JOTI JOURNAL

DECEMBER 2012 (BI-MONTHLY)

न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान

मध्य प्रदेश उच्च न्यायालय, जबलपुर - 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

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FOUNDATION STONE LAYING CEREMONY OF THE REGIONAL TRAINING CENTRE AT GWALIOR
Venue: High Court Premises, Bench Gwalior
(06.01.2013 SUNDAY)

Unveiling the plaque by Hon'ble Mr. Justice Dipak Misra, Judge, Supreme Court of India Also present : Hon'ble Shri Justice S.A. Bobde, Chief Justice, Hon'ble Shri Justice K.K. Lahoti, Administrative Judge, Hon'ble Shri Justice Rajendra Menon, Chairman, High Court Training Committee, Hon'ble Shri Justice S.K. Gangele, Administrative Judge, Bench Gwalior

Hon'ble Mr. Justice Dipak Misra, Judge, Supreme Court of India addressing the gathering

SPECIALISED TRAINING PROGRAMME ON "SENSITISATION AND CYBER FORENSICS" AT SARDAR VALLABHBHAI PATEL NATIONAL POLICE ACADEMY, HYDERABAD (11th to 15th DECEMBER, 2012)

Officer of JOTRI making presentation on Valedictory Session in the presence of Chief Guest Hon'ble Mr. Justice Madan B. Lokur, Judge, Supreme Court of India and other dignitaries

Participant Judges interacting during the Programme

PART - I

MEGA LOK ADALAT IN MADHYA PRADESH : A REPORT (15TH DECEMBER, 2012)

Anurag Shrivastava
Member Secretary,
M.P. State Legal Services
Authority, Jabalpur

Free Legal Aid to the poor and marginalized members of the society is now viewed as a tool to empower them to use the power of the law to advance their rights and interest as citizens and as economic actors. The Legal Services Authorities Act, 1987 has been enacted with the object to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities and to organize Lok Adalats to secure that the operation of the legal system promote justice on the basis of equal opportunity. Thus, Lok Adalats are being constituted at various places in the country for the disposal, in a summary way and through the process of arbitration and settlement between the parties, of large number of cases expeditiously and with lesser costs. This would not only reduce the burden of arrears of work in regular courts, but would also take justice to the door steps of poor and needy, and make justice quicker and less expensive.

Keeping in mind the above objective, on 15th December 2012, a Mega Lok Adalat was organized in Madhya Pradesh at district and tahsil levels with the inspiration of Hon'ble Chief Justice of India, Justice Altamas Kabir and Hon'ble Justice D.K. Jain, Judge, Supreme Court and Executive Chairman, NALSA, and by the order of Hon'ble Chief Justice of M.P. High Court, Justice Sharad Arvind Bobde and under the direction of Hon'ble Justice Shri Krishn Kumar Lahoti, Admn. Judge, M.P. High Court and Executive Chairman, M.P. State Legal Services Authority.

In this Mega Lok Adalat, all the Courts Civil, Criminal, Family Revenue, Labour, Consumer Forum etc. participated and the cases/disputes pending and pre-litigation both were taken up for disposal.

In our State, we found that various matters were pending in different Government departments. It was common complaint that the villagers/poor people do not get Job cards under MNREGA, Ration Cards, Voter Identity Cards, the order for correction of land records or making mutations, partition etc., in reasonable time. Similarly, there were large number of cases/matters pending

for payment of wages, compensation, scholarship, reward and other benefits, provided under several beneficial schemes by Government departments and local bodies. In order to resolve people's problems and provide them speedy relief, we had called upon all concerned Government authorities and local bodies to decide maximum matters, of people, pending before them since long and give them relief. It can be very well presumed that if the people could not get relief from Govt. agencies in time, they would have filed a case before the Court for getting it. Therefore, treating all the claims and applications, of people, pending before other Govt. departments as pre-litigation and legal service matter, we had persuaded these Govt. departments to settle all the matters in Mega Lok Adalat.

For this Mega Lok Adalat, we had prepared an action plan and Hon'ble Shri Justice K.K. Lahoti, Executive Chairman, State Legal Services Authority had visited some of the districts of State, took more than 20 meetings and gave motivation and directions, to all Judicial, Administrative, Police, Revenue, Forest, Labour, Co-operative, Electricity, Municipal Officers. He took meetings with higher officers of Insurance Companies, Members of Bar and Secretaries of Government of Madhya Pradesh.

To encourage people to get benefit of Mega Lok Adalat, we had insisted Electricity, Bank, Local Bodies and other concerning Government departments to give relief to people by reducing and relaxing the amount of tax, surcharge interest and penalty to be levied on, if they settle their disputes in Mega Lok Adalat.

The Electricity Departments had given up to 30 to 75 percent rebate in surcharge levied on electricity bill and local bodies like Nagar Nigam (Municipal Corporation)/ Nagar Palika had given up to 25 to 100 percent rebate. This was a main incentive to the public for getting their cases compounded in Mega Lok Adalat.

Forest and Horticulture Departments had provided the fruit bearing trees, medicinal and other plants for distribution among the litigants/public, who could get their cases settled in Mega Lok Adalat as a mark of peace and harmony. This enhances the green belt and ecological balance too.

This Mega Lok Adalat had got the support of all Members of Bar, Government Officers, Local Bodies, Judges and public. Record number of cases have been decided and people have resolved their disputes by amicable settlement. The salient features of Mega Lok Adalat are given below:

(i) Disposal of pending Civil and Criminal cases

There are **14,182** Civil cases and **2,48,228** Criminal Cases settled (total **2,62,410** cases)

(ii) The cases under public utility services, MPSIDC, Consumer Forum and Labour Courts - **10,349** are settled.

(iii) **Pre-litigation**

In pre-litigation category, Family Court, Electricity, NI Act, Bank Cases, Public Utility Services, Consumer Forum and others - Total **4,22,455** cases have been decided.

(iv) **Revenue Cases**

The cases pending before Revenue Court and different applications for relief as Legal service-

Total **7,95,383** cases/applications have been settled and **16,02,725** persons are benefitted.

(v) **Gas Relief Cases**

In cases for compensation in Bhopal Gas disaster affected people, **1,393** cases are settled and ₹ **27,37,00,125/-** compensation is disbursed to **3,465** persons.

(vi) **Co-operative Cases**

The cases relating to Co-operative Societies and Co-operative Banks **8,598** cases are settled and ₹ **1,03,07,63,798** loan amount is recovered and **14,643** persons are benefitted.

(vii) **Municipal Corporation, Nagar Palika and Nagar Panchayat Cases**

The cases for recovery of local taxes (property, water, sanitation etc.) **2,86,636** no. are settled and ₹**19,66,02,350** as tax/penalty is recovered and **5,03,042** persons are benefitted.

(viii) **Motor Accident Claim Cases**

In MACT pending cases **7,861** no. of cases are settled and ₹ **71,36,73,818** compensation is awarded and **19,474** persons are benefitted.

(ix) **Negotiable Instruments Act**

Under Section 138 of N. I. Act, the cases in pre-litigation and pending category total **19,351** cases decided and ₹ **1,19,47,30,095** is paid and **36,059** persons are benefitted.

(x) **Family Court Cases and Matrimonial Cases**

Pending and pre-litigation dispute total **1,153** no. of cases decided and **2,280** persons are benefitted.

(xi) Pre-litigation Bank Cases

The cases relating to recovery of loan etc. there are **2,12,642** cases are decided as pre-litigation and ₹ **33,70,15,705** loan amount is recovered and **3,73,655** persons are benefitted.

(xii) Pending and Pre-Litigation Electricity Cases

In this category, total **1,49,613** cases are settled and ₹ **69,37,05,223** electric bill/penalty have been levied and **2,55,740** persons are benefitted.

(xiii) Legal Services

(a) In Education Department, the applications for various reliefs are decided expeditiously in Mega Lok Adalat and scholarship and other benefits have been given to student (boys and girls) claimants. The total **3,68,101** applications are decided and ₹ **13,23,34,929** is disbursed.

(b) In Health Department

There are **59,534** applications for various medical bill, assistance etc. are decided and ₹ **6,55,03,615** is disbursed among **1,01,212** benefitted persons.

(c) Forest Department

47,982 applications are decided and ₹ **55,94,372** is disbursed and **81,865** persons are benefitted.

In this Mega Lok Adalat, the total number of cases, disputes, applications for relief as Legal service settled are **27,66,506** and ₹ **6,07,95,17,423** are disbursed/levied/paid and **51,75,059** persons are benefitted.

Therefore, we can very well refer this Mega Lok Adalat a grand success. Although we are not emphasizing on number of settlement but this huge number strengthen our faith on concept of amicable settlement of disputes, by people, through Lok Adalat. This Mega Lok Adalat certainly had brought peace and happiness among number of families. We could imagine the smile of children when they could find their parents united. I can quote the following words-

> *"A smile is quite a funny thing. It wrinkles up your face, but when it is gone, you will never find its secret hiding place. But far more wonderful is to know what a smile can do, smile at one, they smile at you, and so one smile makes two."*

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STANDARD AND EXTENT OF BURDEN OF PROOF ON THE PROSECUTION VIS-A-VIS ACCUSED WITH REFERENCE TO PRESUMPTION UNDER SECTION 29 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

Gajendra Singh,
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Whenever the law places a burden of proof upon a party, a presumption operates against it. Hence, burdens of proof and presumptions have to be considered together. When there is ample evidence from both sides, the fate of the case is not determined by presumptions or burdens of proof, but by a careful identification of the true version based, no doubt, on preponderance of probabilities which have to be so compulsive or overwhelming in favour of a conviction as to remove all reasonable doubt. Burden of proof and presumption may become decisive in cases where evidence is equally balanced. Thus, their function is decisive only in cases where there is paucity of evidence on either side or the evidence given by the two sides is equibalanced. Neither a burden of proof nor a rebuttable presumption can be used for excluding any evidence. That is not their function at all but of other provisions of law.

The standard and extent of burden of proof on the prosecution vis-a-vis accused with reference to presumption in section 29 of the Protection of Children from Sexual Offences Act, 2012, is a questions which requires deliberation. Section 29 of the Act which envisages such presumption reads as hereunder:

> **29. Presumption as to certain offences.** – Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

On plain reading of section 29, it seems that once a charge-sheet is filed against the concerned accused on the allegation of having committed an offence under Sections 3,5,7 or 9 of the Act, he shall be presumed to have committed such offence. The word 'prosecution' has been defined in Black's Law Dictionary, Fifth Edition, at page 1099, to mean, a criminal action, a proceeding instituted and carried on by due course of law, before a competent Tribunal for the purpose of determining the guilt or innocence of a person charged with crime. A Constitution Bench of the Supreme Court in the case of ***Thomas Dana Vs State of Punjab (AIR 1959 SC 375)*** had an occasion to consider the term 'prosecuted' as employed by Article 20(2) of the Constitution of India, wherein it was observed that 'prosecution' means, a proceeding either by way of indictment or information

in the criminal Courts in order to put an offender upon his trial. Therefore, it becomes obvious that once an accused is charge-sheeted, he gets prosecuted before competent Criminal Court. Thus, if section 29 were to be given its literal meaning, after filing of charge-sheet, the Court shall proceed to frame a charge. Thereafter, the entire burden to prove innocence would rest upon the accused. In such a scenario, the prosecution may not lead any evidence at all and by virtue of the presumption under section 29, the accused shall straight away be required to establish his innocence by leading defence evidence.

Keeping in view the extra-ordinary nature of the presumption envisaged under section 29, the question to ponder over is whether such literal interpretation of the provision is permissible under the law? or would it be hit by articles 14, 20(3) and 21 of the Constitution of India.

It may be noted here that the presumption raised under section 29 is somewhat similar to the one raised under section 8-A of the Dowry Prohibition Act, 1961, in as much as both the provisions put burden of proving innocence upon the accused. Section 8-A is reproduced hereinbelow.

8A. Burden of proof in certain cases - Where any person is prosecuted for taking or abetting the taking of any dowry under section 3, or the demanding of any dowry under section 4, the burden of proving that he had not committed an offence under these sections shall be on him.

A casual comparison of two provisions reveals that the presumption envisaged under section 29 of the Act is considerably stronger than the one raised under section 8-A of the Dowry Prohibition Act, yet, a Full Bench of Karnataka High Court in the case of ***Harikumar Vs State of Karnatak,(1995 (1) Crimes 573)*** while examining the vires of section 8-A had held that Section 8-A, in its operation, will have to be read down in the light of Sections 2, 3 and 4 of the Act. Once it is so read down, the challenge to the said Section on the anvil of Articles 14, Article 20(3) and Article 21 of the Constitution of India, would not survive.

There is another provision in the Act which militates against giving literal meaning to the section 29. Section 35 (1) of the Act, ordains that the evidence of the child shall be recorded within a period of 30 days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court. If the defence were to begin evidence there would be practically no chance of evidence of the child being recorded within a month.

Further, according to section 135 of Evidence Act, 1872 the order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively and in the absence of any such law by the discretion of the court.

Under the Code of Criminal Procedure, 1973 there is no provision like Order 18 Rule 3 of code of civil procedure, 1908 which authorizes the party upon whom the burden of proving some issues lies to begin at is option. In a sessions trial we have to follow the procedure laid down in sections 225 to 237 chapter XVIII. According to the procedure prescribed in such trials the initial burden is on the prosecution to prove its case beyond reasonable doubt. If we take the ex-facie interpretation of Section 29 then the above- mentioned procedure is to be given a complete go by.

Moreover as held in cases of ***State of Maharashtra v. Dnyaneshwar Laxman Rao Wankhede, (2009) 15 SCC 200 (205); Noor Aga v. State of Punjab (2008) 16 SCC 417; Jayendra Vishnu Thakur v. State of Maharashtra, (2009) 7 SCC 104*** that even in a case where the burden is on the accused, the prosecution must prove the foundation facts. So in spite of the presumption of Section 29, initially the prosecution has to prove existence of ingredients constituting the offence beyond a reasonable doubt and thereafter burden of rebuttal shall shift upon the accused.

Thus, on a closer scrutiny, the first-hand impression about the Section 29 gets dispelled. It has to be kept in view that Sections deals with burden of proving innocence in given cases. Therefore the Section, in substance, create a Rule of Evidence and deals with casting of burden of proof in certain cases on the accused. A close reading of the Section shows that merely because the accused is charged with offences under Sections 3,5,7 or Section 9 of the Act, the initial burden which is always on the prosecution to prove basic ingredients of the Sections for bringing home the charges to the accused will not get displaced or dispensed with and the provision will have to be read down to that extent.

Now the question arises weather such reading down of section 29, would render it otiose. Section 29 provides that where a person is prosecuted for any of the offences under sections 3,5,7 & 9 of the Act, the Court shall presume that such person has committed the offence unless the contrary is proved. The apex Court had occasion to consider the effect of phrase "unless the contrary is proved" in ***Dhanvantrai Desai v. State of Maharashtra, (AIR 1964 SC 575)*** in the context of section 4 of the Prevention of Corruption Act, 1947 (followed in the case of ***Ram Kishan Bedu Rane Vs State of Maharashtra, AIR 1973 SC 246,)***, and drew a distinction between the presumption under S. 114 of the Evidence Act and a statutory presumption mandatory upon the Court. Repelling the contention that under a statutory presumption the only thing necessary is an explanation or evidence which need be only reasonably true and not necessarily true and thereby throwing a doubt on the prosecution case, it was observed as follows:

> "12. The burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under Section 114 of the evidence Act and cannot

be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted."

Thus, if the ingredients establishing the offence are proved by the prosecution beyond reasonable doubt, the stage of presumption arises and the accused has to rebut this presumption by 'proof' and not by a bare explanation which is merely plausible by directly establishing the facts which rebut the presumption against him.

The quantum and the nature of proof required to displace this presumption may vary according to the circumstances of each case. Such proof may partake the character of defence evidence led by the accused, or it may consist of circumstances appearing in the prosecution evidence itself, as a result of cross-examination or otherwise. While the mere plausibility of an explanation given by the accused in his examination under Section 313, Cr. P. C. may not be enough, the burden on him to negate the presumption may stand discharged, if the effect of the material brought on the record, in its totality, renders the existence of the facts presumed, improbable.

CONCLUSION:

(1) The burden of proving facts constituting offences under ss. 3,5,7 or 9 beyond reasonable doubt shall be upon the prosecution and section 29 of the Act shall have to be read down to that extent.

(2) Once prosecution discharges that burden, presumption envisaged under section 29 shall arise.

(3) Thereafter, the accused shall be required to rebut this presumption by 'proof' and not by a bare explanation which is merely plausible by directly establishing the facts.

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GOVERNMENT CONTRACTS AND ASSURANCES OF PROPERTY AND THEIR EXECUTION IN THE LIGHT OF THE PROVISIONS OF ARTICLE 299 OF THE CONSTITUTION

Judicial Officers
District Panna and Ujjain

The Constitution of India, Part XII Chapter III contains Article 299 related to contracts by Government which is reproduction of Section 175 (3) of the Government of India Act, 1935. After the Constitution (7th Amendment) Act, 1956, it reads as under-

> **299. Contracts –** (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.
>
> (2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

For the purpose and object of making provisions of Article see: ***State of Madhya Pradesh v. Ferm Gopichand Sarju Prasad, Rewa ILR (1974) MP 103*** (DB)

The Apex Court in ***Chaturbhuj Vithal Das Jasani v. Moreswar Prashram, AIR 1954 SC 236*** laid down the rationale behind the said provision that contracts by Government raise some problems which do not or cannot possibly arise in the case of contracts entered into by private persons. Thus, there should be a definite procedure according to which contracts must be made by its agents in order to bind the Government; otherwise public funds may be depleted by clandestine contracts made by any and every public servant. In the case of ***Union of India v. Hanuman Oil Mills Ltd., (1987) Supp. SCC 84*** the Supreme Court held that it has been provided that the State should not be saddled with liability for contracts which do not show on their face that they are made on behalf of the State.

Though the opening words in Clause (1) of Article 299 that, "All contracts made in the exercise of the executive power" is sufficient to show that "Executive power" of the Government is exercised in executing the contracts under

Article 299. However, High Court of M.P. in ***Ram Ratan Gupta v. State of Madhya Pradesh, ILR (1975) MP 377, (FB)*** held that power under Article 299 is the non-statutory executive power and not the statutory one which is wide enough to include power derived from statute. Supreme Court in ***Steel Authority of India Ltd. v. State of Madhya Pradesh, (1999) 4 SCC 76*** considered that Article 299 applies only to the contracts to be executed in exercise of "Executive Power" and not to those executed by virtue of statutory power.

In ***Lalji Khimji v. State of Gujrat, 1993 Supp. (3) SCC 567*** it is made clear that there is marked distinction between contracts which are executed in exercise of the executive power and agreements or orders made which are statutory in nature. In a contract of statutory nature, compliance with Article 299 is not required. Article 299 does not prescribe any particular mode in which the authority must be conferred by the President or the Governor. Hence, it may be conferred either by a general order or by an ad hoc order upon a particular officer for the purpose of a particular contract. Such order may be notified in the official gazette or established by other evidence. (See : ***M/s. Timber Kashmir Pvt. Ltd. v. The Conservator of Forest Jammu, AIR 1977 SC 151*** and ***UoI v. Hunuman Oil Mills Ltd., (1987) Supp. SCC 84***)

Formality of Contracts on behalf of Government

(1) The words "Expressed to be made" and the word "Executed" suggest that there must be a deed for a formal written contract executed by a person duly authorised under the said Article. A contract by a correspondence or an oral contract is accordingly, not binding upon the Government. (See : ***Bhikraj Jaipuria v. UoI, AIR 1962 SC 113*** and ***Karamshi Jethabhai Somayya v. State of Bombay, AIR 1964 SC 1714***)

(2) In order to comply with the requirement of cl. (1) of the Article 299, the contract –

(a) must be executed by a person 'duly authorised' by the President or Governor as the case may be;

(b) must be executed by such person 'on behalf of' the President or Governor as the case may be;

(c) must be 'expressed to be made by' the President or Governor as the case may be, i.e., in the name of President or Governor.

Until a contract in accordance with the requirement of Article 299 (1) is drawn up, there is no completed contract to give rise to contractual obligation under the contract. But this would not apply for the enforcement of statutory rights and duties which exist apart from the contract or equitable considerations, if any (See : ***Mulamchand v. State of M.P. , AIR 1968 SC 1218***). But no damages for breach of contract should be available until there has been a completed

contract (See : ***State of UP v. Kishori Lal Minocha, AIR 1980 SC 680***). So long as the contract is not completed, it is open to the Government to change its policy and in the absence of any statutory obligation, to complete the contracts (See : ***State of UP v. Vijay Bahadur Singh, AIR 1982 SC 1234*** and ***Beharilal v. Smt. Bhuri Devi, AIR 1997 SC 1879***). If contract with Government is not in accordance with Article 229 then it is not enforceable by a writ petition under Article 226 of the Constitution of India. Writ of Mandamus cannot be issued for enforcing contractual right. [See : ***M/s Allied Oil Industries Private Ltd. Durg v. State of M.P., ILR (1983) MP 493(DB)***].

Personal Immunity

Clause (2) of Article 299 provides personal immunity of officers for Government contracts. Except the present clause, there is no provision in our Constitution to exempt official from personal liability for acts done or purported to be done in exercise of their official duties. The present clause, following English law, exempts officials as well as executive heads from personal liability for the contracts made or executed, "for the purposes of this Constitution", or under any of the Government of India Acts. It is to be noted that the Officer will be personally immune only if the contract duly complies with the formalities laid down in Clause 1 of Article 299. In short, where the Government is not bound for want of due compliance with Article 299 (1), the personal liability of the Officer to execute the contract remains.

Articles 77 and 166 of the Constitution encompasses the procedure of authenticity of documents or instruments including "contracts" and "all assurances of property" made in the name of the President or the Governor of the State, as the case may be, through the rule made by him. In this regard, the rules are notified by the President of India by S.O. 2297, 03.11.1958 (Gazette of India, Extra. Part-II Sec. –3(ii) at.page 1315).

Defence of non-compliance must be pleaded

In view of Order 6 Rule 8 and Order 8 Rule 2 of CPC, 1908 the question of invalidity of such contract on the ground of non-compliance with Article 299 will not be allowed to be raised at the stage of hearing unless it is specifically pleaded in the written statement. (See : ***Kalyanpur Lime Works Ltd. v. State of Bihar, AIR 1954 SC 165***). But where the non-compliance is patent from the allegations made in the plaint or the evidence adduced by the plaintiff himself, the court will not uphold the defective contract simply because the defect has not been pleaded.

Applicability of Contract Act, 1872

Though no suit lies against the Government on the basis of defect under Article 299, however, the other party to the contract may obtain relief against the Government on the basis of benefit or service received under the said agreement under Section 65 or 70 of the Contract Act, which is founded on

equitable principle of restitution. The claim restitution or compensations under Section 65 of the Contract Act, however, does not extend to benefits received after the agreement is discovered to be void. Contract made in contravention of Article 299 (1) being absolutely void, is not capable of being ratified by the Government as was supposed in some cases. But such contracts are not void for collateral purposes. The fact that the contract being void as against the Government for non-compliance with Article 299 (1) would not stand in the way of reliefs or consequences which are independent of the formality of contracts as laid down in Article 299 (1) (See : ***State of UP v. Murari Lal and Brothers Ltd., AIR 1971 SC 2210***).

In context to the Section 16(1) and (2) of the Sale of Goods Act, 1930, the High Court of MP in the case of ***State of Madhya Pradesh v. M/s Mohanwi Corporation (Pvt.) Ltd., ILR (1982) MP 137 (DB)*** has held that the conditions and circumstances in contract for supply of articles by manufacturer or dealer, the implied condition of warranty as to fitness and merchantable quality of the said articles, when arises. In the said case it is also propounded what are the requisite conditions to be fulfilled when contract from correspondence is valid and enforceable. In case of ***Santosh Kumar Chopda v. State, ILR (2003) MP 42 (DB).*** The High Court made clear that if petitioner/respondent is himself negligent then he cannot invoke Section 7 of the Sale of Goods Act, 1930.

Service contracts

Where the appointment takes place under a formal contract, it must comply with the formal requirements of Article 299. But it would be too much to say that all appointments by the Government must take place by a formal contract, otherwise they would be invalid. In fact, most of the appointments take place by issue of appointment letter followed by acceptance. Perhaps it would detract from the principle of "Holding office during Pleasure" of the Government under Article 310, if it be held that there cannot be any appointment without a formal contract and thus, no formal contract is necessary for appointment to the regular service of the Government whose conditions of service are laid down in the Constitution and the Rules made under Article 309 and that outside Article 310 (2), a formal contract would confer no right upon the employee. Article 299 would be called into operation only where the Rules made under Article 309 require a formal contract to be executed for the appointment.

Rule of Estoppel

The Apex Court in ***Union of India v. M/s. Anglo-Afghan Agencies, AIR 1968 SC 718*** propounded that the Rule of Estoppel by the representation of a public official, has also been applied against the Government, even though the promise was not recorded in the form of a contract under Article 299 and even though the terms of Section 115 of the Evidence Act, 1872 were not fulfilled. In ***State of Punjab v. Om Prakash Baldev Krishan, AIR 1988 SC 2149,*** it is observed that the

consensus of opinion is that there can not be any estoppel against the mandatory requirement of Article 299 (1), but the private party may be estopped from questioning the validity of the conditions imposed by an invalid contract when he has obtained the benefit under it (See : ***M/s. Timber Kashmir Pvt. Ltd. v. The Conservator of Forest, Jammu, AIR 1977 SC 151***).

The High Court of MP in ***State of Madhya Pradesh v. Firm Gopichand Sarju Prasad, Rewa, ILR (1974) MP 103 (DB)*** has held that there can be no question of Estoppel against fulfillment of requirement of Article 299 (1). Similarly in ***UoI v. Chouthmal, ILR (1980) MP 659 (DB)*** it is made clear that, in case of non-compliance of the provision contained in Article 299 (1), question of estoppel or ratification does not arise.

Doctrine of Promissory Estoppel

In case of ***Motilal Padampat Sugar Mills Company Pvt. Ltd. v. State of UP, AIR 1979 SC 621,*** the Apex Court observed that since the Doctrine of Promissory estoppel is an equitable doctrine, it would be subject to limitation to which all equitable rights and obligations are subjected viz.,-

(a) it would be open for the Government or public authority to show that the officer or agent who made the representation acted beyond the scope of his authority and the person who dealt with him is supposed to have notice of the limitations of the authority of a public servant with whom he is dealing.

(b) It would be open to the public authority to prove that there were special considerations which necessitated his not being able to comply with his obligations under the doctrine, in the public interest,

(c) the doctrine cannot be invoked to prevent the Government from acting in discharge of its duty under the law.

(d) the doctrine cannot be applied against the exercise of the legislative power of the State (See : ***Jit Ram Shiv Kumar v. State of Haryana, AIR 1980 SC 1285*** or against a Statute (See : ***Delhi Cloth and General Mills Ltd. v. UoI, AIR 1987 SC 2414***).

(e) Where a contract describes itself as 'Provisional' and stipulates that Government would not be bound to complete it (e.g., in the case of settlement by public auction), there is nothing to prevent the government to change its policy and to cancel the provisional contract before the contract is finally accepted (See : ***State of UP v. Vijay Bahadur Singh, AIR 1982 SC 1234***).

(f) He who seeks equity must do equity. Hence, the doctrine cannot be invoked where it is found to be unequitable or unjust to enforce it; and;

(g) The representation must be clear and unambiguous and not tentative or uncertain (See : ***Delhi Cloth and General Mills Ltd. v. UoI, AIR 1987 SC 2414***)

In *UP Power Corpn. v. Sant Steel and Alloys, (2008) 2 SCC 777,* the Apex Court laid down the latest position as under-

> "It may be taken as settled law that where the Government makes a promise knowing or intending that it would be acted on by the promisee, and in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promises would be forceable against the Government at instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. It is elementary that in a republic governed by the rule of law, no one, howsoever high, is above the law. Everyone is subject to the law as fully and completely as any other and the Government is no exception. It is indeed the pride of Constitutional Democracy and Rule of Law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned ; the former is equally bound as the latter."

Principles of Judicial Review

In *B.S.N. Joshi and Sons Ltd. v. Nair Coal Services Ltd., 2006 AIR SCW 5834* The Apex Court has summarized the said principles in following terms –

(i) If there are essential conditions, the same must be adhered to;

(ii) If there is no power of general relaxation, ordinarily the same shall not be exercise and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully ;

(iii) If, however, a deviation is made in relation to all the parties in regard to any of such condition, ordinarily again a power of relaxation may be held to be existing;

(iv) The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of another part of tender contract, particularly, when he was also not in position to comply with all the conditions of tender fully, unless the Court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus, the same was wholly illegal and without jurisdiction;

(v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenders on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) The contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority; and

(vii) Where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint.

CONCLUSION

Like other ordinary contracts under India, Contract Act, 1872 a contract or assurances of property under Article 299 is also governed by the provision of the Indian Contract Act, at the same time, such contracts and assurances confer some privileges as these contracts and assurances are executed in the interest of general public represented by the Government. Scope of judicial review is there to a limited extent for examining whether decision making process was adhered with the principle of equality, reasonableness, non arbitrariness and exercised exclusively in public interest as required under Article 14 of the Constitution of India. Merits of decision or terms of such contract or assurances of property does not come within the purview of judicial review.

The judicial attitude on one hand, is to protect the government from unauthorized contracts; and on the other to safeguard the interest of unsuspecting and unwary parties who enter into contracts with the Government officials without fulfilling all the formalities laid down in the Constitution. A strict compliance with these conditions may be inequitable to private parties and at the same time make government operations extremely difficult and inconvenient in practice. Consequently, in the context of the facts of some cases, the courts have somewhat mitigated the rigours of the formalities contained in Article 299 (1), and have enforced contracts even when there have not been full, but substantial, compliance with the requirements of Article 299 (1), in fact it may be true to say that the judicial view has oscillated between the liberal and rigid interpretation of Article 299.

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SUITS BY OR AGAINST THE GOVERNMENT AND VICARIOUS LIABILITY OF THE GOVERNMENT FOR THE ACTS OF ITS EMPLOYEES AS ENVISAGED IN ARTICLE 300 OF THE CONSTITUTION

Judicial Officers
District Dhar

Introduction

Article 300 of the Constitution provides as under :-

> ***Suits and proceedings :-*** (1) The Government of India may sue or be sued by the name of the Union of India and the Governmnet of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding India State might have sued or been sued if this Constitution has not been enacted.
>
> (2) If at the commencement of this Constitution-(a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and
>
> (b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

Clause (1) of Article 300 of the Constitution provides ***firstly***, that the Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State ; ***secondly***, that the Government of the India or the Government of a State may sue or be sued in relation to their respective affairs in the like case of the Dominion of the India and the corresponding Provinces or the corresponding India State might have sued or be sued, "if this Constitution had not been enacted". And ***thirdly***, that the second mentioned rule shall be subject to any provisions which may be made by an Act of Parliament or of the Legislature of such State, enacted by virtue of powers conferred by the Constitution.

