after having obtained the previous sanction of the Central Government. As mentioned hereinbefore, in *Ajay Aggarwal v. Union of India & Ors., AIR 1993 SC 1637,* it was held that sanction under Section 188 Cr.P.C. is not a condition precedent for taking cognizance of an offence and, if need be, it could be obtained before the trial begins. Even in his concurring judgment, R.M. Sahai, J., observed as follows:-

> "29. Language of the section is plain and simple. It operates where an offence is committed by a citizen of India outside the country. Requirements are, therefore, one — commission of an offence; second — by an Indian citizen; and third — that it should have been committed outside the country."

Although the decision in *Ajay Aggarwal's case* (supra) was rendered in the background of a conspiracy alleged to have been hatched by the accused, the ratio of the decision is confined to what has been observed hereinabove in the interpretation of Section 188 Cr.P.C. The proviso to Section 188, which has been extracted hereinbefore, is a fetter on the powers of the investigating authority to inquire into or try any offence mentioned in the earlier part of the Section, except with the previous sanction of the Central Government. The fetters, however, are imposed only when the stage of trial is reached, which clearly indicates that no sanction in terms of Section 188 is required till commencement of the trial. It is only after the decision to try the offender in India was felt necessary that the previous sanction of the Central Government would be required before the trial could commence.

Accordingly, upto the stage of taking cognizance, no previous sanction would be required from the Central Government in terms of the proviso to Section 188 Cr.P.C. However, the trial cannot proceed beyond the cognizance stage without the previous sanction of the Central Government. The Magistrate is, therefore, free to proceed against the accused in respect of offences having been committed in India and to complete the trial and pass judgment therein, without being inhibited by the other alleged offences for which sanction would be required.

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373. CRIMINAL PROCEDURE CODE, 1973 – Sections 207, 208 and 406

(i) It is the duty of the criminal Court to supply copies of the chargesheet and all the relevant documents relied upon by the prosecution – Sections 207 and 208 CrPC are not an empty formality and has to be complied with strictly so the accused is not prejudiced in his defence even at the stage of framing of charge.

(ii) Mere existence of a communally surcharged atmosphere, without there being proof of inability of the Court of holding a fair and impartial trial, could not be made a ground for transfer of case.

Jahid Shaikh and others v. State of Gujarat and another

Judgment dated 06.07.2011 passed by the Supreme Court in Transfer Petition (Crl.) No. 55 of 2010, reported in (2011) 7 SCC 762

Held:

In this regard, we may first refer to a three-Judge Bench decision in *G.X. Francis v. Banke Behari, AIR 1958 SC 309,* where also this Court was considering a transfer petition filed on the apprehension of bias in the minds of the accused. The said petition involved the transfer of a complaint wherein the accused were said to have been concerned in one way or the other in defamatory statements against the complainant regarding a publication known as the "Niyogi Report".

Authoring the judgment on behalf of the Bench, Vivian Bose, J. observed that where there is unanimity of testimony from both sides about the nature of

the surcharged communal tension in the area in question and the local atmosphere is not conducive to a fair and impartial trial, there is a good ground for transfer. The learned Judge also observed that public confidence in the fairness of a trial held in such an atmosphere would be seriously undermined, particularly among reasonable Christians all over India, not because the Judge was unfair or biased but because the machinery of justice is not geared to work in the midst of such conditions. The calm detached atmosphere of a fair and impartial judicial trial would be wanting and even if justice were done it would not be "seen to be done".

We may now refer to another three-Judge Bench decision of this Court in the case of *Gurcharan Dass Chadha v. State of Rajasthan, AIR 1966 SC 1418,* which also involved a Transfer Petition based on the ground of reasonable apprehension on the part of the petitioner that justice would not be done to him by the Court before whom the trial was pending under the provisions of the Penal Code and the Prevention of Corruption Act. While disposing of the matter, this Court observed as follows :

> "13. .... A case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not suffice. The Court has further to see whether the apprehension is reasonable or not."

The aforesaid question once again cropped up in *Maneka Sanjay Gandhi v. Rani Jethmalani, (1979) 4 SCC 167,* in a Transfer Petition filed, *inter alia,* on three grounds, namely,

(i) that the parties (complainant and petitioners) reside in Delhi and some formal witnesses also belong to Delhi;

(ii) that the petitioner is not able to procure competent legal service in Bombay; and

(iii) that the atmosphere in Bombay is not congenial to a fair and impartial trial of the case against her.

Referring to the decision in *G.X. Francis* (supra) a Three-Judge Bench of this Court, dismissed the Transfer Petition upon holding that none of the allegations made by the petitioner made out a case that a fair trial was not possible in the Court where the matter was pending. The mere words of an interested party was insufficient to convince the Court that she was in jeopardy or the Court

might not be able to conduct the case under conditions of detachment, neutrality or uninterrupted progress. This Court, however, went on to say that it could not view with unconcern the potentiality of a flare up and the challenge to a fair trial. In such circumstances, this Court made certain precautionary observations to protect the petitioner and to ensure for her a fair trial.

In *K. Anbazhagan v. Supdt. of Police, Chennai, (2004) 3 SCC 788,* while disposing of two transfer petitions, the learned Judges observed as follows :

> "30. A free and fair trial is a *sine qua non* of Article 21 of the Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the minds of the petitioner."

Before we proceed to the latest views expressed by this Court in a Transfer Petition also praying for transfer of a trial outside the State of Gujarat on account of bias and a vitiated communal atmosphere, we may refer to a slightly different view taken by this Court by a Bench of two-Judges in the case of *Abdul Nazar Madani v. State of T.N., (2000) 6 SCC 204.*

While disposing of a Transfer Petition filed by the accused in the Coimbatore Serial Bomb Blasts case on the allegation that the atmosphere in the State of Tamil Nadu in general and in Coimbatore in particular, being so communally surcharged that his fair and impartial trial there would be seriously impaired, this Court in *Abdul Nazar Madani* case (supra) held that the purpose of a criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. This Court observed that the apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. The mere existence of a surcharged atmosphere without there being proof of inability of the Court of holding a fair and impartial trial, could not be made a ground for transfer of a case. The alleged communally surcharged atmosphere has to be considered in the light of the accusations made and the nature of the crimes committed by the accused seeking transfer of the case. It was observed that no universal and hard and fast rules can be prescribed for deciding a Transfer Petition which has always to be decided on the basis of the facts of each case.

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374. CRIMINAL PROCEDURE CODE, 1973 – Section 311

Recall of witness – Petitioner in order to prove his defence wishes to re-call and cross-examine prosecution witness whose examination on subsequently discovered document is essential to the just decision of the case – It is well settled that where something beneficial to the defence has come to light, it is just and necessary to permit the accused to cross-examine the prosecution witness only in the limited aspect of the case and not beyond that – Application for recalling witness allowed.

Ramhet Sharma v. State of M.P.

Judgment dated 21.06.2011, passed by the High Court of M.P. in M. Cr. C. No. 6166 of 2010, reported in I.L.R. (2011) M.P. 2273

Held :

Section 311 of Cr.P.C. is intended to be wide as the repeated use of the word 'any' throughout its length clearly indicates. The section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word 'may' in the first part and of the word 'shall' in the second firmly establishes this difference. As the section stands there is no limitation on the power of the court arising from the stage to which the trial may have reached, provided the court is bona fide of the opinion that for the just decision of the case, the step must be taken. It is, thus, clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution. There are however, two aspects of the matter which must be distinctly kept apart. The first is that the prosecution cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly and unexpectedly. There is however, the other aspect namely of the power of the court which is to be exercised to reach a just decision. No doubt, this power is exercisable at any time.

In the case of *Mohan Lal Shamji Soni v. Union of India and Ors., AIR 1991 SC 1346*, the Apex court while interpreting Section 311 of Cr.P.C., held as under:-

> "The very usage of the words such as 'any court', 'at any stage' or 'of any enquiry' trial or other proceedings', any person or any such person, clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow for any discretion but it binds and compels the court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case."

In the case of *Shailendra Kumar v. State of Bihar and Ors., 2002 (1) Crimes 197 (SC)*, while considering the provisions of Section 311 of the Code, the Hon'ble Supreme Court held that bare reading of this Section reveals that it is of very wide amplitude and if there is any negligence, laches or mistake by not examining material witnesses, the Courts function to render just decision by examining such witnesses at any stage is not, in any way impaired.

Apparently, Section 311 of Cr.P.C. empowers the power of the court to summon material witness, or examine person present and provides that any Court may, at any stage of inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case. Hence, it is clear that Section 311 allows the court to invoke its inherent powers at any stage, so long as the court retains seisin of the criminal proceedings without qualifying any limitation or prohibition. Needless to say that trial of any court reaches to its finality when the order or judgment is pronounced and until then the court has power to invoke the provisions of Section 311 of Cr.P.C.

Thus, the legal position culled out from the aforesaid decisions of the Hon. Supreme Court is that Section 311 Cr.P.C. allows the Court to invoke its inherent powers at any stage, so long as the Court retains seisin of the criminal proceedings without qualifying any limitation or prohibition. In the present case from the material available on record, it is abundantly clear that the petitioner-accused in order to prove his defence wishes to re-call and cross-examine Jayanti Prasad (PW-4), who is a material witness and whose examination on the subsequent discovered document is essential to the just decision of the case. Even otherwise, it is well settled that where some beneficial to the defence has come to light, it is just and necessary to permit the accused to cross-examine prosecution witness only on the limited aspect of the case and not beyond that. In the circumstances, therefore, the trial court fell in error in declining to summon Jayanti Prasad (PW-4), by the order impugned. The order impugned therefore cannot sustain.

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375. CRIMINAL PROCEDURE CODE, 1973 – Section 319
Power to proceed against other person – Appears from evidence – While considering the application under Section 319 of the Code, sufficient evidence means the evidence by which charges of that offence can be framed against that stranger, who is to be made an accused.

Bhagwan Singh @ Naga v. State of M.P.
Judgment dated 15.07.2011, passed by the High Court of M.P. in Cr. Rev. No. 1515 of 2009, reported in I.L.R. (2011) M.P. 2249

Held :

It is no where specifically mentioned under Section 319 of the Code that

what is the sufficient evidence in the eye of law but it is very much clear in those provisions that when a stranger is added as an accused in the case, he has to face the trial with other co-accused persons. It means that trial shall be initiated against that stranger, which includes the framing of the charges, therefore, sufficient evidence means the evidence by which charges of particular offence can be framed against that stranger. It is a golden yardstick for framing of the charges that if available evidence is not rebutted then conviction should be directed for that crime against that accused on the basis of such evidence, thereafter charges of such offence can be framed. Therefore, while considering the application under section 319 of the Code, sufficient evidence means the evidence by which charges of that offence can be framed against that stranger, who is to be made an accused.

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376. CRIMINAL PROCEDURE CODE, 1973 – Sections 326 and 461

In a summary trial case, evidence has been recorded by one Magistrate, his successor cannot use that evidence – Even consent by the parties cannot confer such jurisdiction to that Magistrate – Section 326 (3) CrPC does not permit the Magistrate to act upon the substance of the evidence recorded by his predecessor – Such irregularities could not be cured by the aid of Section 465 CrPC.

Nitinbhai Saevatilal Shah & Anr. v. Manubhai Manjibhai Panchal & Anr.

Judgment dated 01.09.2011 passed by the Supreme Court in Criminal Appeal No. 1703 of 2011, reported in AIR 2011 SC 3076

Held:

The mandatory language in which Section 326 (3) is couched, leaves no manner of doubt that when a case is tried as a summary case a Magistrate, who succeeds the Magistrate who had recorded the part or whole of the evidence, cannot act on the evidence so recorded by his predecessor. In summary proceedings, the successor Judge or Magistrate has no authority to proceed with the trial from a stage at which his predecessor has left it. The reason why the provisions of sub-Section (1) and (2) of Section 326 of the Code have not been made applicable to summary trials is that in summary trials only substance of evidence has to be recorded. The Court does not record the entire statement of witness. Therefore, the Judge or the Magistrate who has recorded such substance of evidence is in a position to appreciate the evidence led before him and the successor Judge or Magistrate cannot appreciate the evidence only on the basis of evidence recorded by his predecessor. Section 326 (3) of the Code does not permit the Magistrate to act upon the substance of the evidence recorded by his predecessor, the obvious reason being that if succeeding Judge is permitted to rely upon the substance of the evidence recorded by his predecessor, there will be a serious prejudice to the accused and indeed, it

would be difficult for a succeeding Magistrate himself to decide the matter effectively and to do substantial justice.

The cardinal principle of law in criminal trial is that it is a right of an accused that his case should be decided by a Judge who has heard the whole of it. It is so stated by this Court in the decision in *Payare Lal v. State of Punjab, AIR 1962 SC 690*. This principle was being rigorously applied prior to the introduction of Section 350 in the Code of Criminal Procedure, 1898. Section 326 of the new Code deals with what was intended to be dealt with by Section 350 of the old Code. From the language of Section 326(3) of the Code, it is plain that the provisions of Section 326(1) and 326(2) of the new Code are not applicable to summary trial. Therefore, except in regard to those cases which fall within the ambit of Section 326 of the Code, the Magistrate cannot proceed with the trial placing reliance on the evidence recorded by his predecessor. He has got to try the case *de novo*. In this view of the matter, the High Court should have ordered *de novo* trial.

This is not a case of irregularity but want of competency. Apart from Section 326 (1) and 326 (2) which are not applicable to the present case in view of Section 326 (3), the Code does not conceive of such a trial. Therefore, Section 465 of the Code has no application. It cannot be called in aid to make what was incompetent, competent. There has been no proper trial of the case and there should be one.

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377. CRIMINAL PROCEDURE CODE, 1973 – Section 357
CONSTITUTION OF INDIA – Article 20 (2)
FATAL ACCIDENTS ACT, 1855 – Section 1A

(i) An action for civil damages is not prosecution and a decree of damages is not a punishment – Accused is convicted for offence under Section 304 IPC – Wife of deceased filed a civil suit for damages – It is not double jeopardy – Such suit is maintainable even during pendency of criminal case.

(ii) Though there is provision under Section 357 CrPC for compensation, a civil suit claiming of damages out of criminal action is maintainable.

Suba Singh & Anr. v. Davinder Kaur & Anr.

Judgment dated 06.07.2011 passed by the Supreme Court in Civil Appeal No. 5197 of 2003, reported in AIR 2011 SC 3163

Held:

The rule against double jeopardy is contained in sub-article (2) of Article 20 of he Constitution of India which mandates that "no person shall be prosecuted and punished for the same offence more than once". Now, it is elementary that an action for civil damages is not prosecution and a decree of damages is not a punishment. The rule of double jeopardy, therefore, has no application to this case.

The Contention made on behalf of the appellants is fully answered by clauses (b) and (c) of sub-section (1) and sub-section (5) of Section 357 of CrPC. In those provisions there is a clear and explicit recognition of a civil suit at the instance of the dependents of a person killed, against his/her killers. In sub-section (1) (c) of section 357 there is clear indication that apart from the punishment of fine, the person convicted of any offence of having caused the death of another person or of having abetted the commission of such an offence may also be liable to face a civil action for damages under the Fatal Accidents Act, 1855 in a suit for damages and sub-section (5) of section 357 of the Code makes it all the more clear by stipulating that at the time of awarding compensation in a subsequent civil suit relating to the same matter the court shall take into account any sum paid or recovered as compensation under that section.

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378. CRIMINAL PROCEDURE CODE, 1973 – Sections 360 and 361
Recording of special reasons for not granting probation – Court must record special reasons in judgment as to why an accused is not entitled to be released on probation.

Kailash and another v. State of M.P.

Judgment dated 16.08.2011, passed by the High Court of M.P. in Cri. Rev. No. 777 of 2011, reported in 2011 (4) MPHT 367

Held :

Hon'ble the Apex Court, while dealing with the similar issue for grant of probation has observed in the case of *State of Haryana v. Premchand,* reported in *(1997) 7 SCC 756* and in the case of *Bishnu Deo v. State of West Bengal,* reported in *AIR 1979 SC 964*. In the case of *Bishnu Deo* (supra), Their Lordships have observed as under: –

> "If the Court refrains from dealing with an offender under Section 360 or under the provisions of the Probation of Offenders Act, or any other law for the treatment, training or rehabilitation of youthful offenders, where the Court could have done so. Section 361, which is a new provision in the 1973 Code makes it mandatory for the Court to record in its judgment the 'special reasons' for not doing so. Section 361 thus cast a duty upon the Court to apply the provisions of Section 360 wherever, it is possible to do so and to state 'special reasons' if it does not do so. In the context of Section 360, the 'special reasons' contemplated by Section 361 must be such as to compel the Court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed. This is some indication

by the Legislature that reformation and rehabilitation of offenders and not mere deterrence, are now among the foremost objects of the administration of criminal justice in our country. Section 361 and Section 354 (3) have both entered the Statute Book at the same time and they are part of the emerging picture of acceptance by the Indian Parliament of the new trends in criminology. We will not, therefore, be wrong in assuming that the personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform must necessarily play most prominent role in determining the sentence to be awarded, special reasons must have some relation to these factors."

In view of the aforesaid observations, it is a fit case wherein the petitioners ought to have been granted the benefit of probation. As such, the sentence awarded to each of the petitioners is hereby suspended. Both the petitioners are directed to be released on probation for a period of two years subject to each of them furnishing a bond of Probation in sum of ₹ 20,000 with separate surety in the like amount to the satisfaction of the Trial Court on the conditions that each of the petitioner shall not involve in any kind of criminal activities and shall not commit similar offence during the aforesaid period of two years and maintain cordial relations with the complainant. It is made clear that in case they commit any offence, they shall surrender their bonds before the trial Court to undergo the sentence awarded by the Appellate Court.

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379. CRIMINAL PROCEDURE CODE, 1973 – Section 427
NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
Advantage of concurrent sentences – Cannot be extended to the applicant in all cases of Section 138 of N.I. Act.

Rekha Mishra v. State of M.P.
Judgment dated 23.02.2011 passed by the High Court of M.P. in M.Cr.C. No. 13142 of 2010, reported in 2011 (3) MPLJ 678

Held :

The copy of the judgment of lower Court had not been filed but copy of the judgment of Sessions Judge, Khandwa has been filed. It is very much clear that applicant has been convicted in complaint cases filed by different complainants, so under Section 427 of Criminal Procedure Code, advantage of concurrent sentences of all cases cannot be extended to the applicant.

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380. CRIMINAL PROCEDURE CODE, 1973 – Section 437 (6)
EXCISE ACT, 1915 (M.P.) – Section 34 (2)
Grant of bail – Accused was under trial under Section 34 (2) of M.P. Excise Act, 1915 and in custody since 27.06.09 – The evidence commenced in the case w.e.f. 02.09.09 and the trial could not be concluded within the period of 60 days from this date – The accused is entitled to be released on bail under the provision of Section 437 (6) of Cr.P.C.

Arjun v. State of M.P.

Judgment dated 22.01.2010, passed by the High Court of M.P. in Misc. Cri. Case No. 79 of 2010, reported in 2011 (4) MPHT 137

Held :

In the matter of *Ram Kumar Rathore v. State of M.P., 2001 (1) JLJ 404*, the provision under Section 437 (6), Cr.P.C. is mandatory in nature and in case trial is not concluded within 60 days, accused becomes entitled to be released on bail on the apprehension of not attending the Court is not judicious.

In the matter of *Rajendra v. State of M.P., 2002 (4) MPHT 186*, wherein the accused was involved for an offence alleged to have been committed under the provisions of M.P. Excise Act, the question arose before this Court was whether provision of Section 437 (6), Cr.P.C. would be applicable and it was held that provisions of Section 437 (6) will apply for the offence punishable under Section 437 (6) of the Act.

It is true that petitioner is entitled for grant of bail under Section 437 (6), Cr.P.C. if the trial is not concluded within a period of 60 days. The evidence commenced in the case w.e.f. 02.09.09 and could not be concluded within period of 60 days. It is also true that the Court is empowered to reject the application for grant of bail under Section 437 (6), Cr.P.C. for the reasons to be recorded. The ground that the petitioner is a habitual offender of committing the similar type of offences is a valid ground. Since petitioner is in jail w.e.f. 27.06.09, therefore, in the interest of justice and on perusal of record and also keeping in view the fact that the trial did not complete within statutory period, the application filed by the petitioner is allowed and petitioner is released on bail on furnishing bail bond of ₹ 35,000 (Rs. Thirty Five thousand) with a surety of like amount to the satisfaction of learned Trial Court with a further direction that the petitioner shall remain present before the learned Trial Court on each and every date fixed by that Court. If the conduct of petitioner is not found good the respondent shall have liberty to move an appropriate application to get the bail cancelled.

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381. CRIMINAL PROCEDURE CODE, 1973 – Section 438
No straitjacket formula can be fixed for not granting anticipatory bail – There is no allegation against the applicant about dowry demand in the first two dying declarations – Most of the investigation is over – Police has not seized anything from the applicant – Application allowed.

Harshita @ Harshlata v. State of M.P.

Judgment dated 17.01.2011 passed by the High Court of M.P. in Misc. Criminal Case No. 289 of 2010, reported in 2011 (3) MPHT 233

Held :

Present view of Hon'ble the Apex Court is very much clear in the case of *Sidharam Satlingappa Mhetre v. State of Maharashtra and others, 2011 (1) MPHT 430 (SC)* and therefore, no strait-jacket formula can be fixed for not granting of anticipatory bail. Therefore, dictum laid in the case *Samundra Singh v. State of Rajasthan, AIR 1987 SC 737,* cannot be followed. In the present case, there is no allegation against the applicant of dowry demand in first two dying declarations, whereas third dying declaration appears to be prepared by some relative of the deceased, who is in police, which does not bear any medical certificate etc. and which is prepared by computer print. Since the deceased was a working woman and there is nothing alleged about the dowry demand in the first two dying declarations, police cannot be permitted to make harassment to the applicant. Provisions of Section 438 Cr.P.C. are to be applied by balancing between the rights of the applicant and investigation of the police. In the present case, most of the investigation is over. Police has not seized anything from the applicant. Witnesses inclusive of parents and relatives of the deceased may be examined by the police and therefore, if the applicant is enlarged on anticipatory bail, there will be no adverse effect on the investigation.