Even though more than 60 years have elapsed since the commencement of the Constitution, no law has so far been made by Parliament as contemplated by Article 300, notwithstanding the fact that the legal position emerging from the said provision has given rise to a good amount of confusion, however, the Hon'ble Supreme Court in catena of decisions have laid down several principles ascertaining the vicarious liability of the Government for acts of its employees.

Prior to independence, the British law on this subject was that the King is not liable to be sued for supposed wrong. Even the head of the departments or superior officers would not be sued for torts committed by their subordinates

unless expressly authorised by them. With the passage of time the activities of the Crown increased due to which transaction between the State and individual increased and the principle of immunity created severe problems for the persons who were aggrieved by the acts of the State. Realizing the facts, the British Parliament passed the Crown Proceeding Act, 1947 whereby the immunity of the Crown was abolished and was equated like a private citizen in the matters of tortious liability. Hence, in the 1947 Act the Crown in England did not enjoy absolute immunity and may be held vicariously liable for the tortious acts of his officers and servants. However in India, the principle of "King can do no wrong" has not been distinguished as between the terminology of "sovereign" and "non-sovereign function".

In ***P.O. Navigation Company v. Secretary of State for India, 1868-69 Bombay HC Reports Vol. V. Appendix*** it was held that the rule of immunity was applied by drawing a distinction by the acts done by the public servants in the delegated exercise of sovereign powers and acts done by them in the conduct of other activities. The tort in this case was committed by the servants of the Government in the course of a trading activity and the case was not directly concerned with acts done in the exercise of sovereign powers. The above decision was followed by the Calcutta High Court in ***Nobin Chunder Day v. Secretary of State for India, (1875-76) ILR Cal 11.*** However, the aforesaid legal propositions were not followed by the Madras High Court in ***Secretary State for Indian Council v. Hari Bhnji, (1882) ILR 5 Mad 273*** and the Bombay High Court in ***P.O. Rao v. Khushaldas S. Advani, (1949) 51 Bom LR 342 : AIR 1949 Bombay 27.***

Interpretation of Art. 300 by the Supreme Court

After independence, the Supreme Court in ***Province of Bombay v. K.S. Advani, AIR 1950 SC 222*** held that the Government would also be liable for torts committed in exercise of sovereign powers except in act complained of amounted to an act of State. Similarly, the principle of immunity of Crown was not applied by the Supreme Court in the case of ***State of Raj. v. Vidhyawati, AIR 1962 SC 933*** holding that in India, the common law principle of immunity has never operated and in a socialistic State there is no justification, in principle or in public interest that the State should not be held vicariously liable for the tortious act of its servant.

In the case of ***Kasturi Lal Ralia Ram Jain v. State of U.P., AIR 1965 SC 1039*** the Supreme Court rejected the plaintiff's claim on the ground that the act of negligence was committed by the police officers while dealing with the property of the petitioner Ralia Ram, which they had seized in exercise of their statutory powers. The power to arrest a person, to search him and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly categorized as sovereign powers; and so, there is no difficulty in holding that the act which gave rise to the present claim for damages has been committed by the employee of the respondent during the course of its employment; but the employment in question being of the category which can claim the special characteristic of sovereign power, the claim cannot be sustained.

It may be mentioned that in ***Kasturilal's case*** (supra) the Court did not

consider the State liability for violation of Fundamental Rights of a citizen relating to life and personal liberty.

The distinction between sovereign and non-sovereign functions was considered in *N. Nagendra Rao v. State of AP, AIR 1994 SC 2663.* All the earlier decisions on the subject were referred and the Supreme Court enunciated the following legal principles :-

> "In the modern sense, the distinction between sovereign or non-sovereign power thus does not exist. It all depends on the nature of the power and manner of its exercise. Legislative supremacy under the Constitution arises out of constitutional provisions. The legislature is free to legislate on topic and subjects carved out for it. Similarly, the executive is free to implement and administer the law. A law made by a legislature may be bad or may be ultra vires, but since it is an exercise of legislative power; a person affected by it may challenge its validity but he cannot approach a court of law for negligence in making the law. Nor can the Government, in exercise of its executive action, be sued for its decision on political or policy matters. It is in (the) public interest that for act performed by the State, either in its legislative or executive capacity, it should not be answerable in torts. That would be illogical and impracticable. It would be in conflict with even modern notions of sovereignty."

The court in the above case suggested the following tests –

> "One of the tests to determine if the legislative or executive function is sovereign in nature is – Whether the State is answerable for such actions in courts of law. For instance, acts such as defence of the country, raising (the) armed forces and maintaining it, making peace or war; foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature, Therefore, they are not amenable to jurisdiction of ordinary civil court. No suit under Civil Procedure Code would lie in respect of it. The State is immune from being sued, as the jurisdiction of the Court in such matters is impliedly barred. "

The court proceeded further, as under:

> "But there the immunity ends. No civilized system can permit executive to play with the people of its country and claim that it is entitled to act in any manner, as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above (the law) as it is unjust and unfair for a Citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy.

> For sincerity, efficiency and dignity of (the) State as a juristic person, propounded in nineteenth century as sound sociological basis for State immunity, the circle has gone round and the emphasis now is more on liberty, equality and the rule of the law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government on a par with any other juristic legal entity. Any watertight compartmentalization of the functions of the State as "sovereign and non-sovereign" or "Government and non-governmental" is not sound, it is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for (the) sake of society and the people, the claim of a common man or ordinary citizen cannot be thrown out, merely because it was done by an officer of the State: duty of its official and right of the citizens are required to be reconciled, so that the rule of law in a Welfare State is not shaken".
>
> "The determination of vicarious liability of the State being linked with (the) negligence of its officers, they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rational for the proposition that even if the officer is liable, the State cannot be sued."

The existing law in India, thus, draws a distinction between the sovereign and non-sovereign functions of the Government and holds that Government cannot be sued for torts committed by the Government or its officers in the exercise of its 'sovereign' functions but due to pro-people attitude adopted by the Supreme Court as well as the High Courts even in the cases falling under the category of sovereign functions, the State officials have been held liable for the torts committed by them during the course of their employment for violation of the fundamental rights of a person. The Supreme Court in many cases have granted compensation for infringement of the Fundamental Rights enshrined in the Constitution. Some cases are, namely, ***Rudul Sah v. State of Bihar, AIR 1983 SC 1086 ; Bhim Singh v. State of J. and K., AIR 1986 SC 494, Saheli, a Women's Resources Centre v. Commr. of Police, Delhi, AIR 1990 SC 513, People's Union of Democratic Rights v. Police Commissioner, Delhi, 1989 (4) SCC 730*** and ***Sebasim M. Hongry v. Union of India, AIR 1984 SC 1026.***

In this regard, what are the sovereign functions of the Government and what may be termed as non-sovereign functions would always depend on the facts and circumstances of a given case. To take it simply, when the public servants in the course of their duty while discharging functions enter into transactions which a private person could do, then such functions executed by the public servants can be termed as non-sovereign functions; whereas such functions which cannot be done in individual capacity may be termed as "sovereign functions".

The Supreme Court as a final Court has also upheld the principle that the Government can be sued for the acts and negligence of its employees under the common law. The vicarious liability of a public authority in the cases of tort have been elaborated by the Supreme Court in the matter of ***Rajkot Municipal Corporation v. Manjul Ben Jayantilal, (1997) 9 SCC 552.*** In this case, the plaintiff was walking in a public street approaching his office and during the course, a tree fell on him due to which he succumbed to injuries. The suit filed by his heirs before the trial Court was decreed in his favour and confirmed in first appeal by the Division Bench of High Court. The Supreme Court held that for a plaintiff to succeed in such cases for action of negligence is required to prove that (i) the defendant is under duty to take care ; (ii) the burden of proof owned by the plaintiff has been discharged by the proof of breach of duty; and (iii) the breach of duty of care is the cause for damage suffered by the plaintiff. The Apex Court setting aside the judgment and decree passed by the trial court and the first appellate court held that a plaintiff, in common law action is entitled to sue for tort of negligence. The authority will be liable to pay damages for omission or negligence in the performance of their duty. In the present case, the victim being not aware of the disease/decay, the tree suddenly falls in a still weather condition, no-one can anticipate and it is difficult to foresee that a tree would suddenly fall and thereby a person passing by on the roadside would suffer injury or would die in consequences. Holding the causation too remote, the Court relied on the maxim of ***novus actus inconveniens*** and further held that it is difficult to establish lack of care resulting in damage and foreseebility of the damage. It was difficult to foresee that a tree would fall on him.

Some of the cases for illustrative cases where the above principle have been applied are ***Rajendran Chingaravelu v. R.K. Mishra, Additional Commissioner of Income Tax and Others, (2010) 1 SCC 457, Sandvik Asia Ltd. v. Commissioner of Income Tax I, Pune and Others, (2006) 2 SCC 508, H.S.E.B. and Others v. Ram Nath and others, (2004) 5 SCC 793, Ethiopian Airlines v. Ganesh Narain Saboo, (2011) 8 SCC 539.***

Conclusion :

In view of the law laid down by the Apex Court, it can be safely concluded that the State should be as much liable in respect of tortious acts committed by its servant within the scope of his employment and functioning as such, as any other employer. The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of justice, namely that the King was incapable of doing a wrong, and therefore, of authorizing or instigating one, and that he could not be sued in his own courts. In India, ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the common law immunity never operated in India. Now that we have, by our Constitution, established a Republican form of Government, and one of the objectives is to establish a Socialistic welfare State with its varied industrial and other activities employing a large number of servants, the liability of State is much higher.

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PART - II

NOTES ON IMPORTANT JUDGMENTS

353. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 7, 11, 14 and 15

Death of named arbitrator prior to appointment – Effect of – Arbitration clause subsists so long as any question or dispute or difference between the parties exists despite death of named arbitrator unless language of arbitration clause clearly expresses an intention to the contrary – Legal position explained.

ACC Limited (formerly known as the Associated Cement Company Limited) v. Global Cements Limited

Judgment dated 11.06.2012 passed by the Supreme Court in SLP (C) No. 17689 of 2012, reported in (2012) 7 SCC 71

Held:

Clause 21 of the Agreement indisputably is an arbitration agreement which falls under Section 7 of the Act. The intention of the parties to enter into an arbitration agreement can therefore clearly be gathered from clause 21 of the Agreement. Clause 21 clearly indicates an agreement on the part of the parties to refer the disputes to the named arbitrators in the Agreement.

This Court in *Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719* in a clear exposition of law has laid down the principles to be borne in mind while interpreting an arbitration agreement under Clause 7 of the Act. Existence of an agreement is not in dispute, the question is about its enforceability on the death of the named arbitrators. Facts clearly indicate that the parties in this case have contemplated that if any question or difference or dispute arises between them, in relation to or with respect to the meaning or effect of the contract or with respect to their rights and liabilities, the same would be referred to one of the two named arbitrators named in the arbitration clause. The question is whether Clause 21 would outlive the lives of the named arbitrators.

Section 14 of the Arbitration and Conciliation Act, 1996 provides for the circumstances in which the mandate of the arbitrator is to terminate. It says that the mandate of an arbitrator will end when it becomes impossible for him to perform his functions de facto or de jure or for some other reasons he fails to act without undue delay or withdraws from office or the parties agree to terminate his mandate.

Section 15(2) of the Act provides that where a substitute arbitrator has to be appointed due to termination of the mandate of the previous arbitrator, the appointment must be made according to the rules that were applicable to the appointment of the arbitrator being replaced. No further application for appointment of an independent arbitrator under Section 11 will lie where there

has been compliance with the procedure for appointment of a substitute arbitrator. On appointment of the substitute arbitrator in the same manner as the first, no application for appointment of independent arbitrator under Section 11 could be filed. Of course, the procedure agreed upon by the parties for the appointment of the original arbitrator is equally applicable to the appointment of a substitute arbitrator, even if the agreement does not specifically say so. Reference may be made to the judgment of this Court in ***Yashwitha Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd., (2006) 6 SCC 204.***

Sections 14 and 15 provide the grounds for termination of the mandate of the arbitrator on the ground of incapability of the arbitrator to act or if he withdraws from his office or when the parties agree to the termination of the mandate of the arbitrator. Section 15(2) states that a substitute arbitrator shall be appointed as per the rules that were applicable to the appointment of the arbitrator being replaced. Section 15(2), therefore, has to be given a liberal interpretation so as to apply to all possible circumstances under which the mandate may be terminated.

Section 11(6) would not apply only if it is established that parties had intended not to supply the vacancy occurred due to the inability of the arbitrator to resolve the dispute or due to whatever reasons but that intention should be clearly spelt out from the terms of the arbitration clause in the Agreement.

The legislative policy embodied in Sections 14 and 15 of the Act is to facilitate the parties to resolve the dispute by way of arbitration. The arbitration clause if clearly spells out any prohibition or debarment, the court has to keep its hands off and there is no question of persuading or pressurising the parties to resolve the dispute by a substitute arbitrator. Generally, this stands out as an exception and that should be discernible from the language of the arbitration clause and the intention of the parties. In the absence of such debarment or prohibition of appointment of a substitute arbitrator, the court s duty is to give effect to the policy of law that is to promote efficacy of arbitration.

We are of the view that the time factor mentioned in the arbitration clause "at any time" is a clear indication of the intention of the parties and is used in various statutory provisions as well and the meaning of the same has been interpreted by this Court in various judgments.

We have carefully gone through the arbitration clause in the Agreement dated 16.12.1989 and, in our view, the words "at any time" which appear in Clause 21, is of considerable importance. "At any time" expresses a time when an event takes place expressing a particular state or condition that is when the dispute or difference arises. The arbitration Clause 21 has no nexus with the life time of the named arbitrator. The expression "at any time" used in the arbitration clause has nexus only to the time-frame within which the question or dispute or difference arises between the parties be resolved. Those disputes and differences could be resolved during the life time of the named arbitrators or beyond their life time.

The incident of the death of the named arbitrators has no nexus or linkage with the expression "at any time" used in clause 21 of the Agreement. The time factor mentioned therein is the time within which the question or dispute or difference between the parties exists unless the language of the clause clearly expresses an intention to the contrary.

The question may also arise in a given case that the named arbitrators may refuse to arbitrate disputes; in such a situation also, it is possible for the parties to appoint a substitute arbitrator unless the clause provides to the contrary. Objection can be raised by the parties only if there is a clear prohibition or debarment in resolving the question or dispute or difference between the parties in case of death of the named arbitrator or their non-availability, by a substitute arbitrator.

We are of the view Clause 21 does not prohibit or debar the parties in appointing a substitute arbitrator in place of the named arbitrators and, in the absence of any prohibition or debarment, parties can persuade the court for appointment of an arbitrator under Clause 21 of the agreement.

The High Court in our view was justified in entertaining such an application and appointing a former Judge of this Court as a sole arbitrator under the Arbitration and Conciliation Act, 1996 to adjudicate the dispute and difference between the parties.

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354. CIVIL PROCEDURE CODE, 1908 – Section 9

Jurisdiction of Civil Court – Matrimonial dispute – Matters relating to matrimonial dispute or other matters of that nature are wholly within the cognizance of civil courts – There cannot, therefore, be any jurisdiction in the Masaajid Committee, functioning under the Muslim Personal Law, for deciding such disputes – Counselling and mediation within reasonable limits, are permissible – But in the garb of counselling and mediation, committee is not to take over the functions of a civil court and adjudicate matters relating to matrimonial dispute, including one relating to maintenance.

Mohd. Zahir Khan Koti v. Masaajid Committee, Bhopal & others

Judgment dated 14.08.2012 passed by the High Court of M.P. in W. P. No. 13840 of 2009, reported in ILR (2012) M.P. 2143

Held:

The petitioner has essentially prayed that respondents Masaajid Committee Darul-Qaza Msaajid Committee and Darul Ifta Masaajid Committee all at Bhopal be restrained from passing any order, judgment or "fatwa" in matrimonial disputes between Muslims.

After establishment of the civil courts in India, the jurisdiction to decide matters of civil nature is wholly vested in these courts. It is to that end that section 9 of the Code of Civil Procedure enacts that the civil courts will have jurisdiction to try all

suits of civil nature excepting the suits of which cognizance is expressly or impliedly barred. To oust the jurisdiction of a civil court to decide a suite of civil nature there should be some statutory provision baring taking cognizance of that matter. The matters relating to matrimonial dispute or other matters or other matters of that nature are wholly within the cognizance of civil courts. There cannot, therefore, be any jurisdiction in the Masaajid Committee, Bhopal, Darul-Qaza, Masaajid Committee, Bhopal, and Darul Ifta Masaajid Committee, Bhopal functoning under the Muslim Personal Law for deciding such disputes.

Counselling and mediation within reasonable limits are permissible. But in the garb of counselling and mediation, we direct Masaajid Committee, Bhopal, Darul-Qaza Masaajid Committee, Bhopal not to take over the functions of a civil court and adjudicate matters relating to matrimonial dispute, including one relating to maintenance.

If any party is aggrieved with the decision of Masaajid Committee, Darul-qaza Masaajid Committee and Darul Ifta Masaajid Committee all at Bhiopal pertaining to matrimonial dispute or maintenance, it will be at liberty to challenge the same before the appropriate forum.

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***355. CIVIL PROCEDURE CODE, 1908 – Section 11 Explanation II, Order 1 Rule 10**

***Res judicata*, applicability of – Application to implead as defendant by 'Y' – 'X' has been declared owner of suit property in a title suit against 'Y' and then the suit property was sold by 'X' to 'S' – Afterwards, 'S' filed an eviction suit against tenants of suit property – 'Y' filed an application in the eviction suit under Order 1 Rule 10 of CPC to implead him as defendant, as an appeal of the title suit is pending against 'X', regarding suit property of the eviction suit – Held, the Judgment and decree of the title suit still operate as *res judicata* in the view of Explanation II of S. 11 of CPC and until and unless the said decree is set aside, 'X' cannot be impleaded as necessary party in the eviction suit – Trial court rightly rejected the application. [*Narayana Prabhu Venkateswara Prabhu v. Narayan Prabhu Krishna Prabhu, (1977) 2 SCC 181,* relied on]**

Diwakar Rao Gurjar v. Shobna w/o Ashok Kumar Mishra and others

Judgment dated 16.07.2012 passed by the High Court of M.P. in W.P. No. 12816 of 2011, reported in 2012 (3) MPLJ 652

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***356. CIVIL PROCEDURE CODE, 1908 – Section 47 and Order 21 Rule 32**

Executing Court, power of – Decree for specific performance of contract – Decree-holder was required to pay balance consideration to Judgment-Debtor within specified period and in case of refusal of

the same, it may be deposited in the Court – Money order of the said consideration sent by the decree-holder within time was refused by the Judgment-Debtor – An execution application filed to permit decree-holder to deposit the consideration in the Court – The application rejected on the ground that the consideration was not deposited by the decree holder in the court immediately after the refusal and therefore the decree cannot be accepted.
Held, nowhere in the judgment or decree it is mentioned that on refusal of the same, the consideration should be deposited in the court on the very next day – Executing Court cannot go behind the decree – Order of Executing Court set aside.

Anil Kumar Sahu v. Bhoora s/o Bhagunta Ahirwar and another
Judgment dated 02.07.2012 passed by the High Court of M.P. in W.P. No. 1282 of 2005, reported in 2012 (4) MPLJ 131

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357. CIVIL PROCEDURE CODE, 1908 – Section 149 and Order 7 Rules 11 (b), (c) & (d)
Filing of plaint with deficit court fee – Exercise of powers under Section 149 of CPC – Where the plaint is filed within period of limitation prescribed by law but with deficit court fee and the plaintiff seeks to make good the deficit of court fee beyond the period of limitation, the Court, though has discretion under Section 149 CPC, must scrutinize the explanation offered for the delayed payment of the deficit court fee carefully because exercise of such discretion would certainly have some bearing on the rights and obligations of the defendant.

A. Nawab John and others v. V.N. Subramaniyam
Judgment dated 03.07.2012 passed by the Supreme Court in Civil Appeal No. 4838 of 2012, reported in (2012) 7 SCC 738

Held:

Order 7 Rule 11 CPC requires a plaint to be rejected, inter alia, where the relief claimed is undervalued and/or the plaint is written on a paper insufficiently stamped, and, in either case, the plaintiff fails to either correct the valuation and/or pay the requisite court fee by supplying the stamp paper within the time fixed by the court. Rule 13 categorically declares that the rejection of a plaint shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

However, Section 149 of the Code stipulates as follows:

> "**149. Power to make up deficiency of court fees.-** Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person, by whom such fee is payable,

> to pay the whole or part, as the case may be, of such court fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

It can be seen from the language of Section 149, it does not deal only with court fees payable on a plaint. The said section also deals with every document with respect to which court fee is required to be paid under the appropriate law.

Therefore, from the language of Section 149 CPC it follows that when a plaint is presented to a court without the payment of appropriate court fee payable thereon, undoubtedly the court has the authority to call upon the plaintiff to make payment of the necessary court fee. Such an authority of the Court can be exercised at any stage of the suit. It, therefore, appears to us that any amount of lapse of time does not fetter the authority of the court to direct the payment of such deficit court fee. As a logical corollary, even the plaintiff cannot be said to be barred from paying the deficit court fee because of the lapse of time.

This Court in ***Mannan Lal v. Chhotaka Bibi, (1970) 1 SCC 769*** interpreting Section 149 CPC held:

> "12. The above section therefore mitigates the rigour of Section 4 of the Court Fees Act and it is for the court in its discretion to allow a person who has filed a memorandum of appeal with deficient court fee to make good the deficiency and the making good of such deficiency cures the defect in the memorandum not from the time when it is made but from the time when it was first presented in court.
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> 13. In our view in considering the question as to the maintainability of an appeal when the court fee paid was insufficient to start with but the deficiency is made good later on, the provisions of the Court Fees Act and the Code of Civil Procedure have to be read together to form a harmonious whole and no effect should be made to give precedence to provisions in one over those of the other unless the express words of a statute clearly override those of the other."

It was further held:

> "14. .... there can in our opinion, be no doubt that Section 4 of the Court Fees Act is not the last word on the subject and the Court must consider the provisions of both the Act and the Code to harmonise the two sets of provisions which can only be done by reading Section 149 as a proviso to Section 4 of the Court Fees Act by allowing the deficiency to be made good within a period of time fixed by it. If the deficiency is made good no possible objection can be raised

on the ground of the bar of limitation; the memorandum of appeal must be treated as one filed within the period fixed by the Limitation Act subject to any express provision to the contrary in that Act and the appeal must be treated as pending from the date when the memorandum of appeal was presented in court. In our view it must be treated as pending from the date of presentation not only for the purpose of limitation but also for the purpose of sufficiency as to court fee under Section 149 of the Code."

That leads us to the next question regarding the legal character of Section 149. Is it a provision conferring authority on the court to call upon a plaintiff to make payment of court fee which was found to be due but short-paid on the plaint or is it a provision conferring a right on the plaintiff to make good the deficit court fee at any point of time irrespective of the provisions of the law of limitation and other provisions and principles of law.

We have already noticed that under Order 7 Rule 11, a plaint which has not properly valued the relief claimed therein or is insufficiently stamped, is liable to be rejected. However, under Rule 13, such a rejection by itself does not preclude the plaintiff from presenting a fresh plaint. It naturally follows that in a given case where the plaint is rejected under Order 7 Rule 11 and the plaintiff chooses to present a fresh plaint, necessarily the question arises whether such a fresh plaint is within the period of limitation prescribed for the filing of the suit. If it is to be found by the court that such a suit is barred by limitation, once again it is required to be rejected under Order 7 Rule 11 clause (d). However, Section 149 CPC, as interpreted by this Court in ***Mannan Lal*** (supra), confers power on the court to accept the payment of deficit court fee even beyond the period of limitation prescribed for the filing of a suit, if the plaint is otherwise filed within the period of limitation. Therefore, the rigour of Order 7 Rule 11 CPC is mitigated to some extent by Parliament when it enacted Section 149 CPC. We may not forget that limitation is only a prescription of law; and legislature can always carve out exceptions to the general rules of limitation, such as Section 5 of the Limitation Act which enables the court to condone the delay in preferring the appeals, etc.

This Court on more than one occasion held that the jurisdiction under Section 149 CPC is discretionary in nature. [See ***P.K. Palanishamy v. N. Arumugham, (2009) 9 SCC 173*** and ***Ganapathy Hegde v. Krishnakudva, (2005) 13 SCC 539.***

It is well settled that the judicial discretion is required to be exercised in accordance with the settled principles of law. It must not be exercised in a manner to confer an unfair advantage on one of the parties to the litigation. In a case where the plaint is filed within the period of limitation prescribed by law but with deficit court fee and the plaintiff seeks to make good the deficit of the court fee beyond the period of limitation, the court, though has discretion under Section

149 CPC, must scrutinise the explanation offered for the delayed payment of the deficit court fee carefully because exercise of such discretion would certainly have some bearing on the rights and obligations of the defendants or persons claiming through the defendants. (The case on hand is a classic example of such a situation). It necessarily follows from the above that Section 149 CPC does not confer an absolute right in favour of a plaintiff to pay the court fee as and when it pleases the plaintiff. It only enables a plaintiff to seek the indulgence of the court to permit the payment of court fee at a point of time later than the presentation of the plaint. The exercise of the discretion by the court is conditional upon the satisfaction of the court that the plaintiff offered a legally acceptable explanation for not paying the court fee within the period of limitation.

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***358. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17**

Due diligence – Respondent/Plaintiff filed suit for declaration of sale deed as null and void – Petitioner filed application for amendment of written statement on the ground that it was erroneously left out in written statement – Held, it is incumbent upon the petitioners seeking amendment at post-trial stage to explain the aspect of due diligence – Further, a real controversy test is to be satisfied – Trial Court rightly rejected the application.

J. P. Rewa Cement v. Smt. Krishna & others

Judgment dated 19.06.2012 passed by the High Court of M.P. in W. P. No. 15466 of 2011, Reported in ILR (2012) M.P. S.N. 98

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359. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11, Order 2 Rule 2 and Order 1 Rule 9

(i) What is the relevant consideration to decide an application under Order 7 Rule 11 CPC? Only averments in the plaint are the relevant considerations to decide that application and pleas taken in written statement are wholly irrelevant.

(ii) What is cause of action? It is a bundle of facts which when taken with the law applicable to them, gives the suitor right to relief against the opponent.

(iii) A plea as to the non-joinder of the party cannot be raised for the first time before the Supreme Court if the same was not raised before the Trial Court and has not resulted in failure of justice.

(iv) When is plaint liable to be rejected under Order 7 Rule 11 CPC? A suit for specific performance of agreement to sell was filed against owner and his power of attorney-holder – Agreement between plaintiff and power of attorney-holder filed alongwith plaint but holder is not authorized by owner to entor into an agreement to sell or to execute sale deed – Registered copy of power of attorney or its certified copy also not produced by

plaintiff – Date of agreement not mentioned in the plaint, even plaint does not disclose cause of action, so the plaint is liable to be rejected.

The Church of Christ Charitable Trust & Educational Charitable Society, rep. by its Chairman v. M/s Ponniaman Educational Trust rep. by its Chairperson/Managing Trustee

Judgment dated 30.07.2012 passed by the Supreme Court in Civil Appeal No. 4841 of 2012, reported in AIR 2012 SC 3912

Held:

It is clear that in order to consider Order VII Rule 11, the Court has to look into the averments in the plaint and the same can be exercised by the trial Court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the Court to scrutinize the averments/pleas in the plaint. In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averments. These principles have been reiterated in ***Raptakos Brett & Co. Ltd. v. Ganesh Property, AIR 1998 SC 3085 and Mayar (H.K.) Ltd. and Others v. Owners & Parties, Vessel M.V. Fortune Express and Others AIR 2006 SC 1828.***

We hold that a plea as to the non-joinder of the party cannot be raised for the first time before this Court if the same was not raised before the trial Court and has not resulted in failure of justice. In the case of non-joinder, if the objection is raised for the first time before this Court, the Court can always implead the party on the application wherever necessary. However, in the case on hand, for the disposal of application filed for rejection of the plaint under Order VII Rule 11, 2nd defendant is not a necessary party, hence he need not be impleaded. Accordingly, we reject the said objection of the respondent herein.

While scrutinizing the plaint averments, it is the bounden duty of the trial Court to ascertain the materials for cause of action. The cause of action is a bundle of facts which taken with the law applicable to them gives the plaintiff the right to relief against the defendant. Every fact which is necessary for the plaintiff to prove to enable him to get a decree should be set out in clear terms. It is worthwhile to find out the meaning of the words "cause of action". A cause of action must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue.

In the case on hand, the plaintiff-respondent to get a decree for specific performance has to prove that there is a subsisting agreement in his favour and the second defendant has the necessary authority under the power of attorney. Order VII Rule 14 mandates that the plaintiff has to produce the documents on which the cause of action is based, therefore, he has to produce the power of attorney when the plaint is presented by him and if he is not in possession of the same, he has to state as to in whose possession it is. In the case on hand, only

the Civil Procedure Code. If the Presiding Judge in one of the Court which was executing the decree and under which direction auction was held was not available at the relevant time, could it be said that deposit was not to be made by auction purchaser within the time stipulated under the provisions of Order 21, Rule 85 of Civil Procedure Code.

It is not disputed that auction was held on 8-8-2002. it is clear that twenty fiver percent deposit was to be made on that day. The auction was held for an amount of ₹ 75,000 (seventy five thousand). The remaining amount was to be deposited within fifteen days that is by 23rd August, 2002, so that, the auction could be confirmed. Since this was not done, the objection was raised by the father of the petitioner on 22-10-2002. By that time the deposit was not made. The consequence of non deposit of the amount would be nothing except setting aside the sale. The law in this respect has been considered by the Apex Court in the case of ***Usmansab Hael Sahab vs. R.L. Meharwade and others, AIR 1999 SC 96*** and it has categorically been held that in case there is failure on the part of the auction purchaser to pay the amount of auction sale within fifteen days as required by Order 21, Rule 85 of Civil Procedure Code, the auction sale is liable to be set aside under Order 21, Rule 86 of Civil Procedure Code. It is also held by the Apex Court that in such case there cannot be any direction to compensate the auction purchaser. From the facts as have come on record it is clear that the deposit of auction amount was not made within time. The objection to that effect was raised immediately on 22.10.2002. if the said objection was contested by the decree holder and it was said that the delayed deposit will not completely made the auction as null and void and that matter was contested for a long period, how could it be said that default was not there and auction sale was not to be set aside, What was required to be seen whether there was full compliance of the provisions of the Order 21, Rule 85, Civil Procedure Code or not.

The word which is used in the said prevision makes it clear that the said provision is mandatory in nature as the word "shall" has been used by the legislature. If the decree holder was raising any objection with that respect, it was meaningless. It is not satisfaction of the decree holder but it is the satisfaction of the law and the Court that such an objection is required to be considered. In the given circumstances when it is found that the amount was not deposited, as per the provisions of the Code, the Court below was required to cancel the auction held in favour of the respondent No. 10 and to put the property for re-auction or to accept any other offer extended by the judgment debtor to satisfy the judgment and decree granted by the Court. The another aspect is required to be examined. The Division Bench of this Court. In Writ Appeal No. 1314/2006 has considered the aspect of application of provision of Order 21, Rules 85 and 86 of Civil Procedure Code with respect to the auction held by the DRT. The similar provisions are applicable with respect to confirming the auction sale and interpreting the law laid down by the Apex Court in this respect, the Division Bench of this Court has categorically held that the prescription of deposit of the

balance amount of 75% of the purchase money was mandatory and the consequence of non deposit of such balance amount during the fixed period was in fact violative of the peremptory provision of the Code and thus there was no question of relaxation to be extended to such a defaulter.

It is contended by learned counsel for the respondent No. 10 that merely because the deposit was made at belated stage, of course because of certain pending proceedings on account of filing of objection by the petitioner, it cannot be said that the respondent No. 10 was a defaulter. For the said purposes, reliance is placed in the case of ***Bijoy Singh vs. Raja Kirtyanand Singh and others, AIR 1932 Patna 342*** and in the case of ***Bharat Singh and others vs. Ramprasad, AIR 1934 Allahabad 816***. The facts and circumstances of each case are required to be examined. In the present case it was nowhere pointed out that the amount was ready with the respondent No.10 for deposit, he was ever since willing to deposit the amount in the Court but for some reasons beyond the control of the respondent No.10 the said deposit could not be made within time. On the other hand from the order it appears that since the objection filed by the petitioner was being contested by the decree holder only, the deposit was not made by the respondent No. 10. in such a case if the respondent No. 10 was ready and willing to deposit the amount, he could have obtained sanction from the Court even before other Court where the urgent work of the concerning executing Court was required to be sent, in case of non-availability of the Presiding Officer of the executing Court and the deposit could have been made in the CCD. The deposit was not to be made directly to the bank, on the other hand it was to be deposited in the Court and said amount was to be paid to the bank, the decree holder by the Court, therefore, there was nothing available on record before the Court below to indicate that the procedure laid down under O.21, R. 86 of CPC was not to be resorted to. The said provision is very clear where it is said that if the amount has not been deposited within the time the Court not only can cancel auction sale but can also forfeit the claim to the property or any part of the same and the money paid for said purposes can be deposited with the Government, thus, in the considered opinion of this Court, such a procedure was not rightly followed by the Court below.

In view of the aforesaid, as also in view of the law laid down by the Apex Court in the case of Balram son of ***Bhasa Ram vs. Ilam Singh and others, 1997 (1) MPLJ (S.C.) 314 = AIR 1996 SC 2781***, no escape was available to the Court below except to set aside the auction sale and to take further action for recovery of the decretal amount from the petitioner.

In view of the aforesaid, the order impugned cannot be sustained. The Revision deserves to be and is hereby allowed. The order dated 19.07.2006 is hereby set aside.

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362. CIVIL PROCEDURE CODE, 1908 – Order 22 Rule 9
LIMITATION ACT, 1963 – Section 5
Abatement of suit, setting aside of – Applicant has to take timely steps for bringing the L.Rs. within reasonable period after their respective deaths or to move application for candonation of delay and setting aside the abatement – Not doing the same is sufficient to infer gross negligence and deliberate inaction on the part of the applicant.
Sufficient cause – The phrase 'sufficient cause' as used in Section 5 of Limitation Act and Order 22 Rule 9 of CPC should receive a liberal construction so as to advance substantial justice only when the delay is not on account of any dilatory tactics, want of bonafides, deliberate inaction or negligence on the part of applicant.

Misriya v. Kishandas

Judgment dated 12.01.2012 passed by the High Court of M.P. in First Appeal No. 206 of 1992, reported in 2012 (4) MPLJ 179

Held:

A bare perusal of the records would expose the following features –

(a) A period of more than 11 years has expired after the deaths of respondent nos.1 to 3 and 5 whereas death of respondent no.4 had taken place in the year 2004.

(b) Both the appeals, registered as F.A. Nos.206/92 and 252/92, were dismissed on 29/8/2005 for want of prosecution and F.A. No.252/92 was restored vide order-dated 6/1/2006 passed in MCC No.2518/05 and the other one was restored vide order-dated 28/6/2008 passed in MCC No.2031/05. Both the restoration applications were presented and argued by the present counsel. Although none of the Vakalatnamas bears any date yet, the aforesaid facts clearly suggest that the present counsel were engaged by the appellants somewhere in the year 2005.

(c) In accordance with the prevailing practice, I.A. No.12725/08 appears to have been presented on 7.11.08 only after serving copy thereof on the opposite counsel and the corresponding acknowledgment was made by the present counsel and not by the earlier advocate appointed by the appellants.

(d) On 4/9/2008, observing that none of the parties was represented in F.A. No.206/92, direction was given to issue SPCs to them for final hearing on a date to be fixed by the office and the SPCs issued to respondent nos.2 to 5 were returned unserved on 03.11.2008 with the report that they had expired.

While construing the words 'sufficient cause', Raghubar Dayal J., speaking for a three-Judge Bench in ***Union of India v. Ram Charan AIR 1964 SC 215,*** made the following illuminating observations -

"Of course, the Court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time, need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merits of the dispute between the parties and because if the abatement is set aside, the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance. This, however, does not mean that the Court should readily accept whatever the appellant alleges to explain away his default. It has to scrutinize it and would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for the impleading of the legal representatives of the deceased or for setting aside the abatement. It is true that it is no duty of the appellant to make regular enquiries from time to time about the health or existence of the respondent, but it does not mean that the mere fact of the appellant's coming to know of the respondent's death belatedly will, by itself, justify his application for setting aside the abatement. That is not the law. Rule 9 of O. XXII of the Code requires the plaintiff to prove that he was prevented by any sufficient cause from continuing the suit. The mere allegation about his not coming to know of the death of the opposite party is not sufficient. He had to state reasons which, according to him, led to his not knowing of the death of the defendant within reasonable time and to establish those reasons to the satisfaction of the Court, specially when the correctness of those reasons is challenged by the legal representatives of the deceased who have secured a valuable right on the abatement of the suit.

Adverting to the facts of the case, it is difficult to conceive that the appellants were not in touch with their present advocates from 2008 onwards. If not every week, they were expected to contact their lawyers once in a year. There is nothing on record to indicate as to when the intimation given by learned counsel for the respondents regarding the deaths was communicated to the appellants by their counsel. It is also well settled that ignorance of legal consequence without something more would be not sufficient to condone such a huge delay (***Katari Suryanarayana v. Koppisetti Subba Rao, AIR 2009 SC 2907*** relied on).

Upon conspectus of all the leading decisions on the subject, the Supreme Court, in ***Balwant Singh's case*** (supra), has opined –

> "delay is just one of the ingredients which has to be considered by the Court. In addition to this, the Court must also take into account the conduct of the parties, bona fide reasons for condonation of delay and whether such delay could easily be avoided by the applicant acting with normal

care and caution. The statutory provisions mandate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the legal representatives on record, should be rejected unless sufficient cause is shown for condonation of delay. Thus, it is the requirement of law that these applications cannot be allowed as a matter of right and even in a routine manner".

In that case, the Court quoted with approval the following observations made in ***Ramlal v. Rewa Coalfields Ltd., AIR 1962 SC 361*** -

> "It is however, necessary to emphasize that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration;..."

Reiterating the principle in ***Lanka Venkateswarlu's case*** (supra), which related to delay attributable to inefficiency and ineptitude of Government pleaders, the Supreme Court has observed that -

> "Whilst considering applications for condonation of delay under S.5 of the Limitation Act, the Court do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections cannot and should not form the basis of exercising discretionary powers. The concepts such as "liberal approach", "justice oriented approach", "substantial justice" cannot be employed to jettison the substantial law of limitation. Especially, in cases where the Court concludes that there is no justification for the delay".

The true legal position, therefore, is that the words "sufficient cause" in Section 5 of Limitation Act and Order 22 Rule 9 of the Code should receive a liberal construction so as to advance substantial justice only when the delay is

not on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant.

In ***Balwant Singh's case*** (ibid), the ground raised for condonation of delay of over two years in applying for setting aside the abatement was found not only insufficient but also unbelievable. Similar is the situation here.

Conduct of the appellants in not taking timely steps for bringing the legal representatives of the respondent nos.2 to 5 within a reasonable period after their respective deaths as well as in not bothering to move applications for condonation of delay & for setting aside the abatement is sufficient to infer gross negligence and deliberate inaction on their part.

Thus, viewed from any angle, the explanation given for the delay in filing the applications for setting aside the abatement does not deserve acceptance.

In the result, the applications for condonation of delay as well as the application for setting aside the abatement are hereby dismissed.

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363. COMMISSION FOR PROTECTION OF CHILD RIGHTS ACT, 2005 – Sections 2(b), 13, 14, 15, 25 and 26
CRIMINAL PROCEDURE CODE, 1973 – Section 223
Offences triable by Children's Court – Scope of the Act and procedure, explained.

In Reference v. Vinod

Judgment dated 07.08.2012 passed by the High Court of M.P. in Criminal Reference No. 1 of 2012, reported in 2012 (4) MPHT 492 (DB)

Held :

Observing that the 'Act' is silent on various important points relating to the trial of offences against child as well as the matters relating to violation of child rights, and a lot of confusion has been created as to what cases should be tried by the "Children's Court" and what exact procedure should be adopted in this respect, learned Sessions Judge has referred for our answer to the following questions:

1. First, what should be the meaning of expression 'child' which is not defined in the Act of 2005.
2. Secondly, whether each and every offence irrespective of its gravity and nature in which a child happens to be a complainant or victim either alone or with other persons who are not child has to be tried exclusively by the Children's Court, which is a Court of Sessions.
3. Thirdly, whether, the Children's Court can directly take cognizance in such matters or a committal order is required at the hands of the Magistrate.

4. Fourthly, what is the expense and scope of expressions 'Offence against Child' and 'Violation of Child Right's and what sort of trial or proceedings are required to be carried out in case or 'Violation of Child Rights' which are brought to the notice of the Children's Court.

Since the 'Act' is silent in respect to the meaning of words "child" and "child rights" a reference to preamble may render assistance in deriving the real intention of Legislature.

It is apparent that India being signatory to the United Nations Convention on the Rights of the Child and having adopted the National Charter for Children, 2003, the Parliament enacted the Act. For ascertaining the meaning of expression "Child" we will have to look at the definition of "Child" given under Article 1 of the Convention on the Rights of the Child which India endorsed on 11th December, 1992.

> "**Article 1 (Definition of the child):** The Convention defines a 'child' as a person below the age of 18, unless the laws of a particular country set the legal age for adulthood younger. The Committee on the Rights of the Child, the monitoring body for the Convention, has encouraged States to review the age of majority if it is set below 18 and to increase the level of protection for all children under 18."

In India under the provisions of Indian Majority Act, 1875 as well as in Juvenile Justice (Care and Protection of Children) Act, 2000 the age of 'minor' and 'juvenile' has been prescribed as a person who has not attained the age of 18 years. Apart from it, the Committee of Convention on the rights of child recommends States to review the age of majority if it is set below 18 and to increase the level of protection for all children under 18. In our opinion, the above provisions enacted for describing the age of a child can be taken into consideration to decipher the intention of the Legislature about the age of a child for the purpose of the Act. Therefore, in our opinion, for the purpose of the Act 'child' would be a person who has not attained (completed) the age of 18 years.

The Act in question does not define offences against the children, therefore, it can be assumed that if any offence under the Penal Code or any other law is committed against or in relation to child, it would be offence against the child, but there may be myriads of criminal cases in which a child is affected. Would it not lead to absurdity if all those cases are sent to Sessions Court for trial. In our opinion, that cannot be the intention of Legislature. Only those cases of serious nature in which Government or the authority concerned proceeds for prosecution on the recommendation of Commission can be tried by the specified Sessions Court. Since the normal procedure provided under the Code of Criminal Procedure has not been excluded by the Act, all other cases affecting a child shall proceed in accordance with the procedure provided in the Code.

Next question before us is whether a case in which a victim is child and others are adult/major, can there be a joint trial? In our opinion, this question can be answered on the strength of section 223 of the Code of Criminal Procedure which provides that persons accused of the same offence committed in the course of the same transaction may be charged and tried together. The proceedings of the Code of Criminal Procedure in this regard have not been excluded by the Act. If the prosecution of an offence in which victims are child as well as adult is splitted for trial in two Forums, in our opinion, it would lead to complication and multiplicity. It has not been specifically provided by the Act that the offences against a child or the case of violation of child rights have to be tried separately where in the same incident or transaction, some of the victims are adult. There is no provision, like section 18 of Juvenile Justice (Care and Protection of Children) Act, 2000 where there cannot be a joint proceeding of a juvenile and a person who is not a juvenile, therefore, in our opinion, it cannot be held that there cannot be a joint trial of a case in which child is not the sole victim and some other persons are also victims. Separation of trials, in our opinion, would lead to absurdity since an accused would have to face two trials; one before Specified Court and other before Regular Court, and similarly prosecution witnesses would have to give evidence twice.

Last question before us is whether the Children's Court can directly take cognizance in such matters or a committal order by Magistrate is required? In our opinion, this question is squarely covered by the law laid down by the Apex Court in case of ***Gangula Ashok v. State of A.P.-AIR 2000 SC 740.*** The provisions of section 25 of the Act are ***pari materia*** to the provisions of section 14 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Apex Court in case of ***Gangula Ashok*** (supra) observed:-

> "9. Thus, the Court of Session is specified to conduct a trial and no other Court can conduct the trial of offences under the Act. Why the Parliament provided that only a Court of Session can be specified as a Special Court? Evidently the legislature wanted the Special Court to be Court of Session. Hence the particular Court of Session, even after being specified as a Special Court, would continue to be essentially a Court of Session and designation of it as a Special Court would not denude it of its character or even powers as a Court of Session. The trial in such a Court can be conducted only in the manner provided in Chapter XVIII of the Code which contains a fasciculus of provisions for 'Trial before a Court of Session".
>
> 10. Section 193 of the Code has to be understood in the aforesaid backdrop. The section imposes an interdict on all Courts of Session against taking cognizance of any offence as a Court of original jurisdiction. It can take

cognizance only if "the case has been committed to it by a magistrate", as provided in the Code. Two segments have been indicated in Section 193 as exceptions to the aforesaid interdict. One is, when the Code itself has provided differently in express language regarding taking of cognizance, and the second is when any other law has provided differently in express language regarding taking cognizance of offences under such law. The word "expressly" which is employed in Section 193 denoting to those exceptions is indicative of the legislative mandate that a Court of Session can depart from the interdict contained in the section only if it is provided differently in clear and unambiguous terms. In other words, unless it is positively and specifically provided differently no Court of Session can take cognizance of any offence directly, without the case being committed to it by a Magistrate.

11. Neither in the Code nor in the Act there is any provision whatsoever, not even by implication, that the specified Court of Session (Special Court) can take cognizance of the offence under the Act as a Court of original jurisdiction without the case being committed to it by a magistrate. If that be so, there is no reason to think that the charge- sheet or a complaint can straightway be filed before such Special Court for offences under the Act. It can be discerned from the hierarchical settings of criminal Courts that the Court of Session is given a superior and special status. Hence we think that the legislature would have thoughtfully relieved the Court of Session from the work of performing all the preliminary formalities which Magistrates have to do until the case is committed to the Court of Session.

16. Hence we have no doubt that a Special Court under this Act is essentially a Court of Session and it can take cognizance of the offence when the case is committed to it by the Magistrate in accordance with the provisions of the Code. In other words, a complaint or a charge-sheet cannot straightway be laid before the Special Court under the Act.

In view of the above preposition of law, there is no doubt that the prosecution of the offences against children by way of complaint or a police case has to be initiated before the Court of Magistrate having jurisdiction. The Court of Session specified can take cognizance of the offence under the Act only if it has been committed to it by the Magistrate.

For the reasons given above, we answer the questions referred to us as follows:

(1) The meaning of expression 'Child' for the purpose of the Act would be a person who has not completed 18th year of age.

(2) Each and every offence in which a child happens to be a complainant or victim shall not necessarily be deemed to be an offence triable under the Act unless in respect of it a proceeding for prosecution has been initiated by concerned Government or authority on the recommendation of Commission constituted under the Act. In respect of the prosecution initiated by the complainant or police in the absence of there being recommendation from the Commission, ordinary procedure provided under the Code of Criminal Procedure has to be followed. Even if the complainant or a victim is a child alone or there are other persons who are not child, the case has to be tried exclusively by the Children's Court constituted under section 25 of the Act, if prosecution has been recommended by the Commission.

(3) Children's Court constituted under section 25 of the Act cannot directly take cognizance in such matters. It can take cognizance only if the case has been committed to it by Magistrate as provided in the Code of Criminal Procedure.

(4) Only those kind of cases in respect of which the Commission finds "violation of child rights of a serious nature" or "contravention of provision of any law for the time being in force" and recommends to the concerned Government or authority for initiation of the proceedings for prosecution, shall be deemed to be cognizable and triable by the specified Children's Court constituted under section 25 of the Act. In all other cases, ordinary procedure provided in the Code of Criminal Procedure shall be followed."

Reference is answered accordingly. The matter shall now go back to learned Sessions Judge and Presiding Officer of Children's Court, East-Nimar Khandwa for disposal of cases before him in accordance with law and in the light of the observations made in this order.

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364. CONTRACT ACT, 1872 – Section 72

Recovery of amount paid in excess without fault of recipient party – Any amount paid or received without authority of law can always be recovered barring a few exceptions of extreme hardship but not as a matter of right, in such situation, law implies an obligation on the payee to repay the money otherwise it would amount to unjust enrichment.

Chandi Prasad Uniyal and others v. State of Uttarakhand and others

Judgment dated 17.08.2012 passed by the Supreme Court in Civil Appeal No. 5899 of 2012, reported in (2012) 8 SCC 417

Held:

The question that arises for consideration in this appeal is whether over-payment of amount due to wrong fixation of 5th and 6th pay scale of teachers/ principals based on the 5th Pay Commission Report could be recovered from the recipients who are serving as teachers. The Division Bench of the High Court rejected the writ petition filed by the appellants and took the view that since payments were effected due to a mistake committed by the District Education Officer, the same could be recovered. Aggrieved by the said judgment, this appeal has been preferred.

We are of the considered view, after going through various judgments cited at the Bar, that this Court has not laid down any principle of law that only if there is misrepresentation or fraud on the part of the recipients of the money in getting the excess pay, the amount paid due to irregular/wrong fixation of pay be recovered.

Shyam Babu Verma v. Union of India, (1994) 2 SCC 521 was a three-Judge Bench judgment, in that case the higher pay scale was erroneously paid in the year 1973, the same was sought to be recovered in the year 1984 after a period of eleven years. The Court felt that the sudden deduction of the pay scale from ₹ 330-560 to ₹ 330-480 after several years of implementation of said pay scale had not only affected financially but even the seniority of the petitioners. Under such circumstance, this Court had taken the view that it would not be just and proper to recover any excess amount paid.

In ***Sahib Ram v. State of Haryana, 1995 Supp (1) SCC 18*** a two-Judge Bench of this Court noticed that the appellants therein did not possess the required educational qualification and consequently would not be entitled to the relaxation but having granted the relaxation and having paid the salary on the revised scales, it was ordered that the excess payment should not be recovered applying the principle of equal pay for equal work. In our view, this judgment is inapplicable to the facts of this case. In ***Yogeshwar Prasad v. National Institute of Education Planning and Admn., (2010) 14 SCC 323*** a two-Judge Bench of this Court after referring to the above mentioned judgments took the view that the grant of higher pay could not be recovered unless it was a case of misrepresentation or fraud. On facts, neither misrepresentation nor fraud could be attributed to appellants therein and hence, restrained the recovery of excess amount paid.

We may in this respect refer to the judgment of two-Judge Bench of this Court in ***Col. B.J. Akkara v. Govt. of India, (2006) 11 SCC 709,*** where this Court after referring to ***Shyam Babu Verma case*** (supra), ***Sahib Ram case*** (supra) and few other decisions held as follows:

> "28. Such relief, restraining recovery back of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion, to relieve the employees, from the hardship that will be caused if recovery is implemented. A Government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it genuinely, believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, Courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery."

Later, a three-Judge Bench in ***Syed Abdul Qadir v. State of Bihar, (2009) 3 SCC 475*** after referring to ***Shyam Babu Verma*** (supra) and ***Col. B.J. Akkara*** (supra) restrained the department from recovery of excess amount paid, but held as follows:

> "59. Undoubtedly, the excess amount that has been paid to the appellants - teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. *Learned Counsel appearing on behalf of the appellants-teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellants-teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellants-teachers should be made.*"

We may point out that in *Syed Abdul Qadir case* (supra) such a direction was given keeping in view of the peculiar facts and circumstances of that case since the beneficiaries had either retired or were on the verge of retirement and so as to avoid any hardship to them.

We are not convinced that this Court in various judgments referred to hereinbefore has laid down any proposition of law that only if the State or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered. On the other hand, most of the cases referred to hereinbefore turned on the peculiar facts and circumstances of those cases either because the recipients had retired or on the verge of retirement or were occupying lower posts in the administrative hierarchy.

We are concerned with the excess payment of public money which is often described as "tax payers' money" which belongs neither to the officers who have effected over-payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. Question to be asked is whether excess money has been paid or not may be due to a bona fide mistake. Possibly, effecting excess payment of public money by Government officers, may be due to various reasons like negligence, carelessness, collusion, favouritism etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law.

Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.

We are, therefore, of the considered view that except few instances pointed out in *Syed Abdul Qadir case* (supra) and in *Col. B.J. Akkara case* (supra), the excess payment made due to wrong/irregular pay fixation can always be recovered.

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365. COURT FEES ACT, 1870 – Section 7(vi-a)(a)(b)
CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11

(i) Suit for partition of house – Leviable court fees – Court fees is payable on the basis of market value on the date of presentation of plaint.

(ii) Effect – Application under Order 7 Rule 11, raising objection with regard to valuation, was earlier rejected – Subsequently, issue with regard to valuation of property was framed – On the basis of statement of plaintiff itself issues with regard to valuation

was decided against plaintiff – Held, finding on application under Order 7 Rule 11 is not binding on the Trial Court at the time of passing of final judgment.

Shakuntla Butani (Smt.) v. Smt. Poonam Butani

Judgment dated 03.07.2012 passed by the High Court of M.P. in W. P. No. 3964 of 2011, Reported in ILR (2012) M.P. 2113

Held:

A bare reading of Section 7(vi-a)(b) of the Court Fees Act Makes it crystal clear that it is the date of the presentation of the suit on which the valuation is to be ascertained.

This point is consistently decided by various Courts. In ***Poosa Thorai vs. (O.L.K.K.N.K.E.) Kannappa Chetty and others, AIR 1918 Madras 1099*** it is held as under:-

> "Under S.110 of the Code of Civil Procedure the value of the subject- matter of the suit is the real market value of the property involved; the fact that for the purpose of stamp duty the plaintiff in exercise of the option given to him by the Court fees Act, S.7, valued it as less than its market value cannot deprive him of his right to appeal to the Privy Council:"

In ***Raj Kumar Jain v. Savitri Devi and others, 2010 (1) M.P.H.T. 121 (DB),*** it is held that there is distinction between the market price of a property and sale price of property. In para 5 of the judgment, it is held as under:-

> "5 True it is, for the purpose of registration, the market value should be determined so that the loss of revenue is not suffered by the State. Assuming in a case, a person who is in immediate need of sum of ₹ 2 crores may sell his property worth ₹ 5 crores for the said amount of ₹ 2 crores. Sale price would be two crores but for the purpose of registration, the value of the document would be 5 crores being the market value. Determination of the market value would depend upon the market condition and guideline but the sale price would be determined on the basis of the mutual consent and the agreement of the parties."

In ***Narayanprasad v. Jagdish and others, 2011 (II) MPWN 66*** (in toto), this Court held that the suit has to be valued according to one-half of the value of the plaintiff's share of the property and on the basis of its market value. The same view was taken in ***Ram Narayan v. Harinarayan, 1975 LJL (SN) 25*** (page 19).

When application under Order 7 Rule 11 C.P.C. was decided, the plaintiff's own statement was not recorded. Thus, on the basis of material available before the Court below, at the relevant point of time, the Court below was not in a position to hold that the suit is not tenable, therefore, Order 7 Rule 11 application was rejected. However, the Court below framed issues including the objection

of valuation, which has an impact on the pecuniary jurisdiction of the Court below. The trial Court was equipped with the statement of plaintiff at the time of passing judgment and found that the valuation is improper and accordingly, answered issue No. 3 and 5. Accordingly, it is held that it did not have any pecuniary jurisdiction.

In my considered opinion, the findings given at the time of decision of application under Order 7 Rule 11 C.P.C. have no binding impact on the merits of the case at the time of judgment.

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366. CRIMINAL PROCEDURE CODE, 1973 – Section 154

F.I.R. – Whether the wireless message sent soon after the incident is the real F.I.R.? – Wireless message cryptic and did not sufficiently disclose the nature of offence committed much less the identity of the persons who committed the offence – Such cryptic information cannot be treated to be a first information report – Legal position explained.

Anand Mohan v. State of Bihar

Judgment dated 10.07.2012 passed by the Supreme Court in Criminal Appeal No. 1804 of 2009, reported in (2012) 7 SCC 225

Held:

The first question that we have to decide is whether the wireless message sent soon after the incident on 5.12.1994 is the real FIR as contended on behalf of the defence or whether the typed report subsequently lodged by PW 14 in Muzaffarpur Sadar Police Station is the FIR as contended on behalf of the prosecution.

Sub-section (1) of Section 154 CrPC which provides for the first information report is quoted herein below:

> "**Information in cognizable cases.** – (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf."

It will be clear from the language of sub-section (1) of Section 154 CrPC that every information relating to the commission of a cognizable offence whether given in writing or reduced to writing shall be signed by the person giving it. Hence, the person who gives the information and who has to sign the information has to choose which particular information relating to the commission of cognizable offence is to be treated as an FIR.

In the present case. PW 14, the information has chosen not to treat the wireless message but the subsequent typed information as the FIR and the police has also not treated the wireless message sent soon after the incident on 5-12-1994 stated only that the people mixed with the crowd of funeral procession for the cremation of Chottan Shukla have injured the deceased by shooting him with revolver and have fled towards Hajipur by different vehicles. This wireless message was cryptic and did not sufficiently disclose the nature of the offence committed much less the identity of the persons who committed the offence. Unless and until more information was collected on how exactly the deceased was killed, it was not mandatory for either PW 14 to lodge the same as FIR or for the officer in charge of a police station to treat the same as an FIR. Such cryptic information has been held by this court not to be FIR in some cases.

In *Sk. Ishaque v. State of Bihar, (1995) 3 SCC 392* Gulabi Paswan, gave a cryptic information at the Police station to the effect that there was a commotion at the village as firing and brickbatting was going on and this Court held that this cryptic information did not even disclose the commission of a cognizable offence nor did it disclose who were the assailants and such a cryptic statement of Gulabi Paswan cannot be treated to be an FIR within the meaning of Section 154 CrPC.

Similarly, in *Binay Kumar Singh v. State of Bihar, (1997) 1 SCC 283* information was furnished to the police in Ext. 10/3 by Rabindra Bhagat that the sons of late Ram Niranjan Sharma along with large number of persons in his village had set fire to the houses and of straws and had also resorted to firing. This Court held that Ext. 10/3 is evidently a cryptic information and is hardly sufficient to discern the commission of any cognizable offence therefrom.

In our considered opinion, therefore, the trial court and the High Court have rightly treated the subsequent typed written information lodged by PW 14 and not the wireless message as the FIR.

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367. CRIMINAL PROCEDURE CODE, 1973 – Sections 190 and 195
INDIAN PENAL CODE, 1860 – Section 188

(i) Powers of Magistrate – Issuance of process – Once a process is issued against some accused, on the next date, Magistrate can issue process to some other person against whom there is some material on record, but his name is not included as accused in the charge–sheet.

(ii) Cognizance – Cognizance can only be taken on the complaint in writing of the Additional Chief Secretary to State Government or of some other public servant to whom he is administratively subordinate – Complaint does not include police report.

Ajay Singh v. State of M.P.

Judgment dated 17.07.2012 passed by the High Court of M.P. in M.Cr.C. No. 5741of 2012, reported in ILR (2012) M.P. 2310

Held:

When a charge sheet is submitted before the Magistrate, he my either accept the investigation report as it is and take cognizance of the offence mentioned and issue process against the person arraigned as accused, or may disagree with the report and take cognizance of any offence under Section 190 (1)(b) of the Code, irrespective of whether it is triable by Court of Session or not, against any person not named therein and for this, he can take into account the statements of the witnesses examined and material Collected by the police during the investigation. This view stands fortified by the under-mentioned observations made by the Supreme Court in ***Rajinder Prasad v. Bashir, AIR 2001 SC 3524*** which, in turn, were based on the ratio of a three-Judge Bench decision in ***Raghubans Dubey v. State of Bihar, AIR 1967 SC 1167*** -

> "Under this section, a Magistrate has jurisdiction to take cognizance of offences against such persons also who have not been arrested by the police as accused- persons, if it appears from the evidence collected by the police that they were prima facie guilty of offence alleged to have been committed. Section 209 of the Code prescribes that when in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session he shall commit, after compliance with the provisions of S.207 or S.209, as the case may be the case to the Court of Session and subject to the provisions of the Code, pass appropriate orders. This section refers back to S.190, as is evident from the words "instituted on a police report" used in S.190(1)(b) of the Code. While dealing with the scope of S.190 this Court in ***Raghubans Dubey v. State of Bihar (1967) 2 SCR 423*** held that the cognizance taken by the magistrate was of the offence and not of the offenders. Having taken cognizance of the offence, a Magistrate can find out who the real offenders were and if he comes to the conclusion that apart from the persons sent by the police some other persons were also involved, it is his duty to proceed against those persons as well."

Further, there is no such bar under S. 190 that once the process is issued against some accused, on the next date, the Magistrate cannot issue process to some other person against whom there is some material on record, but his name is not included as accused in the charge-sheet (***SWIL Ltd. M/s v. State of Delhi AIR 2001 SC 2747*** referred to).

Thus, viewed from any angle, it is not possible to say that the order taking cognizance of the offences against the petitioner was one without jurisdiction. However, it was apparently perverse and not based on any material on record. Reasons for this conclusion may be set out as under-

(i) By virtue of the provisions of Section 195 (1)(a)(i) of the Code, cognizance of the offence under Section 188 of the IPC could be taken only on the complaint in writing of the Additional Chief Secretary to State Government in Department of Panchayat and Rural Development, who had issued the circular-dated 21.8.2007 (supra), whereunder the petitioner as CEO was made responsible for maintaining the records and receive utilization certificates – or of some other public servant to whom he is administratively subordinate [See. ***State of U.P. v. Mata Bhikh (1994) 4 SCC 95***] and 'complaint' as defined under Section 2(d) of the Code does not include a police report.