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382. CRIMINAL PROCEDURE CODE, 1973 – Section 451
N.D.P.S. ACT, 1985 – Sections 43, 60 and 63
Interim custody of vehicle seized under Section 43 of the N.D.P.S. Act – Owner of vehicle was not the accused – Interim custody of the vehicle cannot be denied on the ground that the vehicle is liable to be confiscated under Section 60 of the N.D.P.S. Act.

Yadwinder Singh v. State of M.P. & others

Judgment dated 04.05.2011, passed by the High Court of M.P. in Cri. Rev. No. 432 of 2010, reported in 2011 (4) MPHT 171

Held :

The provisions of Section 451 which provide for order for interim custody and disposal of the property pending trial is identical, in case the property is subject to speedy and natural decay and if it is otherwise in the interest of the owner, to this extent, the provisions of Section 451 of the Code are not applicable. The object of the Act is to see that the vehicle which is used for such an offence is not made available to the persons who have indulged in these activities. They shall not have the benefit of such a vehicle. By and large, if an accused person is himself the owner of the vehicle and he uses such a vehicle for the purpose of conveying the drugs, then, of course, it is possible for the prosecution to contend that it is against the interest of justice that such a vehicle be given to the accused

pending trial. But in a given case, it might be that a vehicle belonging to innocent owner is misused by the accused and in that event, if seized by the officer, it does not mean that such an owner has to wait till the trial is completed for the purpose of getting an order of return of the vehicle from the Magistrate. In such cases, subject to a guarantee that the vehicle becomes available for the purpose of confiscation, if any, the Court has necessarily the jurisdiction to pass an order for interim custody either under Section 451 or Section 457 (1) of Cr.P.C., as the case may be. An order under Section 451 or Section 457 (1) of Cr.P.C guarantees return of the vehicle at the time of the final hearing of the matter, or as and when called upon by the Court. It secures, subject to certain terms and conditions, the interim custody of the vehicle pending trial.

The Hon'ble Apex Court in the case of *Ganga Hire Purchase Pvt. Ltd. v. State of Punjab and Others*, reported in *(1999) 5 SCC 670*, held that interim custody of the seized or to be confiscated vehicle cannot be denied to a person who is registered owner, on the ground that the vehicle is liable to be confiscated under Section 60 of the Act.

In the case of *Ganga Hire Purchase* (supra), the Apex Court while interpreting the meaning of "Owner" held: –

> "Under sub-section (3) of Section 60 of the NDPS Act, any animal or conveyance used in carrying any narcotic drug or psychotropic substance is liable to confiscation, unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the animal or conveyance and that each of them had taken all reasonable precaution against such use. There is no dispute that the vehicle in question was found to be carrying certain narcotics. The bone of contention of the appellant is that in view of the hire-purchase agreement, the appellant continues legally to be "the owner" of the vehicle so long as the entire hire-purchase money has not been paid and therefore, unless and until it is established that the vehicle was used for carrying of narcotics with the knowledge of the appellant, an order of confiscation could not have been passed."

It is further held by the Apex Court that the very purpose for engrafting sub-section (3) of Section 60 of the NDPS Act is to have it as a deterrent measure to check the offences under the Act in question which have been found to be dangerous to the entire society and in the absence of any definition of "owner" in the NDPS Act, it would be reasonable for us to construe that the expression "owner" must be held to mean the "registered owner" of the vehicle in whose name the vehicle stands registered under the provisions of the Motor Vehicles Act.

As already noticed above, in the present case, the interim custody of the vehicle is sought not by the registered owner but by the Power of Attorney holder

on his behalf. Further, the vehicle has not been kept in secured place. It is lying in an open place at police station and as such there is every danger of it being damaged by vagaries of weather. It is further submitted by the learned Counsel for the petitioner that the vehicle in the commission of offence was not used either with the knowledge or connivance of the registered owner and further all reasonable precautions against such use were taken. Thus, in view of the above, the order of the learned Trial Court denying the interim custody to the petitioner is not sustainable in law and the same deserves to be set aside and is hereby set aside.

Keeping in view the fact that the property seized is subject to speedy and natural decay and further in the light of the decision in the case of *Ganga Hire Purchase* (supra), it is directed that the truck No. HR-37A-4616 shall be delivered to the petitioner on *Supurdginama*, subject to his producing the original registration certificate and permit and further on satisfying the following conditions: –

"(i) That, instead of the petitioner, the registered owner shall furnish a personal bond in the sum of ₹ 10,00,000 (Rupees Ten lacs only) with two sureties of ₹ 5,00,000 (Rupees Five lacs only) each to the satisfaction of the Trial Court on undertaking to produce the truck in the Court as and when required.

(ii) That the petitioner shall get the truck photographed showing the registration number as well as the chassis number. Such photograph shall be taken in the presence of the Investigating Officer, to be kept on the file of the case.

(iii) That the personal bond of the registered owner and bonds of sureties shall carry the photographs of the owner and his sureties and the bond of sureties shall further carry the photographs of persons identifying them before the Court which would be with full residential proofs of the sureties and the persons identifying them.

(iv) The registered owner shall undertake not to transfer the ownership of the truck and not to lease it to any one and not to make or allow any changes in it to be made so as to make identifiable.

(v) The registered owner will not allow the truck to be used for any anti-social activities including for the purpose of carrying narcotics which may constitute offence under the NDPS Act.

(vi) In the event of confiscation order by the Court competent, the registered owner either shall keep the vehicle present positively for confiscation or shall deposit the face value of the vehicle on the date of releasing the vehicle by the Court."

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383. CRIMINAL PROCEDURE CODE, 1973 – Sections 451 and 457
EXCISE ACT, 1915 (M.P.) – Section 58
WILD LIFE (PROTECTION) ACT, 1972 – Sections 50, 51 and 54
Whether Magistrate is competent under Sections 451 and 457 of Cr.P.C. to grant interim custody of vehicle seized under the Wild Life (Protection) Act, 1972 or under the M.P. Excise Act, 1915? Held, Yes.

Dilip v. State of M.P.

Judgment dated 07.07.2011, passed by the High Court of M.P. in Cri. Rev. No. 16 of 2007, reported in 2011 (4) MPHT 140

Held :

Whether the petitions have been filed by the vehicle owners or by the State raise only one question regarding competence of the Magistrate to grant interim release of vehicle to its owner during the pendency of trial against the claimant. The question that arises for consideration in these petitions has already been considered and answered by Full Bench of this Court in the case of *Madhukar Rao v. State of Madhya Pradesh, 2000 (2) MPHT 445 (FB) = 2000 (1) MPLJ 289*, wherein it was held as under: –

> "In order that the seized property may be treated as property of the State, there should be a finding by the Competent Court that vehicle seized has been used for committing an offence. The property seized under Section 50 of the Wild Life (Protection) Act from an alleged offender cannot become property of the State under clause (d) of Section 39 (1) unless there is a trial and a finding reached by the Competent Court that the property was used for committing an offence under the Act. properties including vessel can be seized on accusation of commission of an offence under the Act and if the offender is available and is arrested, on proof of his guilt, the property seized from him and used in commission of the offence is liable to forfeiture to the State under Section 51 (2) of the Act. Similarly every property seized and is held to have been used for committing an offence by Competent Court, whether the offender is available or not for punishment, would be declared to be the property of the State by virtue of the provisions contained under Section 39 (1) (d) of the Act. Section 39 contained in Chapter V is sort of a residuary provision to make all properties seized and found to be used in commission of an offence as properties of the State Government irrespective of the fact whether they are liable to forfeiture at the conclusion of the trial under sub-section (2) of Section 51 of the Act. A situation can be envisaged

where the offence is proved to have been committed but the owner of the property or the offender himself is not available for prosecution. In that situation by virtue of clause (d) of Section 39 of the Act the property would become the property of the State without any requirement of passing an order of forfeiture in a trial by the Criminal Court in accordance with sub-section (2) of Section 51 of the Act. Any property including vehicle seized on accusation or suspicion of commission of an offence under the Act can, on relevant grounds and circumstances, be released by the Magistrate pending trial in accordance with Section 50 (4) read with Section 451 of the Code of Criminal Procedure, 1973. Mere seizure of any property including vehicle on the charge of commission of an offence would not make the property to be of the State Government under Section 39 (1) (d) of the Act."

The above view on the point in issue taken by the Full Bench of this Court in the aforementioned case has been affirmed by the Hon'ble Supreme Court in an appeal preferred by the State against the judgment of the Full Bench *vide* its decision dated 9th January, 2008 in Civil Appeal No. 5196/01. While affirming the view on the point in issue taken by the Full Bench of this Court, Hon'ble the Supreme Court has held that the Magistrate is fully competent to grant interim release of the offending vehicle to its owner during the pendency of criminal case in which the vehicle was seized against him. Said judgment of the Hon'ble Supreme Court dated 9th January, 2008 in Civil Appeal No. 5196/01 is reported as case titled *State of M.P. and others v. Madhukar Rao, 2008 (1) JT 364.*

The question whether the Magistrate is competent to grant interim release of the vehicle seized under the Wild Life (Protection) Act, 1972 (hereinafter, referred to as "the Act" for brevity), also came up for consideration before the Hon'ble Supreme Court yet in another case titled *State of U.P. and another v. Lallo Singh, (2007) 7 SCC 334*, and in that case also it was held by Hon'ble Supreme Court that the Magistrate is competent to grant interim release of the offending vehicle to its true owner during the pendency of criminal case in which the vehicle was seized.

Since, decision on the question that has been raised in these petitions stands already concluded by decision of the Full Bench in *Madhukar Rao's case* (supra), and affirmed by the Hon'ble Supreme Court, as stated above, in the opinion of this Court, no further consideration of the said question is required by this Court.

It is apparent on a plain reading of the above statutory provision contained in Section 58 of the M.P. Excise Act, 1915, that the provisions of Code of Criminal Procedure, 1973 are applicable to matters relating to arrest, detention, search

and seizure, summons, warrants etc. for case under the M.P. Excise Act, 1915 in the same manner as they are applicable under the Wild Life Act.

A similar argument in regard to applicability of the provisions of the Code of Criminal Procedure, 1973 to cases under the Wild Life Act was also raised before the Hon'ble Supreme Court in *Madhukar Rao's case* (supra), and the Hon'ble Supreme Court after consideration of the said argument has held as under:-

> "The scheme of Section 50 of the Wild Life Act makes it abundantly clear that a police officer is also empowered to investigate the offences and search and seize the offending articles. For trial of offences, the Code of Criminal Procedure is required to be followed and for that there is no other specific provision to the contrary. The special procedure prescribed is limited for taking cognizance of the offence as well as powers are given to other officers mentioned in Section 50 for inspection, arrest, search and seizure as well as of recording statement. The power to compound offences is also conferred under Section 54. Section 51 provides for penalties which would indicate that certain offences are cognizable offences meaning thereby a police officer can arrest without warrant. Sub-section (5) of Section 51 provides that nothing contained in Section 360 of the Code of Criminal Procedure or in the Probation of Offenders Act, 1958 shall apply to a person convicted of an offence with respect to hunting in a sanctuary or a national park or of an offence against any provision of Chapter V-A unless such person is under 18 years of age. The aforesaid specific provisions are contrary to the provisions contained in the Code of Criminal Procedure and that would prevail during the trial. However, from this, it cannot be said that operation of rest of the provisions of the Code of Criminal Procedure are excluded."

Since the provisions of the Code of Criminal Procedure, 1973 are held applicable to cases tried under the Wild Life Act, by no stretch of imagination, it may be said that the Magistrate who is competent to try a criminal case under the M.P. Excise Act will be incompetent to grant interim release of the offending vehicle even if the merits of the case so warrant. Hence, this Court holds that the Magistrate is competent to grant interim release of the vehicle even in Excise cases during the pendency of the trial of such cases, as per merits of each case.

In the facts and circumstances of the case and for the reasons given hereinabove, all these petitions are disposed of with the following directions:-

(1) The petitions filed by the owners of the vehicles against orders declining them interim release of the vehicles by the Magistrate/ Revisional Court are allowed. Impugned orders in all such cases are set aside.

(2) The petitions filed by the State against the orders of the Magistrate/ Revisional Court granting interim release of the offending vehicle to its owner on *supurdagi* are dismissed.

(3) The cases of the vehicle owners in those petitions, who vide orders impugned in these petitions were declined interim custody of their vehicles, are remanded back to the concerned Trial Court for passing fresh orders on their applications for interim release of their vehicles filed either under Section 451 or Section 457 Cr.P.C. on merits of each case without being influenced by the observations of this Court regarding his competence to grant interim release of the vehicles. It shall be open to the concerned Magistrate either to grant or not to grant interim custody of the vehicle, but that shall be on objective assessment of the relative merits of each case. The Magistrate shall pass a speaking order spelling out the reasons for grant or non-grant of interim custody of vehicle, as expeditiously as possible, but not later than three months of receipt of certified copy of this order Needless to mention that the Magistrate shall give a hearing on application under Section 451/457, Cr.P.C. to both the parties before passing his reasoned order.

(4) In case, it is found by the Magistrate at fresh hearing of the application under Section 451/457 that the finding of guilt has already been recorded against the owner of the vehicle/accused person in the main case and the said conviction has attained finality, then the Magistrate shall not grant custody of the vehicle, what to speak of interim custody.

(5) The Magistrate shall be entitled to put such conditions as he may consider necessary for interim release of the vehicle on *supurdari* and may also take an undertaking from the vehicle owners that they shall abide by those conditions till final disposal of main criminal case.

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384. DRUGS AND COSMETICS ACT, 1940 – Section 25 (3)
If accused/drug manufacturer wants to controvert the report of Government analyst, he should express his intention to adduce evidence to controvert the analyst's report within the statutory limitation period of 28 days – Accused/drug manufacturer did not express his above intention – Delay in filing complaint becomes immaterial.

Glaxo Smith Kline Pharmaceuticals Ltd. & another v. State of Madhya Pradesh

Judgment dated 28.07.2011 passed by the Supreme Court in Criminal Appeal No. 1489 of 2011 reported in AIR 2011 SC 2998

Held:

The issue involving herein is no more res integra matter. The issues have been examined time and again. It is a settled legal proposition that report of the analyst is conclusive. It means that no reasons are needed in support of conclusion given in the report, nor it is required that the report should contain the mode or particulars of the analysis. (See: *Dhian Singh v. Municipal Board, Saharanpur & Anr., AIR 1970 SC 318.*)

However, law permits the drug manufacturer to controvert the report expressing his intention to adduce evidence to controvert the report within the prescribed limitation of 28 days as provided under Section 25(3) of the Act 1940. In the instant case, the report dated 27.8.1997 was received by the statutory authorities who sent the show cause notice to the appellants on 29.9.1997 and the appellants replied to that notice on 3.11.1997. The case of the statutory authorities is that option/willingness to adduce evidence to controvert the analyst's report was not filed within the period of 28 days i.e. limitation prescribed for it. The appellants are the persons who knew the date on which the show cause notice was received. For the reasons best known to them, they have not disclosed the said date. It is a company which must be having Receipt and Issue department and should have an office which may inform on what date it has received the notice, and thus, should have made the willingness to controvert the report. In fact, such application had only been made on the technique adopted for analysis. It has been the case that instead of testing the medicine under the I.P. 1985, it could have been done under I.P. 1996 because the I.P.1996 had come into force prior to the date of taking the sample on 9.12.1996.

In view of the fact that the appellants did not express an intention to adduce evidence to controvert the analyst report within the statutory limitation period of 28 days, further delay in filing the complaint becomes immaterial. Even otherwise, expiry date of the medicine was March 1998 i.e. only after 4 months of submission of the reply by the appellants, and they did not fulfill their burden of expressing intention to adduce evidence in contravention of the report. Therefore, they cannot raise the grievance that the complaint had been lodged at a much belated stage. So far as the application of I.P. 1985 or I.P. 1996 is concerned, such an issue can be agitated at the time of trial.

We agree with learned Counsel for the respondent that the case is squarely covered by the judgment of this Court in *State of Haryana v. Brij Lal Mittal & Ors., (1998) 5 SCC 343* wherein this Court has held as under:

> "....Sub-section (4) also makes it abundantly clear that the right to get the sample tested by the Central Government Laboratory (so as to make its report override the report of

the Analyst) through the court accrues to a person accused in the case only if he had earlier notified in accordance with sub-section (3) his intention of adducing evidence in controversion of the report of the Government Analyst. To put it differently, unless requirement of sub-section (3) is complied with by the person concerned he cannot avail of his right under sub-section (4)."

In the said case, like the present case, the manufacturer did not notify the Inspector within the prescribed period that he intended to adduce evidence in contravention of the report. Also, akin to the case at hand, the manufacturer's right under sub-section (3) of Section 25 expired few months before expiry of shelf life. Holding for the directors of the manufacturing company on different grounds, the court opined that the right to get drugs tested by Central Drugs Laboratory does not arise unless requirement of sub-section (3) is complied with.

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385. ELECTRICITY ACT, 2003 – Sections 42, 43 and 67

Every citizen has a statutory right to apply for and obtain supply of electricity from distribution licensee and distribution licensee has a corresponding statutory obligation to supply electricity to every citizen – If there is any dispute regarding passage in which lines passing through, then the distribution licensee has to make supply through another way or follow Section 67 (2) in case there is no other way.

Chandu Khamaru v. Smt. Nayan Malik & Ors.

Judgment dated 02.09.2011 passed by the Supreme Court in Civil Appeal No. 7572 of 2011, reported in AIR 2011 SC 2897

Held :

We may now apply the provisions of Electricity Act, 2003 to the facts of the present case. The appellant has a statutory right to apply for and obtain supply of electricity from the distribution licensee and the distribution licensee has a corresponding statutory obligation to supply electricity to the appellant. Respondent Nos. 1 to 3 also do not object to the supply of electricity by the distribution licensee to the appellant as it will be clear from the averments made in writ petition No.345 of 2005 filed by them before the High Court but they object to the line for supply of electricity being drawn through the passage in Dag Nos.406, 407 and 409 which they claim to be theirs. The further grievance of the respondent Nos.1, 2 and 3 is that they were not made parties in the earlier Writ Petition No.18220 of 2004 filed by the appellant in which the High Court directed the distribution licensee to effect supply of electricity to the house of the appellant. The case of the appellant, on the other hand, is that this passage is not a private passage of respondent Nos. 1 to 3 but is a common passage and therefore an electric line can be drawn through this common passage. This dispute will have to be resolved in Civil Suit No.83 of 2004 pending in the Court

of Civil Judge (Junior Division), Howrah, or in any other suit, but pending resolution of this dispute between the parties, the appellant cannot be denied supply of electricity to his house.

We, therefore, set aside the order of the learned Single Judge as well as the impugned order of the Division Bench and dispose of the Writ Petition of respondent Nos. 1 to 3 with the direction that the distribution licensee will find out whether there is any other way in which electric line can be drawn for supply of electricity to the house of the appellant, other than the disputed passage in Dag Nos. 406, 407 and 409. If there is no other way to supply electricity to the house of the appellant, the distribution licensee will follow the provisions of sub-section (2) of Section 67 of the Electricity Act, 2003 for carrying out the work for supply of electricity to the house of the appellant. This exercise will be completed within a period of six months from today and till the supply of electricity to the house of the appellant is effected through some other way, supply of electricity to the house of the appellant will not be disconnected.

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386. EVIDENCE ACT, 1872 – Section 3
INDIAN PENAL CODE, 1860 – Section 300

(i) If an eye witness did not receive any injury in the incident, it was his good luck – Absence of any injury on an eye witness do not render his presence doubtful.

(ii) There cannot be a rule of universal application that if an eye witness to the incident is interested in prosecution case and/or deposed inimically towards the accused, there should be corroboration to his evidence – If his evidence is found credible and of such a caliber as to be regarded as wholly reliable, could be sufficient and enough to bring home the guilt of the accused.

(iii) But in criminal case, evidence of eye witnesses do not get support from collateral circumstances that have come on record and their evidence has not been corroborated by medical and ballistic evidence – So the evidence cannot be treated as cogent and reliable.

Jalpat Rai & Ors. v. State of Haryana

Judgment dated 06.07.2011, passed by the Supreme Court in Criminal Appeal No. 1736 of 2007, reported in AIR 2011 SC 2719

Held:

PW-1 and PW-4 are real brothers. PW-8 and the deceased are nephews of PW-1 and PW-4. The presence of PW-1, PW-4 and PW-8 at the time of incident, does not appear to us to be doubtful. The trial court has doubted the presence of PW-1 at the place of occurrence but we find it difficult to accept the reasoning of the trial court in this regard. Being transporter, the presence of PW-1 in his office at about 9.00 p.m. was not unnatural. It was his good luck that he did not

receive any injury in the incident. We do not think that absence of any injury on his person renders his presence doubtful. The presence of PW-4 and PW-8 at the time of incident also cannot be doubted. Both of them suffered injuries. Both, PW-4 and PW-8, were medically examined by PW-6. PW-4 was examined by PW-6 immediately after the incident at about 10.15 p.m. on October 2, 2002. PW-8 was examined by PW-6 on the next day, i.e. October 3, 2002 in the afternoon. The trial court doubted that the injury suffered by PW-4 was from the firearm but the evidence of Dr. Paryesh Gupta (PW-19) leaves no manner of doubt that PW-4 received firearm injury in the incident. PW-19 deposed that PW-4 was operated upon for a firearm injury in the abdomen on October 3, 2002 in the emergency O.T. and the firearm was used from a close range. However, the presence of PW-1, PW-4 and PW-8 at the time of incident does not guarantee truthfulness. The question is whether their testimony is trustworthy and reliable insofar as complicity of the appellants with the crime is concerned or they have tried to involve the innocent along with the guilty.