(ii) Section 119 of the IPC contemplates concealment of a design by a public servant other than accused to commit the offence charged and such an concealment must be intentional or at least with the knowledge that it will facilitate the commission of an offence, which is his duty as such public servant to prevent. However, the facts constituting the offence under Section 119 were neither stated in the charge sheet not there was any foundation for the charge. On the contrary, it was at the instance of the petitioner that the prosecution of Sarpanch and Secretary for the offences of cheating, forgery and criminal breach of trust was launched. Further, a mere omission or negligence would not constitute abetment.

(iii) As observed in ***Raj Kishore Prasad's case*** (supra), it is the Court of Sessions only that can exercise jurisdiction, under Section 319 of the Code, to add a new accused on the basis of evidence recorded in a case exclusively triable by it.

For these reasons, the case against the petitioner falls within category (1) and (6) of the cases, as enumerated by the Apex Court in ***State of Haryana v. Bhajan Lal AIR 1992 SC 604,*** attracting interference under inherent powers.

The petition is, accordingly, allowed and the order-dated 29.11.11 (supra) and the consequent proceedings as against the petitioner are hereby quashed.

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368. CRIMINAL PROCEDURE CODE, 1973 – Sections 190 and 198
INDIAN PENAL CODE, 1860 – Sections 494 and 498-A
Cognizance of offences u/s 494 and 498-A IPC on police report – Held, Court can take cognizance for offences both u/s 494 as well as 498-A IPC even on police report.

Ushaben v. Kishorbhai Chunilal Talpada and others
Judgment dated 23.03.2012 passed by the Supreme Court in Criminal Appeal No. 562 of 2012, reported in (2012) 6 SCC 353

Held:

The appellant is the original complainant. Respondents 1 to 9 are original accused 1 to 9 respectively. Respondent 2 is the husband of the appellant, respondent 8 is the second wife of respondent 2 and respondents 1, 3 to 7 and 9 are family members of respondent 2 or respondent 8.

Respondents 1 to 9 moved an application before the Gujarat High Court under Section 482 of the Code, contending inter alia, that cognizance of offence under Section 494 IPC can be taken only on the complaint made by an aggrieved person and inasmuch as in this case the complaint is not made by the aggrieved person, the police could not have taken cognizance of offence under Section 494 IPC.

Section 494 IPC falls in Chapter XX IPC. Chapter XX pertains to offences relating to marriage. So far as it is relevant, Section 494 reads as under:

> "494. ***Marrying again during lifetime of husband or wife.*** – c Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

Section 190 of the Code states when cognizance of offence can be taken by a Magistrate. It reads as under:

> "**190.** *Cognizance of offences by a Magistrate.* – (1) Subject to the provisions of this Chapter, any Magistrate of the First Class, and any Magistrate of the Second Class specially empowered in this behalf under sub-section (2), may take cognizance of any offence –
>
> (a) upon receiving a complaint of facts which constitute such offence;
>
> (b) upon a police report of such facts;
>
> (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed
>
> (2) The Chief Judicial Magistrate may empower any Magistrate of the Second Class to take cognizance under sub-sectiaaon (1) of such offences as are within his competence to inquire into or try."

Section 198 of the Code pertains to prosecution for offences against marriage. Sub-section (1) thereof is relevant. It reads as under:

> "**198**. *Prosecution for offences against marriage.*– (1) No court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence:"
>
> Section 198 (1) (c) of the Code reads as under:
>
> "198 (1) (c) Where the person aggrieved by an offence punishable under Section 494 or Section 495 of the Indian Penal Code (45 of 1860) is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister, or, with the leave of the court, by any other person related to her by blood, marriage or adoption."

The above provisions indicate that whereas Section 190 (1) empowers the Magistrate to take cognizance of any offence, upon receiving complaint of facts which constitute such offence; upon police report of such facts; upon information received from any person other than a police officer or upon his knowledge that such offence has been committed, Section 198 which relates to prosecution of offences against marriage brings in the concept of complaint by an aggrieved person and Section 198 (1) (c) explains how far the scope of the term "aggrieved person" can be extended in the context of offence under Section 494 IPC.

We must now turn to Section 198-A of the Code. It reads thus:

> "**198-A**. *Prosecution of offences under Section 498-A of the Indian Penal Code.* – No court shall take cognizance of an offence punishable under Section 498-A of the Indian Penal Code (45 of 1860) except upon a police report of facts which constitute such offence or upon a complaint made by the person aggrieved by the offence or by her father, mother, brother, sister or by her father's or mother's brother or sister or, with the leave of the court, by any other person related to her by blood, marriage or adoption."

A conjoint reading of the above provisions makes it clear that a complaint under Section 494 IPC must be made by the aggrieved person. Section 498-A does not fall in Chapter XX IPC. It falls in Chapter XX-A. Section 198-A which we have quoted hereinabove, permits a court to take cognizance of offence punishable under Section 498-A upon a police report of facts which constitute offence. It must be borne in mind that all these provisions relate to cognizance of the offence by the Court.

"Complaint" is defined under Section 2 (d) of the Code. The definition reads as under:

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

Explanation. – A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be a complainant;"

Explanation to Section 2 (d) makes it clear that a report made by a police officer after investigation of a non-cognizable offence is to be treated as a complaint and the officer by whom such a report is made is to be deemed to be the complainant.

The above provisions, lead us to conclude that if a complaint contains allegations about commission of offence under Section 498-A of the IPC which is a cognizable offence, apart from allegations about the commission of offence under Section 494 of the IPC, the court can take cognizance thereof even on a police report.

The upshot of the above discussion is that no fetters can be put on the police preventing them from investigating the complaint which alleges offence under Section 498-A IPC and also offence under Section 494 IPC. In the circumstances, the appeal must succeed. The impugned order is set aside. Obviously, therefore, the direction to delete Section 494 IPC is set aside. The police shall investigate the complaint in accordance with law.

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369. CRIMINAL PROCEDURE CODE, 1973 – Section 235 (2)

Hearing accused on the question of sentence – Duty of Court – The Court, for awarding a proper sentence has a duty and obligation to elicit relevant facts from accused or prosecution, even if the accused has kept silent.

Ajay Pandit alias Jagdish Dayabhai Patel & Anr. v. State of Maharashtra

Judgment dated 17.07.2012 passed by the Supreme Court in Criminal Appeal No. 864 of 2006, reported in AIR 2012 SC 3422

Held:

The principles laid down in ***Santa Singh v. State of Punjab, AIR 1976 SC 2386, Dagdu & Ors v. State of Maharashtra, AIR 1977 SC 1579, Bachan Singh v. State of Punjab, AIR 1980 SC 898, Muniappan v. State of Tamil Nadu, AIR 1981 SC 1220, Allauddin Mian & Or v. State of Bihar, AIR 1989 SC 1456, Malkiat Singh v. State of Punjab, (1991) 4 SCC 341 and Rajesh Kumar v. State through Government of NCT of Delhi, AIR 2011 SC (Cri) 2268*** judgments squarely applies on the question of awarding of sentence and we find from the records that the High

Court has only mechanically recorded what the accused has said and no attempt has been made to elicit any information or particulars from the accused or the prosecution which are relevant for awarding a proper sentence. The accused, of course, was informed by the Court of the nature of the show-cause-notice. What was the nature of show cause notice? The nature of the show-cause-notice was whether the life sentence awarded by the trial court be not enhanced to death penalty. No genuine effort has been made by the Court to elicit any information either from the accused or the prosecution as to whether any circumstance exists which might influence the Court to avoid and not to award death sentence. Awarding death sentence is an exception, not the rule, and only in rarest of rare cases, the Court could award death sentence. The state of mind of a person awaiting death sentence and the state of mind of a person who has been awarded life sentence may not be the same mentally and psychologically. The court has got a duty and obligation to elicit relevant facts even if the accused has kept totally silent in such situations. In the instant case, the High Court has not addressed the issue in the correct perspective bearing in mind those relevant factors, while questioning the accused and, therefore, committed a gross error of procedure in not properly assimilating and understanding the purpose and object behind Section 235(2) Cr.P.C.

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***370. CRIMINAL PROCEDURE CODE, 1973 – Section 257**
NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 147
Withdrawal of complaint – Application for withdrawal filed instead of application for compromise – The application was filed at the stage of defence with a view to circumventing the guidelines laid down by the Supreme Court in *Damodar S. Prabhu v. Sayed Babalal H., AIR 2010 SC 1907* – Held, application was rightly rejected by the trial Court.

Raghunath Singh Patel v. Chandra Pal Singh Parihar
Judgment dated 07.08.2012 passed by the High Court of M.P. in Misc. Cri. Case No. 7489 of 2012, reported in 2012 (4) MPHT 505

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371. Mohammed Ajmal Mohammed Amir Kasab @ Abu Mujahid v. State of Maharashtra
Judgment dated 29.8.2012 passed by the Supreme Court in Criminal Appeal No. 1899 of 2011, reported in (2012) 9 SCC 1.

Q. At what stage of criminal proceeding right to access to legal aid, to consult and to be defended by a legal practitioner arises ?

Ans. The right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a Magistrate. (para 474)

Q. What is the duty and obligation of the Magistrate in this regard ?

Ans. It is the duty and obligation of the Magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. (para 474)

Q. Whether this right can be taken away in serious offences ?

Ans. No. The said right given to the indigent and underprivileged people of this country by the Supreme Court 31 years ago can not be taken away even when court deal with one terrorist. (para 473)

The right flows from Articles 21 and 22 (1) of the Constitution and needs to be strictly enforced. All the Magistrates in the country are directed to faithfully discharge the aforesaid duty and obligation. It is further made clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the Magistrate concerned liable to departmental proceedings.(para 474)

Q. Whether it extends to sanctioning or permitting the presence of a lawyer during interrogation ?

Ans. No. The right to consult and be defended by a legal practitioner is not to be construed as sanctioning or permitting the presence of a lawyer during police interrogation. According to our system of law, the role of a lawyer is mainly focused on court proceedings. The accused would need a lawyer to resist remand to police or judicial custody and for granting of bail; to clearly explain to him the legal consequences in case he intended to make a confessional statement in terms of Section 164 CrPC; to represent him when the court examines the charge-sheet submitted by the police and decides upon the future course of proceedings and at the statge of the framing of charges; and beyond that, of course, for the trial.(para 475)

Q. Whether it is necessary that accused should ask to exercise that right?

Ans. No. Even if the accused does not ask for a lawyer or he remains silent, it is the constitutional duty of the court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute. (para 477)

Q. What would be the legal consequences of failure to provide legal aid to an accused ?

Ans. Failure at trial stage(at the commencement of trial) – The failure to provide so, would vitiate the trail and the resultant conviction and sentence, if any, given to the accused. (para 477)

Failure at pre-trial stage-

The failure to provide a lawyer to the accused at the pre-trial stage may not have the same consequence of vitiating the trial. It may have other consequences like making the delinquent Magistrate liable to disciplinary proceedings, or giving the accused a right to claim compensation against the State for failing to provide him legal aid. But it would not vitiate the trial unless it is shown that failure to provide legal assistance at the pre-trial stage had resulted in some material prejudice to the accused in the course of the trial. That would have to be judged on the facts of each case. (para 478)

Q. Whether request for plea of guilt can be entertained when the stage of Section 229 CrPC was already over and sufficient number of witnesses had been examined ?

Ans. Yes. Accused may be allowed to make a statement. His plea of guilt may be recorded after giving him due caution.(para 512)

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372. CRIMINAL PROCEDURE CODE, 1973 – Section 353

Judgment – Accused were facing trial and were not on bail – Sessions Judge heard the final arguments and fixed the case for delivery of judgment – No judgment was passed or was found on record, but an unsigned order-sheet was written that the accused persons have been acquitted and their release warrant be prepared – Release warrant was signed by Sessions Judge – Held, criminal Court of original jurisdiction cannot pronounce the operative part of the judgment and thereafter, proceed to write the judgment – Presiding Officer is required to deliver either the whole of the judgment or has to deliver in Court by writing or dictating the judgment or a previously written judgment can be pronounced by reading out the whole or operative part of judgment – Sessions Judge committed manifest illegality by acting in violation of mandate of Sections 353 and 354 of Cr.P.C. – Signing of release warrant in absence of any judgment of acquittal had led to miscarriage of justice – Release warrants quashed – Sessions Judge directed to comply with the provisions of Sections 353 and 354 of Cr. P.C.

In Reference

Judgment dated 12.07.2012 passed by the High Court of M.P. in Cr. R. No. 485 of 2012, Reported in ILR (2012) M.P. 2280

Held:

Having gone through the record of the sessions trial, I find that on 11.04.2012 final arguments of the case were heard by the learned Sessions Judge and the case was fixed for 19.04.2012 for pronouncement of the judgment. On 19.04.2012, an order sheet has been recorded mentioning therein that the

judgment of acquittal of Rahul and Pintu @ Model has been written separately and pronounced in the open Court which has been signed and dated. It has been signed and dated. It has been further recorded in the said order sheet dated 19.04.2012 that the accused persons are in Jail and as such, an endorsement be made in the warrant that they have been acquitted in this sessions trial and they be released, if not required in any other case. However, no such written judgment was found in the record and even the order sheet dated 19.04.2012 is found to be unsigned. The record also shows that the release warrants were issued, which were signed by the Sessions Judge.

On the basis of the statements of the Reader, the Stenographers, the report of the District Judge (I & V) and from the explanation offered by the said Session Judge, it is very clear that the Sessions Judge has issued the release warrants of the accused persons without writing a judgment of acquittal.

Sections 353 and 354 of the Code of Criminal Procedure, 1973 deal about 'judgment', its "language and contents". Section 353 provides that the judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced in open Court by the Presiding Officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders. It further provides that the judgment shall be pronounced by delivering the whole of the judgment or by reading out the operative part of the judgment and explaining the substance of the judgment in a language, which is understood by the accursed or his pleader. There are further requirements which need to be complied with as provided under sub-clause (2) to (8) of Section 353.

Section 354 provides that except as otherwise expressly provided by the Code of Criminal Procedure, ever judgment referred to in Section 353 shall be written in the language of the Court; shall contain the point or points for determination; the decision thereon and the reasons for the decision; shall specify the offence (if any) of which and the section of the Indian Penal Code or other law under which the accused is convicted and the punishment to which he is sentenced; and if it be a judgment of acquittal, shall state the offence of which the accused is acquitted and direct that he be set at liberty. Sub-Sections (2) to (6) of Section 354 provide further requirements regarding the contents of the judgment.

The order-sheets of the sessions case, referred to above shows the learned Sessions Judge heard the final arguments on 11.04.2012 and then fixed the case for pronouncement of the judgment on 19.04.2012. Thereafter, on 19.04.2012 no written judgment was passed and on the basis of some oral order of acquittal the accused persons were released on the basis of release warrants signed by the Sessions Judge.

Having considered the aforesaid order-sheets and the legal requirement of 'judgment' and "the language and contents of the judgment" as provided under Sections 353 and 354 of the Code of Criminal Procedure, it is clear that the Criminal Court of original jurisdiction cannot pronounce the operative part

of the judgment and thereafter to proceed to write the judgement. The Presiding Officer is required to deliver either the whole of the judgment or has to deliver in the Court by writing or dictating the judgment or a previously written judgment can be pronounced by reading out the whole judgment or reading out the operative part of the judgment and thereafter to sign the every page of the judgment giving date of pronouncement. The judgment is required to contain the point or points of determination, decision thereon and reasons for the decision. [See *Udai Narayan v. State of UP & others, 2000 Cr. L.J. 544 = 1999 ILR 140* (Allahabad Series)].

Thus, in may considered view, the learned Sessions Judge has committed a manifest illegality by acting in violation of the mandate of Sections 353 and 354 of the Code of Criminal Procedure. Signing the release warrants in the absence of any judgment of acquittal and consequent release of the accused persons has led to miscarriage of justice.

In the circumstances to prevent abuse of the process of law, the revision petition deserves to be is hereby allowed. The aforesaid oral pronouncement of judgment of acquittal, as recorded in the unsigned order sheet dated 19.04.2012 and the release warrants issued by the Sessions Judge, deserves to be and are hereby quashed.

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373. CRIMINAL PROCEDURE CODE, 1973 – Sections 366, 368 and 433-A Commutation of death sentence to specified minimum term of imprisonment – When the Court has come to the conclusion that the case was not "rarest of the rare cases" warranting death penalty, but a sentence of 14 years or 20 years as referred to the guidelines laid down by the States would be totally inadequate and then in such cases, specified minimum term of imprisonment may be awarded. Life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years, rather it always means the whole natural life – Legal position reiterated.

State of Uttar Pradesh v. Sanjay Kumar

Judgment dated 21.08.2012 passed by the Supreme Court in SLP (Crl.) No. 6467 of 2012, reported in (2012) 8 SCC 537

Held:

It has been submitted at the Bar that this Court has given different terms as minimum sentence to be served by convicts and, thus, the Court failed to ensure consistency in sentence and in laying down an effective and elaborate sentencing policy.

In *Neel Kumar @ Anil Kumar v. State of Haryana, (2012) 5 SCC 766* and *Sandeep v. State of U.P. (2012) 6 SCC 107* while commuting the awarded death sentence into a sentence of life imprisonment, it has been directed by this Court

that convicts therein must serve a minimum of 30 years in jail without remissions before the consideration of their respective cases for premature release.

It has been further submitted that the aforesaid judgments reveal that there is no definite yardstick for the purpose of sentencing and that it varies from court to court to award the term of sentence. If the court awards a sentence of a particular term, subject to the clemency power of the sovereign or subject to premature release under Section 433-A Cr.P.C., then the period of sentence so fixed by the court remains meaningless.

Questions arise as to whether the direction of the court, that the convict has to serve a particular period of sentence before his case for premature release is considered, infringes upon the clemency or other statutory powers of the executive; whether such an order can be said to have been passed under Article 142 of the Constitution; and whether the court can issue such direction in exercise of the power vested in it under Article 142 of the Constitution. Whether this kind of sentence awarded by the court, if made subject to the clemency power and other statutory powers could be held merely to be a recommendation, as a result of which, while exercising such a power, the executive may bear in mind the opinion expressed by the court and take a decision, accordingly.

Undoubtedly, a comprehensive sentencing policy is required to be laid down by the Court, however, the same would be a Herculean task as it is impossible to foresee all possible circumstances which may take place in the future.

Sentencing Policy is a way to guide judicial discretion in accomplishing particular sentencing. Generally, two criteria, that is, the seriousness of the crime and the criminal history of the accused, are used to prescribe punishment. By introducing more uniformity and consistency into the sentencing process, the objective of the policy, is to make it easier to predict sentencing outcomes.

Sentencing policies are needed to address concerns in relation to unfettered judicial discretion and lack of uniform and equal treatment of similarly situated convicts. The principle of proportionality, as followed in various judgments of this Court, prescribes that, the punishments should reflect the gravity of the offence and also the criminal background of the convict. Thus the graver the offence and the longer the criminal record, the more severe is the punishment to be awarded. By laying emphasis on individualised justice, and shaping the result of the crime to the circumstances of the offender and the needs of the victim and community, restorative justice eschews uniformity of sentencing.

Undue sympathy to impose inadequate sentence would do more harm to the public system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats.

Ultimately, it becomes the duty of the Courts to award proper sentence, having regard to the nature of the offence and the manner in which it was executed or committed etc. The Courts should impose a punishment befitting the crime so that the Courts are able to accurately reflect public abhorrence of

the crime. It is the nature and gravity of the crime, and not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. Imposition of sentence without considering its effect on social order in many cases may be in reality, a futile exercise.

The survival of an orderly society demands the extinction of the life of a person who is proved to be a menace to social order and security. Thus, the Courts for the purpose of deciding just and appropriate sentence to be awarded for an offence, have to delicately balance the aggravating and mitigating factors and circumstances in which a crime has been committed, in a dispassionate manner. In the absence of any foolproof formula which may provide a basis for reasonable criteria to correctly assess various circumstances germane for the consideration of gravity of crime, discretionary judgment, in relation to the facts of each case, is the only way in which such judgment may be equitably distinguished. The Court has primarily dissected the principles into two different compartments - one being, the "aggravating circumstances" and the other being, the 'mitigating circumstance'. To balance the two is the primary duty of the Court.

The principle of proportionality between the crime and the punishment is the principle of "just deserts" that serves as the foundation of every criminal sentence that is justifiable. In other words, the "doctrine of proportionality" has valuable application to the sentencing policy under Indian criminal jurisprudence. While determining the quantum of punishment the court always records sufficient reasons. (Vide: ***Sevaka Perumal etc. v. State of Tamil Nadu AIR 1991 SC 1463; Ravji v. State of Rajasthan, AIR 1996 SC 787; State of Madhya Pradesh v. Ghanshyam Singh AIR 2003 SC 3191; Dhananjay Chatterjee alias Dhana v. State of W.B. AIR 2004 SC 3454; Rajendra Pralhadrao Wasnik v. State of Maharashtra, AIR 2012 SC 1377;*** and ***Brajendra Singh v. State of Madhya Pradesh, AIR 2012 SC 1552***).

In view of the above, we reach the inescapable conclusion that the submissions advanced by learned counsel for the State are unfounded. The aforesaid judgments make it crystal clear that this Court has merely found out the via media, where considering the facts and circumstances of a particular case, by way of which it has come to the conclusion that it was not the "rarest of rare cases", warranting death penalty, but a sentence of 14 years or 20 years, as referred to in the guidelines laid down by the States would be totally inadequate. Life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years, rather it always meant as the whole natural life. This Court has always clarified that the punishment so awarded would be subject to any order passed in exercise of the clemency powers of the President of India or Governor of State, as the case may be. Pardons, reprieves and remissions are granted in exercise of prerogative power. There is no scope of judicial review of such orders except on very limited grounds for example non-application of mind while passing the order; non-consideration of relevant material; or if the order suffers from

arbitrariness. The power to grant pardons and to commute sentences is coupled with a duty to exercise the same fairly and reasonably. Administration of justice cannot be perverted by executive or political pressure. Of course, adoption of uniform standards may not be possible while exercising the power of pardon. Thus, such orders do not interfere with the sovereign power of the State. More so, not being in contravention of any statutory or constitutional provision, the orders, even if treated to have been passed under Article 142 of the Constitution do not deserve to be labelled as unwarranted. The aforesaid orders have been passed considering the gravity of the offences in those cases that the accused would not be entitled to be considered for premature release under the guidelines issued for that purpose i.e. under Jail Manual etc. or even under Section 433-A Cr.P.C.

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374. CRIMINAL PROCEDURE CODE, 1973 – Sections 374 and 386

Extension of benefit of acquittal to non–appealing accused – Appellants succeeded in appeal and acquitted, same role had been assigned to non-appealing accused – If entire prosecution case has been found to be unreliable and prosecution as a whole has not been able to prove its case beyond reasonable doubt, then benefit should be extended to all accused including non-appealing accused.

Sahadevan and another v. State of Tamil Nadu

Judgment dated 8.05.2012 passed by the Supreme Court in Criminal Appeal No. 1405 of 2008, reported in (2012) 6 SCC 403

Held:

The question for consideration of the Court is as to what order, if any, is required to be made against the non-appealing accused, i.e., Accused No.1, Chandran. From the prosecution evidence, it is clear that some role had been specifically assigned to the accused Chandran. He is the brother-in-law of the deceased and is stated to have been last seen taking the deceased on the moped where after the deceased never returned. In normal circumstances, the obvious result would be to leave the non-appealing accused to undergo the punishment awarded to him in accordance with law. But, where the Court finds that the entire case of the prosecution suffers from material contradictions, the most crucial evidence is not reliable, there are definite and material flaws in the case of the prosecution and the Police has failed to discharge its duties at different steps, in that event, it will be difficult for this Court to leave the non-appealing accused to his fate.

Under the Indian criminal jurisprudence, an accused is presumed to be innocent until proven guilty and his liberty can be curtailed by putting him under imprisonment by due process of law only. If the entire case of the prosecution has been found to be unreliable and the prosecution, as a whole, has not been able to prove its case beyond reasonable doubt, then the benefit should accrue to all the accused persons and not merely to the accused who have preferred an appeal against the judgment of conviction.

In ***Raja Ram v. State of Madhya Pradesh, (1994) 2 SCC 568,*** this Court extended the benefit of conversion of sentence to all the accused, from that under Section 302 IPC to one under Section 304 IPC, including the non-appealing accused. The Court held that in its opinion, the case of the non-appealing accused was not really distinguisbable from other accused persons and it was appropriate that benefit of the judgment should also be extended to the non-appealing accused, Ram Sahai, in that case.

Again, in ***Bijoy Singh v. State of Bihar, (2002) 9 SCC 147***, this Court clearly stated the principle that:

> "it has set up a judicial precedent that where on evaluation of the case, the Court reaches the conclusion that no conviction of any accused is possible the benefit of that decision must be extended to the co-accused, similarly situated, though he has not challenged the order by way of an appeal."

In ***Pawan Kumar v. State of Haryana, (2003) 11 SCC 241,*** while referring to the myth of the salutary powers exercisable by the Court under Article 142 of the Constitution for doing complete justice to the parties, the Court opined that powers under Article 136 of the Constitution can be exercised by it even suo motu and that the right to personal liberty guaranteed to the citizens, as enshrined under Article 21 of the Constitution, would be a factor which can be considered by the Court in granting such reliefs.

The Court held as under : [***Pawan Kumar's case*** (supra)]

> "17. Apart from the salutary powers exercisable by this Court under Article 142 of the Constitution for doing complete justice to the parties, the powers under Article 136 of the Constitution can be exercised by it in favour of a party even suo motu when the Court is satisfied that compelling grounds for its exercise exist but it should be used very sparingly with caution and circumspection inasmuch as only the rarest of rare cases. One of such grounds may be, as it exists like in the present case, where this Court while considering appeal of one of the accused comes to the conclusion that conviction of appealing as well as non-appealing accused both was unwarranted. Upon the aforesaid conclusion arrived at by the Apex Court of the land, further detention of the non-appealing accused, by virtue of the judgment rendered by the High Court upholding his conviction, being without any authority of law, infringes upon the right to personal liberty guaranteed to the citizen as enshrined under Article 21 of the Constitution. In our view, in cases akin to the present one, where there is either a flagrant violation of mandatory provision of any

statute or any provision of the Constitution, it is not that this Court has a discretion to exercise its suo motu power but a duty is enjoined upon it to exercise the same by setting right the illegality in the judgment of the High Court as it is well settled that illegality should not be allowed to be perpetuated and failure by this Court to interfere with the same would amount to allowing the illegality to be perpetuated. In view of the foregoing discussion, we are of the opinion that accused Balwinder Singh alias Binder is also entitled to be extended the same benefit which we are granting in favour of the appellant."

Similar view has also been expressed by this Court in the cases of ***Madhu v. State of Kerala, (2012) 2 SCC 399*** and ***Gurucharan Kumar v. State of Rajasthan (2003) 2 SCC 698.***

It is very difficult to set any universal principle which could be applied to all cases irrespective of the facts, circumstances and the findings returned by the Court of competent jurisdiction. It will always depend upon the facts and circumstances of a given case. Where the Court finds that the prosecution evidence suffers from serious contradictions, is unreliable, is ex facie neither cogent nor true and the prosecution has failed to discharge the established onus of proving the guilt of the accused beyond reasonable doubt, the Court will be well within its jurisdiction to return the finding of acquittal and even suo moto extend the benefit to a non-appealing accused as well, more so, where the Court even disbelieves the very occurrence of the crime itself. Of course, the role attributed to each of the accused and other attendant circumstances would be relevant considerations for the Court to apply its discretion judiciously.

There can be varied reasons for a non-appealing accused in not approaching the appellate Court. If, for compelling and inevitable reasons, like lack of finances, absence of any person to pursue his remedy and lack of proper assistance in the jail, an accused is unable to file appeal, then it would amount to denial of access to justice to such accused. The concept of fair trial would take within its ambit the right to be heard by the appellate Court. It is hardly possible to believe that an accused would, out of choice, give up his right to appeal, especially in a crime where a sentence of imprisonment for life is prescribed and awarded. Fairness in the administration of justice system and access to justice would be the relevant considerations for this Court to examine whether a non-appealing accused could or could not be extended the benefit of the judgment of acquittal.

Access to justice is an essential feature of administration of justice. This is applicable with enhanced rigour to the criminal jurisprudence. Where the court disbelieves the entire incident of the occurrence or where the role of the accused who has not appealed is identical to that of the other appealing accused or where the ends of justice demand, the Court would not hesitate and, in fact, is

duty-bound, to dispense justice in accordance with law. The powers of this Court, in terms of Articles 136 and 142 on the one hand and the rights of an accused under Article 21 of the Constitution on the other, are wide enough to deliver complete justice to the parties. These powers are incapable of being curtailed by such technical aspects which would not help in attainment of justice in the opinion of the Court. In light of the above principles, this Court is required to consider the effect of these judgments on the case of the non-appealing accused in the present case.

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375. CRIMINAL PROCEDURE CODE, 1973 – Section 386

When an order of *de novo* trial or retrial is ordered and when it is justified too? A *de novo* trial or retrial of the accused should be ordered by the appellate Court in exceptional and rare cases only when in the opinion of the appellate court such order becomes indispensable to avert failure of justice – The accused has been charged for the offence of committing bomb blast in a public transport bus in which four persons died and twenty four persons were injured – Trial vitiated due to non-compliance of Section 304 CrPC though the accused had been in jail for over fourteen years – Looking to gravity of the offence, retrial is justified.

Mohd. Hussain alias Julfikar Ali v. State (Govt. of NCT), Delhi

Judgment dated 31.08.2012 passed by the Supreme Court in Criminal Appeal No. 1091 of 2006, reported in AIR 2012 SC 3860 (3-Judges)

Held:

The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Criminal Procedure Code. That is clear from the bare language of Section 386 (b). Though such power exists, it should not be exercised in a routine manner. A de novo trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386 (b) of the Code, will depend on the facts and circumstances of each case for which no strait-jacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.