PW-1, PW-4 and PW-8 are not only much interested in the prosecution case but they are inimically disposed towards the accused party as well. The deep rooted enmity and serious disputes between PW-1 on the one hand and A-1 and his sons on the other and their unflinching interest in the prosecution case necessitate that the evidence of PW-1, PW-4 and PW-8 is considered with care and caution. To find out intrinsic worth of these witnesses, it is appropriate to test their trustworthiness and credibility in light of the collateral and surrounding circumstances as well as the probabilities and in conjunction with all other facts brought out on record. There cannot be a rule of universal application that if the eye-witnesses to the incident are interested in prosecution case and/or are disposed inimically towards the accused persons, there should be corroboration to their evidence. The evidence of eye-witnesses, irrespective of their interestedness, kinship, standing or enmity with the accused, if found credible and of such a caliber as to be regarded as wholly reliable could be sufficient and enough to bring home the guilt of the accused. But it is reality in life, albeit unfortunate and sad, that human failing tends to exaggerate, over-implicate and distort the true version against the person/s with whom there is rivalry, hostility and enmity. Cases are not unknown where entire family is roped in due to enmity and simmering feelings although one or only few members of that family may be involved in the crime. In the circumstances of the present case, to obviate any chance of false implication due to enmity of the complainant party with the accused party and the interestedness of PW-1, PW-4 and PW-8 in the prosecution case, it is prudent to look for corroboration of their evidence by medical/ballistic evidence and seek adequate assurance from the collateral and surrounding circumstances before acting on their testimony. The lack of corroboration from medical and ballistic evidence and the circumstances brought out on record may ultimately persuade that in fact their evidence cannot be safely acted upon.

Besides PW-1, PW-4 and PW-8, who are closely related to the three deceased, no other independent witness has been examined although the incident occurred in a busy market area. The place of occurrence was visited by PW-20 in the same night after the incident. He found three two-wheelers one bearing no. HR—31—A/5071, the second bearing no. RJ—13—M/7744 and the third without number lying there. One Maruti car bearing no. HR—20—D/8840 with broken glasses was also parked there. The owners of these vehicles have not been examined. At the place of occurrence, one HMT Quartz wrist watch with black strap, one belcha and four pair of chappals were also found. There is no explanation at all by the prosecution with regard to these articles. Nothing has come on record whether four pair of chappals belonged to the accused party or the complainant party or some other persons. Whether HMT Quartz wrist watch that was found at site was worn by one of the accused or one of the members of the complainant party or somebody else is not known. Then, the mystery remains about belcha that was found at site. These circumstances instead of lending any corroboration to the evidence of those three key witnesses, rather suggest that they have not come out with the true and complete disclosure of the incident.

Murder – Death caused by accused by firing gunshots. Evidence of eye-witnesses. Eye-witnesses closely related to three deceased. No independent witnesses examined though incident occurred in busy market area. Articles found at place of occurrence not shown whether belonging to accused party or complainant party or some other persons. It suggest that eye-witnesses had not given true and complete disclosure of incident. Their evidence not corroborated by medical and ballistic evidence. It also does not get support from collateral circumstances that have come on record. Their disposition suffers from significant improvements and omissions as well. Thus evidence of eye-witnesses cannot be treated as cogent, convincing and truthful. Prosecution, therefore, failed to prove complicity of accused beyond any reasonable doubt. Conviction of accused, liable to be set aside.

Decision of Punjab and Haryana High Court dated 20.09.2006 reversed.

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387. EVIDENCE ACT, 1872 – Sections 3, 8, 45 and 134
CRIMINAL PROCEDURE CODE, 1973 – Sections 154 and 157
INDIAN PENAL CODE, 1860 – Section 302/149

(i) Motive – Not proved in case of which depending on direct evidence – It is not of any significant consequence – If it is proved, it may support the prosecution version.

(ii) Every witness that the prosecution may have listed in their chargesheet need not be examined – If prosecution examined some of them at the trial and their evidence is accepted as trustworthy, non-examination of others would become inconsequential.

(iii) **Discrepancy in ocular evidence and medical evidence – How to appreciate? It is not always easy for an eye witness to a ghastly murder to register the precise number of injuries that were caused by the accused and the part of the body on which the same were caused – A witness who is terrorized by the brutality of the attack cannot be disbelieved only because in his description of who hit the deceased on what part of the body there is some mix up or confusion – It is the totality of the evidence on record and its credibility that would eventually determine whether the prosecution has proved the charge against the accused.**

(iv) **F.I.R. – Lodged – Delay of one hour – It is not so inordinately delayed as to give rise to a suspicion on that delay.**

(v) **If delay in dispatch of FIR to the concerned Magistrate was material, the attention of the Investigating Officer ought to have been drawn to that aspect to give him an opportunity to offer an explanation for the same – How far the explanation was acceptable, would be a matter for the Court to consider.**

Gosu Jairami Reddy & Anr. v. State of A.P.

Judgment dated 26.07.2011 passed by the Supreme Court in Criminal Appeal No. 1321 of 2006, reported in AIR 2011 SC 3147

Held:

It is settled by a series of decisions of this Court that in cases based on eye witness account of the incident proof or absence of a motive is not of any significant consequence. If a motive is proved it may support the prosecution version. But existence or otherwise of a motive plays a significant role in cases based on circumstantial evidence. The prosecution has in the instant case examined as many as five eye witnesses in support of its case that the deceased was done to death by the appellants. The depositions of Shri M. Sanjeeva Reddy (PW1), Shri M. – Rammohan Reddy (PW2), Shri Veeranjaneyu (PW3), Shri D. Dastnagiramma (PW4) and Shri Eswaraiah (PW5) have been relied upon by the prosecution to substantiate the charge framed against the appellants. If the depositions giving the eye witness account of the incident that led to the death of late Shri Midde Chinna Reddy are indeed reliable as the same have been found to be, by the Trial Court and the first appellate Court, absence of a motive would make little difference.

There is in our view no merit even in this submission of the learned counsel. A report regarding the commission of a cognizable offence, lodged within an hour of the incident cannot be said to be so inordinately delayed as to give rise to a suspicion that the delay – if at all the time lag can be described to be constituting delay, was caused because the complainant, resorted to deliberations and consultations with a view to presenting a distorted, inaccurate or exaggerated version of the actual incident. No suggestion was made to PW1

the first informant that he delayed the lodging of the report because he held any consultation in order to present a false or distorted picture of the incident. A promptly lodged report may also at times be inaccurate or distorted just as a delayed report may despite the delay remain a faithful version of what had actually happened. It is the totality of the circumstances that would determine whether the delay long or short has in any way affected the truthfulness of the report lodged in a given case. The credibility of a report cannot be judged only by reference to the days, hours or minutes it has taken to reach the police station concerned. Viewed thus the credibility of the report was not affected on account of the so called delay of one hour in lodging of the complaint. So also, the receipt of the report by the Magistrate at 1.05 a.m. was not so inordinately delayed as to render suspect the entire prosecution case especially when no question regarding the cause of delay was put to the Investigating Officer. If delay in the despatch of the First Information Report to the Magistrate was material the attention of the Investigating Officer ought to have been drawn to that aspect to give him an opportunity to offer an explanation for the same. How far was the explanation acceptable would then be a matter for the court to consider.

It is true that PW 1 has in his depositions attributed an injury to A 3 which according to the witness was inflicted on the neck of the deceased. It is also true that the post mortem examination did not reveal any injury on the neck. But this discrepancy cannot in the light of the evidence on record and the fact that it is not always easy for an eye witness to a ghastly murder to register the precise number of injuries that were inflicted by the assailants and the part of the body on which the same were inflicted. A murderous assault is often a heart-rending spectacle in which even a witness wholly unconnected to the assailant or the victim may also get a feeling of revulsion at the gory sight involving merciless killing of a human being in cold blood. To expect from a witness who has gone through such a nightmarish experience, meticulous narration of who hit whom at what precise part of the body causing what kind of injury and leading to what kind of fractures or flow of how much blood, is to expect too much. Courts need to be - realistic in their expectation from witnesses and go by what would be reasonable based on ordinary human conduct with ordinary human frailties of memory and power to register events and their details. A witness who is terrorised by the brutality of the attack cannot be disbelieved only because in his description of who hit the deceased on what part of the body there is some mix up or confusion. It is the totality of the evidence on record and its credibility that would eventually determine whether the prosecution has proved the charge against the accused.

It was then contended on behalf of the appellants that the prosecution had dropped Shankar the driver of the Sumo Jeep and Hanumantha Reddy who according to the - defence witnesses could have given true account of incident if at all they were accompanying the deceased on the date of the occurrence. It

was argued by the learned senior counsel for the appellants that the non-examination of Shankar, the driver of the Jeep assumes importance because according to the prosecution version the driver had after entering the factory premises reversed the Jeep and parked it facing the gate. This part of the case could be supported only by the driver and since the driver had been given up at the trial the prosecution case that the vehicle was parked facing the gate, must be deemed to have remained unproved. The parking of the vehicle in the manner suggested by the prosecution was according the learned counsel material in as much as unless the prosecution introduced the theory of the vehicle being parked by the driver facing the gate the so called eye-witness to the occurrence would have had no opportunity to see the accused persons entering the factory with bombs and sickles. We regret to say that there is no merit in that contention either. It is well-settled that every witness that the prosecution may have listed in the charge-sheet need not be examined. It is entirely in the discretion of the Public Prosecutor to decide as to how he proposes to establish his case and which of the listed witnesses are essential for unfolding the prosecution story. Simply because more than one witnesses have been cited to establish the very same fact is no reason why the prosecution must examine all of them. The prosecution in the present case examined three eye-witnesses to prove the incident in question. There was no particular fact that could be proved only by the deposition of the driver and not by other witnesses. That Shanker was the driver of the vehicle at the relevant time, and that he reversed the vehicle and parked it facing the gate, were facts regarding which each one of the occupants of the vehicle was a competent witness. PWs. 1, 2 and 3 have in their depositions testified that the vehicle was parked facing the gate by Shankar driver of the vehicle after reversing the same. So also the non-examination of Hanumantha Reddy does not, in our opinion, make any dent in the prosecution case or render the version given by three eye-witnesses who have supported the prosecution version unworthy of credit. As a matter of fact once the deposition of the eyewitnesses examined at the trial is accepted as trustworthy the non-examination of other witnesses would become inconsequential. This Court in *Nirpal Singh v. State of Haryana, AIR 1977 SC 1066* stated the principles in the following words:

> "The real question for determination is not as to what is the effect of non-examination of certain witnesses as the question whether the witnesses examined in Court on sworn testimony should be believed or not. Once the witnesses examined by the prosecution are believed by the Court and the Court comes to the conclusion that their evidence is trust-worthy, the non-examination of other witnesses will not affect the credibility of these witnesses. It is not necessary for the prosecution to multiply witnesses after witnesses on the same point. In the instant case, once the

evidence of the eye witnesses is believed, there is an end of the matter."

To the same effect are the decisions of this Court in *State of U.P. v. Hakim Singh and Ors., (1980) 3 SCC 55, Nandu Rastogi alias Nandji Rastogi and Anr. v. State of Bihar, (2002) 8 SCC 9, Hem Raj & Ors. v. State of Haryana, AIR 2005 SC 2110, State of M.P. v. Dharkole @ Govind Singh and Ors., AIR 2005 SC 44* and *Raj Narain Singh v. State of U.P. & Ors., (2009) 10 SCC 362.*

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388. EVIDENCE ACT, 1872 – Sections 8 and 3
INDIAN PENAL CODE, 1860 – Sections 302 and 201

(i) Motive – Not proved in case resting only on circumstantial evidence – It is not fatal by itself – In such a case Court shall have to be more careful and cautious in appreciation of evidence to ensure that suspicion does not take the place of proof while finding the accused guilty – Court need to remember that motive is a matter which is primarily known to the accused and which the prosecution may at times find difficult to explain or establish by substantive evidence.

(ii) Circumstantial evidence – Deceased having been last seen with the accused around the time he was killed is a circumstance together with other circumstances proved by prosecution are explainable only on one hypothesis that the accused killed the deceased – Conviction proper.

Amitava Banerjee alias Amit alias Bappa Banerjee v. State of West Bengal

Judgment dated 17.08.2011 passed by the Supreme Court in Criminal Appeal No. 1939 of 2008, reported in AIR 2011 SC 2913

Held:

Motive for the commission of an offence no doubt assumes greater importance in cases resting on circumstantial evidence than those in which direct evidence regarding commission of the offence is available. And yet failure to prove motive in cases resting on circumstantial evidence is not fatal by itself. All that the absence of motive for the commission of the offence results in is that the court shall have to be more careful and circumspect in scrutinizing the evidence to ensure that suspicion does not take the place of proof while finding the accused guilty. Absence of motive in a case depending entirely on circumstantial evidence is a factor that shall no doubt weigh in favour of the accused, but what the Courts need to remember is that motive is a matter which is primarily known to the accused and which the prosecution may at times find difficult to explain or establish by substantive evidence. Human nature being what it is, it is often difficult to fathom the real motivation behind the commission of a crime. And yet experience about human nature, human conduct and the

frailties of human mind has shown that inducements to crime have veered around to what Wills has in his book *Circumstantial Evidence* said:

> "The common inducements to crime are the desires of revenging some real or fancied wrong; of getting rid of rival or an obnoxious connection; of escaping from the pressure of pecuniary or other obligation or burden of obtaining plunder or other coveted object; or preserving reputation, either that of general character or the conventional reputation or profession or sex; or gratifying some other selfish or malignant passion."

The legal position as to the significance of motive and effect of its absence in a given case is fairly well-settled by the decisions of this Court to which we need not refer in detail to avoid burdening this judgment unnecessarily. See *Dhananjoy Chatterjee alias Dhana v. State of W.B., (1994) 2 SCC 220, Surinder Pal Jain v. Delhi Administration, AIR 1993 SC 1723, Tarseem Kumar v. Delhi Administration, AIR 1994SC 2585, Jagdish v. State of M.P., 2010 AIR SCW 443, Mulakh Raj and Ors. v. Satish Kumar and Ors., AIR 1992 SC 1175.*

The above circumstances are, in our opinion, not only established, but they form a complete chain, that leaves no manner of doubt, that the crime with which the appellant stood charged was committed by him and no one else. The deposition of the mother of the deceased, that Babusona wanted to go to the appellant to fetch two parrots which the latter had promised, that he did after returning from the drawing tuition go to the appellant on getting a signal from him, sets the stage for drawing the deceased out of the house. He is shortly thereafter seen talking to the appellant who calls out for him in the park and carries him away on his bicycle towards Kanchan Oil Mill which fact has been proved by two witnesses whose deposition does not suffer from any embellishment or contradiction. The fact that Babusona and the appellant were seen together in Sitaldihi jungle around 6.00/6.30 p.m. on 12th July, 1998 is a highly incriminating circumstance, especially when according to the medical evidence the time of death of the deceased was also around the same time. The deceased having been last seen with the appellant around the time he was killed is a circumstance which together with other circumstances proved in the case, are explainable only on one hypothesis that the appellant was guilty of killing the deceased. The fact that the appellant had borrowed the spade, tide it with 'Sutli' after wrapping the wooden part with the newspaper is fully established by the statement of Jadunath Das, PW6. So also the deposit of the spade on 12th July, 1998 in the evening with Rukshmini Yadav, PW11 stands established beyond any doubt whatsoever. The presence of the newspaper near the ditch where the deceased was buried and the recovery of the 'Sutli' from around the neck of the deceased where it had left a ligature mark are also telling circumstances which are explainable only on the hypothesis that the appellant was the author of the crime. Recovery of the cap which according to the

prosecution witnesses was worn by the appellant on the date of occurrence from Sitaldihi jungle is also a circumstance that establishes that the appellant was in the jungle on 12th July, 1998 around the place from where the dead body was recovered. Similarly, the recovery of the bicycle which the appellant owned from Sitaldihi jungle, from near the place where the dead body was buried is not explainable on any hypothesis except the guilt of the accused-appellant. The fact that the appellant had late in the evening on 12th July, 1998 left the spade at the house of Rukshmini Yadav, PW11 and entered the flat from the rear door without his chappals as also the fact that when asked where his bicycle was, he gave a false explanation too are incriminating circumstances which are important links in the chain of the circumstances.

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***389. EVIDENCE ACT, 1872 – Sections 45, 47 and 67**

Application for examination of disputed thumb impression by handwriting expert – Plaintiff denied in his plaint that she never gave any consent letters bearing her disputed thumb impression in the revenue court to get the name of defendant mutated in the revenue record – Defendant filed an application under Section 45 of the Evidence Act for examination of the consent letters by handwriting expert asserting that the documents were thumb marked by the plaintiff – The application was rejected by the lower Court – Held, one of the modes of proving document is to get the document proved by examination of handwriting expert – By rejecting the application the defendants were debarred from adducing material evidence in order to demonstrate that the consent letters contained the thumb impression of plaintiff – Application allowed.

Kawal Singh and another v. Sembai and another

Judgment dated 15.07.2011, passed by the High Court of M.P. in S.A. No. 1443 of 2010, reported in 2011 (4) MPHT 470

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390. EVIDENCE ACT, 1872 – Sections 47 and 67

How to prove a document? There is difference between exhibiting a document and proving it – Mere putting exhibit mark on a document would not mean that document has been proved – A document has to be proved in accordance with Section 67 of the Evidence Act.

Haseena Bi v. State of M.P.

Judgment dated 16.08.2011 passed by the High Court of M.P. in S.A. No. 587 of 1994, reported in 2011 (4) MPLJ 140

Held :

According to me, since it is borne out from the testimony of Dr. Satpati (PW-2) that he is not acquainted whether the signatory of Exhibit P-10 made

any inquiry from the defendant Haseena Bi in respect of whether the dead body of the person was of her husband or not, I am of the view that the document is not proved from the statement of this witness. According to me, if Dr. Heeresh Chandra would have been examined, opportunity would have been availed by the defendant to cross-examine him and therefore in absence of the examination of Dr. Heeresh Chandra who had written the document Ex. P-10, mere putting exhibit mark on the said document would not be sufficient to prove this document and therefore, the evidence of the best witness has been suppressed by the plaintiff. The Single Bench decision of this Court in *M.P. Bombay Transport Corporation (M/s) and others v. New India Assurance Company and another, 1998 (1) JLJ 53,* is squarely applicable in the present case which is based on the decision of Supreme Court in *Sait Tarajee Khimchand v. Yelamarti Satyam, AIR 1971 SC 1865,* I have also gone through this decision of Supreme Court and I find that as per the dictum laid down by Apex Court, mere marking of document as exhibit does not dispense with its proof. In this regard paras 14 and 16 of the said decision are quite material. Similarly, the decision of Bombay High Court in *Madholal Sindhu v. Asian Assurance Co. Ltd. and others, AIR 1954 Bombay 305,* para - 7 is also quite relevant. The decision of Calcutta High Court in *State v. Bhola Pal alias Salil Pal, 1995 Cri.L.J. 3717,* and Madras High Court in *T. N. Govindarajulu v. Lakshmi Ammal* by her agent *P.V. Narasimhan, AIR 1961 Madras 158,* respectively are also applicable in the present case.

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391. EVIDENCE ACT, 1872 – Sections 74 and 115
STAMP ACT, 1899 – Section 35

(i) What are the essentials of estoppel by conduct? One of the essentials of estoppel by conduct is that party against whom it is pleaded should have made some representation intended to induce a course of conduct by the party to whom it was made.

(ii) If a document is required to be stamped under the provisions of the Stamp Act, it is not admissible in evidence though it is a public document.

(iii) There is a difference between the record of the acts of the Court and record of Court – A private document does not become public document because it is filed in the Court – To be a public document, it should be the record of the act of the Court.

Mamta Awasthy and others v. Ajay Kumar Shrivastava

Judgment dated 05.04.2011 passed by the High Court of M.P. in W.P. No. 5315 of 2010, reported in 2011 (3) MPLJ 588

Held :

The relevant extract of Section 35 of the Indian Stamp Act, 1899 (in short 'the 1899 Act') reads as under:-

"**35.** *Instruments not duly stamped inadmissible in evidence, etc.*- No instrument chargeable with duty shall be admired in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or small be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped :

Provided that-

(a) any such instrument shall be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of any instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion."

Section 36 of the 1899 Act provides that where an instrument has been admitted in evidence, such admission shall not, except as provided in Section 61 thereof, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not duly been stamped. From perusal of section 35 of the 1899 Act, it is apparent that it casts a duty on the Court not to admit in evidence any document which is not duly stamped. A scrutiny of section 36 reveals that it bars the objection with regard to admissibility of a document at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. One of the essential elements of estoppel by conduct is that party against whom it is pleaded, should have made some representation intended to induce a course of conduct by the party to whom it was made. In the instant case, this essential element is lacking as document in question was marked as an exhibit in the absence of respondent. Apart from this, section 35 of 1899 Act casts a duty on the Curt not to admit in evidence any document which is not duly stamped. Thus, the contention raised by the learned Counsel for the petitioners that objection to admissibility of the document at the instance of respondent cannot be entertained on the ground of the estoppel by conduct, cannot be accepted. Besides that section 36 of the Indian Stamp Act does not bar such a challenge.

Section 74 of the 1872 Act which deals with the public document reads as under:-

"74. Public documents. – The following documents are public documents : –

(1) Document forming the acts, or records of the acts–

(i) of the sovereign authority,

(ii) of official bodies and Tribunals and

(iii) of public officers, legislative judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;

(2) Public records kept in any State of private documents."