Insofar as present case is concerned, it has been concurrently held by the two Judges who head the criminal appeal that the appellant was denied due process of law and the trial held against him was contrary to the procedure

prescribed under the provisions of the Code since he was denied right of representation by counsel in the trial. The Judges differed on the course to be followed after holding that the trial against the appellant was flawed. We have to consider now, whether the matter requires to be remanded for a de novo trial in the facts and the circumstances of the present case. The incident is of 1997. It occurred in a public transport bus when that bus was carrying passengers and stopped at a bus stand. The moment the bus stopped an explosion took place inside the bus that ultimately resulted in death of four persons and injury to twenty-four persons. The nature of the incident and the circumstances in which it occurred speak volume about the very grave nature of offence. As a matter of fact, the appellant has been charged for the offences under Section 302/307 IPC and Section 3 and, in the alternative, Section 4 (b) of ES Act. It is true that the appellant has been in jail since 09.03.1998 and it is more than 14 years since he was arrested and he has passed through mental agony of death sentence and the retrial at this distance of time shall prolong the culmination of the criminal case but the question is whether these factors are sufficient for appellant's acquittal and dismissal of indictment. We think not. It cannot be ignored that the offences with which the appellant has been charged are of very serious nature and if the prosecution succeeds and the appellant is convicted under Section 302 IPC on retrial, the sentence could be death or life imprisonment. Section 302 IPC authorizes the court to punish the offender of murder with death or life imprisonment. Gravity of the offences and the criminality with which the appellant is charged are important factors that need to be kept in mind, though it is fact in the first instance the accused has been denied due process. While having due consideration to the appellant's right, the nature of the offence and its gravity, the impact of crime on the society, more particularly the crime that has shaken the public and resulted in death of four persons in a public transport bus cannot be ignored and overlooked. It is desirable that punishment should follow offence as closely as possible. In an extremely serious criminal case of the exceptional nature like the present one, it would occasion in failure of justice if the prosecution is into taken to the logical conclusion. Justice is supreme. The retrial of the appellant, in our opinion, in the facts and circumstances, is indispensable. It is imperative that justice is secured after providing the appellant with the legal practitioner if he does not engage a lawyer of his choice.

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***376. CRIMINAL PROCEDURE CODE, 1973 – Section 438**

Anticipatory bail – Limited period – Life of the order passed under Section 438 of Cr.P.C., cannot be curtailed – It is not proper to impose any condition for grant of anticipatory bail.

Harnam Singh v. State of M.P.

Judgment dated 31.08.2012 passed by the High Court of M.P. in M. Cr. C. No. 6212 of 2012, reported in ILR (2012) M.P. S.N. 96

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377. CRIMINAL TRIAL:

CRIMINAL PROCEDURE CODE, 1973 – Sections 173, 207 and 313 Scope of use of document filed by prosecution in defence by accused – Documents whether relied or not by prosecution but filed in Court with police report under Section 173 CrPC and which would help in determining the truth should be disclosed to the accused – Accused can claim access to such documents in custody of Court filed by prosecution at any stage of trial – Denial may cause prejudice to accused in properly defending his case and thus, resulting in denial of fair trial – Cause of speedy trial should not cause justice to be denied.

V. K. Sasikala v. State represented by Superintendent of Police Judgment dated 27.09.2012 passed by the Supreme Court in Criminal Appeal No. 1497 of 2012, reported in (2012) 9 SCC 771

Held:

Seizure of a large number of documents in the course of investigation of a criminal case is a common feature. After completion of the process of investigation and before submission of the report to the Court under S.173 Cr.P.C., a fair amount of application of mind on the part of the investigating agency is inbuilt in the Code. Such application of mind is both with regard to the specific offence(s) that the Investigating Officer may consider to have been committed by the accused and also the identity and particulars of the specific documents and records, seized in the course of investigation, which supports the conclusion of the Investigating Officer with regard to the offence(s) allegedly committed. Though it is only such reports which support the prosecution case that are required to be forwarded to the Court under S. 173 (5) in every situation where some of the seized papers and documents do not support the prosecution case and, on the contrary, supports the accused, a duty is cast on the Investigating Officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself. However, it is not impossible to visualize a situation whether the Investigating Officer ignores the part of the seized documents which favour the accused and forwards to the Court only those documents which support the prosecution. If such a situation is pointed by the accused and such documents have, in fact, been forwarded to the Court would it not be the duty of the Court to make available such documents to the accused regardless of the fact whether the same may not have been marked and exhibited by the prosecution? What would happen in a situation where such documents are not forwarded by the Investigating Officer to the Court is a question that does not arise in the present case. What has arisen before us is a situation where evidently the unmarked and unexhibited documents of the case that are being demanded by the accused had been forwarded to the Court under S. 173 (5) but are not being relied upon by the prosecution. Though the prosecution has tried to cast some cloud on the issue as to whether the

unmarked and unexhibited documents are a part of the report under S. 173 Cr.P.C., it is not denied by the prosecution that the said unmarked and unexhibited documents are presently in the custody of the Court. Besides, the accused in her application before the learned Trial court (IA 711 of 2012) had furnished specific details of the said documents and had correlated the same with reference to specific seizure lists prepared by the investigating agency. In such circumstances, it can be safely assumed that what has been happened in the present case is that along with the report of investigation a large number of documents have been forwarded to the Court out of which the prosecution has relied only on a part thereof leaving the remainder unmarked and unexhibited.

In a recent pronouncement in ***Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1*** to which one of us (Sathasivam, J) was a party, the role of a public prosecutor and his duties of disclosure have received a wide and in-depth consideration of this Court. This Court has held that though the primary duty of a Public Prosecutor is to ensure that an accused is punished, his duties extend to ensuring fairness in the proceedings and also to ensure that all relevant facts and circumstances are brought to the notice of the Court for a just determination of the truth so that due justice prevails. The fairness of the investigative process so as to maintain the citizens' rights u/arts. 19 and 21 and also the active role of the court in a criminal trial have been exhaustively dealt with by this Court. Finally, it was held that it is the responsibility of the investigating agency as well as that of the courts to ensure that every investigation is fair and does not erode the freedom of an individual except in accordance with law. It was held that one of the established facets of a just, fair and transparent investigation is the right of an accused to ask for all such documents that he may be entitled to under the scheme contemplated by the Code of Criminal Procedure.

The views expressed would certainly be useful for reiteration in the context of the facts of the present case:

> "216. Under Section 170, the documents during investigation are required to be forwarded to the Magistrate, while in terms of S. 173(5) all documents or relevant extracts and the statement recorded u/s. 161 have to be forwarded to the Magistrate. The investigating officer is entitled to collect all the material, which in his wisdom is required for proving the guilt of the offender. He can record statement in terms of S.161 and his power to investigate the matter is a very wide one, which is regulated by the provisions of the Code. The statement recorded u/s. 161 is not evidence per se u/s. 162 of the Code. The right of the accused to receive the documents/statements submitted before the court is absolute and it must be adhered to by the prosecution and the court must ensure supply of documents/statements to the accused in accordance with law. Under the proviso to

S.162(1) the accused has a statutory right of confronting the witnesses with the statements recorded u/s. 161 of the Code thus indivisible.

217. Further, S.91 empowers the court to summon production of any document or thing which the court considers necessary or desirable for the purposes of any investigation, inquiry, trial or another proceeding under the provisions of the Code. Where S. 91 read with S. 243 says that if the accused is called upon to enter his defence and produce his evidence there he has also been given the right to apply to the court for issuance of process for compelling the attendance of any witness for the purpose of examination, cross-examination or the production of any document or other thing for which the court has to pass a reasoned order.

218. The liberty of an accused cannot be interfered with except under due process of law. The expression 'due process of law' shall deem to include fairness in trial. The court gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This Constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution (prosecution and the Prosecutor) to make fair disclosure. ***The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in court or not. That document should essentially be furnished to the accused and even in the cases where during investigation a document is bona fide obtained by the investigating agency and in the opinion of the Prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the accused.***

219. The role and obligation of the Prosecutor particularly in relation to disclosure cannot be equated under our law to that prevalent under the English system as aforereferred to. But at the same time, the demand for a fair trial cannot be ignored. It may be of different consequences where a document which has been obtained suspiciously, fraudulently or by causing undue advantage to the accused during investigation such document could be denied in the discretion of the Prosecutor to the accused whether the prosecution relies or not upon such documents, however in other cases the obligation to disclose would be more

certain. As already noticed the provisions of S. 207 have a material bearing on this subject and make an interesting reading. This provision not only require or mandate that the court without delay and free of cost should furnish to the accused copies of the police report, first information report, statements, confessional statements of the persons recorded u/s. 161 whom the prosecution wishes to examine as witnesses, of course, excluding any part of a statement or document as contemplated u/s. 173(6) of the Code, any other document or relevant extract thereof which has been submitted to the Magistrate by the police under sub-s. (5) of S. 173. In contradistinction to the provisions of Section 173, where the legislature has used the expression 'documents on which the prosecution relies' are not used u/s. 207 of the Code. Therefore, the provisions of S. 207 of the Code will have to be given liberal and relevant meaning so as to achieve its object. Not only this, the documents submitted to the Magistrate along with the report u/s. 173(5) would deem to include the documents which have to be sent to the Magistrate during the course of investigation as per the requirement of S.170(2) of the Code.

220. The right of the accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial. On such matters, the accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the documents annexed to the report u/s. 173(2) as per orders of the court. ***But certain rights of the accused flow both from the codified law as well as from equitable concepts of the Constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial.*** To claim documents within the purview of scope of Sections 207, 243 read with the provisions of S.173 in its entirety and power of the court under S. 91 of the Code to summon documents signifies and provides precepts which will govern the right of the accused to claim copies of the statement and documents which the prosecution has collected during investigation and upon which they rely.

221. It will be difficult for the Court to say that the accused has no right to claim copies of the documents or request the Court for production of a document which is part of the general diary subject to satisfying the basic ingredients of law stated therein. ***A document which has been obtained bona***

fide and has bearing on the case of the prosecution and in the opinion of the Public Prosecutor, the same should be disclosed to the accused in the interest of justice and fair investigation and trial should be furnished to the accused. Then that document should be disclosed to the accused giving him chance of fair defence, particularly when non-production or disclosure of such a document would affect administration of criminal justice and the defence of the accused prejudicially."

[*Manu Sharma* (supra)]

The declaration of the law in *Manu Sharma* (supra) may have touched upon the outer fringe of the issues arising in the present case. However, the positive advancement that has been achieved cannot, in our view, be allowed to take a roundabout turn and the march has only to be carried forward. If the claim of the appellant is viewed in context and perspective outlined above, according to us, a perception of possible prejudice, if the documents or at least an inspection thereof is denied, looms large. The absence of any claim on the part of the accused to the said documents at any earlier point of time cannot have the effect of foreclosing such a right of the accused. Absence of such a claim, till the time when raised, can be understood and explained in several reasonable and acceptable ways. Suffice it would be to say that individual notion of prejudice, difficulty or handicap in putting forward a defence would vary from person to person and there can be no uniform yardstick to measure such perceptions. If the present appellant has perceived certain difficulties in answering or explaining some part of the evidence brought by the prosecution on the basis of specific documents and seeks to ascertain if the allegedly incriminating documents can be better explained by reference to some other documents which are in the court's custody, an opportunity must be given to the accused to satisfy herself in this regard. It is not for the prosecution or for the Court to comprehend the prejudice that is likely to be caused to the accused. The perception of prejudice is for the accused to develop and if the same is founded on a reasonable basis it is the duty of the Court as well as the prosecution to ensure that the accused should not be made to labour under any such perception and the same must be put to rest at the earliest. Such a view, according to us, is an inalienable attribute of the process of a fair trial that Art. 21 guarantees to every accused.

The issue that has emerged before us is, therefore, somewhat larger than what has been projected by the State and what has been dealt with by the High Court. The question arising would no longer be one of compliance or non-compliance with the provisions of S. 207 Cr.P.C. and would travel beyond the confines of the strict language of the provisions of the Cr.P.C. and touch upon the larger doctrine of a free and fair trial that has been painstakingly built up by the courts on a purposive interpretation of Art. 21 of the Constitution. It is not the stage of making of the request; the efflux of time that has occurred or the prior conduct of the accused that is material. What is of significance is if in a

given situation the accused comes to the court contending that some papers forwarded to the Court by the investigating agency have not been exhibited by the prosecution as the same favours the accused the court must concede a right to in the accused to have an access to the said documents, if so claimed. This, according to us, is the core issue in the case which must be answered affirmatively.

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378. EVIDENCE ACT, 1872 – Section 3
CRIMINAL PROCEDURE CODE, 1973 – Sections 378 and 386
INDIAN PENAL CODE, 1860 – Sections 302 and 149

(i) Whether delay in disposal of Criminal Appeal a ground to exonerate the accused? Held, No – Merely because the appeal was disposed of by the High Court after 25 years, it is not a ground to exonerate the accused.

(ii) It is also not a ground to exonerate the accused that all accused, except the appellant, has died.

(iii) Evidence of an injured witness stands on higher pedestal.

(iv) It is not possible for the appellate Court to interfere in order of acquittal without rendering specific finding that the decision of the trial court is perverse or unreasonable resulting in miscarriage of justice.

Shyam Babu v. State of U.P.

Judgment dated 07.09.2012 passed by the Supreme Court in Criminal Appeal No. 434 of 2006, reported in AIR 2012 SC 3311

Held:

It is true that it would not be possible for the appellate Court to interfere with the order of acquittal passed by the trial Court without rendering specific finding, namely, that the decision of the trial Court is perverse or unreasonable resulting in miscarriage of justice. At the same time, it cannot be denied that the appellate Court while entertaining an appeal against the judgment of acquittal by the trial Court is entitled to re-appreciate the evidence and come to an independent conclusion. We are conscious of the fact that in doing so, the appellate Court should consider every material on record and the reasons given by the trial Court in support of its order of acquittal and should interfere only on being satisfied that the view taken by the trial Court is perverse and unreasonable resulting in miscarriage of justice. We also reiterate that if two views are possible on a set of evidence, then the appellate Court need not substitute its own view in preference to the view of the trial Court which has recorded an order of acquittal.

In the case on hand, Nathu Ram (PW-1) is closely related to all the deceased as he is the son of the deceased Pahunchi Lal and nephew of deceased Lalta Prasad. It is also true that Prayag Singh (PW-3), the injured witness, is the real

brother of the deceased Pahunchi Lal and Lalta Prasad. Mukut Singh (PW-6) has also admitted in his cross-examination that he has some land in joint khata with the victims but their testimony cannot be discarded on the ground of relationship alone as they appeared to be honest and truthful witnesses and their testimony has not been impaired in their cross-examination. We have already referred to the lengthy cross-examination of all these persons and nothing has come out to impair their credibility. We have also observed that among these three eye-witnesses, PW-3 is an injured witness and his evidence stands on higher pedestal. There is no reason to either disbelieve his version or his presence at the place of occurrence. On the other hand, we agree with their statement and hold that the High Court was justified on relying upon their evidence.

Learned counsel for the appellant pointed out that inasmuch as the present appellant alone is the remaining accused since out of 7, other 6 accused persons died due to natural death, he may be exonerated from the conviction and sentence. In view of the clinching evidence led by the prosecution, we are unable to accept his submission. We should not forget that due to gruesome incident, 5 persons lost their lives and one person sustained injuries. It is also brought in evidence that Shyam Babu, appellant herein and Tej Ram used guns and the third one Babu Ram used country made pistol for the said diabolical act of shooting. It is undisputed fact that 5 persons died and 1 person sustained injuries by use of such weapons. Even otherwise, the present appellant along with others was convicted by the High Court under Sections 148, 307 & 302 read with S. 149 IPC, hence he cannot be exonerated. Taking note of all these aspects and considering the gruesome murders, there is no reason to exonerate the present sole appellant-accused merely because the other co-accused died due to natural death. Delay in disposal of appeal.

It was argued by the learned counsel for the appellant that considering the fact that though the appeal was filed before the High Court at Allahabad in the year 1981, the same was disposed of by the High Court only on 13.01.2006, i.e., after a gap of 25 years and, the sole appellant be discharged from the commission of offence on the ground of delay. We are unable to accept the said contention. This Court, in a series of decisions, held that the Limitation Act, 1963 does not apply to criminal proceedings unless there is express and specific provision to that effect. It is also settled law that a criminal offence is considered as a wrong against the State and the Society even though it is committed against an individual. After considering various decisions including the decision of the Constitution Bench of this Court in ***Abdul Rehman Antulay v. R.S. Nayak, AIR 1992 SC 170 and Kartar Singh v. State of Punjab, (1994) 3 SCC 569 and a decision rendered by seven learned Judges of this Court in P. Ramachandra Rao v. State of Karnataka, AIR 2002 SC 1856, recently on 17.08.2012, a Bench of two Judges of this Court in Ranjan Dwivedi etc. vs. C.B.I., Through the Director General, 2012 AIR SCW 4591*** rejected similar argument based on delay either at the stage of trial or thereafter.

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379. EVIDENCE ACT, 1872 – Sections 3, 9 and 154
CRIMINAL PROCEDURE CODE, 1973 – Section 162
INDIAN PENAL CODE, 1860 – Sections 302 and 34

(i) Statement of hostile witness can be relied upon by Court to the extent it supports the case of prosecution.

(ii) No statement of a witness can be read in part or in isolation – The Court should read the statement of a witness in its entirety and read it along with the statement of other witnesses in order to arrive at a reasonable conclusion.

(iii) The delay in examination of witness depend upon various factors as also availability of witness, Investigating Officer spending his time in arresting the accused who are absconding, being occupied in other spheres of investigation of the same case which may require his attention urgently and importantly etc., so it is a variable factor – If delay in examination of witnesses because they were of poor strata who had to move from one place to another to earn their livelihood, Investigating Officer was also busy in arresting the absconding accused, Such delay found not fatal.

(iv) Once the last seen theory comes into play, the onus was on the accused to explain as to what happened to deceased after they were seen alive together – If accused persons have failed to render any plausible explanation in this regard, the possible inference would be that the accused are responsible for commission of the murder of the deceased.

(v) Object of Test Identification Parade, explained.

(vi) Discrepancies or omissions have to be material ones and then alone they may amount to contradiction of some serious consequences – Every omission cannot take place of a contradiction in law and therefore, be the foundation for doubting the case of the prosecution.

Shyamal Ghosh v. State of West Bengal

Judgment dated 11.07.2012 passed by the Supreme Court in Criminal Appeal No. 507 of 2007, reported in AIR 2012 SC 3539

Held:

It was contended that some of the witnesses had turned hostile and have not supported the case of the prosecution. In this regard, reference has been made to PW13 and PW23. PW13 admitted that he was a rickshaw puller of rickshaw No. 4. He also stated that he was not examined by the police. It was at that stage that the learned prosecutor sought permission of the Court to declare him hostile, which leave was granted by the Court. This witness stated that there were 10 rikshaw pullers at Nandan Kanan and he used to park his rikshaw from 7.00 a.m. to 10.00 a.m. at that stand, while in the afternoon, he used to

park his rikshaw at the Sodhpur Railway Station. He denied having seen the accused persons loading the gunny bags into the Maruti Van and also receded completely from his statement made u/s 161 of the CrPC. The other witness is PW23 who was a witness to the recovery of the Maruti Van. According to this witness, the Maruti Van was parked in his parking lot. However, on 30th November, 2003 Manik Das had taken out the vehicle from the parking and again returned at mid night. With regard to his signature on the seizure memo which he accepted as Exhibit 13, he took up the plea that he was made to sign blank papers.

The mere fact that these two witnesses had turned hostile would not affect the case of the prosecution adversely. Firstly, it is for the reason that the facts that these witnesses were to prove already stand fully proved by other prosecution witnesses and those witnesses have not turned hostile, instead they have fully supported the case of the prosecution. As per the version of the prosecution, PW23 was witness to the recovery of the Maruti Van along with PW24, PW25 and PW26. All those witnesses have proved the said recovery in accordance with law. They have clearly stated that it was upon the statement of Manik Das that the vehicle had been recovered. Other witnesses have proved that the said vehicle was used for carrying the gunny bags containing the mutilated parts of the dead body of the deceased. Firstly, PW13 is a witness who was at the railway station rickshaw stand along with other two witnesses namely PW9 and PW11 who have fully proved the fact as eye-witnesses to the loading of the gunny bags into the Maruti van. Secondly, even the version given by PW13 and PW23 partially supports the case of the prosecution, though in bits and pieces. For example, PW23 has stated that the driver of the Maruti Van was Manik Das and also that he had taken out the vehicle from the parking lot at about 9.30 p.m. on the day of the incident and had brought it back after mid-night. He also stated that this car was being driven by Manik Das. Similarly, PW13 also admitted that other rickshaws were standing at the stand. This was the place where PW9 and PW11 had seen the loading of the gunny bags into the Maruti Van. In other words, even the statements of witnesses PW13 and PW23, who had turned hostile, have partially supported the case of the prosecution. It is a settled principle of law that statement of a hostile witness can also be relied upon by the Court to the extent it supports the case of the prosecution. Reference in this regard can be made to the case of ***Govindaraju @ Govinda v. State by Sriramapuram P.S. & Anr., AIR 2012 SC 1292***.

Then, it was argued that there are certain discrepancies and contradictions in the statement of the prosecution witnesses in as much as these witnesses have given different timing as to when they had seen the scuffling and strangulation of the deceased by the accused. It is true that there is some variation in the timing given by PW8, PW17 and PW19. Similarly, there is some variation in the statement of PW7, PW9 and PW11. Certain variations are also pointed out in the statements of PW2, PW4 and PW6 as to the motive of the accused for commission of the crime. Undoubtedly, some minor discrepancies

or variations are traceable in the statements of these witnesses. But what the Court has to see is whether these variations are material and affect the case of the prosecution substantially. Every variation may not be enough to adversely affect the case of the prosecution. The variations pointed out as regards the time of commission of the crime are quite possible in the facts of the present case. Firstly, these witnesses are rickshaw pullers or illiterate or not highly educated persons whose statements had been recorded by the Police. Their statements in the Court were recorded after more than two years from the date of the incident. It will be unreasonable to attach motive to the witnesses or term the variations of 15-20 minutes in the timing of a particular event, as a material contradiction. It probably may not even be expected of these witnesses to state these events with the relevant timing with great exactitude, in view of the attendant circumstances and the manner in which the incident took place. To illustrate the irrelevancy of these so called variations or contradictions, one can deal with the statements of PW2, PW4 and PW6. PW4 and PW6 have stated that the deceased had constructed shops along with his brother for the purpose of letting out and it was thereupon that the accused persons started demanding a sum of ₹ 40,000 from the deceased and had threatened him of dire consequences, if their demand was not satisfied. PW2 has made a similar statement. However, he has stated that Uttam Das and the accused persons had threatened the deceased that if the said money was not paid, they would not allow the deceased to enjoy and use the said shops built by him. This can hardly be stated to be a contradiction much less a material contradiction. According to the witnesses, two kinds of dire consequences were stated to follow, if the demand for payment of money made by the accused was not satisfied. According to PW4 and PW6, they had threatened to kill the deceased while according to PW2, the accused had threatened that they would not permit the accused to enjoy the said property. Statements of all these witnesses clearly show one motive, i.e., illegal demand of money coupled with the warning of dire consequences to the deceased in case of default. In our view, this is not a contradiction but are statements made bona fide with reference to the conduct of the accused in relation to the property built by the deceased and his brother. It is a settled principle of law that the Court should examine the statement of a witness in its entirety and read the said statement along with the statement of other witnesses in order to arrive at a rational conclusion. No statement of a witness can be read in part and/or in isolation. We are unable to see any material or serious contradiction in the statement of these witnesses which may give any advantage to the accused.

The delay in examination of witnesses is a variable factor. It would depend upon a number of circumstances. For example, non-availability of witnesses, the Investigating Officer being pre-occupied in serious matters, the Investigating Officer spending his time in arresting the accused who are absconding, being occupied in other spheres of investigation of the same case which may require his attention urgently and importantly, etc. In the present case, it has come in

evidence that the accused persons were absconding and the Investigating Officer had to make serious effort and even go to various places for arresting the accused, including coming from West Bengal to Delhi. The Investigating Officer has specifically stated, that too voluntarily, that he had attempted raiding the houses of the accused even after cornering the area, but of no avail. He had ensured that the mutilated body parts of the deceased reached the hospital and also effected recovery of various items at the behest of the arrested accused. Furthermore, the witnesses whose statements were recorded themselves belonged to the poor strata, who must be moving from one place to another to earn their livelihood. The statement of the available witnesses like PW2, PW4, PW6, and the doctor, PW16, another material witness, had been recorded at the earliest. The Investigating Officer recorded the statements of nearly 28 witnesses. Some delay was bound to occur in recording the statements of the witnesses whose names came to light after certain investigation had been carried out by the Investigating Officer. In the present case, the examination of the interested witnesses was inevitable. They were the persons who had knowledge of the threat that was being extended to the deceased by the accused persons. Unless their statements were recorded, the investigating officer could not have proceeded with the investigation any further, particularly keeping the facts of the present case in mind. Merely because three witnesses were related to the deceased, the other witnesses, not similarly placed, would not attract any suspicion of the court on the credibility and worthiness of their statements.

The discrepancies or the omissions have to be material ones and then alone, they may amount to contradiction of some serious consequence. Every omission cannot take the place of a contradiction in law and therefore, be the foundation for doubting the case of the prosecution. Minor contradictions, inconsistencies or embellishments of trivial nature which do not affect the core of the prosecution case should not be taken to be a ground to reject the prosecution evidence in its entirety. It is only when such omissions amount to a contradiction creating a serious doubt about the truthfulness or creditworthiness of the witness and other witnesses also make material improvements or contradictions before the court in order to render the evidence unacceptable, that the courts may not be in a position to safely rely upon such evidence. Serious contradictions and omissions which materially affect the case of the prosecution have to be understood in clear contradistinction to mere marginal variations in the statement of the witnesses. The prior may have effect in law upon the evidentiary value of the prosecution case; however, the latter would not adversely affect the case of the prosecution. Another settled rule of appreciation of evidence as already indicated is that the court should not draw any conclusion by picking up an isolated portion from the testimony of a witness without adverting to the statement as a whole. Sometimes it may be feasible that admission of a fact or circumstance by the witness is only to clarify his statement or what has been placed on record. Where it is a genuine attempt on the part of a witness to bring correct facts by clarification on record, such

statement must be seen in a different light to a situation where the contradiction is of such a nature that it impairs his evidence in its entirety.

The whole idea of a Test Identification Parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eye-witnesses of the crime.

It is equally correct that the CrPC does not oblige the investigating agency to necessarily hold the Test Identification Parade. Failure to hold the test identification parade while in police custody, does not by itself render the evidence of identification in court inadmissible or unacceptable. There have been numerous cases where the accused is identified by the witnesses in the court for the first time. One of the views taken is that identification in court for the first time alone may not form the basis of conviction, but this is not an absolute rule. The purpose of the Test Identification Parade is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of the witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence is, however subjected to exceptions. Reference can be made to ***Munshi Singh Gautam v. State of M.P., AIR 2005 SC 402 and Sheo Shankar Singh v. State of Jharkhand and Anr., AIR 2011 SC 1403.***

Identification Parade is a tool of investigation and is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that persons named accused in the case are actually the culprits. The Identification Parade primarily belongs to the stage of investigation by the police. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in court. Thus, it is only a relevant consideration which may be examined by the court in view of other attendant circumstances and corroborative evidence with reference to the facts of a given case.

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380. HINDU MARRIAGE ACT, 1955 – Section 13 (1) (i-a)

Decree for divorce on the ground of cruelty – Meaning and proof of mental cruelty – Expression "cruelty" has an inseparable nexus with human conduct or human behaviour – It is always depended upon the social strata or the milieu to which the parties belong, their ways of lives, relationship, temperaments and emotions that are conditioned by their social status.

Mental cruelty – Conduct of wife in publishing newspaper that her husband was a womanizer and drunkard, wild allegations about an

extra marital relationship afford to prosecute him under Sections 494 and 498-A IPC, that ultimately resulted in acquittal – It was mental cruelty sufficient to make out a ground for divorce.
Matrimonial litigation – Credibility of interested/related witnesses – It would be inappropriate to expect outsiders to come and depose – Family members, relatives, friends and neighbours are the most natural witnesses – Veracity of their testimony is to be tested on objective parameters and not to be thrown overboard on ground that the witnesses are related to either spouse.

Vishwanath Agrawal v. Sarla Vishwanath Agrawal

Judgment dated 04.07.2012 passed by the Supreme Court in Civil Appeal No. 4905 of 2012, reported in (2012) 7 SCC 288

Held:

The expression "cruelty" has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status.

We shall first appreciate the impact of the notice published in the Lokmat. The relevant part of the said notice, as published in the newspaper, reads as follows:

> "Shri Vishwanath Sitaram Agrawal is having vices of womanizing, drinking liquor and other bad habits. He is having monthly income of Rs. 10 lakhs, but due to several vices, he is short of funds. Therefore, he has started selling the property. He has sold some properties. My client has tried to make him understand which is of no use and on the contrary, he has beaten my client very badly and has driven her away and dropped her to Akola at her parents house.
>
> In the property of Shri Vishwanath Sitaram Agrawal my client and her two sons are having shares in the capacity of members of joint family and Shri Vishwanath Sitaram Agrawal has no right to dispose of the property on any ground."

Immense emphasis has been given to the fact that after publication of the notice, the husband had filed a caveat in the court. The factual matrix would reveal that the husband comes from a respectable family engaged in business. At the time of publication of the notice, the sons were quite grown up. The respondent wife did not bother to think what impact it would have on the reputation of the husband and what mental discomfort it would cause. It is manifest from the material on record that the children were staying with their father. They were studying in the school and their father was taking care of everything. Such a publication in the newspaper having good circulation can cause trauma, agony and anguish in the mind of any reasonable man. The explanation given by the

wife to the effect that she wanted to protect the interests of the children, as we perceive, is absolutely incredible and implausible. The filing of a caveat is wholly inconsequential. In fact, it can decidedly be said that it was mala fide and the motive was to demolish the reputation of the husband in the society by naming him as a womanizer, drunkard and a man of bad habits.

In our considered opinion, a normal reasonable man is bound to feel the sting and the pungency. The conduct and circumstances make it graphically clear that the respondent wife had really humiliated him and cause mental cruelty. Her conduct clearly exposits that it has resulted in causing agony and anguish in the mind of the husband. She had publicised in the newspapers that he was a womanizer and a drunkard. She had made wild allegations about his character. She had made an effort to prosecute him in criminal litigations which she had failed to prove. The feeling of deep anguish, disappointment, agony and frustration of the husband is obvious.

It can be stated with certitude that the cumulative effect of the evidence brought on record clearly establishes a sustained attitude of causing humiliation and calculated torture on the part of the wife to make the life of the husband miserable. The husband felt humiliated both in private and public life. Indubitably, it created a dent in his reputation which is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished values this side of the grave. It is a revenue generator for the present as well as for the posterity. Thus analysed, it would not be out of place to state that his brain and the bones must have felt the chill of humiliation. The dreams sweetly grafted with sanguine fondness with the passage of time reached the Everstine disaster, possibly, with a vow not to melt. The cathartic effect looked like a distant mirage. The cruel behaviour of the wife has frozen the emotions and snubbed out the bright candle of feeling of the husband because he has been treated as an unperson. Thus analysed, it is abundantly clear that with this mental pain, agony and suffering, the husband cannot be asked to put up with the conduct of the wife and to continue to live with her. Therefore, he is entitled to a decree of divorce.