Perusal of Section 74 reveals that the documents which are record of the acts of the Court are public documents within the meaning of section 74(1)(iii) of the 1872 Act. There is distinction between the records of the acts of the Court and record of the Court. A private document does not become public document because it is filed in the Court. To be a public document it should be record of act of the Court. In the instant case, admittedly, the partition deed was marked as exhibit. Marking of an exhibit on the document is an act of the Court. Thus, the partition deed is record of the act of the Court and is thus a public document within the meaning of section 74(1)(iii) of the 1872 Act. Thus, for the aforementioned reasons, it is held that partition deed dated 02.11.1985 is a public document within the meaning of section 74(1)(iii) of the Indian Evidence Act, 1872.

Section 77 of the Evidence Act has been enacted to obviate the production of original public document for evidentiary purpose. The original public document requires no proof and under section 77 of the Evidence Act, the contents of public document are proved by production of certified copy of such documents. The Indian Evidence Act does not purport to deal with the admissibility of documents in evidence which requires to be stamped under the provisions of Indian Stamp Act. See: *Jupudi Kesava Rao v. Pulavarthi Venkata Subbarao and others, AIR 1971 SC 1070.* Thus, merely because the document in question is a public document, it is not *per se* admissible in evidence. It is required to be stamped under the provisions of Indian Stamp Act, 1935.

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392. EVIDENCE ACT, 1872 – Section 135
INDIAN PENAL CODE, 1860 – Sections 34 and 302

(i) Where prosecution has given up one eye witness because he felt that witness would turn hostile, another prosecution witness was examined by the accused as a defence witness – In above factual position, no adverse inference can be drawn against prosecution.

(ii) The common intention or state of mind and the physical act both may be arrived at the spot and essentially may not be the result of any pre-determined plan to commit such an offence – This will always depend on the facts and circumstances of the case.

(iii) Individual act in crime is essential requirement to conviction with the aid of Section 34.

Nand Kishore v. State of Madhya Pradesh

Judgment dated 07.07.2011, passed by the Supreme Court in Criminal Appeal No. 437 of 2005, reported in AIR 2011 SC 2775

Held :

Another very significant aspect of this case is that the prosecution had not examined Rajendra and Sunil as prosecution witnesses and this issue was raised on behalf of the defence that the Court should draw adverse inference from non-examination of these witnesses. Witness Rajendra was given up as the prosecution felt that he would be hostile to the case of the prosecution but Sunil himself was examined by the accused as its own witness. Once Sunil was examined as witness of the defence, the objection taken by the appellant loses its legal content. DW1, though appeared as witness for the defence, supported the case of the prosecution resulting in his being declared as a hostile witness by the counsel appearing for the accused. Therefore, the statement of DW1 could be and has rightly been relied upon by the learned Sessions Judge while convicting the accused of the offence. The statement of DW1 has fully corroborated the statement of PW1. He stated that there were nearly 20 to 30 houses in that Mohalla and denied the suggestion made to him by the defence counsel that he had not seen anything on the fateful day and was not witness to the occurrence. He also, specifically, denied the suggestion that he was related to the family of the deceased. In his cross-examination, he has clearly stated that Mahesh Dhimar had caught hold of both the hands of the deceased and Dinesh Dhimar had given blows on the chest of the deceased by a knife and Nand Kishore had pelted stones on the deceased. Lastly, he also stated that he had taken the deceased to the hospital along with PW1. Confronted with this evidence, the appellant can hardly even attempt to argue that there is no definite evidence on record to prove the commission of the offence by the appellant. There is definite documentary, ocular and medical evidence and more definitely statement of defence witness itself to repel the plea of the appellant that he has been falsely implicated in the case.

Now, we would examine whether the conviction of the appellant under Section 302 with the aid of Section 34 by the courts is sustainable in law or not. For the application of Section 34 IPC, it is difficult to state any hard and fast rule which can be applied universally to all cases. It will always depend upon the facts and circumstances of the given case whether the persons involved in the commission of the crime with a common intention can be held guilty of the main offence committed by them together. Provisions of Section 34 IPC come to the aid of law while dealing with cases of criminal offence committed by a group of persons with common intention. Section 34 reads as under :

> *"34. Acts done by several persons in furtherance of common intention.*— When a criminal act is done by several persons in furtherance of the common intention of all, each of such

persons is liable for that act in the same manner as if it were done by him alone."

A bare reading of this section shows that the section could be dissected as follows :

(a) Criminal act is done by several persons;

(b) Such act is done in furtherance of the common intention of all; and

(c) Each of such persons is liable for that Act in the same manner as if it were done by him alone.

In other words, these three ingredients would guide the court is determining whether an accused is liable to be convicted with the aid of Section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once criminal act and common intentions are proved, then by fiction of law, criminal liability of having done that act by each person individually would arise. The criminal act, according to Section 34 IPC must be done by several persons. The emphasis in this part of the section is on the word 'done'. It only flows from this that before a person can be convicted by following the provisions of Section 34, that person must have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. Every individual member of the entire group charged with the aid of Section 34 must, therefore, be a participant in the joint act which is the result of their combined activity. Under Section 34, every individual offender is associated with the criminal act which constitutes the offence both physically as well as mentally, i.e., he is a participant not only in what has been described as a common act but also what is termed as the common intention and, therefore, in both these respects his individual role is put into serious jeopardy although this individual role might be a part of a common scheme in which others have also joined him and played a role that is similar or different. But referring to the common intention, it needs to be clarified that the courts must keep in mind the fine distinction between 'common intention' on the one hand and *'mens rea'* as understood in criminal jurisprudence on the other. Common intention is not alike or identical to *mens rea.* The latter may be co-incidental with or collateral to the former but they are distinct and different.

Section 34 also deals with constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. If the common intention leads to the commission of the criminal offence charged, each one of the persons sharing the common intention is constructively liable for the criminal act done by one of them. (Refer to *Brathi alias Sukhdev Singh v. State of Punjab, AIR 1991 SC 318*).

Another aspect which the Court has to keep in mind while dealing with such cases is that the common intention or state of mind and the physical act, both may be arrived at the spot and essentially may not be the result of any pre-

determined plan to commit such an offence. This will always depend on the facts and circumstances of the case, like in the present case Mahavir, all alone and unarmed went to demand money from Mahesh but Mahesh, Dinesh and Nand Kishore got together outside their house and as is evident from the statement of the witnesses, they not only became aggressive but also committed a crime and went to the extent of stabbing him over and over again at most vital parts of the body puncturing both the heart and the lung as well as pelting stones at him even when he fell on the ground. But for their participation and a clear frame of mind to kill the deceased, Dinesh probably would not have been able to kill Mahavir. The role attributable to each one of them, thus, clearly demonstrates common intention and common participation to achieve the object of killing the deceased. In other words, the criminal act was done with the common intention to kill the deceased Mahavir. The trial court has rightly noticed in its judgment that all the accused persons coming together in the night time and giving such serious blows and injuries with active participation shows a common intention to murder the deceased. In these circumstances, the conclusions arrived at by the trial Court and the High Court would not call for any interference.

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***393. HINDU MARRIAGE ACT, 1955 – Section 25**

What are relevant factors to fix permanent alimony:

(a) the status of the parties

(b) their respective needs

(c) the capacity of the husband to pay or his income

(d) having regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute

(e) the amount of maintenance fixed for wife should be such that she can live in reasonable comfort considering her status and mode of life she was used to live when she lived with her husband

(f) the amount so fixed cannot be excessive or affect the living condition of the other party.

Vinny Parmvir Parmar v. Parmvir Parmar

Judgment dated 20.07.2011, passed by the Supreme Court in Civil Appeal No. 5831 of 2011, reported in AIR 2011 SC 2748

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394. INDIAN PENAL CODE, 1860 – Sections 300 and 304

When culpable homicide not murder? Accused came to the house under drunken state – There was a fight and in the fight, he first hit his wife on the left knee with a water pot and thereafter threw kerosene lamp on her – She was wearing nylon sari and got 70% burns – There was no premeditation – Case of sudden fight comes under Section 304 Part I IPC and not under Section 302 IPC.

Sayaji Hanmat Banker v. State of Maharashtra

Judgment dated 13.07.2011 passed by the Supreme Court in Criminal Appeal No. 457 of 2007, reported in AIR 2011 SC 3172

Held:

We have gone through the evidence carefully. It seems that as soon as the accused entered the house, there appeared to be some quarrel with his wife and in that fight first, he threw water pot and thereafter a kerosene lamp. The burning seems to be more out of the fact that unfortunately at that time, the lady was wearing nylon sari. Had she not been wearing a nylon sari, it is difficult to imagine how she could have been burnt to the extent of 70%. In our view this was a case which clearly fall under Exception 4 of Section 300 IPC since there was sudden fight. There was no premeditation either. Therefore the accused-appellant is liable to be convicted for the offence punishable under Section 304 Part-I.

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395. INDIAN PENAL CODE, 1860 – Section 306

Abetment of suicide – Husband/appellant harassed and insulted his wife because she could not give birth to a child – Wife committed suicide – Conviction for offence of abetment of suicide proper.

Sudarshan Kumar v. State of Haryana

Judgment dated 28.07.2011 passed by the Supreme Court in Criminal Appeal No. 1201 of 2007, reported in AIR 2011 SC 3024

Held :

It is natural that everyone wants children, but if a woman does not have a child, that does not mean that she should be insulted or harassed. In such a situation, the best course would be to take medical help, and if that fails, to adopt a child. Experience has shown that an adopted child gives as much happiness to the adoptive parents as any natural child does. Hence, we see no justification to condone such an act of harassing or tormenting a woman just because she did not give birth to a child. It may not be the fault of the wife that she did not have a child. At any event, that is no justification for tormenting or beating her, and this reveals a feudal, backward mentality.

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396. INDIAN PENAL CODE, 1860 – Sections 353 and 333

Office duty – Victims were assaulted while undertaking return journey to the office – Held, travelling by virtue of office is not a part of duty. Causing hurt in discharge of duty – Appellant suspected that victims were involved in negligence leading to death of his buffalo – It cannot be said that injured were assaulted in the execution of their duties as public servants.

Santosh v. State of M.P.

Judgment dated 22.03.2011, passed by the High Court of M.P. in Criminal Appeal No. 74 of 1996, reported in I.L.R. (2011) M.P. 2210

Held :

It was not possible to hold that Parsadi and Shripat (Line helpers of MPEB) were assaulted at the time when they were performing duty as line-helpers in view of these infirmities in the prosecution evidence-

> (i) The report (Ex.P-1) indicated that appellant had assaulted Pasradi at the time when he was checking the electric line at the well of Omprakash Arjaria whereas both Pasradi and Shripat were emphatic in deposing that Pasradi was manhandled near the appellant's well where he had called them at the time when they were returning home after making necessary repairs at the well of Rakesh Arjaria.
>
> (ii) No duty certificate or any other document pertaining to duty hours was produced.
>
> (iii) Neither Om Prakash nor Rakesh Arjaria was examined by the prosecution to prove that Pasradi and Shripat have gone to attend to the complaint made by him as well as to give information regarding exact time of their departure.

This apart, even if the statement of Pasradi and Shripat that they were assaulted while undertaking return journey to the office is taken at its face value, no offence under Section 353 of the IPC would be made out as traveling by virtue of office is not a part of duty (See. *Richard Saldana v. State, 1960 Cri.L.J. 828* that has been followed in *Mohammed Kutty v. State of Kerala, 2004 Cri.L.J. 1603*). In *Richard Saldana's case* (supra), the following excerpts of the commentary by H.S. Gour on the Penal Law of India were quoted in support of the view taken:-

> "This offence consists of assaulting or using criminal force on a person who is at the time of the offence a public servant in the execution of his duty. As such, he is often exposed to considerable risks in the discharge of his official duties, and the law, therefore, throws round him a special protection by prescribed specifically deterrent sentences to those who offend against the majesty of the law of which he is a minister. *As however, it is not intended to encircle him with a perennial halo of sanctity and inviolability, the Code has through out, in referring to him, protected him only when he is in the execution of duty, he being left at other times to have recourse to the ordinary law applicable to all alike.*"
>
> (Emphasis supplied)

Apparently, Parsadi was assaulted in view of the fact that appellant was suspecting his involvement in the negligence leading to death of the buffalo. In such a situation, learned trial Judge completely misdirected himself in arriving at the conclusion that Parsadi and Shripat were assaulted in the execution of their duties as the public servant.

Thus, upon re-appreciation of the entire evidence on record, I am of the view that the appellant ought to have been convicted for offences under Sections 325 and 352 only for causing grievous hurt to Parsadi and for using criminal force to Shripat. This apart, the impugned sentences passed against the appellant for the offence under Section 353 for using criminal force to Parsadi was also not legal as being violative of Section 71 of the Code.

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397. INDIAN PENAL CODE, 1860 – Section 376 (2) (g)
EVIDENCE ACT, 1872 – Sections 3 and 45

(i) Gang rape case – Doctor opined that prosecutrix was habitual to sexual intercourse – Prosecutrix medically examined after two days of incident – Medical opinion has to be taken in that background specifically when doctor had also stated that there was possibility that she was subjected to intercourse on the date of occurrence.

(ii) Discrepancies which are not significant does not render the statement of prosecutrix unreliable or untrustworthy.

(iii) Appreciation of evidence – The evidence must be viewed collectively –The statement of a witness must be read as a whole – Reliance on a mere line in the statement of the witness out of context would not serve the ends of justice and the conclusion of the court based on such appreciation of evidence could be faulted.

Prem Prakash alias Lillu & Anr. v. State of Haryana

Judgment dated 07.07.2011, passed by the Supreme Court in Criminal Appeal No. 91 of 2007, reported in AIR 2011 SC 2677

Held :

The main argument on behalf of the appellant, while challenging the above findings, is that there is hardly any evidence directly involving the accused Prem Prakash @ Lillu in the commission of the crime. This argument does not impress us. Firstly, the prosecutrix when examined as PW4 stated in Court that the appellant was driving the car in which she was kidnapped and subsequently taken to the jungle. Her version is also supported by her father Pratap Singh, PW7, though, of course, Pratap Singh was not an eye- witness to the occurrence. There is no reason for this Court to disbelieve the version given by the prosecutrix. Some contradictions have been pointed out between the statements of the prosecution witnesses. The trial court has rightly observed that these are

some discrepancies which, viewed from any angle, are not significant. It is also on record that PW4 did deny some portion of her statement Ex.DA, particularly, that she was raped in the car one after the other by all the three accused. This statement does not find support from any of the prosecution witnesses or from the investigation of the Investigating Officer. Thus, this contradiction does not render the statement of the prosecutrix unreliable or untrustworthy.

The learned counsel appearing for the appellant had placed emphasis on the fact that the doctor had opined that the prosecutrix was accustomed to sexual intercourse and that there was no sign of fresh intercourse. This argument has rightly been rejected by the High Court by noticing that there was no fresh intercourse but she had been subjected to intercourse more than 24 hours ago. The doctor had examined her on 27th July, 1990 while the incident took place on 25th July, 1990. Thus, the statement of the doctor has to be read and understood in that background and the doctor also specifically stated, that there was a possibility that she was subjected to intercourse on 25th July, 1990.

The evidence, essentially, must be viewed collectively. The statement of a witness must be read as a whole. Reliance on a mere line in the statement of the witness, out of context, would not serve the ends of justice and the conclusion of the Court based on such appreciation of evidence could be faulted. Another aspect of this case which has specifically not been noticed by the High Court, is that the prosecutrix and her father were made to run from pillar to post by the police authorities, before their case could be registered. The prosecutrix, PW4, has specifically stated that report made by her father was not recorded by the police and the next day they went to Jhajjar along with her mother and appeared before the police officers but again, no action was taken. According to her, the application which she had given in the Tehsil office was thumb marked by her. Pratap Singh, father of the prosecutrix, stated that he had even convened a panchayat of the brotherhood but the panchayat having failed to arrive at a decision, he had proceeded to the police station along with his daughter and his report was not recorded at the police station by the police. He returned to the village and again went to the Jhajjar Sub Divisions Headquarter and met the DSP and narrated the entire occurrence to him. But still no action was taken and then they claim to have gone to the SDM, Jhajjar and made a complaint in writing. Thereafter, his daughter was medically examined and subsequently, the case was registered. This event certainly describes and points towards the apathy in the functioning of investigating agencies in heinous crimes, to which the complainant was subjected. In terms of the provisions of Section 154, Cr.P.C., it is obligatory for the police to register a case when the facts constituting a cognizable offence are brought to its notice. The father of the girl, surely must have felt trauma and frustration when he was subjected to the above treatment, besides the knowledge of his daughter's raped by the accused. We do express a pious hope, that such occurrences will not be repeated in any police station in the country.

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398. INDIAN PENAL CODE, 1860 – Sections 396 and 302
CRIMINAL PROCEDURE CODE, 1973 – Sections 215, 216 and 222

(i) Can an accused be convicted under Section 302 IPC where charge against him has been framed only under Section 396 IPC? Held, Yes, provided that accused does not suffer from any prejudice.

(ii) A person charged with a heinous or grave offence can be punished for a less grave offence of cognate nature whose essentials are satisfied with the evidence on record – Generally an offence of grave nature includes in itself the essentials of a lesser but cognate offence.

(iii) In all cases, non-framing of a charge or some defect in drafting of the charge *per se* would not vitiate the trial itself – It will have to be examined in the facts and circumstances of each case.

(iv) What is cognate offence? Explained.

Rafiq Ahmad alias Rafi v. State of Uttar Pradesh

Judgment dated 04.08.2011 passed by the Supreme Court in Criminal Appeal No. 656 of 2005, reported in (2011) 8 SCC 300

Held :

With the passage of time more and more such cases came up for consideration of this Court as well as the High Courts. The development of law has not changed the basic principles. Usually an offence of grave nature includes in itself the essentials of a lesser but cognate offence. In other words, there are classes of offences like offence against the human body, offences against property and offences relating to cheating, misappropriation, forgery, etc. In the normal course of events, the question of grave and less grave offences would arise in relation to the offences falling in the same class and normally may not be inter se the classes. It is expected of the prosecution to collect all evidence in accordance with law to ensure that the prosecution is able to establish the charge with which the accused is charged, beyond reasonable doubt. It is only in those cases, keeping in view the facts and circumstances of a given case and if the court is of the view that the grave offence has not been established on merits or for a default of technical nature, it may still proceed to punish the accused for an offence of a less grave nature and content.

Dinesh Seth v. State of NCT of Delhi, (2008) 14 SCC 94 was a case where the accused was charged with an offence under Section 304B read with Section 34 IPC but was finally convicted for an offence under Section 498A. The plea of prejudice, on the ground that no specific charge under Section 498A was framed and the Court, while referring to the facts and circumstances of the case and the cross-examination of the prosecution witnesses found that it was unmistakably shown that the defence had made concerted efforts to discredit the testimony of the alleging cruelty, was rejected and the accused was punished for an offence under Section 498A. This clearly demonstrates the principle that in all cases,

non-framing of charge or some defect in drafting of the charge per se would not vitiate the trial itself. It will have to be examined in the facts and circumstances of a given case. Of course, the court has to keep in mind that the accused 'must be' and not merely 'may be' guilty of an offence. The mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions. (*Shivaji Sahebrao Bobade & Anr. v. State of Maharashtra, AIR 1973 SC 2622*).

Black's Law Dictionary (Eighth Edition) defines the expression 'cognate offences' as follows:

> "*cognate offences.* A lesser offence that is related to the greater offense because it shares several of the elements of the greater offense and is of the same class or category. For example, shoplifting is a cognate offence of larceny because both crimes require the element of taking property with the intent to deprive the rightful owner of that property."

Therefore, where the offences are cognate offences with commonality in their feature, duly supported by evidence on record, the Courts can always exercise its power to punish the accused for one or the other provided the accused does not suffer any prejudice as afore-indicated.

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399. JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000– Section 7
JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) RULES, 2007– Rule 12
Age of juvenile – How to be determined? According to Rule 12 (3) (a), matriculation or equivalent certificate has been given first preference and in the absence of it, the date of birth certificate from the school (other than play school) first attended and in its absence, the birth certificate given by a Corporation or a Municipal Authority or a Panchayat and only in the absence of all the above, medical opinion will be sought from a duly constituted Board.

Shah Nawaz v. State of U.P. & Anr.

Judgment dated 05.08.2011 passed by the Supreme Court in Criminal Appeal No. 1531 of 2011, reported in AIR 2011 SC 3107

Held :

The documents furnished above clearly show that the date of birth of the appellant had been noted as 18.06.1989. Rule 12 of the Rules categorically envisages that the medical opinion from the medical board should be sought only when the matriculation certificate or school certificate or any birth certificate issued by a corporation or by any Panchayat or municipality is not available. We are of the view that though the Board has correctly accepted the entry relating

to the date of birth in the mark sheet and school certificate, the Additional Sessions Judge and the High Court committed a grave error in determining the age of the appellant ignoring the date of birth mentioned in those documents which is illegal, erroneous and contrary to the Rules.

We are satisfied that the entry relating to date of birth entered in the mark sheet is one of the valid proof of evidence for determination of age of an accused person. The School Leaving Certificate is also a valid proof in determining the age of the accused person. Further, the date of birth mentioned in the High School mark sheet produced by the appellant has duly been corroborated by the School Leaving Certificate of the appellant of Class X and has also been proved by the statement of the clerk of Nehru High School, Dadheru, Khurd- O-Kalan and recorded by the Board. The date of birth of the appellant has also been recorded as 18.06.1989 in School Leaving Certificate issued by the Principal of Nehru Preparatory School, Dadheru, Khurd-O-Kalan, Muzaffarnagar as well as the said date of birth mentioned in the school register of the said school at S. No. 1382 which have been proved by the statement of the Principal of that school recorded before the Board. Apart from the clerk and the Principal of the school, the mother of the appellant has categorically stated on oath that the appellant was born on 18.06.1989 and his date of birth in his academic records from preparatory to Class X is the same, namely, 18.06.1989, hence her statement corroborated his academic records which clearly depose his date of birth as 18.06.1989. Accordingly, the appellant was a juvenile on the date of occurrence that is 04.06.2007 as alleged in the FIR dated 04.06.2007.

We are also satisfied that Rule 12 of the Rules which was brought in pursuance of the Act describes four categories of evidence which have been provided in which preference has been given to school certificate over the medical report.

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400. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 – Section 12

Bail to juvenile – A juvenile has to be released on bail mandatorily unless and until the exceptions carved out in the section itself are made out – Case is not covered in anyone of the three exceptions carved out under Section 12 of the Act – The juvenile is entitled for bail.

Hakam v. State of M.P.

Judgment dated 08.07.2011, passed by the High Court of M.P. in Cr. Rev. No. 985 of 2011, reported in I.L.R. (2011) M.P. 2237

Held :

It is well settled legal position that once a person is held to be a juvenile delinquent, then Section 12 of the Act, 2000 would govern the question of grant of bail and custody of juvenile and it will not be governed by the provisions of the Code of Criminal Procedure, 1973.

The position of law with regard to grant of bail to a juvenile under Section 12 of the Act, is clear that a juvenile has to be released on bail mandatorily unless and until the exceptions carved out in the section itself are made out. The first exception is a reasonable ground for believing that the release is likely to bring the juvenile into association with any known criminal. The second exception is that the release of the juvenile is likely to expose him to any moral, physical or psychological danger. Both these exceptions are not made out because there is no material available in the record of the case to suggest any such association or exposure. The third exception is that the release of the juvenile would defeat the ends of the justice.

The impugned order is based on the serious nature of the offence as well as the release of the petitioner not being in the interest of justice. The nature of the offence is not one of the conditions on which bail can be granted or refused to the juvenile. Bail, in respect of a juvenile, has to be considered purely under the parameters of Section 12 of the Act which requires bail to be granted mandaorily unless the court feels that the release of the juvenile is likely to bring him in the association of any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.

The prosecution did not bring on record any material or report of the Probation Officer, to show that the release of the delinquent juvenile on bail is likely to bring him into the association with any known criminal or expose him to moral, physical or psychological danger or his release would defeat the ends of justice.

It appears that there is no likelihood of the juvenile delinquent, to whom the bail is being granted, interfering with the course of justice. He is not likely to abscond from the jurisdiction of the Court. If the petitioner is released on bail, there does not appear a reasonable ground for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice. The grant of bail itself is not likely to result in injustice.

Looking at the totality of circumstances, I feel that the present case is not covered in any one of the three exceptions carved out under Section 12, of the Act, therefore, the juvenile is entitled for bail and the impugned order dated 18.04.2011 is liable to be set aside.

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401. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 – Section 12

Bail to juvenile – Bail application of Juvenile cannot be rejected on the ground of seriousness of crime unless there is ground of believing that he will come in to association with known criminals if bail is granted.

Rahul v. State of M.P.

Judgment dated 28.06.2011, passed by the High Court of M.P. in Cri. Rev. No. 480 of 2011, reported in 2011 (4) MPHT 113

Held :

In the case of *Raj Kumar v. State of M.P., 2008 (I) MPWN 94*, it has been held that, "the bail application of juvenile cannot be rejected on the ground of seriousness of crime. There was no ground of believing that he will come into association of known criminals the bail granted to the juvenile". The similar view was adopted in the case *Rahul Mishra v. State of M.P., 2001 (I) MPWN 76*. Since there is no criminal history against the applicant and there is no legible ground to believe that he will come into association of known criminal the applicant is entitled for bail.

Considering circumstances and the fact that the applicant Rahul is a juvenile, hence he should not be denied bail, the revision petition is allowed and it is ordered that on production of Supurdginama of ₹ 25,000 (Rupees Twenty Five Thousand only) along with surety of the same amount by his father to the satisfaction of Juvenile Court the applicant Rahul be released on Supurdgi to his father Shri Gulabsing till the disposal of the trial. Therefore, this revision is disposed of accordingly.

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402. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 – Section 12

Offence under Section 307 IPC and Section 25/27 of the Arms Act – Looking to the facts and circumstances of the case and report of the Probationary Officer, applicant found entitled to extend the benefit of mandatory provision of Section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2000.

Ritesh v. State of M.P.

Judgment dated 10.08.2011 passed by the High Court of M.P. in Criminal Revision No. 1087 of 2011, reported in 2011 (4) MPLJ 226

Held:

Having heard the Counsel at length after perusing the case diary and the impugned orders of the Courts below along with other papers placed on record, also the report of Probationary Officer, I am of the considered view that the applicant is entitled to extend the benefit of mandatory provisions of section 12 of the Act for grant of bail, hence by allowing this revision the impugned rejection orders of the Courts below in this regard are hereby set aside and it is directed that on furnishing a bail bond of ₹ 25,000 by the father of the applicant in accordance with the provision of Juvenile Justice (Care and Protection) Act, 2000 to the satisfaction of the Trial Court the applicant shall be given in the custody of his father, namely Shri Suresh Choubey with a direction that he will produce the applicant before the trial Court on each and every date of hearing.

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403. LAND ACQUISITION ACT, 1894 – Sections 23, 18 and 54

(i) It is not an absolute rule that when the acquired land is a large track of land, sale instances relating to smaller pieces of land cannot be considered – There are certain circumstances when sale deeds of small pieces of land can be used to determine the value of acquired land which is comparatively large in area, as can be seen from the judicial pronouncements in this behalf.

(ii) Where sale instance is related to small, piece of land and acquired land is a large track of land, deduction of 60% is proper in that situation.

Special Land Acquisition Officer and another v. M.K. Rafiq Saheb
Judgment dated 05.07.2011 passed by the Supreme Court in Civil Appeal No. 1086 of 2006, reported in (2011) 7 SCC 714

Held:

The only issue is that Ext. P-5, which was relied upon by the High Court, relates to a small piece of land, whereas the acquisition is of a larger piece of land. It is not an absolute rule that when the acquired land is a large tract of land, sale instances relating to smaller pieces of land cannot be considered. There are certain circumstances when sale deeds of small pieces of land can be used to determine the value of acquired land which is comparatively large in area, as can be seen from the judicial pronouncements in *Land Acquisition Officer v. Nookala Rajamallu, (2003) 12 SCC 334. Bhagwathula Samanna v. Tehsildar and Land Acquisition Officer, (1991) 4 SCC 506, Land Acquisition v. L. Kamalamma, AIR 1998 SC 781* and *Basavva v. Land Acquisition Officer, AIR 1996 SC 3168.*

Thus, we are of the opinion that the sale deed, Ext. P-5 was rightly relied upon by the High Court in determining compensation. The High Court made a 50% deduction since the sale instance, Ext. P-5 related to a smaller piece of land. We are of the considered view that the said deduction should be increased to 60%, which we find fair, just and reasonable in the circumstances. Hence, the judgment of the High Court is modified to the extent of the abovementioned deduction. All other findings of the High Court are sustained.

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***404. LAND ACQUISITION ACT, 1894 – Sections 23, 31, 32 and 33**

(i) Developmental cost – Where land was situated in the vicinity of the residential colonies developed by the Board, other educational institutions, hospitals etc. and is one of the junctions of two important roads, 1/3rd deduction towards development cost is proper.

(ii) Escalation in price – When acquired land was semi-urban and huge potential for being developed as housing sites, then 10% per annum escalation in the price is proper.

Valliyammal and another v. SpecialTehsildar (Land Acquisition) and another

Judgment dated 01.08.2011 passed by the Supreme Court in Civil Appeal No. 6127 of 2011, reported in (2011) 8 SCC 91

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405. LAND REVENUE CODE, 1959 (M.P.)– Section 185
CIVIL PROCEDURE CODE, 1908 – Section 9
Suit for recovery of possession by occupancy tenant – A person who enters into peaceful possession of land claiming it as his own although he might not have any title to the land, can sue another person who has forcibly ousted him of possession – In the case plaintiff is possessing the land as occupancy tenant as per order of Naib Tehsildar and defendants themselves pleaded that they encroached upon the land – Plaintiff is having better title than defendants who are trespassers as per their pleadings and affirmed decree of trial court for restoration of possession.

Pratap Singh (since dead) by LRs. Sardar Singh and Others v. Mangal Khan and Another

Judgment dated 18.05.2011, passed by the High Court of M.P. in S. A. No. 375 of 1987, reported in 2011 (3) MPLJ 306

Held :

Admittedly in the order dated 31-5-1974 (Ex.P-1) the Naib Tahsildar held that plaintiff is possessing the lands mentioned in para-1 of the plaint (including the suit land) as occupancy tenant and thus, according to me the plaintiff is having better title than that of defendants who according to their own stand in the written statement are the trespassers. The Supreme Court *M.Kallappa Setty v. M.V.Lakshminarayana Rao, AIR 1972 SC 2299* has held that the plaintiff who is in possession of the suit property, on strength of his possession, resist interference from defendant who has no better title than himself and get injunction restraining defendant from disturbing his possession. According to me, same analogy can also be applied for suit for possession against a third person who is not having better title than that of plaintiff.

A person who enters into peaceful possession of land claiming it as his own although he might not have any title to the land, can sue another person who has forcibly ousted him of possession and who has no better title to that land, because although he (in the present case the plaintiff) might not have any legal title, had at least possessory title and had commenced to prescribe for a legal title (See *Pannalal Bhagirath Marwadi v. Bhaiyalal Bindraban Pardeshi Teli, AIR1937 Nagpur 281*). The case in hand is on better footing because in the instant case the plaintiff has been held to be the occupancy tenant on the lands (including suit land) by Naib Tahsildar vide its order dated 31-5-1974 (Ex.P-1) by holding further that he was possessing those lands in that capacity. Thus,

the plaintiff was having better possessory title and when he has been dispossessed by the defendants (having no better title than him) he can sue for the restoration of possession. The learned trial Court has rightly decreed the suit for possession of the plaintiff. In this context it would be fruitful to place reliance on the decision of Supreme Court *Nair Service Society Ltd.v. K.C.Alexander and others, AIR 1968 SC 1165.*

Thus, the substantial question of law is answered in favour of appellant and against the respondents and it is hereby held that appellant/plaintiff is having better title (occupancy tenant) as compared with the respondents on the basis of which he can retain the possession of the suit property.

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406. LAND REVENUE CODE, 1959 (M.P.) – Section 248
SPECIFIC RELIEF ACT, 1963 – Section 34
EVIDENCE ACT, 1872 – Sections 64 and 77
CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17

(i) The provision of Section 248 MPLRC is attracted even if the land is situated in Municipal area.

(ii) In a suit for declaration and injunction if the title of plaintiff is challenged, he is not only bound to prove his title, but also prove the title of his seller.

(iii) Photocopy of a document is neither primary evidence nor secondary evidence, hence, inadmissible in evidence.

(iv) If an amendment application is filed to fill up the lacuna and change the basis of title i.e. from title deed to adverse possession, it is not allowed at the appellate stage.

(v) Public document – How to prove? If a certified copy of a public document is produced, it would be proof of public document.

Rashid Khan and another v. State of M.P. and others

Judgment dated 07.05.2011 passed by the High Court of M.P. in F.A. No. 179 of 1996, reported in 2011 (3) MPLJ 575

Held :

So far as the contention of learned counsel for the appellants that since the land is in the Municipal area, the provisions of Section 248 of the Code are not applicable is concerned, the entire argument is based on the pivot of the dictum laid down by the Division Bench of this Court in *Sind Mahajan Exchange Ltd., Lashkar v. State of M.P. and another, 1980 MPLJ 834* which has been reversed by the Supreme Court in *State of M.P. and another v. Sind Mahajan Exchange Ltd., 1999 R.N. 328.* Hence, this contention cannot be accepted that in the Municipal area the provisions of Section 248 of the Code are not attracted.

So far as the other contention of learned counsel that they have proved their title is concerned, suffice it to say that Exhibits P-1 and P-2 which are the sale deeds dated 27.07.1990 and 16.02.1990, respectively have been filed by

them in order to prove that Mohammad Sabir sold the suit property to them by these two sale deeds. Learned counsel has also invited by attention to sale deed Exhibit P-8 dated 02.12.1996 executed by Qamal Abbas in favour of his vendor and submitted that Qamal Abbas was the owner of the suit property being the heir of Musharraf Jahan Begum and therefore, validly the title has been proved. However, the plaintiffs have not filed any document in respect of the title of Musharraf Jahan Begum in the trial Court. Along with Application IA. No. 4222/1996 under Order XLI, Rule 27, Civil Procedure Code also only a photocopy of certificate of Municipality Jaora dated 26-8-1996 has been filed certifying that in the Municipal register 1966-67, Halka No. 1 on Page No. 149 of the register of Municipality, House No. 618/2 which is in dilapidated condition, the ownership of Sahabjadi Musharraf Jahan Begum has been entered. According to me, the document which has been filed along with the application is nothing but a waste paper because it is a photocopy of some certificate. The photocopy of a document is inadmissible in evidence, since it is neither primer not secondary evidence. Even if the original would have been filed it could not be a primary evidence because on bare perusal of this document itself it appear that this certificate has been prepared from the entry made in the register at page No. 149 of the Municipality. Indeed, the certified copy of the Municipal register which is a public document ought to have been filed and if it would have been filed, under Section 77 of the Evidence Act, mere production of it would have been sufficient because under this provision the production of the certified copy of a public document would be the proof of the public document. Thus, this application cannot be accepted on the ground that the document which is filed is the photocopy of some certificate and that certificate itself is not a primary evidence. Needless to say that under Section 64 of the Evidence Act if primary evidence is available, the secondary evidence is inadmissible. In this context, I may profitable place reliance on the decision of Supreme Court in *Tukaram S. Dighole v. Manikrao Shivaji Kokate, AIR 2010 SC 965* (para 17).

So far as the amendment application of the appellants to amend the plaint is concerned, I have gone through that application and I find that the plaintiffs are now shifting their case on the basis of adverse possession. According to me, having lost from the Court below, now at this stage they cannot shift over their stand because it will prejudice the respondents and the entire case will be reopened. Indeed, it is apparent that in order to fill up the lacuna this amendment application has been filed. Thus, this application is hereby dismissed.

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407. LIMITATION ACT, 1963 – Section 18
EVIDENCE ACT, 1872 – Sections 3 and 45
Acknowledgement in writing – Plaintiff failed to establish original transaction of loan and further the acknowledgement of such loan before expiry of the prescribed period of limitation of three years – He was rightly non-suited.

Handwriting expert – Opinion of handwriting expert is not conclusive, but may be rebutted by making out different discrepancies/ shortcomings in the process pertaining to the examination of disputed document with reference to the specimen/standard handwriting and signatures.

Proof – Merely because the handwriting expert has given his opinion, powers of the Courts are not curtailed, while examining documents with reference to the pleadings and other material on record – An unfounded claim of money without proving the original transaction cannot be accepted, on the basis of such a report and scanty evidence – Trial Judge has not committed any mistake or illegality in dismissing the suit.

Comparison of signature/handwriting with admitted signature/ handwriting – Court should not normally take upon itself the responsibility of comparing the disputed signature with that of the admitted signature or handwriting and in the event of slightest doubt, leave the matter to the wisdom of experts.

Mahesh Chandra v. Kamal Kumar

Judgment dated 28.07.2011, passed by the High Court of M.P. in F.A. No. 577 of 2005, reported in I.L.R. (2011) M.P. 2202

Held :

In paragraph 9 of the plaint, cause of action is stated to have been arisen on account of alleged acknowledgement-cum-receipt having been executed and handed over by the defendant to the plaintiff. There is no averment in the paragraphs pertaining to cause of action about any promise to pay having been made by the defendant and further failure on his part in this regard. It is significant to note that no suggestion was put to the defendant in his cross-examination about having made any promise to pay vide Ex.P/1. Although the plaintiff in his statement has stated that the defendant assured him of repayment on 5.1.2000, it is observed that Ex.P/1 is said to have been executed on 05.1.2000, itself. Had there been any assurance by the defendant to make repayment on 05.01.2000, plaintiff, instead of getting executed Ex. P/1, would have realised the money itself. Thus, from the pleadings and evidence on record, it is clear that Ex. P/1 as per the case of the plaintiff and/or material on record itself, if not stated to have been executed with intent to make any promise to pay and is also equally not proved to have been executed by the defendant with intent to make any such promise. This being so, it was obligatory on the part of the plaintiff to prove in a case like the one in hand that advancement of loan was made within three years prior to Ex. P/1 and that, acknowledgment of past liability was made by the defendant vide Ex. P/1. I may here successfully quote the following observations of the Supreme Court appearing in the decision of the case between *Sampuran Singh and others v. Smt. Niranjan Kaur and others* reported as *AIR 1999 Supreme Court 1047*:

> "Thus, the acknowledgment, if any, has to be prior to the expiration of the prescribed period for filing the suit in other words, if the limitation has already expired, it would not revive under this Section. It is only during subsistence of a period of limitation, if any, such document is executed, the limitation would be revived afresh from the said date of acknowledgment."

Thus, the plaintiff having failed to establish original transaction of loan, and further the acknowledgement of such loan before expiry of the prescribed period of limitation of three years, is found to have been rightly non-suited.

Learned counsel for the appellant, placing reliance on *AIR 2003 SC 1796 (Lalit Popli v. Canara Bank and others)*, contended that the statement of handwriting expert is not totally irrelevant and the same ought to have been accepted.

Suffice it to say that the respondent has been able to demonstrate the lacunas in the report (Ex.P/5), which made the report untrustworthy. Although Court did not reach on a conclusion about forgery allegedly committed by the plaintiff, but it is equally true that an unfounded claim of money without proving the original transaction cannot be accepted, on the basis of such a report and scanty evidence. Accordingly, it is held that the learned trial Judge has not committed any mistake or illegality in dismissing the suit of the plaintiff.

Learned counsel for the appellant made a request to this Court to examine the documents in exercise of powers under Section 73 of the Indian Evidence Act.

It is suffice to say that in the facts and circumstances, it is not desirable to examine the disputed document by the Court having no expertise in the field. I may successfully refer to decision of this Court in the case of *Narayan Prasad v. Ambikaprasad, 1963 JLJ Short Note 291* wherein it has been observed by this Court that the comparison of signatures by Court in exercise of power under Section 73 of the Indian Evidence Act is hazardous and it should be left for the experts. I may also successfully refer to the decision of the Apex Court *AIR 1997 SC 3255(Ajit Savant Majagavi v. State of Karnataka)* and *AIR 1979 SC 14(State (Delhi Administration) v. Pali Ram)* that as a matter of extreme caution and judicial propriety, the Court should not normally take upon itself the responsibility of comparing the disputed signature with that of the admitted signature or handwriting and in the event of slightest doubt, leave the matter to the wisdom of experts.

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408. LIMITATION ACT, 1963 – Article 65

Adverse possession – Possession of the land had been delivered to applicant for cultivation and only for a limited period of 15 years by the State Government as a grant – Such type of transfer do not involve absolute ownership of land – In above factual position, period of limitation for adverse possession in such suit would be 30 years and not 12 years.

G. Krishna Reddy v. Sajjappa (D) by LRs. & anr.
Judgment dated 18.07.2011, passed by the Supreme Court in Civil Appeal No. 4255 of 2002, reported in AIR 2011 SC 2762

Held:

To ascertain whether in the present case the period of limitation would be 12 years or 30 years, we have perused the grant given to the predecessor-in-interest of the Respondent, a copy of which was placed on record by the appellant. A bare perusal of the aforesaid grant would indicate that nowhere in the said grant it has been clearly and specifically stated that it has been an absolute transfer of the right in title and possession by the State Government to the concerned person. A bare perusal of the document would also indicate that it was only a transfer of the possession of the land by way of allotment and in none of the clauses of the grant it is stated that it is a conveyance of the title over such land by the State Government. Clause 1 of the grant gives authority to the grantee to clear the land and to bring it to cultivable stage. It further provides that the grantee can enjoy the property for 15 years. Not only the grant was only for a limited period but it was also for cultivation. Therefore, it was a grant for possession by way of cultivation for a limited period and it cannot be said that by the aforesaid grant the transferee had acquired absolute title to the land in question from the State Government. Therefore, the period of limitation which would have been applicable in the present case would be 30 years, in the light of the ratio laid down by the said decision.

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409. LIMITATION ACT, 1963 – Article 99

Bar of limitation to set aside sale for arrears of revenue – When a sale proceeding initiated by the State Authorities has been held to be a nullity, bar under Article 99 of the Limitation Act would not be applicable.

Suresh Kumar and others v. Mohan Lal and Others
Judgment dated 25.07.2011, passed by the High Court of M.P. in S.A. No. 508 of 1994, reported in 2011 (4) MPHT 497

Held :

The issue for consideration is whether under the facts and circumstances of the case, when the sale proceedings initiated by the State Authorities have been held to be a nullity, the bar of limitation would be applicable to a challenge to the orders and the suit, as held by the Appellate Court, would be barred under Article 99 of the Limitation Act. This Court need not delve deeply into this issue in view of a decision of the Supreme Court in the of *Md. Murtiza Khan v. State of M.P. and others, 1966 JLJ 543*, wherein it has been held that where the proceedings are a nullity or the Revenue Authorities acted without jurisdiction, the affected person may file a suit for possession and he need not file a suit for setting aside the impugned orders or proceedings of the Revenue Authorities as they are in themselves without jurisdiction and a nullity.