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381. INDIAN PENAL CODE, 1860 – Section 53

Prisoner working as a part of punishment – A person sentenced to simple imprisonment cannot be required to work unless he volunteers himself to do the work but the jail officer who requires a prisoner, sentenced to rigorous imprisonment, to do hard labour, would be doing so as enjoined by law and mandated by Court.

Phool Kumari v. Office of the Superintendent, Tihar Central Jail, New Delhi and Another

Judgment dated 09.08.2012 passed by the Supreme Court in Criminal Appeal No. 1186 of 2012, reported in (2012) 8 SCC 183

Held:

Section 53 of the IPC defines 5 kinds of punishment which includes punishment for life and two other kinds of imprisonment i.e., rigorous and simple imprisonment. Rigorous imprisonment is one which is required by law to be completed with hard labour. Section 36 of the Delhi Prisons Act, 2000 prescribes that the convicts sentenced to simple imprisonment shall be employed only so long as they desire but cannot be punished for neglect of work. A person sentenced to simple imprisonment cannot be required to work unless he volunteers himself to do the work. But the Jail officer who requires a prisoner sentenced to rigorous imprisonment to do hard labour would be doing so as enjoined by law and mandated by the court. [Vide ***State of Gujarat v. Hon'ble High Court of Gujarat, (1998) 7 SCC 392***].

Thus, while a person sentenced to simple imprisonment has the option of choosing to work, a person sentenced to rigorous imprisonment is required by law to undergo hard labour. The undertrials are not required to work in Jail.

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382. INDIAN PENAL CODE, 1860 – Sections 299, 300, 302 and 304

(i) Culpable homicide when amounts to murder and when not – Legislature in its wisdom covers the entire gamut of culpable homicide amounting to murder as well as not amounting to murder in a composite manner in Section 300 IPC – Legal position reiterated.

(ii) Two parts of Section 304 IPC – Offence into either part of Section 304 is primarily a matter of fact – This would have to be decided with reference to the nature of the offence, intention of the offender, weapon used, the place, and nature of the injuries existence of premeditated mind, the persons participating in the commission of the crime and to some extent, the motive for commission of the crime.

Rampal Singh v. State of Uttar Pradesh

Judgment dated 24.07.2012 passed by the Supreme Court in Criminal Appeal No. 2114 of 2009, reported in (2012) 8 SCC 289

Held

Sections 299 and 300 of the Code deal with the definition of 'culpable homicide' and 'murder', respectively. In terms of Section 299, 'culpable homicide' is described as an act of causing death (i) with the intention of causing death or (ii) with the intention of causing such bodily injury as is likely to cause death, or (iii) with the knowledge that such an act is likely to cause death. As is clear from a reading of this provision, the former part of it, emphasizes on the expression 'intention' while the latter upon 'knowledge'. Both these are positive mental attitudes, however, of different degrees. The mental element in 'culpable homicide', that is, the mental attitude towards the consequences of conduct is

one of intention and knowledge. Once an offence is caused in any of the three stated manners noted-above, it would be 'culpable homicide'.

Section 300, however, deals with 'murder' although there is no clear definition of 'murder' in Section 300 of the Code. As has been repeatedly held by this Court, 'culpable homicide' is the genus and 'murder' is its species and all 'murders' are 'culpable homicides' but all 'culpable homicides' are not 'murders'.

Another classification that emerges from this discussion is 'culpable homicide not amounting to murder', punishable under Section 304 of the Code. There is again a very fine line of distinction between the cases falling under Section 304, Part I and Part II, which we shall shortly discuss.

In the case of ***State of Andhra Pradesh v. Rayavarapu Punnayya, (1976) 4 SCC 382,*** this Court while clarifying the distinction between these two terms and their consequences, held as under:-

> "12. In the scheme of the penal Code, 'culpable homicide' is genus and 'murder' its species. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called 'culpable homicide of the first degree'. This is the greatest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304."

Section 300 of the Code proceeds with reference to Section 299 of the Code. 'Culpable homicide' may or may not amount to 'murder', in terms of Section 300 of the Code. When a 'culpable homicide is murder', the punitive consequences shall follow in terms of Section 302 of the Code while in other cases, that is, where an offence is 'culpable homicide not amounting to murder', punishment would be dealt with under Section 304 of the Code.

Various judgments of this Court have dealt with the cases which fall in various classes of Firstly, Secondly, Thirdly and Fourthly, respectively, stated under Section 300 of the Code. It would not be necessary for us to deal with that aspect of the case in any further detail. Of course, the principles that have been stated in various judgments like ***Abdul Waheed Khan @ Waheed and Others v. State of A.P., (2002) 7 SCC 175, Virsa Singh v. State of Punjab, AIR 1958 SC 465***

and Rajwant and Anr. v. State of Kerala, AIR 1966 SC 1874 are the broad guidelines and not cast-iron imperatives.

These are the cases which would provide precepts for the courts to exercise their judicial discretion while considering the cases to determine as to which particular clause of Section 300 of the Code they fall in.

This Court has time and again deliberated upon the crucial question of distinction between Sections 299 and 300 of the Code, i.e., "culpable homicide" and "murder" respectively. In the case of ***Phulia Tudu v. State of Bihar, AIR 2007 SC 3215,*** the Court noticed that confusion is caused if courts, losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of these sections.

The Court in ***Phulia Tudu*** (supra) provided the following comparative table to help in appreciating the points of discussion between these two offences:

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done —	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done —
Intention	
(a) with the intention of causing death; or	(1) with the intention of causing death; or
(b) with the intention of causing such bodily injury as is likely to cause death; or	(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or
	(3) with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
Knowledge	
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so imminently dangerous that it must in allprobability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above." [***Abdul Waheed Khan v. State of A.P., (2002) 7 SCC 175***]

Section 300 of the Code states what kind of acts, when done with the intention of causing death or bodily injury as the offender knows to be likely to cause death or causing bodily injury to any person, which is sufficient in the ordinary course of nature to cause death or the person causing injury knows that it is so imminently dangerous that it must in all probability cause death, would amount to "murder". It is also "murder" when such an act is committed, without any excuse for incurring the risk of causing death or such bodily injury. The Section also prescribes the exceptions to "culpable homicide amounting to murder". The Explanations spell out the elements which need to be satisfied for application of such Exceptions, like an act done in the heat of passion and without pre-mediation. Where the offender whilst being deprived of the power of self-control by grave and sudden provocation causes the death of the person who has caused the provocation or causes the death of any other person by mistake or accident, provided such provocation was not at the behest of the offender himself, "ulpable homicide would not amount to murder".

This Exception itself has three limitations. All these are questions of facts and would have to be determined in the facts and circumstances of a given case.

This Court in the case of ***Vineet Kumar Chauhan v. State of U.P. (2007) 14 SCC 660,*** noticed that academic distinction between "murder" and 'culpable homicide not amounting to murder' had vividly been brought out by this Court in ***Rayavarapu Punnayya,*** (supra) where it was observed as under:

> ".....that the safest way of approach to the interpretation and application of Section 299 and 300 of the Code is to keep in focus the key words used in various clauses of the said sections. Minutely comparing each of the clauses of Sections 299 and 300 of the Code and the drawing support from the decisions of the Court in ***Virsa Singh*** (supra) and ***Rajwant Singh*** (supra) speaking for the court, Justice R.S. Sarkaria, neatly brought out the points of distinction between the two offences, which have been time and again reiterated. Having done so, the court said that wherever the Court is confronted with the question whether the offence is "murder or culpable" homicide not "amounting to murder", on the facts of a case, it would be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be that the accused has done an act by doing which he has caused the death of another. Two, if such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable" homicide as defined in Section 299. If the answer to this question is in the negative, the offence would be culpable homicide not amounting to "murder", punishable

> under the First or Second part of Section 304, depending respectively, on whether this second or the third clause of Section 299 is applicable. If this question is found in the positive, but the cases come within any of the Exceptions enumerated in Section 300, the offence would still be culpable homicide not amounting to "murder", punishable under the first part of Section 304 of the Code. It was, however, clarified that these were only broad guidelines to facilitate the task of the court and not cast-iron imperative."

Having noticed the distinction between "murder" and "culpable homicide not amounting to murder", now we are required to explain the distinction between the application of Section 302 of the Code on the one hand and Section 304 of the Code on the other.

In ***Ajit Singh v. State of Punjab, (2011) 9 SCC 462,*** the Court held that:

> "20. In order to hold whether an offence would fall under Section 302 or Section 304 Part I of the Code, the courts have to be extremely cautious in examining whether the same falls under Section 300 of the Code which states whether a culpable homicide is murder, or would it fall under its five Exceptions which lay down when culpable homicide is not murder."

In other words, Section 300 states both, what is murder and what is not. First finds place in Section 300 in its four stated categories, while the second finds detailed mention in the stated five Exceptions to Section 300. The legislature in its wisdom, thus, covered the entire gamut of culpable homicide that 'amounting to murder' as well as that "not amounting to murder" in a composite manner in Section 300 of the Code.

Sections 302 and 304 of the Code are primarily the punitive provisions. They declare what punishment a person would be liable to be awarded, if he commits either of the offences. An analysis of these two Sections must be done having regard to what is common to the offences and what is special to each one of them. The offence of culpable homicide is thus an offence which may or may not be murder. If it is murder, then it is culpable homicide amounting to murder, for which punishment is prescribed in Section 302 of the Code. Section 304 deals with cases not covered by Section 302 and it divides the offence into two distinct classes, that is (a) those in which the death is ***intentionally*** caused; and (b) those in which the death is caused ***unintentionally*** but knowingly. In the former case the sentence of imprisonment is compulsory and the maximum sentence admissible is imprisonment for life. In the latter case, imprisonment is only optional, and the maximum sentence only extends to imprisonment for 10 years. The first clause of this Section includes only those cases in which offence is really "murder", but mitigated by the presence of circumstances recognized in the Exceptions to section 300 of the Code, the second clause deals only with the cases in which the accused has no intention of

injuring anyone in particular. In this regard, we may also refer to the judgment of this Court in the case of ***Fatta v. Emperor, AIR 1931 Lah 63,*** (Refer : Penal Law of India by Dr. Hari Singh Gour, Volume 3, 2009)

Thus, where the act committed is done with the clear intention to kill the other person, it will be a murder within the meaning of Section 300 of the Code and punishable under Section 302 of the Code but where the act is done on grave and sudden provocation which is not sought or voluntarily provoked by the offender himself, the offence would fall under the exceptions to Section 300 of the Code and is punishable under Section 304 of the Code. Another fine tool which would help in determining such matters is the extent of brutality or cruelty with which such an offence is committed.

An important corollary to this discussion is the marked distinction between the provisions of Section 304 Part I and Part II of the Code. Linguistic distinction between the two Parts of Section 304 is evident from the very language of this Section. There are two apparent distinctions, one in relation to the punishment while other is founded on the intention of causing that act, without any intention but with the knowledge that the act is likely to cause death. It is neither advisable nor possible to state any straightjacket formula that would be universally applicable to all cases for such determination. Every case essentially must be decided on its own merits. The Court has to perform the very delicate function of applying the provisions of the Code to the facts of the case with a clear demarcation as to under what category of cases, the case at hand falls and accordingly punish the accused.

A Bench of this Court in the case of ***Mohinder Pal Jolly v. State of Punjab, AIR 1979 SC 577,*** stating this distinction with some clarity, held as under:

> "11. A question arises whether the appellant was guilty under Part I of Section 304 or Part II. If the accused commits an act while exceeding the right of private defence by which the death is caused either with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death then he would be guilty under Part I. On the other hand if before the application of any of the Exceptions of Section 300 it is found that he was guilty of murder within the meaning of clause "Fourthly", then no question of such intention arises and only the knowledge is to be fastened on him that he did indulge in an act with the knowledge that it was likely to cause death but without any intention to cause it or without any intention to cause such bodily injuries as was likely to cause death. There does not seem to be any escape from the position, therefore, that the appellant could be convicted only under Part II of Section 304 and not Part I."

As we have already discussed, classification of an offence into either Part of Section 304 is primarily a matter of fact. This would have to be decided with reference to the nature of the offence, intention of the offender, weapon used, the place and nature of the injuries, existence of pre-meditated mind, the persons participating in the commission of the crime and to some extent the motive for commission of the crime. The evidence led by the parties with reference to all these circumstances greatly helps the court in coming to a final conclusion as to under which penal provision of the Code the accused is liable to be punished. This can also be decided from another point of view, i.e., by applying the "principle of exclusion". This principle could be applied while taking recourse to a two-stage process of determination. Firstly, the Court may record a preliminary finding if the accused had committed an offence punishable under the substantive provisions of Section 302 of the Code, that is, "culpable homicide amounting to murder". Then secondly, it may proceed to examine if the case fell in any of the Exceptions detailed in Section 300 of the Code. This would doubly ensure that the conclusion arrived at by the court is correct on facts and sustainable in law. We are stating such a proposition to indicate that such a determination would better serve the ends of criminal justice delivery. This is more so because presumption of innocence and right to fair trial are the essence of our criminal jurisprudence and are accepted as rights of the accused.

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383. INDIAN PENAL CODE, 1860 – Section 302

Murder trial based on circumstantial evidence – Death due to administration of poison – The law required the accused to provide some explanation as he was last seen in the room with the deceased – Accused failed to offer any explanation therefor which was the least expected of him – Court was justified in drawing an adverse inference against accused.

Nagesh v. State of Karnataka

Judgment dated 8.05.2012 passed by the Supreme Court in Criminal Appeal No. 671 of 2005, reported in (2012) 6 SCC 477

Held:

In the present case, there is no eye-witness to the actual scene of crime that resulted in the death of the deceased. To that limited extent, it is a case of circumstantial evidence. Certain enough, the statements of the parents of the deceased, PW 4 and PW 9, the neighbours, PW 1 and PW 2 and the Investigating Officer, PW 15 clearly establishes the case of the prosecution.

PW1 has stated that the accused Anant had gone to the temple and the deceased was in the room along with the appellant. At 8.30 p.m., Anant came and he brought the deceased by holding her hand and, upon enquiry from PW1, she was told that the deceased was not feeling well. Seeing her condition and the moaning sound made by the deceased, PW1 gave her saline water. Then,

the accused Venkatesh also came there in the Ambassador car. Even other people gathered by that time. The Police also came at the spot and the deceased was taken to the hospital in the Ambassador car. Later, it was learnt that the police had come to the spot and informed that Nagaratna had died.

Similarly, PW2 is the other neighbour who had been watching TV at about 8.45 p.m. on that day but after hearing the commotion, had come out of his house saw that Nagaratna was being taken away in the Ambassador car and he was told by the accused that they were taking her to a doctor as she was not well.

PW4 is the mother of the deceased while PW9 is the father of the deceased. Both of them have stated that Anant had pressurized them to send their daughter to Belgaum with him. On 8th October, 1993, the accused brought her dead body in the car and at that time her nose was bleeding and there were blood clottings on the cheeks as well. Anant and Nagesh had informed the parents that she died as a result of consuming poison. They did not give any further information. Further, the father of the deceased, PW9, had objected that her body be not cremated but despite his protest, the dead body was cremated in the village.

PW11, Praveen, who was running a tea shop at Belgaum, stated that he had seen the accused persons in the Ambassador car and he even knew the driver. He was standing near the taxi-stand when the driver brought the three accused persons in the car and there was a girl sleeping in the car.

The statement of these witnesses examined in light of the statement of the Investigating Officer, PW15, provides a complete chain as to how the deceased was brought to Belgaum and was last seen with accused Nagesh, where after she died and her body was cremated in the village despite protest by her parents.

All the three accused had put the deceased into the car and never took her to the doctor but instead they went to the village Gokarna where they reached next morning and handed over the dead body of the deceased to the parents.

A contention has also been raised to argue that the First Information Report (FIR), Exhibit P10, is an afterthought as it was lodged after deliberation and planning, that too, after a considerable time. The Court cannot ignore the fact that young daughter of PW4 and PW9 had died allegedly by consuming poison. No other details were brought to their notice, they had other daughters present in the house and the dead body of the deceased was cremated against their wish. After the cremation, the FIR was lodged. The delay, if any, in the circumstances of the case, thus, stands properly explained.

The Court has to examine the evidence in its entirety, particularly, in the case of circumstantial evidence, the Court cannot just take one aspect of the entire evidence led in the case like delay in lodging the FIR in isolation of the other evidence placed on record and give undue advantage to the theory of benefit of doubt in favour of the accused.

Firstly, we are unable to find any major discrepancy or even an iota of real doubt in the case of the prosecution and secondly, despite clear irresponsible attitude on the part of the Police officials who were present at the residence of the accused persons when the deceased was brought to the car on the pretext of taking her to a doctor for treatment but her body was taken away, still the prosecution has been able to establish the complete chain of events pointing undoubtedly towards the guilt of the appellant.

Another very important aspect of this case is that the accused in their statement under Section 313 of the Code of Criminal Procedure, 1973 took up the stand of complete denial of their involvement in the crime and offered no explanation before the court. As noticed above, the law required the accused Nagesh in particular to provide some explanation as he was last seen in the room with the deceased. Rather than providing some explanation of the circumstances under which the deceased died, the appellant offered complete denial. But strangely when PW4, the mother of the deceased, was cross-examined by the defence, they put the suggestion to her that the deceased was having a love affair with a student from her college and her parents had sent her to Belgaum to ensure that the said love affair failed. The deceased had become desperate at Belgaum and had taken poison and died. If this be the stand of the accused, then there was no occasion for the accused to deny every material piece of evidence as well as not to give any explanation when the accused were specifically asked for.

The purpose of a statement under Section 313 Cr.PC is to put to the accused the material evidence appearing in the case against him as well as to provide him an opportunity to explain his conduct or his version of the case.

It is also possible and permissible that an accused may remain silent but in that circumstance and with reference to the facts and circumstances of a given case, the Court may be justified in drawing an adverse inference against the accused. PW5, Smt. Pushpa, is another vital witness who had seen the deceased when she was brought to the Ambassador car and, according to her, lips of the deceased were blackish and her neck had black marks on two sides and when she enquired about her from the accused, she was told that the deceased had taken poison. The statements of PW1, PW4 and PW9 read with the statement of this witness, establish the facts which form the very basis of the case of the prosecution and they have been proved in accordance with law. The trend of cross-examination on behalf of the accused implies admission of the death of the deceased having taken place in the premises in question by taking poison, however, the accused have failed to offer any explanation there for which was least expected of him.

In view of the above factual matrix and upon appreciation of evidence, the Court found itself unable to concur with the findings recorded by the courts below. It was primarily for the reason that the courts had departed from the Rule of Prudence in appreciation of evidence. In the present case, the evidence

is admissible evidence and has been appreciated in consonance with the rules of prudence and law. These findings can neither be termed as perverse or so improper that no person of common prudence can arrive at that conclusion. In light of the above noted principles of appreciation of evidence, we would not interfere merely because it is possible to take another view on the same evidence.

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384. INDIAN PENAL CODE, 1860 – Section 302 r/w/s 34

CRIMINAL TRIAL:

Murder trial based on circumstantial evidence – Vicarious liability – Culpability will have to be determined on the basis of individual's overt acts on the part of the accused – Legal position explained.

Brijesh Mavi v. State (NCT of Delhi)

Judgment dated 03.07.2012 passed by the Supreme Court in Criminal Appeal No. 824 of 2011, reported in (2012) 7 SCC 45

Held:

Insofar as the charges under Section 302 and Section 460 read with Section 34 IPC are concerned, there are certain other connected facts and circumstance proved by the evidence on record which will have to be weighed by us in order to determine the consequence(s) that can be attributed to the accused from the recovery of the weapon in question.

The recovery was affected after more than two years. The incident had occurred on 6-6-2001 and the recovery was made on 12-08-2003. The prosecution has not proved that during the intervening period the weapon had not changed hands and the same was consistently possessed by the appellant-accused Brijesh. The live and fired cartridges along with the bullets recovered from the place of occurrence and also the bullets recovered from the dead body in the course of post-mortem were sent to the FSL, Rohini. The report has been exhibited as Ext. PW-21/A. The said report is dated 28-2-2002 i.e. Before the recovery of the 0.380 calibre revolver. After the recovery of the said weapon was made, the weapon itself along with the cartridges (live and empty) as well as the four bullets recovered from the place of occurrence was sent to the CFSL, Chandigarh and is covered by the report of PW 20 dated 28-11-2003 (Ext. PW-20/B). However, surprisingly, the bullets recovered from the dead body at the time of post-mortem were not sent to the CFSL, Chandigarh. This is evident from the evidence of PW 25 SI Sanjeev Sharma. No explanation for what appears to us to be a serious lapse on the part of the prosecution, is forthcoming.

That apart, in Ext. PW-20/B it is recorded that three out of the four bullets (discovered from the place of occurrence) were fired from the recovered weapon. The said bullets were not sent for serological examination to establish that the three bullets fired form the recovered weapon had entered and exited from the body of the deceased. In such a situation a lingering doubt remains as to whether

the prosecution in the present case has succeeded in proving the charge against the appellant-accused beyond all reasonable doubt.

Furthermore, from Ext. PW-20/B it is evident that one bullet (marked as B-2 by the expert) was not fired from the .380 calibre firearm recovered at the instance of the appellant. The first report of the FSL, Rohini, Delhi, Ext. PW-21/A also indicates that one bullet of .380 caliber did not have any striations of refilling marks. The prosecution has remained silent on the aforesaid aspect of the matter, though, from the two reports, the possibility of use of another firearm of .380 calibers cannot be ruled out.

In the above context the decision of this Court in ***Abdulwahab Abdulmajid Baloch v. State of Gujarat, (2009) 11 SCC 625*** would be of particular significance. Though the observations contained in paras 37 and 38 of the judgment have to be understood to have been rendered in the context of the facts of the case we find that the said observations would squarely apply to the present case. Consequently the aforesaid two paragraphs may be usefully extracted hereinbelow: (SCC p. 636)

> "37. Be that as it may, we feel that only because the recovery of a weapon was made and the expert opined that the bullet found in the body of the deceased was fired from one the weapons seized, by itself cannot be the sole premise on which a judgment of conviction under section 302 could be recorded. There was no direct evidence. The accused, as noticed hereinbefore, was charged not only under Section 302 read with Section 34 of the Penal Code but also under Section 302 read with Section 120-B thereof. The murder of the deceased was said to have been committed by all the accused persons upon hatching a conspiracy. This charge has not been proved.
>
> "38. The learned trial Judge himself opined that the recovery having been made after nine months, the weapon might have changed many hands. In absence of any other evidence connecting the accused with commission of crime of murder of the deceased, in our opinion, it is not possible to hold that the appellant on the basis of such slander evidence could have been found guilty for commission of offence punishable under Section 302 of the Penal Code."

Though the above discussions would lead us to be conclusion that prosecution, in the present case, has succeeded in proving a highly incriminating circumstance against the appellant-accused, yet, we do not consider that it would be wholly safe to hold that the only conclusion that can follow from the aforesaid proved circumstance is that the accused Brijesh is responsible for the death of the deceased that had occurred on 6-6-2001. We have also noticed that the High Court has convicted the appellant-accused under Section 302 as well as

Section 302 as well as Section 460 IPC with the aid of Section 34. In a situation where co-accused satish had died during the trial and the other co-accused Med Singh had been acquitted by the High Court, the culpability of the present appellant-accused with the aid of Section 34 will be open to serious doubt. Such culpability will have to be determined on the basis of individual overt acts on the part of the appellant-accused for which we do not find any cogent and reliable material on record.

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385. INDIAN PENAL CODE, 1860 – Sections 302 r/w/s 34 and 452
CRIMINAL TRIAL:
Murder trial – Where the occurrence in parts took place inside the house and the rest of it slightly outside the premises of the deceased, under these circumstances, the family members and the close relatives are bound to be the natural witnesses – Legal position reiterated.
Common intention – Proof of – Previous meeting of minds with pre-arranged plans or prior concert is difficult to establish by way of direct evidence – They are to be inferred from the conduct and circumstances – Legal position reiterated.

Thoti Manohar v. State of Andhra Pradesh

Judgment dated 15.05.2012 passed by the Supreme Court in Criminal Appeal No. 1739 of 2007, reported in (2012) 7 SCC 723

Held:

The submission of the learned counsel for the appellant is that all the witnesses, being relatives, are interested witnesses. The occurrence in part took place inside the house and the rest of it slightly outside the premises of the deceased. Under these circumstances, the family members and the close relatives are bound to be the natural witness. They intervened and sustained injuries. Their sustaining of injuries has got support from the ocular evidence as well as the medical evidence. The same has been dislodged and if we allow ourselves to say so, not even a fragile attempt has been made to dislodge the same. By no stretch of imagination can it be said that they are chance witnesses. In the obtaining factual matrix, they are the most natural witnesses.

In this context, we may refer with profit to the decision of this Court in ***Dalip Singh v. State of Punjab, AIR 1953 SC 364,*** wherein Vivan Bose, J., speaking for the Court, observed as follows:

> "25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the

reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in ***Rameshwar v. State of Rajasthan, AIR 1952 SC 54***"

.In the said case, it was further observed that:

"26. A witness is normally to be considered independent unless he or she springs from source which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close [relative] would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

In ***Masalti v. State of U.P., AIR 1965 SC 202,*** it has been ruled that normally close relatives of the deceased would not be considered to be interested witnesses who would also mention the names to the other persons as responsible for causing injuries to the deceased.

In ***Hari Obula Reddy v. State of A.P., AIR 1981 SC 82,*** three – Judge Bench has held that evidence of interested witnesses is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. It cannot be laid down as

"an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon"

In ***Kartik Malhar v. State of Bihar, (1996) 1 SCC 614,*** it has been opined that a close relative who is a natural witness cannot be regarded as an interested witness, for the term "interested" postulates that the witness must have some interested in having the accused, somehow or the other, convicted for some animus or for some other reason.

In ***Pulicherla Nagaraju v. State of A.P., AIR 2006 SC 3010*** while dealing with the liability of interested witnesses who are relatives, a two-Judge Bench observed that:

> "It is well settled that evidence of a witness cannot be discarded merely on the ground that he is either partisan or interested or closely related to the deceased, if it is otherwise found to be trustworthy and credible."

The said evidence only requires scrutiny with more care and caution, so that neither the guilty escape nor the innocent is wrong convicted. If on such careful scrutiny, the evidence is found to be reliable and probable, them it can be acted upon.

> "If is found to be improbable or suspicious, it ought to be rejected. Where the witness has a motive to falsely implicate the accused, his testiomony should have corroboration in regard to material particulars before it is accepted" [***Pulicherla case*** (supra)]

Tested on the anvil and touchstone of the aforesaid principle, we find that the evidence of the injured witnesses who are closed relatives of the deceased have really not embellished or exaggerated the case of the prosecution. They are the most natural witnesses and there is nothing on record to doubt their presence at the place of occurrence. By no stretch of imagination can it be stated that the presence of the said witnesses at the scene of the crime and at the time of occurrence was improbable. Their version is consistent and nothing has been suggested to bring any kind of inherent improbabilities in their testimonies.

The next plank of submission which has been ambitiously and zealously pyramided by the learned counsel for the appellant is that the appellant has been erroneously convicted with the aid to Section 34 IPC. It is worth noting that the High Court has acquitted A-3 on the ground that he did not share the common intention. Certain distinct features have been emphasised by the High Court. They are:

(i) he is a distant cousin of A-1 and A-2 and belongs to a different villages;

(ii) he had no role to play in the genesis of the occurrence and the subsequent cavil;

(iii) he had neither participated in the dragging of the deceased nor did he assault on his body;

(iv) he was at a distance;

(v) A-1 and A-2 are real brothers and they have definite roles as regarded the previous incident; and

(vi) A-2 was intervened by the witnesses from assaulting the deceased.

The material evidence on record clearly shows that A-1 and A-2 had threatened the deceased with dire consequences. Though they had gone to the elders on 24-9-2002 and the panchayat was to be convened on 26.09.2002, yet on

25.09.2002 at 11.00 a.m; armed with lethal weapons, they went to the house of the deceased.

In ***Ram Tahal v. State of U.P., AIR 1972 SC 254,*** while with the applicability of section 34 IPC, a two-Judge Bench observed:

> "There is no doubt that a common intention should be anterior in time to the commission of the crime showing a pre-arranged plan and prior concert and though, it is difficult in most cases to prove the intention of an individual [yet] it has to be inferred from the act or conduct or other relevant circumstances of the case. This inference can be gathered by the manner in which the accused arrived on the scene and mounted the attack, the determination and concert which the beating was given or the injuries, caused by one or some of them, the acts done by others to assist those causing the injuries the concerted conduct subsequent to the commission of the offence for instance that all of them had left the scene of the incident together and others acts which all or some may have done as would help in determining the common intention. In other words, the totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted."

43. In ***Rajesh Govind Jagesha v. State of Maharashtra, AIR 2000 SC 160,*** a two-Judge Bench has held that:

> "The existence of common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases."

In ***Bishna v. State of W.B. AIR 2006 SC 302,*** it has been held that for the purpose of attracting Section 34 IPC, specific overt act on the part accused is not necessary. He may even wait and watch. Inaction on the part of an accused may sometimes go a long way to achieve a common intention or an object with others.

In ***Manik Das v. State of Assam AIR 2007 SC 2274.*** It has been held as follows:

> "The section does not say "the common intention of all" nor does it say "an intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in

furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in ***Chinta Pulla Reddy v. State of A.P., AIR 1993 SC 1899***. Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused.' "

[As observed in ***Anil Sharma v. State of Jharkhand, (2004) 5 SCC 679***]

Coming to the case at hand, the appellant had an inimical relationship with the deceased and his family as the previous occurrence would show. Despite a consensus being arrived at that there would be a panchayat on 26-9-2002, they armed with deadly weapons, went to the house of the deceased and dragged the deceased. The previous meeting of minds with pre-arranged plan or prior concert as has been held in a number of authorities is difficult to establish by way of direct evidence. They are to be inferred from the conduct and circumstances. As is evincible, the weapons they carried were lethal in nature. The deceased was absolutely helpless and not armed with any weapon. It was most unexpected on their part as normally it was expected that there would be a panchayat on the next day.

The two brothers, A-1 and A-2, dragged the deceased outside the house and A-1 gave the blows. True it is that A-2 did not give the blow, but his participation from the beginning till the end would clearly reveal that he shared the common intention with his brother. He had assaulted the other witnesses who had tried to intervene. Thus, though he might not have inflicted the injury, yet it can safely be concluded that he shared the common intention making him jointly liable.

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***386. INDIAN PENAL CODE, 1860 – Sections 302 and 304 Part–A (Section 300 Exception 4)**

Murder or culpable homicide not amounting to murder – Single stab injury inflicted upon the deceased with the aid of a knife without premeditation in mind of the accused to cause death of the deceased – The deceased (son) was under the influence of liquor and was misbehaving which created a heat of passion in the accused (father) – The deceased sustained one stab injury 1½ inch in length and 2 inches in depth which was perforated upto intestine – On internal

examination, the abdominal wall was found ruptured due to the stab on right lateral part of abdominal wall and that peritoneal cavity was full of blood, liver was also found ruptured below stab injury – The probable cause of death was injury to a vital organ like the liver, which caused internal haemmorrhage and shock – Therefore, unmindful of consequences, though not in a cruel manner, the appellant inflicted a single blow which unfortunately caused severe damage to vital organs resulting into death of the deceased – Conviction of the appellant altered u/s 304 Part I in place of Section 302 IPC.

Sudhakar v. State of Maharashtra

Judgment dated 05.10.2012 passed by the Supreme Court in Criminal Appeal No. 1603 of 2012, reported in (2012) 9 SCC 725

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387. INDIAN PENAL CODE, 1860 – Sections 302 and 304 Pt. I

Murder or culpable homicide not amounting to murder – Case of sudden fight – Appreciation of evidence there in – Pushing a person into the sea, with a bleeding head injury may not have been with the intention to kill, but it would certainly show the "intention of causing a bodily injury as was likely to cause death", within the meaning of S. 300 Secondly and Section 304 Part I IPC

Abdul Nawaz v. State of West Bengal

Judgment dated 10.05.2012 passed by the Supreme Court in Criminal Appeal No. 801 of 2012, reported in (2012) 6 SCC 581

Held:

The dao allegedly used by him for assaulting the deceased was even according to the prosecution lying within the dinghy. That the appellant had not repeated the act and the intensity of the dao-blow was not severe enough inasmuch as it had not caused any fracture on the skull of the deceased. It was further argued that there was no evidence medical or otherwise to prove that the injury inflicted by the appellant was in the ordinary course of nature sufficient to cause death. As a matter of fact, the injury had not itself caused the death, as according to the trial Court, the victim had died of drowning.

It was urged that while according to PW-1 the deceased was pushed into the sea that version had not been supported by PW2. To top it all the prosecution case itself suggested that there was a sudden fight between the deceased and the appellant and his companions and it was in the course of the said fight that an injury was sustained causing the death of the deceased thereby bringing the case under Exception 4 to Section 300 of the IPC.

Relying upon the decisions of this Court in ***Chinnathaman v. State, (2007) 14 SCC 690***, ***Muthu v. State, (2009) 17 SCC 433***, ***Arumugam v. State, (2008) 15 SCC 590*** and ***Ajit Singh v. State of Punjab, (2011) 9 SCC 462*** and judgment of this Court in ***Elavarasan v. State, (2011) 7 SCC 110*** it was contended that the conviction

of the appellant under Section 302 of the IPC was erroneous in the facts and circumstances of the case and that the evidence at best made out a case punishable under Section 304 Part II of the IPC, and in the worst case scenario, one punishable under Section 304 Part I.

The contention urged by learned Senior Counsel for the appellant is not wholly without merit to be lightly brushed aside. The prosecution case clearly is that the appellant and his companions had returned to the place of occurrence only to recover the second dinghy which they had left behind while they had escaped from the spot in the other dinghy. It is not the case of the prosecution that there was any pre- mediation to commit the murder of the deceased. It is also common ground that the appellant was not armed with any weapon. The weapon allegedly used by him to assault the deceased was even according to the prosecution case lying in the said dinghy. The nature of the injury inflicted upon the victim has not been proved to be sufficient in the ordinary course of nature to cause death. The blow given by the appellant to the deceased had not caused any fracture on the skull.

The two courts below have, all the same, accepted the prosecution story that after the deceased was given a dao-blow, the appellant pushed him into the sea. That finding has been affirmed by us in the earlier part of this judgment. The question, however, is whether this act of pushing the deceased into the sea after he was given a blow on the head, no matter the blow was not proved to be severe enough to cause death by itself, would be suggestive of an intention to kill. According to learned senior counsel the answer is in the negative. That is so because, the main purpose of the appellant returning to the place of occurrence was not to kill any one, but only to have the dinghy back. The obstruction caused in the accomplishment of that object could be removed by pushing the deceased who was resisting the attempt made by the appellant into the sea. The fact that the deceased was pushed into the sea, should not, therefore, be seen as indication of an intention to kill the deceased.

The appellant was interested only in having the dinghy back. That could be done only by removing the obstruction caused by the deceased who was resisting the attempt. Pushing the deceased into the sea could be one way of removing the obstruction not necessarily by killing the deceased. Having said that we cannot ignore the fact that the deceased had sustained a head injury and was bleeding. Pushing a person into the sea, with a bleeding head injury may not have been with the intention to kill, but it would certainly show the "intention of causing a bodily injury as was likely to cause death", within the meaning of Sections 300 & secondly 304 Part I of the IPC. The appellant having assaulted the deceased with a dao and having thereby disabled him sufficiently ought to have known that pushing him into the sea was likely to cause his death. Pushing the deceased into the sea was in the circumstances itself tantamount to inflicting an injury which was likely to cause the death of the deceased.

The High Court has gone into the question whether the deceased knew or did not know swimming. But that issue may have assumed importance if the deceased was not disabled by the assault on a vital part of his body. In the case at hand he was assaulted with a sharp-edged weapon on the head and was bleeding. His ability to swim, assuming he knew how to swim, was not, therefore, of any use to him. The injury on the head and the push into the sea have, therefore, to be construed as one single act which the appellant ought to have known was likely to cause death of the deceased.

Even so Exception 4 to Section 300 of the IPC would come to the rescue of appellant inasmuch as the act of the appellant even when tantamount to commission of culpable homicide will not amount to murder as the same was committed without any pre-meditation and in a sudden fight, in the heat of passion, in the course of a sudden quarrel without the offender taking undue advantage or acting in a cruel or unusual manner. The prosecution evidence sufficiently suggests that a scuffle had indeed taken place on the dinghy where the appellant and his companions were trying to recover the dinghy while the deceased was preventing them from doing so. In the course of this sudden fight and in the heat of passion the appellant assaulted the deceased and pushed him into the sea eventually resulting in his death. The act of the appellant is more appropriately punishable under Section 304 (I) of the IPC instead of Section 302 of the Code invoked by the Courts below. The appeal must to that extent succeed.

In the result, we allow this appeal in part and to the extent that while setting aside the conviction of the appellant for the offence of murder under Section 302 of the IPC, we convict him for culpable homicide not amounting to murder punishable under Section 304 Part (I) of the IPC and sentence him to undergo imprisonment for a period of eight years. Sentence of fine and imprisonment in default of payment of fine is, however, affirmed.

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388. INDIAN PENAL CODE, 1860 – Sections 304-B, 306 and 498-A
CRIMINAL PROCEDURE CODE, 1973 – Section 161
Dowry death – Demand of dowry – Appreciation of – There were major improvements/embellishments in the prosecution case and the demand by the accused husband does not find mention in the statements u/s 161 Cr. P.C. – Even if such demands were there, it may not necessarily be a demand of dowry – FSL report falsifies the theory of suicide – The facts regarding sale of house for payment of dowry does not also inspire confidence – No other statements were made u/s 161 of Cr. P.C. – Appellant/accused is acquitted.

Rohtash v. State of Haryana

Judgment dated 22.05.2012 passed by the Supreme Court in Criminal Appeal No. 878 of 2010, reported in (2012) 6 SCC 589

Held:

We have considered the rival submission made by learned counsel for the parties and perused the records. It may be pertinent to make reference to the relevant part of the deposition of witnesses.

Jiwan (PW.1), complainant, deposed that her daughter had complained against the ill-treatment given to her by her husband, his parents and his elder brother Rajbir; they even taunted her that she belonged to "Bhukha-Nanga" family and that her father had not given adequate dowry. Rohtash accused also visited him and asked him to give ₹ 10,000 so that he could settle himself in some business. Six months after the marriage, he gave ₹ 10,000 to Rohtash accused after selling his house. Her in-laws still continued to ill-treat her and raised a further demand of ₹ 5,000 on the pretext that they wanted to settle Rajbir, elder brother of Rohtash, in some business. On the fateful day of incident, Gopi Chand and Ram Kishan of Village Mandora came to him and told that his daughter Indro had consumed poisonous tablets and died.

PW 1 was confronted with his statement u/s. 161 Cr.P.C. in respect of demand of ₹ 10,000 by appellant Rohtash as no such fact had been stated by him to the I.O. Even for the demand of ₹ 5,000 for Rajbir, he was confronted with his statement u/s. 161 Cr.P.C. as no such fact had been mentioned therein. He was also confronted with his statement u/s. 161 Cr.P.C. as he had not stated before the I.O. that he had been informed about the death of his daughter by Gopi Chand and Ram Kishan. Regarding the sale of the house to Suresh (PW.2), he has admitted that land belonged to the Wakf Board and, therefore, he could not execute any registered sale-deed in respect of the same.

Suresh (PW.2) deposed that he had purchased the house from Jiwan (PW.1), complainant, for ₹ 12,000, however, no sale- deed could be executed in his favour as the land belonged to the Wakf Board. Fateh Singh (PW.3) deposed that he had been told by Jiwan (PW.1) that he was under a great pressure to pay ₹10,000 to the appellant to buy peace for his daughter and he had given ₹ 10,000 to the appellant. He was confronted with his statement u/s. 161 Cr.P.C. where he has not told the I.O. about this transaction.

S.I., Inder Lal (PW.6), Investigating Officer, deposed that he went to the cremation ground and collected ashes and bones in presence of witnesses and sent it for chemical analysis. In his cross- examination he has stated that no independent witness was ready to involve himself in the case becoming a prosecution witness as it was a family matter for the accused persons.

So far as the statement of the appellant u/s. 313 Cr.P.C. is concerned, he replied that the facts and circumstances put to him were not correct. In reply to Question No. 10, he stated that his wife Indro did not commit suicide and the allegation of suicide was concocted version. In reply to para 21, he stated as under:-

> "The deceased Smt. Indro was leading a happy married life with me and we never ill-treated her, much less on account of any dowry. The deceased was suffering from fits as a result of which she had died. We had informed the parents of the deceased through Rajbir accused and after Jiwan P.W. and his other relations had come to our village, we had cremated the dead body of the deceased in their presence in our village. There was no question of our demanding any dowry, much less ill-treating the deceased on that account because our financial position is very sound."

The aforesaid depositions make it crystal clear that the version given by the prosecution witnesses regarding demand of ₹ 10,000 by the appellant did not find mention in the statement u/s. 161 Cr.P.C. of either of the witnesses.

The facts regarding the sale of house by Jiwan (PW.1) to Suresh (PW.2) does not also inspire confidence as the land belonged to Wakf Board. More so, the demand of ₹ 5,000 for establishment of a business of Rajbir was made by the in-laws of the deceased Indro, and not by the appellant, who had been acquitted by both the courts below, therefore, that issue cannot be considered by us.

The only question remains for our consideration is as to whether there was a dowry demand by the appellant and for that purpose the deceased Indro had been ill-treated to the extent that she had to take a drastic step of committing suicide.

This Court in ***Appasaheb v. State of Maharasthra, (2007) 1 SCC 721,*** while dealing with the similar issue and definition of the word dowry' held as under:-

> "A demand for money on account of some financial stringency or for meeting some urgent domestic expenses or for purchasing manure cannot be termed as a demand for dowry as the said word is normally understood."

The aforesaid judgment was reconsidered by this Court in ***Bachni Devi v. State of Haryana, (2011) 4 SCC 427,*** wherein this Court held that the aforesaid judgment does not lay down a law of universal application. Each case has to be decided on its own facts and merit. If a demand for property or valuable security, directly or indirectly, has nexus with marriage, such demand would constitute demand for dowry. The cause of raising of such demand remains immaterial.

In view of above, we have to examine as to whether the demand by the appellant for establishment of his tailoring business could be held to be a demand for dowry and further whether for that demand, the ill-treatment given by the appellant to his wife was so grave that she had been driven to the extent that she has to commit suicide.

The prosecution case has been that Indro, deceased, committed suicide by taking pills/poison. There is ample evidence on record and it has specifically been mentioned by the prosecution witnesses, particularly, Jiwan (PW.1), Fateh Singh (PW.3) and S.I., Inder Lal, I.O., (PW.6), that some broken pieces of bangles had been collected by the I.O. from the place of occurrence and broken bones and articles were collected from the cremation site and sent for chemical analysis to Forensic Science Laboratory. Unfortunately, none of the courts below has taken note of the FSL report though the documents had been marked as Ext.PH and Ext.PH-1.

The first document is Report No. FSL(H) dated 29.5.1990 by the Forensic Science Laboratory, Haryana, Madhuban, Karnal, wherein the result of examination of bones and ashes is as under:-

Ext.1 - some burnt bones alongwith ash (Approximately 1 Kg.) Result of the examination - no common metallic poison could be detected in Ext. 1.

Ext. PH-1 dated 16.8.1989 revealed that the fragments of bones in Ext. PH-1 were identified that they belonged to human individual.

The aforesaid reports do not support the case of the prosecution, rather leans towards the defence taken by the appellant.

The High Court interfered with the order of acquittal recorded by the trial court. The law of interfering with the judgment of acquittal is well-settled. It is to the effect that only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of the acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference. [Vide: ***State of Rajasthan v. Talevar & Anr., AIR 2011 SC 2271*** and ***Govindaraju @ Govinda v. State by Srirampuram Police Station & Anr., (2012) 4 SCC 722***].

In view of above, we are of the considered opinion that in the instant case there had been major improvements/embellishments in the prosecution case and demand of ₹ 10,000 by the appellant does not find mention in the statements u/s. 161 Cr.P.C. More so, even if such demand was there, it may not necessarily be a demand of dowry. Further, the chemical analysis report falsifies the theory of suicide by deceased taking any pills. In such a fact- situation, the defence taken by the appellant in his statement u/s. 313 Cr.P.C. could be plausible.

Thus, appeal succeeds and is allowed. The appellant is given the benefit of doubt and the impugned judgment of the High Court dated 11.1.2007, 543 is set aside. The appellant is acquitted of all the charges.

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389. INDIAN PENAL CODE, 1860 – Sections 342, 363 and 364
Wrongful confinement and abduction for murder – When by force or deceit, if any person is compelled or induced to go from any place and such an abduction takes place in order to ultimately eliminate him, then offence would be made out under Section 364 IPC.

Subhash Krishnan v. State of Goa

Judgment dated 17.08.2012 passed by the Supreme Court in Criminal Appeal No. 1089 of 2010, reported in (2012) 8 SCC 365

Held:

It was contended that none of the ingredients of Section 364 IPC were made out for the High Court to find the appellant guilty of the said offence along with A-1, A-3 and A-4. In this context, it is sufficient to refer to what has been stated by the High Court. In paragraph 87, the High Court has observed in *Sanjay Gadekar v. State, Cri Appeal No. 7 of 2007* and *6 of 2008*) on this aspect which reads as under:

> "87. The learned trial Court, however, erred in acquitting the accused No.1- Valeriano Barretto the Accused No.2- Subhash Krishnan, the Accused No.3- Sanjay Gadekar, the accused No.4-Shailesh Gadekar under Sections 342, 364 read with Section 34 of IPC, 1860. The view taken by the learned trial Court for acquitting the said accused persons proceeded from the fact that the victim Shanu fell unconscious and thereafter, he was put in a dicky of the Maruti van. This fact, the learned trial Court reasoned, did not further materialize into his prevention from proceeding in any direction and or his abduction in order to murder him or to put him in danger of being murdered. Essentially both the offences i.e. wrongful confinement and abduction are the offences which are committed as a result of curtailment of personal liberty. The offence of wrongful confinement as defined under Section 340 of the Code occurs when individual is wrongfully restrained in such a manner as to prevent him/her from proceeding beyond certain circumscribing limits. The offence of abduction under Section 362 of the Code involves use of force or deceit to compel or induce any person to go from any place. Evidence clearly shows that the victim Shanu by use of criminal force i.e. the assault was made to loose his consciousness. Even if the victim would have wished to proceed in any one direction, he would not have been in position to do so for the reason of his unconsciousness. Certainly, Shanu never wished to go with his assailants in the Maruti Van, but was compelled by the said accused

persons to go from the place of incident to the place where he ultimately met his death. Deceit involves tricking away of individual from reality. Unconsciousness paralyzed the mental faculties of the victim and freezed his perception as regards the place. Virtually, the victim was, thereafter, tricked away from the reality while in unconscious state and made to go from one place to another. Thus, the learned trial Court grossly misinterpreted the facts and recorded manifestly illegal finding."

As rightly pointed out by the High Court under Section 362 IPC when by force or deceit if any person is compelled or induced to go from any place and such an abduction takes place in order to ultimately eliminate him, the offence would be made out under Section 364 IPC. As rightly pointed out by the High Court, examining the conduct of the appellant along with the other accused in wrongfully restraining the deceased by inflicting severe injuries on the body of the deceased i.e. by causing as many as 36 injuries in which process the person lost his consciousness where after he was shifted to a different place, where it ultimately came to light that the person was killed by hanging, every description of the offence under Sections 342 and 364 with the aid of Section 34 IPC was clearly made out. Therefore, we do not find any fault in the said conclusion of the High Court in having reversed the judgment of the trial Court for convicting the appellant for the offence under the said Sections.

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

Sentence for rape – Sexual violence is not only an unlawful invasion of the right of privacy and sanctity of a woman but also a serious blow to her honour – It leaves a traumatic and humiliating impression on her conscience, offending her self-esteem and dignity – It is not only a crime against the person of a woman, but a crime against the entire society – It indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least, her chastity – It destroys the entire psychology of a woman and pushes her into deep emotional crisis – It is a crime against the basic human rights, and is also violative of the victim's most cherished fundamental rights, namely, the right to life contained in Article 21 of the Constitution – The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity – Such cases need to be dealt with sternly and severely.

Pushpanjali Sahu v. State of Orissa and another

Judgment dated 18.09.2012 passed by the Supreme Court in Criminal Appeal No. 1439 of 2012, reported in (2012) 9 SCC 705

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391. INDIAN PENAL CODE, 1860 – Section 376 and proviso

(i) Offence of rape – Awarding punishment lesser than the minimum prescribed is an exception to the general rule – Exception clause is to be invoked only in exceptional circumstances – The power u/s 376(1) proviso is not to be used indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict interpretation.

(ii) Reduction of sentence – The statutory requirement for awarding punishment of less than seven years is to record adequate and special reasons in writing – Socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy.

State of Rajasthan v. Vinod Kumar

Judgment dated 18.05.2012 passed by the Supreme Court in Criminal Appeal No. 1887 of 2008, reported in (2012) 6 SCC 770

Held:

In *State of Karnataka v. Raju, AIR 2007 SC 3225,* this Court dealt with a case of rape of a minor girl below 12 years of age, wherein the High Court reduced the sentence of the accused from seven years to three-and-a-half years. This Court held that the normal sentence in a case where rape is committed on a child below 12 years of age, is not less than 10 years' rigorous imprisonment, though in exceptional cases "for special and adequate reasons" sentence of less than 10 years' rigorous imprisonment can also be awarded. The Court observed that socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of relevant circumstances in a dispassionate manner by the Court.

Awarding punishment lesser than the minimum prescribed under Section 376 IPC, is an exception to the general rule. Exception clause is to be invoked only in exceptional circumstances where the conditions incorporated in the exception clause itself exist. It is a settled legal proposition that exception clause is always required to be strictly interpreted even if there is a hardship to any individual. Exception is provided with the object of taking it out of the scope of the basic law and what is included in it and what legislature desired to be excluded.

Thus, the law on the issue can be summarised to the effect that punishment should always be proportionate/commensurate to the gravity of offence. Religion, race, caste, economic or social status of the accused or victim are not the relevant factors for determining the quantum of punishment. The court has to decide the punishment after considering all aggravating and mitigating factors and the circumstances in which the crime has been committed. Conduct and state of

mind of the accused and age of the sexually assaulted victim and the gravity of the criminal act are the factors of paramount importance. The court must exercise its discretion in imposing the punishment objectively considering the facts and circumstances of the case.

The power under the proviso is not to be used indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict interpretation. The legislature introduced the imposition of minimum sentence by amendment in the IPC w.e.f. 25.12.1983, therefore, the courts are bound to bear in mind the effect thereof. The court while exercising the discretion in the exception clause has to record "exceptional reasons" for resorting to the proviso. Recording of such reasons is sine qua non for granting the extraordinary relief. What is adequate and special would depend upon several factors and no straight jacket formula can be laid down.

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***392. INDIAN PENAL CODE, 1860 – Sections 376 and 302**

Crime against women and children – Rape and murder of 11 year old girl – The primary concern both at national and international level is about the devastating increase in rape cases and cases relating to crime against women in the world – India is no exception to it – Although the statutory provisions provide strict penal action against such offenders, it is for the courts to ultimately decide whether such incident has occurred or not – The courts should be more cautious in appreciating the evidence and the accused should not be left scot-free merely on flimsy grounds – Conviction under Sections 302 and 376 IPC restored and accused sentenced to rigorous imprisonment for life.

State of Uttar Pradesh v. Munesh

Judgment dated 12.10.2012 passed by the Supreme Court in Criminal Appeal No. 180 of 2007, reported in (2012) 9 SCC 742

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393. INDIAN PENAL CODE, 1860 – Sections 405 and 409

Offence of criminal breach of trust – Ingredients thereof – In order to prove the offence of criminal breach of trust which attracts the provision of Section 409 IPC, the prosecution must prove that the accused, a public servant or banker or agent, was entrusted with the property of which he is duty bound to account for; and the accused has committed criminal breach of trust provided under Section 405 IPC.

Sadhupati Nageswara Rao v. State of Andhra Pradesh

Judgment dated 17.08.2012 passed by the Supreme Court in Criminal Appeal No. 1159 of 2012, reported in (2012) 8 SCC 547

Held:

It is useful to refer the definition and punishment of "criminal breach of

trust" and related provision provided under Sections 405, 406 and 409 IPC which read as under:-

> "**405. Criminal breach of trust.-** Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".
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> **406. Punishment for criminal breach of trust.-** Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.
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> **409. Criminal breach of trust by public servant, or by banker, merchant or agent.-** Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

In order to prove the offence of criminal breach of trust which attracts the provision of Section 409 IPC, the prosecution must prove that one who is, in any manner, entrusted with the property, in this case as a dealer of fair price shop, dishonestly misappropriates the property, commits criminal breach of trust in respect of that property. In other words, in order to sustain conviction under Section 409 IPC, two ingredients are to be proved:, namely,

(i) the accused, a public servant or a banker or agent was entrusted with the property of which he is duty bound to account for; and

(ii) the accused has committed criminal breach of trust. What amounts to criminal breach of trust is provided under Section 405 IPC.

The basic requirement to bring home the accusations under Section 405 are the requirements to prove conjointly (i) entrustment and (ii) whether the accused was actuated by dishonest intention or not, misappropriated it or converted it to his own use to the detriment of the persons who entrusted it.

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394. JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000 – Section 7-A
JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) RULES, 2007 – Rule 12
CRIMINAL PROCEDURE CODE, 1973 – Section 2 (g) and 2 (h)
Claim of juvenility – Age determination – Scope of procedure and nature of inquiry contemplated under Juvenile Justice (Care & Protection of Children) Act, 2000 and Juvenile Justice (Care & Protection of Children) Rules, 2007 explained – Such inquiry is not expected to be an inquiry of the sort contemplated under Section 2 (g) of the Cr.P.C. – Procedure under Rule 12 of 2007 Rules only to be followed and not that under CrPC – Courts in such a situation act as a *parens patriae* because they have a kind of guardianship over minors who from their legal disability stand in need of protection. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a corporation or a municipal authority or a panchayat may not be correct – But Court, Juvenile Justice Board or a Child Welfare Committee functioning under the J.J. Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business – Only in case where those documents or certificates are found to be fabricated or manipulated, the Court, the Juvenile Justice Board or the Child Welfare Committee need to go for medical report for age determination.

Ashwani Kumar Saxena v. State of Madhya Pradesh
Judgment dated 13.09.2012 passed by the Supreme Court in Criminal Appeal No. 1403 of 2012, reported in (2012) 9 SCC 750

Held:

Section 7-A of the Juvenile Justice (Care & Protection of Children) Act, 2000 obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under the Code of Criminal Procedure, but under the J.J. Act. Criminal Courts, JJ Board, Committees etc., we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per the Code. Statute requires the Court or the Board only to make an 'inquiry' and in what manner that inquiry has to be conducted is provided in JJ Rules. Few of the expressions used in Section 7-A and Rule 12 are of considerable importance and a reference to them is necessary to understand the true scope and content of those provisions. Section 7-A has used the expression "court shall make an inquiry", "take such evidence as may be necessary" and "but not an affidavit". The Court or the Board can accept as evidence something more than an affidavit i.e. the Court or the Board can accept documents, certificates etc. as evidence need not be oral evidence.

Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 which has to be read alongwith Section 7-A has also used certain expressions which are also to be borne in mind. Rule 12(2) uses the expression "prima facie" and "on the basis of physical appearance" or "documents, if available". Rule 12(3) uses the expression "by seeking evidence by obtaining". These expressions in our view re-emphasize the fact that what is contemplated in Section 7A and Rule 12 is only an inquiry. Further, the ***age determination inquiry*** has to be completed and age be determined within thirty days from the date of making the application; which is also an indication of the manner in which the inquiry has to be conducted and completed. The word 'inquiry' has not been defined under the JJ Act, but S. 2(y) of the JJ Act says that all words and expressions used and not defined in the J.J. Act but defined in the Code of Criminal Procedure, 1973 (2 of 1974), shall have the meanings respectively assigned to them in that Code.

Let us now examine the meaning of the words "inquiry", "enquiry", "investigation" and "trial" as we see in the Code of Criminal Procedure and their several meanings attributed to those expressions. "Inquiry" as defined in S.2(g), Cr.P.C. reads as follows:

"2. (g) **'Inquiry'** means every inquiry, other than a trial, conducted under this Code by a Magistrate or court;

The word "enquiry" is not defined under the Code of Criminal Procedure which is an act of asking for information and also consideration of some evidence, may be documentary.

"Investigation" as defined in s. 2(h), Cr.P.C. reads as follows:

> "**Investigation** includes all the proceedings under this code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf."

The expression "trial" has not been defined in the Code of Criminal Procedure but must be understood in the light of the expressions "inquiry" or "investigation" as contained in ss. 2(g) and 2(h) of the Code of Criminal Procedure.

The expression "trial" has been generally understood as the examination by court of issues of fact and law in a case for the purpose of rendering the judgment relating some offences committed. We find in very many cases that the Court/the J.J. Board while determining the claim of juvenility forget that what they are expected to do is not to conduct an inquiry under S.2(g) of the Code of Criminal Procedure, but an inquiry under the J.J. Act, following the procedure laid down under Rule 12 and not following the procedure laid down under the Code.

The Code lays down the procedure to be followed in every investigation, inquiry or trial for every offence, whether under the Indian Penal Code or under other Penal laws. The Code makes provisions for not only investigation, inquiry

into or trial for offences but also inquiries into certain specific matters. The procedure laid down for inquiring into the specific matters under the Code naturally cannot be applied in inquiring into other matters like the claim of juvenility under Section 7-A read with Rule 12 of the 2007 Rules. In other words, the law regarding the procedure to be followed in such inquiry must be found in the enactment conferring jurisdiction to hold inquiry.

Consequently, the procedure to be followed under the J.J. Act in conducting an inquiry is the procedure laid down in that statute itself i.e. Rule 12 of the 2007 Rules. We cannot import other procedures laid down in the Code of Criminal Procedure or any other enactment while making an inquiry with regard to the juvenility of a person, when the claim of juvenility is raised before the court exercising powers under section 7-A of the Act. Many of the cases, we have come across, it is seen that the Criminal Courts are still having the hangover of the procedure of trial or inquiry under the Code as if they are trying an offence under the Penal laws forgetting the fact that the specific procedure has been laid down in Section 7-A read with Rule 12.

We also remind all Courts/Juvenile Justice Boards and the Committees functioning under the Act that a duty is cast on them to seek evidence by obtaining the certificate etc. mentioned in Rule 12 (3) (a) (i) to (iii). The courts in such situations act as a parens patriae because they have a kind of guardianship over minors who from their legal disability stand in need of protection.

"Age determination inquiry" contemplated under Section 7-A of the Act read with Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court need obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court need obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the above mentioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

Once the court, following the above mentioned procedures, passes an order; that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in subs. (5) or Rule 12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of the Rule 12. Further, S. 49 of the JJ Act also draws a presumption of the age of the Juvenility on its determination.

Age determination inquiry contemplated under the JJ Act and Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a Corporation or a Municipal Authority or a Panchayat may not be correct. But Court, Juvenile Justice Board or a Committee functioning under the JJ Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court, the Juvenile Justice Board or the committee need to go for medical report for age determination.

We notice that none of the above mentioned principles have been followed by the courts below in the instant case. The court examined the question of juvenility of the appellant as if it was conducting a criminal trial or inquiry under the Code. Notice was issued on the application filed by the juvenile and in response to that State as well as the widow of the victim filed objection to the application. The father of the appellant was cross examined as PW 1 and was permitted to produce several documents including the mark sheet of class five marked as Ext. P-1, mark sheet of class eight marked as exhibit P-2, mark sheet of Intermediate Education Board, MP, marked as exhibit P-3, horoscope prepared by Daya Ram Pandey marked as exhibit P-4. Further, the mother of the appellant was examined as PW 4, Transfer Certificate was produced on the side of the appellant which was marked as exhibit P-6. Noticing that the parents of the appellant were attempting to show a lesser age of the child so as to escape from the criminal case, the Court took steps to conduct ossification test. Dr. R.P. Gupta was examined as PW 2 who had submitted the report. Dr. S.K. Sharma was examined as PW 3. Placing considerable reliance on the report submitted after conducting ossification test, the application was dismissed by the trial court.

We find that the appellate court, of course, thought it necessary to summon the original register of Jyoti English School where the appellant was first admitted and the same was produced by the Principal of the School. We have called for the original record from the Court and perused the same.

We fail to see, after having summoned the admission register of the Higher Secondary School where the appellant had first studied and after having perused the same produced by the Principal of school and having noticed the fact that the appellant was born on 24.10.1990, what prompted the Court not to accept that admission register produced by the Principal of the school. The date of birth of the appellant was discernible from the school admission register. Entry made therein was not controverted or countered by the counsel appearing for the State or the private party, which is evident from the proceedings recorded on 11.02.2009 and which indicates that they had conceded that there was nothing

to refute or rebut the factum of date of birth entered in the School Admission Register. We are of the view the above document produced by the principal of the school conclusively shows that the date of birth was 24.10.1990 hence s. 12(3)(a)(i)(ii) has been fully satisfied.

The Sessions Judge, however, has made a fishing inquiry to determine the basis on which date of birth was entered in the school register, which prompted the father of the appellant to produce a horoscope. The horoscope produced was rejected by the Court stating that the same was fabricated and that the Pandit who had prepared the horoscope was not examined. We fail to see what types of inquiries are being conducted by the trial courts and the appellate courts, when the question regarding the claim of juvenility is raised.

The legislature and the Rule-making authority in their wisdom have in categorical terms explained how to proceed with the age determination inquiry.