In the instant case, as I have held that the entire proceedings for sale of the appellant/plaintiffs' property were a nullity, the bar under Article 99 of the Limitation Act would not apply and it cannot be held that the suit filed by the appellant/plaintiffs would be barred by limitation or that the suit for possession would not lie. Similar view has been taken by this Court in the case of *Laxminarayan v. Moharsingh and others, 1989 JLJ 271*, wherein it has been held that a sale in respect of the arrears of land revenue held without the issuance of a demand notice under Section 146 of the Land Revenue Code, 1959 is no sale in the eyes of law and in such circumstances, the period of limitation prescribed under Section 99 of the Limitation Act would not apply. This Court in Paragraph 4, by relying upon the aforesaid judgment of the Supreme Court as well as this Court has held in the following terms: –

> "4. Although in this Court, an attempt has been made to submit that the decision of the Courts below on the question of limitation is not sustainable inasmuch as Article 99 would apply, that contention must be repelled by authorities abound for the proposition of law accepted by the Courts below. I do not think if it can be disputed that when a "sale" is not conducted fulfilling the requirements of law, that cannot be regarded as a "sale" within the meaning of Article 99. Indeed, a sale could be made for "any payment recoverable" within the meaning of term employed in Article 99, but it has to be established that a notice of demand was made and the sum due had therefore become "recoverable" on the demand not being satisfied."

It is held that as the sale proceedings initiated by the respondent/State Authorities without issuing demand notice as required under Section 146 of the Code or following the procedure prescribed under Section 147 of the Code are null and void and, therefore, the suit for possession filed by appellant/plaintiffs is not barred by limitation and they are entitled to possession of the land in question.

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410. MOHAMMEDAN LAW – Section 41

Succession – Heirs succeed to the estate of deceased as tenants-in-common in specific shares – Without any effective partition, heirs have no right to execute the sale deed – Temporary Injunction rightly issued against purchaser – However, it was wrongly issued against sellers as they are recorded as bhumiswamis having joint possession with plaintiff.

Shahida (Smt.) & Anr. v. Mohd. Mahmood & Ors.

Judgment dated 19.01.2011, passed by the High Court of M.P. in M.A. No. 339 of 2010, reported in I.L.R. (2011) M.P. 2004

Held :

A bare reading of Section 41 of Mohammedan Law regarding devolution of inheritance makes it clear that heirs succeed to the estate as tenants-in-common in specific shares means plaintiffs No.1 and 2 /respondents No. 1 and 2 along with defendant No. 1/respondent No. 4 Abdul Baki succeed to a definite fraction of every part of the estate left by deceased Farid Ahmad son of pre deceased Bibi Khatun. In these circumstances without any effective partition between the plaintiffs and defendant No.1, defendants No.1 and 2 have no right to execute the sale deed in favour of defendants No. 3 and 4/appellants. Thus, in my opinion trial Court did not commit any illegality in refusing to grant temporary injunction in favour of defendants No. 3 and 4/appellants, despite filing the registered sale deed and affidavits in regard to purchase of disputed land and cultivating thereof.

Considering the aforementioned position in Mohammedans Law, without effective partition defendants no. 1 and 2 are not entitled to alienate the disputed property and this fact will be decided by the trial Court after recording the evidence. Thus, the plaintiffs/respondents No. 1 and 2 have all the three points in their favour viz; prima facie case, balance of convenience and irreparable loss.

On perusal of last paragraph of impugned order dated 07.01.2010, it reveals that trial Court restrained defendants No.1 and 2/respondents No. 3 and 4 along with defendants No. 3 and 4/appellants to interfere into the joint possession of the plaintiffs, despite the fact that trial Court itself found that defendant No. 1 has the joint possession with the plaintiffs on disputed property. Since defendants No. 1 and 2 are the recorded Bhumiswami along with the plaintiffs as per the amended land record dated 03.07.1994, in these circumstances, injunction ought to have been granted only against defendants No. 3 and 4/appellants.

In view of the aforesaid, dismissal of injunction applications filed by appellants/defendants No. 3 and 4 (IA No. 2 and 3) is hereby affirmed and injunction order dated 07.01.2010 is modified to the extent that only defendants No. 3 and 4/appellants are restrained to interfere in the joint possession of plaintiffs/defendants No. 1 and 2, without following the legal procedure.

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411. MOTORYAN KARADHAN ADHINIYAM, 1991 (M.P.) – Section 16
CRIMINAL PROCEDURE CODE, 1973 – Section 457
Interim custody of vehicle seized under Section 16(3) of the Adhiniyam of 1991 – Criminal Court has no power to release the vehicle on interim custody under Section 457 Cr.P.C. – Petitioner has remedy under Section 16 (4) of the Adhiniyam of 1991 to file application before the Taxation Authority.

Shailendra Kumar Motwani v. State of M.P. and Others
Judgment dated 06.07.2011, passed by the High Court of M.P. in W.P. No. 10920 of 2011, reported in 2011 (3) MPLJ 329

Held :

In the instant case the authority, in exercise of powers under Section 16(3) of the Adhiniyam of 1991, has seized the vehicle of the petitioner and in such circumstances the appropriate remedy of the petitioner, as provided under Section 16(4) of the Adhiniyam of 1991, was to apply before the authority itself along with all relevant documents for release of his vehicle. Admittedly, the petitioner, instead of doing so, filed an application under Section 457 of the Code of Criminal Procedure before the Chief Judicial Magistrate, Bhopal who has rightly rejected the same on account of the fact that the matter had been seized by the competent authority under the provisions of the Adhiniyam of 1991, in view of the ouster clause contained in Section 16(5) thereof. It is an admitted fact that the petitioner instead of filing an application for release of the vehicle, under Section 16(4) of the Adhiniyam of 1991, has directly approached this Court by filing the present petition.

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412. MOTOR VEHICLES ACT, 1988 – Sections 146, 147 and 149

(i) Once the vehicle is insured, the owner as well as any other person can use the vehicle with the consent of the owner – Section 146 of the M.V. Act does not provide that any person who uses the vehicle independently, a separate insurance policy should be taken – The purpose of compulsory insurance in the Act has been enacted with an object to advance social justice i.e. the benefit of the third parties.

(ii) If a vehicle is given on hire by the owner of the vehicle to SRTC, together with its existing and running insurance policy with certain terms and conditions, the Insurance Company cannot escape its liability to pay amount of compensation to third party.

Uttar Pradesh State RoadTransport Corporation v. Kulsum and others

Judgment dated 25.07.2011 passed by the Supreme Court in Civil Appeal No. 5901 of 2011, reported in (2011) 8 SCC 142

Held:

Critical examination thereof would show that the Appellant and the owner had specifically agreed that the vehicle will be insured and a driver would be provided by owner of the vehicle but overall control, not only on the vehicle but also on the driver, would be that of the Corporation. Thus, the vehicle was given on hire by the owner of the vehicle together with its existing and running insurance policy. In view of the aforesaid terms and conditions, the Insurance Company cannot escape its liability to pay the amount of compensation.

The liability to pay compensation is based on a statutory provision. Compulsory Insurance of the vehicle is meant for the benefit of the Third Parties. The liability of the owner to have compulsory insurance is only in regard to Third

Party and not to the property. Once the vehicle is insured, the owner as well as any other person can use the vehicle with the consent of the owner. Section 146 of the Act does not provide that any person who uses the vehicle independently, a separate Insurance Policy should be taken. The purpose of compulsory insurance in the Act has been enacted with an object to advance social justice.

In a recent judgment of this Court, in the case of *United India Insurance Company Limited v. Santro Devi, (2009) 1 SCC 558* it has been held as under :

> "16. The provisions of compulsory insurance have been framed to advance a social object. It is in a way part of the social justice doctrine. When a certificate of insurance is issued, in law, the insurance company is bound to reimburse the owner.
>
> 17. There cannot be any doubt whatsoever that a contract of insurance must fulfil the statutory requirements of formation of a valid contract but in case of a third- party risk, the question has to be considered from a different angle.
>
> 18. Section 146 provides for statutory insurance. An insurance is mandatorily required to be obtained by the person in charge of or in possession of the vehicle. There is no provision in the Motor Vehicles Act that unless the name(s) of the heirs of the owner of a vehicle is/are substituted on the certificate of insurance or in the certificate of registration in place of the original owner (since deceased), the motor vehicle cannot be allowed to be used in a public place. Thus, in a case where the owner of a motor vehicle has expired, although there does not exist any statutory interdict for the person in possession of the vehicle to ply the same on road; but there being a statutory injunction that the same cannot be plied unless a policy of insurance is obtained, we are of the opinion that the contract of insurance would be enforceable. It would be so in a case of this nature as for the purpose of renewal of insurance policy only the premium is to be paid. It is not in dispute that quantum of premium paid for renewal of the policy is in terms of the provisions of the Insurance Act, 1938."

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413. MOTOR VEHICLES ACT, 1988 – Section 166
Compensation – Claimant younger brother of deceased and dependent upon him – Deceased unmarried – Annual income of deceased ₹ 21,600 – Half deducted towards expenses of deceased – Deceased aged about 30 years therefore, multiplier of 17 would apply – Claimant also entitled to ₹ 15,000 towards funeral expenses, loss of expectancies and loss of estate – Compensation enhanced to ₹ 1,98,600.

Munshi. v. The New India Insurance Co.Ltd. & Ors.
Judgment dated 08.02.2011, passed by the High Court of M.P. in M.A. No. 766 of 2003, reported in I.L.R. (2011) M.P. 2012

Held :

Keeping in view the available evidence and the circumstances, the income of the deceased could be safely assumed ₹ 60 per day. Accordingly his income comes to ₹ 1,800 per month and in such premises the yearly income of the deceased comes to ₹ 1,800 x 12 = 21,600. Out of this assessed income, keeping in view the principle laid down in the case of *Sarla Verma and others v. Delhi Transport Corporation and another* reported in *2009 ACJ 1298*, as the claimant is younger brother of the deceased and deceased was unmarried person, firstly I deem fit to deduct 1/2 from it out of the expenses of the deceased which he would have spent on him, had he been alive, on deducting the same, (21600-10,800) the annual dependency of the appellant comes to ₹ 10,800.

In view of the principle laid down by Apex Court in the matter of *Sarla Verma* (Supra) on adopting the multiplier of 17 relating to the age of the deceased i.e. 30 years, the total dependency comes to (10800 x 17) ₹ 1,83,600. The same is awarded. Besides this, the appellant is also entitled some amount on the traditional head like funeral expenses, loss of expectancies and loss of the estate. In such account, I deem fit to award ₹ 15,000 to the appellant. Accordingly, the total claim of the appellant is awarded for the sum of ₹ 1,98,600. Out of this the respondents are entitled to deduct the sum which has been awarded by the tribunal and paid by them.

In the aforesaid premises, by allowing this appeal in part, the sum of ₹ 1,44,000 awarded by the tribunal is enhanced from such amount to ₹ 1,98,600 besides this the appellant shall also be entitle to get the interest on the aforesaid enhanced amount @ 6% per annum from the date of filing the claim petition.

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414. N.D.P.S. ACT, 1985 – Sections 50 and 21

(i) Personal search of accused – There should be strict compliance of Section 50 of the NDPS Act – Accused should be informed of his right to search before Gazetted Officer or Magistrate – The theory of substantial compliance would not be applicable to such situation – In absence of above strict compliance, search and recovery stands vitiated.

(ii) Once the recovery itself is made in an illegal manner i.e. in contravention of strict compliance of Section 50, its character cannot be changed so as to be admissible on the strength of statement of witnesses – What cannot be done directly cannot be permitted to be done indirectly – Accused cannot be held guilty for illegal possession of contraband.

State of Delhi v. Ram Avtar

Judgment dated 07.07.2011, passed by the Supreme Court in Criminal Appeal No. 1101 of 2004, reported in AIR 2011 SC 2699

Held:

It is a settled canon of criminal jurisprudence that when a safeguard or a right is provided, favouring the accused, compliance thereto should be strictly construed. As already held by the Constitution Bench in the case of *Vijaysinh Chandubha Jadeja v. State of Gujarat, (2007) 1 SCC 433 (3-Judge Bench)*, the theory of 'substantial compliance would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudices against the suspect. The safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance thereof must be ensured. The law has provided a right to the accused, and makes it obligatory upon the officer concerned to make the suspect aware of such right. The officer had prior information of the raid; thus, he was expected to be prepared for carrying out his duties of investigation in accordance with the provisions of Section 50 of the Act. While discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act. Non-compliance of the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, amount to the denial of a fair trial. To secure a conviction under Section 21 of the Act, the possession of the illicit article is a *sine qua non*. Such contraband article should be recovered in accordance with the provisions of Section 50 of the Act, otherwise, the recovery itself shall stand vitiated in law. Whether the provisions of Section 50 of the Act were complied with or not, would normally be a matter to be determined on the basis of the evidence produced by the prosecution. An illegal search cannot entitle the prosecution to raise a presumption of validity of evidence under Section 50 of the Act. As is obvious from the bare language of Ex.PW-6/A, the accused was not made aware of his right, that he could be searched in the presence of Gazetted Officer or a Magistrate, and that he could exercise such choice. The writing does not reflect this most essential requirement of Section 50 of the Act. Thus, we have no hesitation in holding that the judgment of the High Court does not suffer from any infirmity.

We are also unable to appreciate how the provisions of Section 50 of the Act can be read to support such a contention. The language of the provision is plain and simple and has to be applied on its plain reading as it relates to penal consequences. Section 50 of the Act states the conditions under which the search of a person shall be conducted. The significance of this right is clear from the language of Section 50(2) of the Act, where the officers have been given the power to detain the person until he is brought before a Gazetted Officer or Magistrate as referred to in sub-section (1) of Section 50 of the Act. Obviously,

the legislative intent is that compliance with these provisions is imperative and not merely substantial compliance. Even in the case of *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala, AIR 1995 SC 244,* this Court clearly stated that contraband seized as a result of search made in contravention to Section 50 of the Act, cannot be used to fasten the liability of unlawful possession of contraband on the person from whom the contraband had allegedly been seized in an illegal manner. 'Unlawful possession' of the contraband is the *sine qua non* for conviction under the Act. In the case of *Ali Mustaffa Abdul Rahman Moosa* (supra), this Court had considered the observation made by a Bench of this Court, in an earlier judgment, in the case of *Pooran Mal v. Director of Inspection, AIR 1974 SC 348* which had stated that the evidence collected as a result of illegal search or seizure could be used as evidence in proceedings against the party under the Income Tax Act. The Court, while examining this principle, clearly held that even this judgment cannot be interpreted to lay down that contraband seized as a result of illegal search or seizure can be used to fasten the liability of unlawful possession of the contraband on the person from whom the contraband had allegedly been seized in an illegal manner. 'Unlawful possession' of the contraband, under the Act, is a factor that has to be established by the prosecution beyond any reasonable doubt. Indeed, the seized contraband is evidence, but in the absence of proof of possession of the same, an accused cannot be held guilty under the Act.

What the learned counsel for the appellant has argued is exactly to the contrary. According to him, even if the recovery was in violation of Section 50 of the Act, the accused should be held guilty of unlawful possession of contraband, on the basis of the statement of the witnesses. Once the recovery itself is made in an illegal manner, its character cannot be changed, so as to be admissible, on the strength of statement of witnesses. What cannot be done directly cannot be permitted to be done indirectly. If Ex.PW-6/A is not in conformity with the provisions of Section 50 of the Act, then there is patent violation of the provisions. Firstly, in the present case, there is no public witness to Ex.PW-6/A; and the recovery thereof; secondly, even the evidence of all the witnesses, who are police officers, does not improve the case of the prosecution. The defect in Ex.PW-6/A is incurable and incapable of being construed as compliance with the requirements of Section 50 of the Act on the strength of ocular statement.

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415. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138

Liability of Legal Heirs – Complaint against petitioner regarding cheque not issued by the petitioner herself – Held, petitioner cannot be held criminally liable in regard to a cheque issued by her mother during her life time.

Neena Chopra (Shrimati) v. Mahendra Singh Vaishya & Anr.

Judgment dated 05.07.2011, passed by the High Court of M.P. in M.Cr.C. No. 7019 of 2008, reported in I.L.R. (2011) M.P. 2277

Held :

The cheque in question which is the subject matter of complaint against the petitioner was not issued by the petitioner herself, she is not criminally liable in regard to the cheque issued by her mother late Shrimati Rajmadanlal. There appears to be a jurisdictional error in the impugned order of the Trial Court summoning the petitioner for offence under Section 138 of NI Act on the complaint of respondent No. 1 with regard to the cheque in question issued by the petitioner's mother. If the impugned order is allowed to stand, it shall be travesity of justice with the petitioner who cannot be held criminally liable in regard to a cheque issued by her mother during her life time.

In view of the foregoing and having regard to the facts and circumstances of the present case, this petition is allowed. Impugned order dated 16th May, 2008 passed by the Trial Court in Complaint Case No. 4668/08 is hereby set aside and criminal proceedings pending against the petitioner before the Trial Court are ordered to be dropped.

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416. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 139

A limited company is a separate legal entity and its Directors are different legal persons but where two Companies have common Directors and understanding which had been arrived at among complainant and common Directors that goods supplied to one Company, payment would be made by sister concern – In above facts cheque issued by one Company can be presumed for discharge in whole or in part of any debt or other liability by other Company.

Anil Sachar & Anr. v. M/s. Shree Nath Spinners P. Ltd. & Ors. Etc. Judgment dated 19.07.2011, passed by the Supreme Court in Criminal Appeal No. 1413 of 2011, reported in AIR 2011 SC 2751

Held :

Upon perusal of the record, we find that the complainants had established before the trial court that there was an understanding among the complainants and the accused that in consideration of supply of goods to M/s. Shree Nath Spinners Pvt. Ltd., M/s. A.T. Overseas Ltd. was to make the payment. The aforestated understanding was on account of the fact that directors in both the aforestated companies were common and the aforestated companies were sister concerns. In the circumstances, it can be very well said and it has been proved that in consideration of supply of goods to M/s. Shree Nath Spinners Pvt. Ltd., M/s. A.T. Overseas Ltd. had made the payment. In view of the above fact, in our opinion, the trial court was not right when it came to the conclusion that there was no reason for M/s. A.T. Overseas Ltd. to give the cheques to the complainants. The aforestated facts are very well reflected in the statement made in the complaint and in the evidence by the complainant which have not been controverted. Paras 2 and 3 of the complaint are reproduced herein below:

"2. That the accused had business dealings with the complainant and supply of the goods which duly supplied by my client vide separate bills from time to time which was duly acknowledged by the accused no. 5 Varun Jain Director of the accused no. 1.

3. That in order to discharge the liability of making the payment, the accused issued following two cheques in favour of the complainant through their sister concern M/s A.T. Overseas Ltd. i.e. Accused No. 1 and the cheques were duly signed by Mr. Munish Jain one of its Directors"

It is true that a limited company is a separate legal entity and its directors are different legal persons. In spite of the aforestated legal position, in view of the provisions of Section 139 of the Act and the understanding which had been arrived at among the complainants and the accused, one can safely come to a conclusion that the cheques signed by Munish Jain had been given by M/s. A.T. Overseas Ltd. to the complainants in discharge of a debt or a liability, which had been incurred by M/s Shree Nath Spinners Pvt. Ltd.

We may also refer to the judgment delivered by this Court in the case of *ICDS Ltd. v. Beena Shabeer and Anr., AIR 2002 SC 3014.* In the said judgment this Court has referred to the nature of liability which is incurred by the one who is a drawer of the cheque. If the cheque is given towards any liability or debt which might have been incurred even by someone else, the person who is a drawer of the cheque can be made liable under Section 138 of the Act. The relevant observation made in the aforestated judgment is as under :

"The words "any cheque" and "other liability" occurring in Section 138 are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the statute. These expressions leave no manner of doubt that for whatever reason it may be, the liability under Section 138 cannot be avoided in the event the cheque stands returned by the banker unpaid. Any contra-interpretation would defeat the intent of the legislature. The High Court got carried away by the issue of guarantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act.

.....

The language, however, has been rather specific as regard the intent of the legislature. The commencement of the section stands with the words "where any cheque". The above noted three words are of extreme significance, in particular, by reason of the user of the word "any"– the first

three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well. This aspect of the matter has not been appreciated by the High Court, neither been dealt with or even referred to in the impugned judgment."

Looking to the facts of the case and law on the subject, we are of the view that all the four cheques referred to in both the complaints are presumed to have been given for consideration. The presumption under Section 139 of the Act has not been rebutted by the accused and, therefore, we are of the view that the trial court wrongly acquitted the accused by taking a view that there was no consideration for which the cheques were given by Munish Jain to the complainants. The aforesaid incorrect view was wrongly confirmed by the High Court. We, therefore, set aside the acquittal order and convict accused Munish Jain under Section 138 of the Act.

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417. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 141 Dishonour of cheque – Cheque in question was issued on behalf of partnership firm – It was alleged by a partner/petitioner that the business of firm was under the control of another partner who signed the cheque in question and hences he is not responsible for the deeds of this partner of the firm – Held, the accused was involved in the alleged offence on the basis of being one of the partners of the said firm – A specific notice had been issued to all the partners including the present petitioner, but he had not even sent a reply stating that he was only a sleeping partner – He shall be liable to be proceeded against and punished under Section 141 of the Act.

Naresh Kumar v. Smt. Prabhabai

Judgment dated 26.08.2011, passed by the High Court of M.P. in Cri. Rev. No. 672 of 2010, reported in 2011 (4) MPHT 381

Held :

Section 141 (2) starts with a *non obstante* clause. Under sub-section (1) of Section 141, the person in charge of and responsible to the company shall be deemed to be guilty of the offence, but under sub-section (2) even persons who are not stated to be in charge of and responsible to the company can be

prosecuted if it is alleged and proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any of those persons prosecuted. Hence, a bare perusal of sub-section (1) of Section 141 of the Act makes it clear that when the offence is alleged to have been committed by a Firm, every person who at the time the offence was committed, was in charge of and was responsible to the Firm for conduct of its business as well as the Firm shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.

In the case of *S.V. Muzumdar v. Gujarat State Fertilizer Co. Ltd., AIR 2005 SC 2436*, the Apex Court held: –

> "We find that the prayers before the Courts below essentially were to drop the proceedings on the ground that the allegations would not constitute a foundation for action in terms of Section 141 of the Act. These questions have to be adjudicated at the trial. Whether a person is in charge of or is responsible to the company for conduct of the business is to be adjudicated on the basis of materials to be placed by the parties. Sub-section (2) of Section 141 is a deeming provision which as noted supra operates in certain specified circumstances. Whether the requirements for the application of the deeming provision exist or not is again a matter for adjudication during trial. Similarly, whether the allegations contained are sufficient to attract culpability is a matter for adjudication at the trial."

In the case of *Harshendra Kumar D. v. Rebatilala Koley and others, (2011) 3 SCC 351*, the Apex Court held: –

> "It is not the law that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of the summons or taking cognizance, material relied upon by the accused which are in the nature of public documents or the materials, which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of its jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 or revision jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed it is not proper for High Court to consider the defence of the accused or embark upon inquiry in respect of merits of the accusations."

It appears that the petitioner has been involved in the alleged offence on the basis of his being one of the partners of the said Firm. A specific notice had been issued to all of the partners including the present petitioner, but he had

not even sent a reply stating that he was only a sleeping partner or dormant partner and not in charge of management, control or conduct of the business or having any responsibility in the management and administration of the company. On the other hand, it is specifically mentioned in the complaint that they all were responsible for the non-payment of the cheque amount after receipt of notice within the statutory period. The provision of Section 141 of the Act postulates that every person in charge of the company is also responsible for the offence. The question whether he or she is not such person responsible for the offence is a question of fact to be proved at the stage of trial. At this juncture, the petitioner/accused by cogent and reliable evidence could not get success to prove that at relevant time he was not the Partner of the Firm Pyarelal Tarachand Mahalwar.

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***418. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 142 (b) and 138**

Cognizance of offence under Section 138 of N.I. Act, limitation for – Approach of Court – While dealing with the application seeking condonation of delay it is always desirable to take liberal approach and not a rigid or too technical view and the Court has to keep in mind that discretion has to be exercised to advance substantial justice.

Tulsiram Narwariya v. Mahesh Chandra

Judgment dated 24.06.2011, passed by the High Court the M.P. in Misc. Cri. Case No. 1896 of 2007, reported in 2011 (4) MPHT 72

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419. PREVENTION OF CORRUPTION ACT, 1988 – Section 19

Can a Special Judge refuse to accept closure report under Section 169 CrPC? Held, Yes – The Lokayukta police after investigation submitted closure report under Section 169 CrPC for some accused – The Special Judge after hearing the parties and appreciating the evidence on record and perusing the case diary had rejected the closure report and observed:

> **"Therefore, matter may be taken up for seeking necessary sanction to prosecute the accused persons Raghavchandra, Shri Ram Meshram and Shahajaad to prosecute them under Section 13 (1-d) and 13 (2) of the Anti Corruption Act and under Section 120-B of the IPC the and for further necessary action, case be registered in criminal case diary".**

Whether it is a direction issued to the Sanctioning Authority to grant sanction? Held, No.

Arun Kumar Aggarwal v. State of Madhya Pradesh & Ors.

Judgment dated 02.09.2011 passed by the Supreme Court in Criminal Appeal No. 1706 of 2011, reported in AIR 2011 SC 3056

Held :

In the facts and circumstances of the present case, we are of the opinion that the refusal of the learned Special Judge, vide its Order dated 26.04.2005, to accept the final closure report submitted by Lokayukta Police is the only *ratio decidendi* of the Order. The other part of the Order which deals with the initiation of Challan proceedings cannot be treated as the direction issued by the learned Special Judge. The relevant portion of the Order of the learned Special Judge dealing with challan Proceeding reads as "Therefore matter may be taken up seeking necessary sanction to prosecute the accused persons Raghav Chandra, Shri Ram Meshram and Shahjaad Khan to prosecute them under Section 13 (1-d), 13 (2) Anti Corruption Act and under Section 120-B I.P.C. and for necessary further action, case be registered in the criminal case diary." The wordings of this Order clearly suggest that it is not in the nature of the command or authoritative instruction. This Order is also not specific or clear in order to direct or address any authority or body to perform any act or duty. Therefore, by no stretch of imagination, this Order can be considered or treated as the direction issued by the learned Special Judge. The wholistic reading of this Order leads to only one conclusion, that is, it is in the nature of 'Obiter Dictum' or mere passing remark made by the learned Special Judge, which only amounts to expression of his personal view. Therefore, this portion of the Order dealing with Challan proceeding, is neither relevant, pertinent nor essential, while deciding the actual issues which were before the learned Special Judge and hence, cannot be treated as the part of the Judgment of the learned Special Judge.

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420. PREVENTION OF FOOD ADULTERATION ACT, 1954 – Sections 2 (ix) (k) and 17 (2)
PREVENTION OF FOOD ADULTERATION RULES, 1955 – Rule 32 (e), (f) and (i)
Offence by company – Prosecution of Secretary and Directors of Company – Complaint should contain the averments that how the Secretary and Directors are responsible for the day to day management of the company – A mere bald statement that a person was a Director or Secretary of the company is not sufficient to make him liable.

Mrs. Shukla Wassan v. State of M.P.
Judgment dated 27.06.2011, passed by the High Court of M.P. in Misc. Cri. Case No. 7113 of 2010, reported in 2011 (4) MPHT 374

Held :

From perusal of the complaint filed by the Food Inspector before the Trial Court, it reveals that there is no averment in the complaint that how the Directors and the Company Secretary of the Company are responsible for the day to day management of the Company or incharge of or responsible for misbranding of the seized items. He has simply stated that the accused persons has sold the

misbranded sweetened carbonated beverage, hence they are responsible, but this is not the required point of law.

In the case of *Pepsico India Holdings Private Limited v. Food Inspector and another, (2011) 1 SCC 176*, it has been held that: –

> "It is now well established that in complaint case against the Company and his Director, the complainant has to indicate in the complaint itself as to whether the directors concerned were either in charge of or responsible to the company for its day to day management, or whether they were responsible to the company for the conduct of its business. A mere bald statement that a person was a Director of the Company against which certain allegations had been made, is not sufficient to make such Director liable in the absence of any specific allegations regarding his role in the management of the Company."

In the case of *State of NCT of Delhi through Prosecuting Officer v. Rajiv Khurana, AIR 2010 SC 2986*, it has been held that: –

> "legal position which emerges from a series of judgments is clear and consistent that it is imperative to specifically aver in the complaint that the accused was in charge of and was responsible for the conduct of business of the company. Unless clear averments are specifically incorporated in the complaint, the respondent cannot be compelled to face the rigmarole of a criminal trial."

In the case of *Central Bank of India v. Asian Global Ltd. and others, AIR 2010 SC 2835*, it has been held that –

> "in absence of specific charges against the respondent, the complaint was liable to be quashed and the respondents were liable to be discharged."

In the case of *R. Banerjee and others v. H.D. Dubey and others, AIR 1992 SC 1168*, it has been held that –

> "from the scheme of Section 17, it is clear that where a company has committed an offence under the Act, the person nominated by the company under sub-section (2) of Section 17 to be in charge of and responsible to the company for the conduct of its business shall be proceeded against unless it is shown that the offence was committed with the consent/connivance/negligence of any other Director, Manager, Secretary or Officer of the Company in which case the said person can also be proceeded against and punished for the commission of the said offence. It is only where no person has been nominated under

sub-section (2) of Section 17 that every person who at the time of the commission of the offence was in charge of and was responsible to the company for the conduct of its business can be proceeded against and punished under the law."

This Court in M.Cri.C. No. 4455/2009, vide order dated 21.05.2010 has adopted the same view. Therefore, on the basis of the above discussions, I am of the view that in this case the company has nominated Rajkumar Tinker as its nominee who is added as accused No. 9 in the complaint filed by the Food Inspector and since there was no averment in the complaint presented by the complainant that how the Directors and other officers and other persons had any nexus with the day to day working of the company with respect to seized articles, therefore, there was no ground to proceed against them. Hence, the impugned order is not sustainable in the eye of law.

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421. RENT CONTROL AND EVICTION:

(i) At the time of granting stay against eviction decree, appellate Court has enhanced rent taking into consideration the prevalent market rate – The rent which has been so fixed, was found reasonable, just and proper by the Supreme Court.

(ii) To minimize landlord-tenant litigation at all levels, Hon'ble the Supreme Court has laid down guidelines to fix reasonable rent akin to market rent for rental premises.

Mohammad Ahmad and another v. Atma Ram Chauhan and others

Judgment dated 13.05.2011 passed by the Supreme Court in Civil Appeal No. 4422 of 2011, reported in (2011) 7 SCC 755

Held:

Looking to the matter from all angles we are of the considered opinion that the rent as has been fixed by the learned Single Judge for the two shops having total area 240 sq. ft. to ₹ 2100 per month is not only reasonable but would be just and proper. Any enhancement in rent will not ipso facto be deemed to be unreasonable and exorbitant, unless the party aggrieved is able to give cogent reasons for the same.

In this context, we may profitably refer to the judgment pronounced by this Court, reported in *Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd., (2005)1 SCC 705.* The relevant portion thereof is reproduced hereinbelow:-

"In the case at hand, it has to be borne in mind that the tenant has been paying ₹ 371.90 rent of the premises since 1944. The value of real estate and rent rates have skyrocketed since that day. The premises are situated in the prime commercial locality in the heart of Delhi, the

capital city. It was pointed out to the High Court that adjoining premises belonging to the same landlord admeasuring 2000 sq. ft. have been recently let out on rent at the rate of ₹ 3,50,000 per month. The Rent Control Tribunal was right in putting the tenant on terms of payment of ₹ 15,000 per month charges for use and occupation during the pendency of appeal. The tribunal took extra care to see that the amount was retained in deposit with it until the appeal was decided so that the amount in deposit could be disbursed by the appellate Court consistently with the opinion formed by it at the end of the appeal. No fault can be found with the approach adopted by the Tribunal. The High Court has interfered with the impugned order of the Tribunal on a erroneous assumption that any direction for payment by the tenant to the landlord of any amount at any rate above the contractual rate of rent could not have been made. We cannot countenance the view taken by the High Court. We may place on record that it has not been the case of the tenant-respondent before us, nor was it in the High Court, that the amount of ₹ 15,000 assessed by the Rent Control Tribunal was unreasonable or grossly on the higher side".

According to our considered view majority of these cases are filed because landlords do not get reasonable rent akin to market rent, then on one ground or the other litigation is initiated. So before saying omega, we deem it our duty and obligation to fix some guidelines and norms for such type of litigation, so as to minimise landlord-tenant litigation at all levels. These are as follows:

(i) The tenant must enhance the rent according to the terms of the agreement or at least by ten percent, after every three years and enhanced rent should then be made payable to the landlord. If the rent is too low (in comparison to market rent), having been fixed almost 20 to 25 years back then the present market rate should be worked out either on the basis of valuation report or reliable estimates of building rentals in the surrounding areas, let out on rent recently.

(ii) Apart from the rental, property tax, water tax, maintenance charges, electricity charges for the actual consumption of the tenanted premises and for common area shall be payable by the tenant only so that the landlord gets the actual rent out of which nothing would be deductible. In case there is enhancement in property tax, water tax or maintenance charges, electricity charges then the same shall also be borne by the tenant only.

(iii) The usual maintenance of the premises, except major repairs would be carried out by the tenant only and the same would not be reimbursable by the landlord.

(iv) But if any major repairs are required to be carried out then in that case only after obtaining permission from the landlord in writing, the same shall be carried out and modalities with regard to adjustment of the amount spent thereon, would have to be worked out between the parties.

(v) If present and prevalent market rent assessed and fixed between the parties is paid by the tenant then landlord shall not be entitled to bring any action for his eviction against such a tenant at least for a period of 5 years. Thus for a period of 5 years the tenant shall enjoy immunity from being evicted from the premises.

(vi) The parties shall be at liberty to get the rental fixed by the official valuer or by any other agency, having expertise in the matter.

(vii) The rent so fixed should be just, proper and adequate, keeping in mind, location, type of construction, accessibility to the main road, parking space facilities available therein etc. Care ought to be taken that it does not end up being a bonanza for the landlord.

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422. RIGHT TO INFORMATION ACT, 2005 – Sections 2, 6, 8, 9 and 24

(i) Right of examinee to inspect his evaluated answer books – The answer book is a document or record in terms of Sections 2 (f) and 2 (i) and evaluated answer books and records contain the "opinion" of the examinee – Therefore, the evaluated answer book is also an "information" under the Right to Information Act.

(ii) Right to information – Nature and extent of – It is a facet of freedom of "speech and expression" as contained in Article 19 (1) (a) of the Constitution of India and such a right is subject to reasonable restriction in the interest of the security of the State and to exemptions and exceptions.

Central Board of Secondary Education and another v. Aditya Bandopadhyay and others

Judgment dated 09.08.2011 passed by the Supreme Court in Civil Appeal No. 6454 of 2011, reported in (2011) 8 SCC 497

Held :

The definition of 'information' in section 2(f) of the RTI Act refers to any material in any form which includes records, documents, opinions, papers among several other enumerated items. The term 'record' is defined in section 2(i) of the said Act as including any document, manuscript or file among others. When a candidate participates in an examination and writes his answers in an answer-book and submits it to the examining body for evaluation and declaration of the result, the answer-book is a document or record. When the answer-book is evaluated by an examiner appointed by the examining body, the evaluated answer-book becomes a record containing the 'opinion' of the examiner. Therefore the evaluated answer-book is also an 'information' under the RTI Act.

Section 22 of RTI Act provides that the provisions of the said Act will have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore the provisions of the RTI Act will prevail over the provisions of the bye-laws/rules of the examining bodies in regard to examinations. As a result, unless the examining body is able to demonstrate that the answer-books fall under the exempted category of information described in clause (e) of section 8(1) of RTI Act, the examining body will be bound to provide access to an examinee to inspect and take copies of his evaluated answer-books, even if such inspection or taking copies is barred under the rules/ bye-laws of the examining body governing the examinations. Therefore, the decision of this Court in *Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth, (1984) 4 SCC 27* and the subsequent decisions following the same, will not affect or interfere with the right of the examinee seeking inspection of answer-books or taking certified copies thereof.

In a philosophical and very wide sense, examining bodies can be said to act in a fiduciary capacity, with reference to students who participate in an examination, as a government does while governing its citizens or as the present generation does with reference to the future generation while preserving the environment. But the words 'information available to a person in his fiduciary relationship' are used in section 8(1)(e) of RTI Act in its normal and well recognized sense, that is to refer to persons who act in a fiduciary capacity, with reference to a specific beneficiary or beneficiaries who are to be expected to be protected or benefited by the actions of the fiduciary - a trustee with reference to the beneficiary of the trust, a guardian with reference to a minor/physically/ infirm/mentally challenged, a parent with reference to a child, a lawyer or a chartered accountant with reference to a client, a doctor or nurse with reference to a patient, an agent with reference to a principal, a partner with reference to another partner, a director of a company with reference to a share-holder, an executor with reference to a legatee, a receiver with reference to the parties to a lis, an employer with reference to the confidential information relating to the employee, and an employee with reference to business dealings/transaction of the employer. We do not find that kind of fiduciary relationship between the examining body and the examinee, with reference to the evaluated answer-books, that come into the custody of the examining body.

The duty of examining bodies is to subject the candidates who have completed a course of study or a period of training in accordance with its curricula, to a process of verification/examination/testing of their knowledge, ability or skill, or to ascertain whether they can be said to have successfully completed or passed the course of study or training. Other specialized Examining Bodies may simply subject candidates to a process of verification by an examination, to find out whether such person is suitable for a particular post, job or assignment. An examining body, if it is a public authority entrusted with public functions, is required to act fairly, reasonably, uniformly and consistently for public good and in public interest.

This Court has explained the role of an examining body in regard to the process of holding examination in the context of examining whether it amounts to 'service' to a consumer, in *Bihar School Examination Board v. Suresh Prasad Sinha, (2009) 8 SCC 483*, in the following manner:

> "*11.* The process of holding examinations, evaluating answer scripts, declaring results and issuing certificates are different stages of a single statutory non-commercial function. It is not possible to divide this function as partly statutory and partly administrative.
>
> *12.* When the Examination Board conducts an examination in discharge of its statutory function, it does not offer its "services" to any candidate. Nor does a student who participates in the examination conducted by the Board, hires or avails of any service from the Board for a consideration. On the other hand, a candidate who participates in the examination conducted by the Board, is a person who has undergone a course of study and who requests the Board to test him as to whether he has imbibed sufficient knowledge to be fit to be declared as having successfully completed the said course of education; and if so, determine his position or rank or competence *vis-a-vis* other examinees. The process is not therefore availment of a service by a student, but participation in a general examination conducted by the Board to ascertain whether he is eligible and fit to be considered as having successfully completed the secondary education course. The examination fee paid by the student is not the consideration for availment of any service, but the charge paid for the privilege of participation in the examination.....
>
> *13.* .... The fact that in the course of conduct of the examination, or evaluation of answer-scripts, or furnishing of mark-sheets or certificates, there may be some negligence, omission or deficiency, does not convert the Board into a service-provider for a consideration, nor convert the examinee into a consumer ....."

It cannot therefore be said that the examining body is in a fiduciary relationship either with reference to the examinee who participates in the examination and whose answer-books are evaluated by the examining body.

We may next consider whether an examining body would be entitled to claim exemption under section 8(1)(e) of the RTI Act, even assuming that it is in a fiduciary relationship with the examinee. That section provides that notwithstanding anything contained in the Act, there shall be no obligation to

give any citizen *information available to a person in his fiduciary relationship*. This would only mean that even if the relationship is fiduciary, the exemption would operate in regard to giving access to the information held in fiduciary relationship, to third parties. There is no question of the fiduciary withholding information relating to the beneficiary, from the beneficiary himself.

One of the duties of the fiduciary is to make thorough disclosure of all relevant facts of all transactions between them to the beneficiary, in a fiduciary relationship. By that logic, the examining body, if it is in a fiduciary relationship with an examinee, will be liable to make a full disclosure of the evaluated answer-books to the examinee and at the same time, owe a duty to the examinee not to disclose the answer-books to anyone else. If A entrusts a document or an article to B to be processed, on completion of processing, B is not expected to give the document or article to anyone else but is bound to give the same to A who entrusted the document or article to B for processing. Therefore, if a relationship of fiduciary and beneficiary is assumed between the examining body and the examinee with reference to the answer-book, section 8(1)(e) would operate as an exemption to prevent access to any third party and will not operate as a bar for the very person who wrote the answer-book, seeking inspection or disclosure of it.

An evaluated answer book of an examinee is a combination of two different 'informations'. The first is the answers written by the examinee and second is the marks/assessment by the examiner. When an examinee seeks inspection of his evaluated answer-books or seeks a certified copy of the evaluated answer-book, the information sought by him is not really the answers he has written in the answer-books (which he already knows), nor the total marks assigned for the answers (which has been declared). What he really seeks is the information relating to the break-up of marks, that is, the specific marks assigned to each of his answers. When an examinee seeks 'information' by inspection/certified copies of his answer-books, he knows the contents thereof being the author thereof.

When an examinee is permitted to examine an answer-book or obtain a certified copy, the examining body is not really giving him some information which is held by it in trust or confidence, but is only giving him an opportunity to read what he had written at the time of examination or to have a copy of his answers. Therefore, in furnishing the copy of an answer-book, there is no question of breach of confidentiality, privacy, secrecy or trust. The real issue therefore is not in regard to the answer-book but in regard to the marks awarded on evaluation of the answer-book. Even here the total marks given to the examinee in regard to his answer-book are already declared and known to the examinee. What the examinee actually wants to know is the break-up of marks given to him, that is how many marks were given by the examiner to each of his answers so that he can assess how is performance has been evaluated and whether the evaluation is proper as per his hopes and expectations. Therefore, the test for finding out whether the information is exempted or not, is not in regard to the answer book but in regard to the evaluation by the examiner.

This takes us to the crucial issue of evaluation by the examiner. The examining body engages or employs hundreds of examiners to do the evaluation of thousands of answer books. The question is whether the information relating to the 'evaluation' (that is assigning of marks) is held by the examining body in a fiduciary relationship. The examining bodies contend that even if fiduciary relationship does not exist with reference to the examinee, it exists with reference to the examiner who evaluates the answer-books. On a careful examination we find that this contention has no merit.

The examining body entrusts the answer-books to an examiner for evaluation and pays the examiner for his expert service. The work of evaluation and marking the answer-book is an assignment given by the examining body to the examiner which he discharges for a consideration. Sometimes, an examiner may assess answer-books, in the course of his employment, as a part of his duties without any specific or special remuneration. In other words the examining body is the 'principal' and the examiner is the agent entrusted with the work, that is, evaluation of answer- books. Therefore, the examining body is not in the position of a fiduciary with reference to the examiner.

On the other hand, when an answer-book is entrusted to the examiner for the purpose of evaluation, for the period the answer-book is in his custody and to the extent of the discharge of his functions relating to evaluation, the examiner is in the position of a fiduciary with reference to the examining body and he is barred from disclosing the contents of the answer-book or the result of evaluation of the answer-book to anyone other than the examining body. Once the examiner has evaluated the answer books, he ceases to have any interest in the evaluation done by him. He does not have any copy-right or proprietary right, or confidentiality right in regard to the evaluation. Therefore it cannot be said that the examining body holds the evaluated answer books in a fiduciary relationship, qua the examiner.

We, therefore, hold that an examining body does not hold the evaluated answer-books in a fiduciary relationship. Not being information available to an examining body in its fiduciary relationship, the exemption under section 8(1)(e) is not available to the examining bodies with reference to evaluated answer-books. As no other exemption under section 8 is available in respect of evaluated answer books, the examining bodies will have to permit inspection sought by the examinees.

At this juncture, it is necessary to clear some misconceptions about the RTI Act. The RTI Act provides access to all information *that is available and existing*. This is clear from a combined reading of section 3 and the definitions of 'information' and 'right to information' under clauses (f) and (j) of section 2 of the Act. If a public authority has any information in the form of data or analysed data, or abstracts, or statistics, an applicant may access such information, subject to the exemptions in section 8 of the Act. But where the information sought is not a part of the record of a public authority, and where such information is not

required to be maintained under any law or the rules or regulations of the public authority, the Act does not cast an obligation upon the public authority, to collect or collate such non- available information and then furnish it to an applicant. A public authority is also not required to furnish information which require drawing of inferences and/or making of assumptions. It is also not required to provide 'advice' or 'opinion' to an applicant, nor required to obtain and furnish any 'opinion' or 'advice' to an applicant. The reference to 'opinion' or 'advice' in the definition of 'information' in section 2(f) of the Act, only refers to such material available in the records of the public authority. Many public authorities have, as a public relation exercise, provide advice, guidance and opinion to the citizens. But that is purely voluntary and should not be confused with any obligation under the RTI Act.

Section 19(8) of RTI Act has entrusted the Central/State Information Commissions, with the power to require any public authority to take any such steps as may be necessary to secure the compliance with the provisions of the Act. Apart from the generality of the said power, clause (a) of Section 19(8) refers to six specific powers, to implement the provision of the Act.

Sub-clause (i) empowers a Commission to require the public authority to provide access to information if so requested in a particular 'form' (that is either as a document, micro film, compact disc, pen drive, etc.). This is to secure compliance with Section 7(9) of the Act.

Sub-clause (ii) empowers a Commission to require the public authority to appoint a Central Public Information Officer or State Public Information Officer. This is to secure compliance with Section 5 of the Act.

Sub-clause (iii) empowers the Commission to require a public authority to publish certain information or categories of information. This is to secure compliance with section 4(1) and (2) of RTI Act.

Sub-clause (iv) empowers a Commission to require a public authority to make necessary changes to its practices relating to the maintenance, management and destruction of the records. This is to secure compliance with clause (a) of section 4(1) of the Act.

Sub-clause (v) empowers a Commission to require the public authority to increase the training for its officials on the right to information. This is to secure compliance with sections 5, 6 and 7 of the Act.

Sub-clause (vi) empowers a Commission to require the public authority to provide annual reports in regard to the compliance with clause (b) of Section 4(1). This is to ensure compliance with the provisions of clause (b) of Section 4(1) of the Act.

The power under Section 19(8) of the Act however does not extend to requiring a public authority to take any steps which are not required or contemplated to secure compliance with the provisions of the Act or to issue directions beyond the provisions of the Act. The power under section 19(8) of

the Act is intended to be used by the Commissions to ensure compliance with the Act, in particular ensure that every public authority maintains its records duly catalogued and indexed in the manner and in the form which facilitates the right to information and ensure that the records are computerized, as required under clause (a) of Section 4(1) of the Act; and to ensure that the information enumerated in clauses (b) and (c) of Section 4(1) of the Act are published and disseminated, and are periodically updated as provided in sub- sections (3) and (4) of Section 4 of the Act. If the 'information' enumerated in clause (b) of Section 4(1) of the Act are effectively disseminated (by publications in print and on websites and other effective means), apart from providing transparency and accountability, citizens will be able to access relevant information and avoid unnecessary applications for information under the Act.

The right to information is a cherished right. Information and right to information are intended to be formidable tools in the hands of responsible citizens to fight corruption and to bring in transparency and accountability. The provisions of RTI Act should be enforced strictly and all efforts should be made to bring to light the necessary information under clause (b) of Section 4(1) of the Act which relates to securing transparency and accountability in the working of public authorities and in discouraging corruption. But in regard to other information,(that is information other than those enumerated in Section 4(1)(b) and (c) of the Act), equal importance and emphasis are given to other public interests (like confidentiality of sensitive information, fidelity and fiduciary relationships, efficient operation of governments, etc.).

Indiscriminate and impractical demands or directions under RTI Act for disclosure of all and sundry information (unrelated to transparency and accountability in the functioning of public authorities and eradication of corruption) would be counter-productive as it will adversely affect the efficiency of the administration and result in the executive getting bogged down with the non-productive work of collecting and furnishing information. The Act should not be allowed to be misused or abused, to become a tool to obstruct the national development and integration, or to destroy the peace, tranquility and harmony among its citizens. Nor should it be converted into a tool of oppression or intimidation of honest officials striving to do their duty. The nation does not want a scenario where 75% of the staff of public authorities spends 75% of their time in collecting and furnishing information to applicants instead of discharging their regular duties. The threat of penalties under the RTI Act and the pressure of the authorities under the RTI Act should not lead to employees of a public authorities prioritising 'information furnishing', at the cost of their normal and regular duties.

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423. RIGHT TO INFORMATION ACT, 2005 – Section 8 (1) (d) INTELLECTUAL PROPERTY

(i) Information regarding instructions and model answers issued to examiners and moderators for evaluation of answer script – Entitlement to exemption from disclosure – Information can be sought under RTI Act at different stages for different points of time – Depending upon the nature of exemption, what is exempted from declaration at one point may cease to *be exempted at a later point of time.*

(ii) Intellectual property – Question papers, instructions regarding evaluation and solutions to question (or model answers) which are furnished to the examiners and moderators in connection with evaluation of answer scripts are literary works which are products of human intellect and therefore, subject to copyright.

Institute of Chartered Accountants of India v. Shaunak H. Satya and others

Judgment dated 02.09.2011 passed by the Supreme Court in Civil Appeal No. 7571 of 2011, reported in (2011) 8 SCC 781

Held :

The term 'intellectual property' refers to a category of intangible rights protecting commercially valuable products of human intellect comprising primarily trade mark, copyright and patent right, as also trade secret rights, publicity rights, moral rights and rights against unfair competition (vide Black's Law Dictionary, 7th Edition, page 813). Question papers, instructions regarding evaluation and solutions to questions (or model answers) which are furnished to examiners and moderators in connection with evaluation of answer scripts, are literary works which are products of human intellect and therefore subject to a copyright. The paper setters and authors thereof (other than employees of ICAI), who are the first owners thereof are required to assign their copyright in regard to the question papers/solutions in favour of ICAI.

Information can be sought under the RTI Act at different stages or different points of time. What is exempted from disclosure at one point of time may cease to be exempted at a later point of time, depending upon the nature of exemption. For example, any information which is exempted from disclosure under section 8, is liable to be disclosed if the application is made in regard to the occurrence or event which took place or occurred or happened twenty years prior to the date of the request, vide section 8(3) of the RTI Act. In other words, information which was exempted from disclosure, if an application is made within twenty years of the occurrence, may not be exempted if the application is made after twenty years.

Similarly, if information relating to the intellectual property, that is the question papers, solutions/model answers and instructions, in regard to any

particular examination conducted by the appellant cannot be disclosed before the examination is held, as it would harm the competitive position of innumerable third parties who are taking the said examination. Therefore it is obvious that the appellant examining body is not liable to give to any citizen any information relating to question papers, solutions/model answers and instructions relating to a particular examination before the date of such examination. But the position will be different once the examination is held. Disclosure of the question papers, model answers and instructions in regard to any particular examination, would not harm the competitive position of any third party once the examination is held.

In fact the question papers are disclosed to everyone at the time of examination. The appellant voluntarily publishes the "suggested answers" in regard to the question papers in the form of a book for sale every year, after the examination. Therefore Section 8(1)(d) of the RTI Act does not bar or prohibit the disclosure of question papers, model answers (solutions to questions) and instructions if any given to the examiners and moderators after the examination and after the evaluation of answerscripts is completed, as at that stage they will not harm the competitive position of any third party. We therefore reject the contention of the appellant that if an information is exempt at any given point of time, it continues to be exempt for all time to come.

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424. SALE OF GOODS ACT, 1930 – Section 37 (2)

Delivery of excess quantity – Plaintiff (seller) delivered excess amount of goods to the defendants (buyers) and the same were accepted by the defendants – Neither the excess quantity of goods was returned back to the the plaintiff nor a notice to uplift the goods immediately was sent to the plaintiff – The goods which were lying in the possession of the defendants for a considerably long period became of no use – Held, defendants are liable to pay the price of the goods.

M.P. State Road Transport Corporation, Habibganj, Bhopal and Others v. Super Stone Rubber Industries (M/S), Neemuch

Judgment dated 13.05.2011, passed by the M.P. High Court in F.A. No. 100 of 1996, reported in 2011 (3) MPLJ 355

Held :

On bare perusal of the aforesaid provision this Court finds that the seller may send larger quantity of goods to the buyer other than the contracted quantity and if the larger quantity is accepted by the buyer and the same is not rejected, the buyer is bound to pay for the larger quantity also. In this context, sub-section (2) of section 37 of the Act is quite clear. Apart from this, according to sub-section (4), the provisions under this section are subject to any usage of trade, special agreement or course of dealing between the parties. It is borne out from the evidence placed on record that earlier also the excess amount of the cushion back rubber slab was being received by the defendants. On bare perusal of the

order dated 7-9-1983 (Exhibit P-1) this Court finds that order to supply cushion back rubber slab for tyres and the requirement was very urgent so that the production of the defendants may not be affected. It is an admitted fact that the goods which were sent by the seller (plaintiff) to the buyer (defendants) were received in the office of buyer at Jabalpur on 3-3-1984. According to me, if the excess amount of the bulk of the goods which was sent by the plaintiff to the defendants was not required by them, immediately, either it should have been sent back by the defendants to the plaintiff and the plaintiff may be asked to sent the transportation charges for sending the excess goods or notice should have been sent to the plaintiff (seller) to uplift the goods immediately because it has been sent in the excess. Admittedly, the excess amount of the bulk of the goods (cushion back rubber slab) were accepted by the defendants (buyers) and not only that, they were kept intact without they being utilized for the purpose for which they were bought, in their godowns. The goods may become rotten on account of lying idle and they were also exposed to air, dust, heat, cold and water. Only after one-and-a-half-month, on 25-5-1984 notice was sent by the defendants (buyers) to plaintiff (seller) to uplift the goods since it has been sent in large quantity in excess to the order which was placed vide Exhibit P-1.

It is borne out from the evidence that the goods which were lying in the possession of the defendants for a considerable long period, became unuseful and therefore, if immediately the action was not taken by the defendants (buyers) in terms of Section 37 of the Act and the goods were retained by them for a considerable long period, they are liable to pay the price of the goods.

Learned trial Court after correctly applying section 37 of the Act has decreed the suit of plaintiff. After going through the evidence placed on record and the documents which are filed, I am of the view that learned trial Court did not commit any error in arriving at such a conclusion and rightly decreed the suit of plaintiff.

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425. SERVICE LAW :

After revocation of suspension entitlement of back wages more so, where employee is acquitted from criminal charge – If competent authority, under fundamental rules is of the opinion that suspension of the employee was wholly unjustified, he is empowered to grant full pay and allowance to employee – But if competent authority is of the opinion that suspension of the employee was not wholly unjustified and employer is not entitled to back wages then Administrative Tribunal and Court cannot interfere in such order.

Greater Hyderabad Municipal Corporation v. M. Prabhakar Rao
Judgment dated 28.07.2011 passed by the Supreme Court in Civil Appeal No. 6014 of 2011, reported in (2011) 8 SCC 155

Held:

It will be clear from what this Court has held in *Union of India v. K.V. Jankiraman, (1991) 4 SCC 109* that even in cases where acquittal in the criminal proceedings is on account of non-availability of evidence, the authorities concerned must be vested with the power to decide whether the employee at all deserves any salary for the intervening period, and if he does, the extent to which deserves it. In the aforesaid case, this Court has also held that this power is vested in the competent authority with a view to ensure that discipline in administration is not undermined and public interest is not jeopardized and it is not possible to lay down an inflexible rule that in every case where an employee is exonerated in the disciplinary/ criminal proceedings he should be entitled to all salary during the period of suspension and the decision has to be taken by the competent authority on the facts and circumstances of each case.

Sub-rule (3) of F.R. 54-B does not state that in case of acquittal in a criminal proceedings the employee is entitled to his salary and allowances for the period of suspension. Sub-rule (3) of F.R. 54-B also does not state that in such case of acquittal the employee would be entitled to his salary and allowances for the period of suspension unless the charge of misconduct against him is proved in the disciplinary proceedings. Sub-rule (3) of F.R. 54-B vests power in the competent authority to order that the employee will be paid the full pay and allowances for the period of suspension if he is of the opinion that the suspension of the employee was wholly unjustified. Hence, even where the employee is acquitted of the charges in the criminal trial for lack of evidence or otherwise, it is for the competent authority to form its opinion whether the suspension of the employee was wholly unjustified and so long as such opinion of the competent authority was a possible view in the facts and circumstances of the case and on the materials before him, such opinion of the competent authority would not be interfered by the Tribunal or the Court.

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***426. SERVICE LAW:**

Compulsory retirement – Service record evaluated by a Committee of Judges of High Court – The order of compulsory retirement cannot be said to be vitiated on account of non-application of mind, malafides or for want of material available on record – The decision to compulsory retire is bonafide and in the public interest.

Grant of Selection Grade – Criteria prescribed for granting of Selection Grade – Held, taking into account the ACRs for the past five years as well as the criteria which has been framed by High Court, the petitioner is entitled to grant of Selection Grade.

Chandraprabha Jolhe (Smt.) & Ors. v. State of M.P. & Anr.

Judgment dated 15.07.2011, passed by the High Court of M.P.in W.P. No. 6425 of 2001, reported in ILR (2011) M.P. S.N.109

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427. SUCCESSION ACT, 1925 – Section 63

Where testator was an illiterate person, it is the duty of the plaintiff to prove that the *Will* was read over and explained to him and after hearing the contents of the *Will*, he agree and put his thumb impression – Plaintiff also kept silent and did not act upon the *Will* for many years which is against the conduct – Suit dismissed.

Ramrao v. Natthu and others

Judgment dated 29.03.2011 passed by the High Court of M. P. in S.A. No. 277 of 2003, reported in 2011 (4) MPLJ 203

Held :

The thorn which is pinching my foot and it has also become an eyesore to me are two circumstances. The first one is that the testator Karuji was an illiterate person and was unable to read and write since he put his thumb impression. The alleged Will Ex P/1 bears his thumb impression and if that would be the position, according to me, unless and until it is proved from the evidence that the Will was read over and explained to him and after hearing the contents of the Will, he agreed to execute it and put his thumb impression, it cannot be said that the Will has been executed according to the wishes and as per the dictation given by the testator. There is no iota of evidence in this regard of any of the witness examined by the plaintiff, therefore, I am of the view that the alleged Will which has been executed by an illiterate person who is unable to read and write, is not proved and is surrounded by suspicious circumstances.

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428. TRANSFER OF PROPERTY ACT, 1882 – Sections 3 and 136
CIVIL PROCEDURE CODE, 1908 – Section 2

Whether a decree come within the definition of actionable claim and restriction of Section 136 of T.P. Act applies to the same? Held, No.

Devkinandan v. State of M.P. and others

Judgment dated 11.08.2011, passed by the High Court of M.P. in W.P. No. 1771 of 2008, reported in 2011 (4) MPHT 532

Held :

Section 136 of the T.P. Act can be an impediment in receiving any "share", "interest" or any "actionable claim". Admittedly, the decree cannot be said to be a 'share' or 'interest'. The only question which is required to be examined is whether decree can be said to be an 'actionable claim' ?

Therefore, the singular question which now requires to be decided is whether the action of purchasing decree falls within the ambit of Section 136 of T.P. Act.

Meaning of word "actionable" as per Black's Law Dictionary is as under: –

> "Furnishing the legal ground for a lawsuit or other legal action <intentional interference with contractual relations is an actionable tort>"

As per Wharton's Concise Law Dictionary, the word "Actionable Claim" has following meaning: –

> " 'actionable claim' means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent."

"Actionable Claim" is defined in Section 3 of the T.P. Act in similar terms

Even on perusal of this definition, it is clear that the 'decree' does not fall within the ambit of "actionable claim". Thus, examining it from any angle whether as per the definition, clause or dictionary meaning, the 'decree' cannot be said to be an "actionable claim" and, therefore, the contention of the petitioner cannot be accepted. No other material, ground or authority is shown by learned Counsel for the petitioner in support of his aforesaid contention.

Madras High Court in the case reported in *AIR 1921 Madras 113, M. Govindarajulu Naidoo v. D.H. Ranga Rao and others*, held as under: –

> "The next point taken before us is that the transfer of the decree to the petitioner who is a pleader was invalid by virtue of Section 136 of the Transfer of Property Act (IV of 1882) since it is a transfer of an actionable claim which the law prohibits in favour of pleaders and certain functionaries of Court. Decree does not come within the definition of an actionable claim as given in the Transfer of Property Act (IV of 1882), but partakes of the nature of property."

The Apex Court in the case reported in AIR 1955 SC 376, *Jugalkishore Saraf v. M/s. Raw Cotton Co. Ltd.*, held as under: –

> "Per Bhagwati, J. : – A judgment debt or decree is not an actionable claim for no action is necessary to realize it. It has already been the subject of an action and is secured by the decree. A decree to be passed in future also does not come as such within the definition of an actionable claim and as assignment or transfer thereof need not be effected in the manner prescribed by Section 130."

In view of aforesaid dictionary meaning and the judgment passed by Madras High Court and Supreme Court (supra) it is crystal clear that the decree, by no stretch of imagination, can be said to be an "actionable claim". Since in the opinion of this Court, the decree is neither a share nor interest or actionable claim, it does not fall within the four corners of Section 136 of the T.P. Act Accordingly, there was no reason for the Court below to invoke Section 136 of the T.P. Act in the facts and circumstances of the case. In absence thereof, the Court below has committed no legal error in passing the impugned order.

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429. TRANSFER OF PROPERTY ACT, 1882 – Section 105
EASEMENTS ACT, 1882 – Section 52
Lease or Licence
Real intention of parties as decipherable from complete reading of document, if any, executed between parties and surrounding circumstances have to be seen – Petitioner was only given right to use the land to run amusement center and I.D.A. retained the possession of the land – Mere right to raise construction on payment of annual rent does not create an interest in property and amounts to merely a right to do something on the land – Deed dated 06.05.1994 was only a licence and not lease.
Promissory Estoppel – Petitioners were permitted to install rides and games under licence – No promise made to petitioner creating any legal relationship or affecting legal relationship – Even otherwise petitioners have not done anything nor have altered their position except by submitting application for renewal – As the use of land has already been changed therefore, principle of promissory estoppel would also not apply – Petition dismissed.

Mangal Amusement (P) Ltd. & Anr. v. State of M.P. & Ors.
Judgment dated 19.05.2011, passed by the High Court of M.P. in W.P. No. 5698 of 2008, reported in I.L.R. (2011) M.P. 1912 (D.B.)

Held :

If the terms and conditions contained in document dated 06.05.1994 are read as a whole it leaves no iota of doubt that the document only confers a right to use the land in a particular way i.e. to run the amusement center without creating any interest or a right in respect of the land on the licensee and Indore Development Authority retains the possession of the land leased out to the petitioners No. 1. A mere right to raise construction on payment of annual rent amounts to merely a right to do something on the land leased out and it does not create an interest in the property. We are fortified in our conclusion by a Division Bench decision of Nagpur High Court in case of *Samrathlal Dhanraj and another v. Mst. Sunderbai W/o Nathoo Singh, AIR 1952 Nagpur 325.* So far as the reliance placed on behalf of the petitioners in the case of *C.M. Beena and another v. P.N. Ramchandra Rao, 2004 (3) SCC 595* is concerned, in paragraph 8 itself the

Supreme Court has held that real intention of the parties as decipherable from complete reading of the document, if any, executed between the parties, and the surrounding circumstances have to be seen. The inference whether a document has to be treated as a lease or licence, has to be drawn by looking at the document as a whole. Thus, the aforesaid decision is of no assistance to the petitioners. Thus, if the contents of the deed dated 06.05.1994 are tested on the touchstone of well settled legal principle to determine whether particular deed is a lease or licence, it leaves no iota of doubt in our minds that document dated 06.05.1994 (Annexure-P/13) is a licence and not a lease, for the reasons which we have already referred to supra. Accordingly, it is held that the deed dated 06.05.1994 is a licence.

In *M/s. Motilal Padampat Sugar Mills Co. Ltd. v. The State of Uttar Pradesh and others, AIR 1979 SC 621*, the relevant principle underlying promissory estoppel was expounded by the Supreme Court as follows:

> "..... Where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective whether there is any pre-existing relationship between the parties or not."

However, in the instant case, essential ingredients for applicability principle of promissory estoppel are miserably lacking. The petitioners have been permitted to install rides and games under the licence. The period of licence has already expired. Thereafter, no promise has been made to the petitioners which has either created a legal relationship or affects a legal relationship. Even if it is assumed that such promise was made, the petitioners have neither done anything nor have altered their position except by submitting an application for renewal. For yet another reason, doctrine of promissory estoppel will not have any applicability in the facts and circumstances of the case as the land use of the land in question has already been changed and therefore, even assuming for the sake of arguments that doctrine of promissory estoppel applies then also the respondents cannot be compelled to renew the licence for the reason that petitioners have no legally enforceable right to seek removal and the same would tantamount to permitting the use which is not permissible in the eye of law. Thus, for the aforementioned reasons the irresistible conclusion is that the doctrine of promissory estoppel has no applicability in the facts and circumstances of the case.

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NOTE : (*) Asterisk denotes short notes.