Further, Rule 12 has also fixed a time-limit of thirty days to determine the age of the juvenility from the date of making the application for the said purpose. Further, it is also evident from the Rule that if the assessment of age could not be done, the benefit would go to the child or juvenile considering his / her age on lower side within the margin of one year.

This Court in ***Babloo Pasi v. State of Jharkhand, (2008) 13 SCC 133*** held, in a case where the accused had failed to produce evidence/certificate in support of his claim, medical evidence can be called for. The court held that

"..... the medical evidence as to the age of a person, though a useful guiding factor is not conclusive and has to be considered along with other cogent evidence.

This court set aside the order of the High Court and remitted the matter to the Chief Judicial Magistrate heading the Board to re-determine the age of the accused.

In ***Shah Nawaz v. State of Uttar Pradesh, (2011) 13 SCC 751,*** the Court while examining the scope of Rule 12, has reiterated that medical opinion from the Medical Board should be sought only when matriculation certificate or equivalent certificate or the date of birth certificate from the school first attended or any birth certificate issued by a Corporation or a municipal authority or a panchayat or municipal is not available. The Court had held entry related to date of birth entered in the mark sheet is a valid evidence for determining the age of the accused person so also the school leaving certificate for determining the age of the appellant.

We are of the view that admission register in the school in which the candidate first attended is a relevant piece of evidence of the date of birth. The reasoning that the parents could have entered a wrong date of birth in the admission register hence not a correct date of birth is equal to thinking that parents would do so in anticipation that child would commit a crime in future and, in that situation, they could successfully raise a claim of juvenility.

We are, therefore, of the view that the appellant has successfully established his juvenility on the date of occurrence of the crime i.e. 19.10.2008 on which date he was aged only 17 years 11 months 25 days. The appellant has already faced the criminal trial in sessions case No. 28 of 2009 and the Court found him guilty along with two others u/s. 302 IPC and has been awarded life imprisonment which is pending in appeal, before the Hon'ble Court at Jabalpur as Crime Appeal No. 1134 of 2009.

We notice that the accused is also involved in few other criminal cases as well. Since we have found that the appellant was a juvenile on the date of the incident, in this case, we are inclined to set aside the sentence awarded in Sessions Case No. 28/2009 by Sessions Court and direct the High Court to place the records before J.J. Board for awarding appropriate sentence in accordance with the provisions of Act, 2000, and if the appellant has already undergone the maximum sentence of three years as prescribed in the Act, needless to say he has to be let free, provided he is not in custody in any other criminal case. We are informed that the appellant is involved in few other criminal cases as well, those cases will proceed in accordance with law.

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395. JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000 – Sections 14, 15 (1)(g), 16 & 20

Determination of juvenility in pending cases – In all pending cases, which ought to include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility would be in terms of Clause (l) of Section 2, even if the juvenile ceased to be a juvenile on or before 01.04.2001 when the Act of 2000 came into force.

Kalu alias Amit v. State of Haryana

Judgment dated 17.08.2012 passed by the Supreme Court in Criminal Appeal No. 1467 of 2007, reported in (2012) 8 SCC 34

Held:

While we are inclined to confirm the conviction and sentence of accused Joginder and Varun, the appeal of accused Kalu @ Amit requires different treatment. A contention was raised before this Court that accused Kalu @ Amit was a juvenile at the time of the offence and he must be given the benefit of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short, 'the Juvenile Act'). In view of this, a direction was given to the District and Sessions Judge, Rewari or some other Judicial Officer nominated by him to submit a report as to the age of the accused Kalu @ Amit. Accordingly, an inquiry was conducted by Mr. R.S. Chaudhary, Additional Sessions Judge, Rewari.

The report of Mr. Chaudhary dated 12/11/2011 is forwarded to this Court by the District and Sessions Judge, Rewari. The report states that on the basis of the oral as well as documentary evidence, it is established that the date of

birth of accused Kalu @ Amit is 14/10/1981 and at the time of the registration of FIR dated 7/4/1999 he was about 17 years, 5 months and 23 days' old. Thus, accused Kalu @ Amit was a juvenile when the offence was committed. We have no reason to disbelieve the report submitted by the Additional Sessions Judge, Rewari, which is based on oral as well as documentary evidence. Once it is held that accused Kalu @ Amit was a juvenile, when the offence was committed, the law must take its course and he must be given the benefit of the Juvenile Act.

Under Section 14 of the Juvenile Act, it is only the Juvenile Justice Board (for short, "the Board") which can conduct an inquiry as to whether a juvenile has committed the offence or not. Even if the Board comes to the conclusion that a juvenile has committed an offence, he cannot be sentenced and sent to a prison. Section of 15 of the Juvenile Act states what order can be passed regarding a juvenile who has committed an offence. Under Section 15 (1) (g), the Board may direct the juvenile to be sent to a special home for a period of three years. Under the proviso, the Board may, for reasons to be recorded, reduce the period of stay to such period as it thinks fit.

Section 16 of the Act forbids the court from sentencing a juvenile and committing him to prison. Proviso to Section 16 states that where a juvenile who has attained the age of 16 years has committed an offence and the Board is satisfied that the offence committed is so serious in nature or that his conduct and behaviour have been such that it would not be in his interest or in the interest of other juvenile in a special home to send him to such special home and that none of the other measures provided under the Juvenile Act is suitable or sufficient, the Board may order such a juvenile to be kept in such place of safety and in such manner as it thinks fit and shall report the case for the order of the State Government.

Under sub-Section (2) of Section 16 on a report received from the Board under sub-Section (1), the State Government may order that such juvenile may be kept under protective custody at such place and on such conditions as it thinks fit. However, the period of detention shall not exceed in any case the maximum period provided under Section 15 i.e. the period of 3 years.

Section 17 of the Juvenile Act says that no proceeding can be instituted and no order shall be passed against a juvenile under Chapter VIII of the Criminal Procedure Code. Section 18 forbids a joint trial of a juvenile and a person who is not a juvenile. Section 19 makes it clear that a juvenile who has committed an offence and has been dealt with under the provisions of the Juvenile Act shall not suffer disqualification, if any, attached to a conviction of an offence. Sub-Section (2) of Section 19 goes a step further. It states that in case of conviction, the Board shall make an order directing that the records of such conviction shall be removed after the expiry of the period of appeal or a reasonable period as prescribed under the rules, as the case may be.

Section 20 makes a special provision in respect of pending cases. It states that notwithstanding anything contained in the Juvenile Act, all proceedings in

respect of a juvenile pending in any court in any area on the date on which Juvenile Act comes into force in that area shall be continued in that court as if the Juvenile Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of the Juvenile Act as if it had been satisfied on inquiry under the Juvenile Act that the juvenile has committed the offence. The Explanation to Section 20 makes it clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of clause (l) of Section 2, even if the juvenile ceased to be a juvenile on or before 1/4/2001, when the Juvenile Act came into force, and the provisions of the Juvenile Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. As regards Explanation to Section 20 of the Juvenile Act, it would be appropriate to quote observations of this Court in ***Hari Ram v. State of Rajasthan, (2009) 13 SCC 211***. The observations read thus:

> 39. The Explanation which was added in 2006, makes it very clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of clause (l) of Section 2, even if the juvenile ceased to be a juvenile on or before 1/4/2001, when the Juvenile Justice Act, 2000 came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. In fact, Section 20 enables the court to consider and determine the juvenility of a person even after conviction by the regular court and also empowers the court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Juvenile Justice Act, 2000."

It is clear, therefore, that the Juvenile Act is intended to protect the juvenile from the rigours of a trial by a criminal court. It prohibits sentencing of a juvenile and committing him to prison. As its preamble suggests it seeks to adopt a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation.

The instant offence took place on 7/4/1999. As we have already noted Kalu @ Amit was a juvenile on that date. He was convicted by the trial court on 7/9/2000. The Juvenile Act came into force on 1/4/2001. The appeal of Kalu @ Amit was decided by the High Court on 11/7/2006. Had the defence of juvenility

been raised before the High Court and the fact that Kalu @ Amit was a juvenile at the time of commission of offence had come to light the High Court would have had to record its finding that Kalu @ Amit was guilty, confirm his conviction, set aside the sentence and forward the case to the Board and the Board would have passed any appropriate order permissible under Section 15 of the Juvenile Act [See ***Hari Ram (supra)***].

As noted above, the Board could have sent Kalu @ Amit to a Special Home for a maximum period of three years and under Section 19, it would have made an order directing that the relevant record of conviction be removed. Since on the date of offence, Kalu @ Amit was about 17 years, 5 months and 23 days of age, he could have been directed to be kept in protective custody for 3 years under proviso to Section 16 as the offence is serious and he was above 16 years of age when the offence was committed. But he certainly could not have been sent to jail. Since, the plea of juvenility was not raised before the High Court, the High Court confirmed the sentence which it could not have done. None of the above courses can be adopted by us, at this stage, because Kalu @ Amit has already undergone more than 9 years of imprisonment. In the peculiar facts and circumstances of the case, therefore, we quash the order of the High Court to the extent it sentences accused Kalu @ Amit to suffer life imprisonment for offence under Section 302 read with Section 34 of the IPC. After receipt of report from Additional Sessions Judge, Rewari, vide order dated 14/12/2009, we had ordered that the Kalu @ Amit be released on bail. If he has availed of the bail order, his bail bond shall stand discharged. If he has not availed of the bail order, the prison authorities are directed to release him forthwith, unless he is required in some other case. Accused Kalu @ Amit shall not incur any disqualification because of this order. Criminal Appeal No.1467 of 2007 filed by the accused Kalu @ Amit is allowed to the above extent.

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396. MOTOR VEHICLES ACT, 1988 – Section 168

(i) Personal expenses – A victim who earned less than ₹ 3000 per month and also having a family of 9 members, it shall be unrealistic to universally apply the rule of 1/3rd deduction towards personal expenses.

(ii) At the time of accident, the age of deceased was 36 years, so the multiplier of 15 for the purpose of determining the amount of compensation is proper.

New India Assurance Co. Ltd. v. Gopali & Ors.

Judgment dated 05.07.2012 passed by the Supreme Court in Civil Appeal No. 5179 of 2012, reported in AIR 2012 SC 3381

Held:

What we have observed hereinabove may not apply to rich people living in urban areas who can afford to spend a substantial amount of their income in

clubs, hotels and on drinks parties. In those cases there may be a semblance of justification in applying the rule of 1/3rd deduction but it would be wholly unrealistic to universally apply that rule in all cases.

It is not in dispute that at the time of accident, the age of the deceased was 36 years. Therefore, the Tribunal and the High Court were not right in applying the multiplier of 10. They should have adopted the multiplier of 15 for the purpose of determining the amount of compensation.

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397. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
Burden of proof – Accused – It is not necessary for the accused to disprove the existence of consideration by way of direct evidence – Inference of preponderance of probabilities can be drawn not only from the materials on record but also by referring to the circumstances upon which he relies.

Reverend Mother Marykutty v. Reni C. Kottaram and Another
Judgment dated 12.10.2012 passed by the Supreme Court in Criminal Appeal No. 1594 of 2012, reported in (2013) 1 SCC 327

Held :

In order to appreciate the correctness of the impugned judgment ***Reni C. Kottaram v. Mother Marykutty, Cr. Appeal No. 1707 of 2007***, of the High Court, as well as, that of the trial Court, it will be worthwhile to refer to certain conclusions drawn by the learned trial Judge by making specific reference to the various documentary evidence placed before it ***vis-a-vis*** the oral version of the complainant himself. The significant admission of the respondent as PW 1 was noted by the trial Court as under:

- The construction work entrusted to the respondent had to be completed for a total sum of ₹ 78,70,678 as stated in Exhibit D-3.
- Respondent admitted that he had not completed the work and that he would have got payment only after the measurement of the quantity of the work done.
- All the amounts received from the accused were noted in Exhibit P- 9.
- It was admitted that a sum of ₹12,60,100 mentioned in Exhibit D-4 series voucher was not noted in Exhibit P-9.
- The amount received by him from the accused for conducting earth work was also not included in Exhibit P-9.
- The respondent received various amounts by cheques and cash. He, however, denied the suggestion that the accused gave two cheques to one Joychen Manthurthy by way of security on 23.10.2001 while borrowing ₹ 5 lakhs from the

said person. It was admitted by the respondent that flooring of the building was done by the appellant herself and the expenses were not included in the bill.

- The respondent admitted that he had received ₹ 77,31,500/- as per Exhibit P-9 statement while the total amount of work as per Exhibit D-3 agreement was ₹ 78,70,678/-.
- The respondent, however, denied the suggestion that excess payments were made by the appellant to him.
- Respondent also admitted that he did not complete the work and the flooring was ultimately done by the appellant herself.
- It was not in dispute that the final payment was to be settled only after completion of the work and that the respondent did not complete the work.
- There was no evidence to conclude that any measurement of the work was done and the accounts were settled.
- As regards the variation in the stand of the appellant, namely, the one in the reply notice and the other in the written statement the same did not materially affect the stand of the appellant in the light of the overwhelming evidence in support of her stand. The fact that the cheque was not in the handwriting of the appellant strengthens the defence version that it was not executed in favour of the respondent.
- There was no reliable documentary evidence adduced by the complainant to hold that a sum of ₹ 25 lakhs was due to him warranting execution of Exhibit P-1 cheque.
- There was no amount legally due to the respondent to hold that Exhibit P-1 cheque was as a matter of fact issued by the appellant in favour of the respondent in order to hold that he was a holder of the cheque.

It was based on the above reasoning, the trial Court ultimately concluded that no offence was made out as against the appellant under Section 138 of the Act in order to convict her under Section 142 of the Act. While such an elaborate consideration was made by the trial Court for acquitting the appellant, it will be appropriate to refer to the nature of consideration made by the High Court which has been stated in paragraph 13 of the impugned judgment ***Reni C. Kottaram v. Mother Margkutty,*** (supra) which is to the following effect:

> "13. Another point vehemently raised by the counsel for the respondent/accused is that no amount is due from the accused to the complainant so as to issue Ext.P-1 cheque. In order to substantiate the above submission, the learned counsel has taken me through the documents namely, Ext.D-3, Exts.P-6 to P-8 final bills and Ext.D-4(A) to D-4(F) series

vouchers and also Ext.D-4(J) voucher. ***Regarding this submission, I am not proposed to enter into any finding on merit as the same is unwarranted in the present case considering the nature of allegations and claim contained in this case. But from the materials and evidence on record, it is crystal clear that the accused miserably failed to produce whatever records which she was in possession to show that no amount is due from the accused to the complainant.*** On the other hand, the attempt was to interpret and explain the documents produced by the complainant. Admittedly, no payment was made to the complainant otherwise than through the vouchers and cheques. If that be so, by producing those documents, the defence plea can be established. But there was no attempt in this regard. When the accused has admitted the transaction claimed by the complainant and the complainant has established his claim that there was outstanding amounts due from the accused to the complainant out of the contract work undertaken by him under Ext. D-3 agreement, it is for the accused to establish that no amount is due to the complainant by producing cogent and concrete evidence if they are sticking on their stand.

"We can understand if the High Court had considered those Exhibits, the attention of which was drawn to it and stated as to how it was not in a position to agree with the conclusions drawn by the learned trial Judge. The above statement contained in paragraph 13 of the impugned judgment ***Reni C. Kottaram*** (supra) discloses that the attention of the High Court was drawn to the specific Exhibits which were relied upon by the appellant and referred to by the learned trial Judge to reach a conclusion about the guilt or otherwise of the appellant. After referring to those Exhibits, unfortunately, we find that in the very next sentence the High Court proceeded to state that the appellant failed to produce any material which was in her possession to show that no amount was due from the appellant to the respondent. Such an approach of the High Court, in our considered opinion, has displayed the total perversity in its approach while reversing the order of the trial Judge. Even, the learned Senior Counsel for the respondent in spite of his best efforts was unable to convince us to support the above conclusion found in the judgment of the High Court.

That apart having considered the conclusions of the learned trial Judge, we find that those conclusions were drawn by adducing cogent and convincing reasoning and we do not find any fault in the said conclusions drawn by the learned trial Judge. In the circumstance, the principles set out in the decision relied upon by the learned counsel for the appellant in ***M.S. Narayana Menon alias Mani v. State of Kerala and another, (2006) 6 SCC 39*** as regards the presumption to be drawn and the preponderance of probabilities to be inferred, as set out in paragraphs 31 to 33, are fully satisfied. Those principles, set out in paragraphs 31 to 33, can be usefully referred to which are as under:

"31. A Division Bench of this Court in ***Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal, (1999) 3 SCC 357*** albeit in a civil case laid down the law in the following terms: (SCC pp. 50-51, para 12)

> '12.Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration

by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt.'

This Court, therefore, clearly opined that it is not necessary for the defendant to disprove the existence of consideration by way of direct evidence.

32. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies.

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

Applying the abovesaid principles to the case on hand, we find that the judgment of the trial Court in having drawn the conclusions to the effect that the appellant sufficiently rebutted the initial presumption as regards the issuance of the cheque under Sections 138 and 139 of the Act, was perfectly justified. We also find that the preponderance of probabilities also fully support the stand of the appellant as held by the learned trial Judge. The judgment of the High Court in having interfered with the order of acquittal passed by the learned trial Judge without proper reasoning is, therefore, liable to be set aside and is accordingly set aside. Consequently, the conviction and sentence imposed in the judgment impugned is also set aside.

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398. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138

Whether cheque issued for repayment of money demanded and received for providing job comes within the sweep of phrase "any debt or other liability" as provided in Section 138 ? Held, Yes.

R.L. Sahu v. Mohd Tahir Shekh

Judgment dated 30.03.2012 passed by the High Court of Chhattisgarh in Criminal Misc. Petition No. 848 of 2011, reported in 2012 (3) MPHT 69(CG)

Held

As per the allegation made in the complaint, the respondent has demanded money for providing job from the petitioner. The petitioner has paid money for getting job, but the Respondent has failed to provide such job, thereafter being demanded the Respondent has issued two cheques for return of money, which he has received for providing job to the petitioner.

Apparently, it appears that first part of agreement relating to demand and receipt of consideration by the Respondent for securing job to the petitioner was void. As held by the High Court of Delhi in the matter of ***Virender Singh v. Laxmi Narain and others, 2007 Cri.LJ 2262*** for the purpose of recovery of such consideration parties being in pari delicto, therefore, cheques were not for payment of debt or discharge of liability legally enforceable.

While dealing with the same question the High Court of Kerala in the matter of ***Saseendra Verma Raj E.K. v. State of Kerala and another, 2008 (2) DCR 519*** has distinguished the case of Virender Singh (supra) and has held that second part of agreement was for correction of mistake/illegality committed by the respondent.

While dealing with the question of doctrine of pari delicto the Supreme Court in the matter of ***Mohd. Salimuddin v. Misri Lal and another, AIR 1986 SC 1019,*** has held that loan advanced by tenant to landlord to secure tenancy under unlawful agreement and subsequent claim of adjustment of such loan, tenant is entitled for such adjustment because tenant was not in a position to oppose the proposal of landlord. The doctrine of pari delicto is not designed to reward the 'wrong-doer' or to penalize the 'wronged', by denying to the victim of exploitation access to justice. The doctrine is attracted only when none of the parties is a victim of such exploitation and both parties have voluntarily and by their free will joined hands to flout the law for their mutual gain. Para 4 of the aforesaid judgment reads as under:-

> "4. ..... To deny access to justice to a tenant who is obliged to yield to the unlawful demands of the landlord in this scenario by invoking the doctrine of pari delicto is to add insult to injury, and to negate the very purpose of the provision designed for his protection. The doctrine of pari delicto is not designed to reward 'wrong-doer' or to penalize the 'wronged', by denying to the victim of exploitation access to justice. The doctrine is attracted only when none of the parties is a victim of such exploitation and both parties have voluntarily and by their free will joined hands to flout the law for their mutual gain. Such being the position the said doctrine embodying the rule that a party to a transaction prohibited by law cannot enforce his claim in a Court of law is not attracted in a situation like the present ....."

While dealing with the such question, i.e., maxim pari delicto in absence of any substance of conspiracy to defraud a third person, maxim does not apply the Supreme Court in the matter of ***Kedar Nath Motani and others v. Prahlad Rai and others, AIR 1960 SC 213,*** has held that where both the parties do not show that there was any conspiracy to defraud a third person or to commit any other illegal act, the maxim in pari delicto etc., can hardly be made applicable.

In the present case, first part of the agreement was illegal, but when the respondent with a view to correct himself has agreed to return the money, which he has received from the petitioner for illegal purpose and issued cheques in favour of the petitioner who is victim of first agreement, then it cannot be said that second part of agreement is illegal and the petitioner is not entitled to take recourse available under the law for wrong committed by the respondent, therefore, petitioner cannot be denied to access the justice. His position was not of pari delicto.

While dismissing the complaint and affirming such order both the Courts below have not considered the aforesaid legal position and thereby committed illegality.

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399. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138

Whether prosecution based upon second or successive dishonour of cheque is permissible? Held, Yes.

(In *Sadanandan Bhadran v. Madhavan Sunil Kumar, (1998) 6 SCC 514* it was held that cause of action for filing complaint u/s 138 of N. I. Act arises only once – Complaint based on a second or successive dishonour of the cheque was not maintainable if no complaint based on earlier dishonour, followed by the statutory notice issued on the basis thereof, had been filed – Overruled)

M.S.R. Leathers v. S. Palaniappan and another

Judgment dated 26.09.2012 passed by the Supreme Court in Criminal Appeal No. 261 of 2002, reported in (2013) 1 SCC 177 (3-Judges)

Held :

Section 142 of the Negotiable Instruments Act governs taking of cognizance of the offence and starts with a non obstante clause. It provides that no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, by the holder in due course and such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138.

A careful reading of the above provisions makes it manifest that a complaint under Section 138 can be filed only after cause of action to do so has accrued in terms of clause (c) of proviso to Section 138 which, as noticed earlier, happens no sooner than when the drawer of the cheque fails to make the payment of the cheque amount to the payee or the holder of the cheque within 15 days of the receipt of the notice required to be sent in terms of clause (b) of proviso to Section 138 of the Act.

What is important is that neither Section 138 nor Section 142 or any other provision contained in the Act forbids the holder or payee of the cheque from presenting the cheque for encashment on any number of occasions within a period of six months of its issue or within the period of its validity, whichever is earlier. That such presentation will be perfectly legal and justified was not disputed

before us even at the Bar by learned counsel appearing for the parties and rightly so in light of the judicial pronouncements on that question which are all unanimous. Even ***Sadanandan Bhadran v. Madhavan Sunil Kumar, (1998) 6 SCC 514*** the correctness whereof we are examining, recognized that the holder or the payee of the cheque has the right to present the same any number of times for encashment during the period of six months or during the period of its validity, whichever is earlier.

Presentation of the cheque and dishonour thereof within the period of its validity or a period of six months is just one of the three requirements that constitutes"cause of action" within the meaning of Sections 138 and 142(b) of the Act, an expression that is more commonly used in civil law than in penal statutes. For a dishonour to culminate into the commission of an offence of which a court may take cognizance, there are two other requirements, namely, (a) service of a notice upon the drawer of the cheque to make payment of the amount covered by the cheque and (b) failure of the drawer to make any such payment within the stipulated period of 15 days of the receipt of such a notice. It is only when the said two conditions are superadded to the dishonour of the cheque that the holder/payee of the cheque acquires the right to institute proceedings for prosecution under Section 138 of the Act, which right remains legally enforceable for a period of 30 days counted from the date on which the cause of action accrued to him. There is, however, nothing in the proviso to Section 138 or Section 142 for that matter, to oblige the holder/payee of a dishonoured cheque to necessarily file a complaint even when he has acquired an indefeasible right to do so. The fact that an offence is complete need not necessarily lead to launch of prosecution especially when the offence is not a cognizable one. It follows that the complainant may, even when he has the immediate right to institute criminal proceedings against the drawer of the cheque, either at the request of the holder/payee of the cheque or on his own volition, refrain from instituting the proceedings based on the cause of action that has accrued to him. Such a decision to defer prosecution may be impelled by several considerations but more importantly it may be induced by an assurance which the drawer extends to the holder of the cheque that given some time the payment covered by the cheques would be arranged, in the process rendering a time consuming and generally expensive legal recourse unnecessary. It may also be induced by a belief that a fresh presentation of the cheque may result in encashment for a variety of reasons including the vicissitudes of trade and business dealings where financial accommodation given by the parties to each other is not an unknown phenomenon. Suffice it to say that there is nothing in the provisions of the Act that forbids the holder/payee of the cheque to demand by service of a fresh notice under clause (b) of proviso to Section 138 of the Act, the amount covered by the cheque, should there be a second or a successive dishonour of the cheque on its presentation.

Sadanandan Bhadran's case (supra) holds that while a second or successive presentation of the cheque is legally permissible so long as such presentation is within the period of six months or the validity of the cheque whichever is

earlier, the second or subsequent dishonour of the cheque would not entitle the holder/payee to issue a statutory notice to the drawer nor would it entitle him to institute legal proceedings against the drawer in the event he fails to arrange the payment. The decision gives three distinct reasons why that should be so:

The first and the foremost of these reasons is the use of the expression "cause of action" in Section 142(b) of the Act which according to the Court has been used in a restrictive sense and must therefore be understood to mean that cause of action under Section 142(b) can arise but once.

The second reason cited for the view taken in the ***Sadanandan Bhadran's case*** (supra) is that dishonour of a cheque will lead to commission of only one offence and that the offence is complete no sooner the drawer fails to make the payment of the cheque amount within a period of 15 days of the receipt of the notice served upon him. The Court has not pressed into service the doctrine of "waiver of the right to prosecute" but held that the failure of the holder to institute proceedings would tantamount to "absolution" of the drawer of the offence committed by him.

The third and the only other reason is that successive causes of action will militate against the provisions of Section 142(b) and make the said provision otiose. The Court in ***Sadanandan Bhadran's case*** (supra) held that the failure of the drawer/payee to file a complaint within one month resulted in forfeiture of the complainant's right to prosecute the drawer/payee which forfeiture cannot be circumvented by him by presenting the cheque afresh and inviting a dishonour to be followed by a fresh notice and a delayed complaint on the basis thereof.

With utmost respect to the Judges who decided ***Sadanandan Bhadran's case*** (supra) we regret our inability to fall in line with the above line of reasoning to hold that while a cheque is presented afresh the right to prosecute the drawer, if the cheque is dishonoured, is forfeited only because the previous dishonour had not resulted in immediate prosecution of the offender even when a notice under clause (b) of proviso to Section 138 had been served upon the drawer. We are conscious of the fact that Sadanandan Bhadran's case (supra) has been followed in several subsequent decisions of this Court such as in ***Sil Import, USA v. Exim Aides Silk Exporters, Bangalore, (1999) 4 SCC 567, Uniplas India Ltd. and Ors. v. State (Govt. of NCT Delhi) and Anr., (2001) 6 SCC 8, Dalmia Cement (Bharat) Ltd. v. Galaxy Traders & Agencies Ltd. and Anr., (2001) 6 SCC 463, Prem Chand Vijay Kumar v. Yashpal Singh and Anr., (2005) 4 SCC 417, S.L. Constructions and Anr. v. Alapati Srinivasa Rao and Anr., (2009) 1 SCC 500, Tameshwar Vaishnav v. Ramvishal Gupta, (2010) 2 SCC 329***.

All these decisions have without disturbing or making any addition to the rationale behind the decision in ***Sadanandan Bhadran's case*** (supra) followed the conclusion drawn in the same. We, therefore, propose to deal with the three dimensions that have been highlighted in that case while holding that successive causes of action are not within the comprehension of Sections 138 and 142 of the Act.

The expression "cause of action" is more commonly and easily understood in the realm of civil laws. The expression is not defined anywhere in the Code of Civil Procedure to which it generally bears relevance but has been universally understood to mean the bundle of facts which the plaintiff must prove in order to entitle him to succeed in the suit. (See ***State of Madras v. C.P. Agencies AIR 1960 SC 1309; Rajasthan High Court Advocates Association v. U.O.I. & Ors. AIR 2001 SC 416*** and ***Mohamed Khaleel Khan v. Mahaboob Ali Mia AIR 1949 PC 78***).

Section 142 of the Negotiable Instruments Act is perhaps the only penal provision in a statute which uses the expression "cause of action" in relation to the commission of an offence or the institution of a complaint for the prosecution of the offender. A careful reading of Sections 138 and 142, as noticed above, makes it abundantly clear that the cause of action to institute a complaint comprises the three different factual prerequisites for the institution of a complaint to which we have already referred in the earlier part of this order. None of these prerequisites is in itself sufficient to constitute a complete cause of action for an offence under Section 138. For instance if a cheque is not presented within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier, no cause of action would accrue to the holder of the cheque even when the remaining two requirements, namely service of a notice and failure of the drawer to make the payment of the cheque amount are established on facts. So also presentation of the cheque within the stipulated period without service of a notice in terms of Section 138 proviso (b) would give no cause of action to the holder to prosecute the drawer just as the failure of the drawer to make the payment demanded on the basis of a notice that does not satisfy the requirements of clause (b) of proviso to Section 138 would not constitute a complete cause of action.

The expression "cause of action" appearing in Section 142 (b) of the Act cannot therefore be understood to be limited to any given requirement out of the three requirements that are mandatory for launching a prosecution on the basis of a dishonoured cheque. Having said that, every time a cheque is presented in the manner and within the time stipulated under the proviso to Section 138 followed by a notice within the meaning of clause (b) of proviso to Section 138 and the drawer fails to make the payment of the amount within the stipulated period of fifteen days after the date of receipt of such notice, a cause of action accrues to the holder of the cheque to institute proceedings for prosecution of the drawer.

There is, in our view, nothing either in Section 138 or Section 142 to curtail the said right of the payee, leave alone a forfeiture of the said right for no better reason than the failure of the holder of the cheque to institute prosecution against the drawer when the cause of action to do so had first arisen. Simply because the prosecution for an offence under Section 138 must on the language of Section 142 be instituted within one month from the date of the failure of the drawer to make the payment does not in our view militate against the accrual of multiple

causes of action to the holder of the cheque upon failure of the drawer to make the payment of the cheque amount. In the absence of any juristic principle on which such failure to prosecute on the basis of the first default in payment should result in forfeiture, we find it difficult to hold that the payee would lose his right to institute such proceedings on a subsequent default that satisfies all the three requirements of Section 138.

That brings us to the question whether an offence punishable under Section 138 can be committed only once as held by this Court in ***Sadanandan Bhadran's case*** (supra). The holder of a cheque as seen earlier can present it before a bank any number of times within the period of six months or during the period of its validity, whichever is earlier. This right of the holder to present the cheque for encashment carries with it a corresponding obligation on the part of the drawer to ensure that the cheque drawn by him is honoured by the bank who stands in the capacity of an agent of the drawer vis-à-vis the holder of the cheque. If the holder of the cheque has a right, as indeed is in the unanimous opinion expressed in the decisions on the subject, there is no reason why the corresponding obligation of the drawer should also not continue every time the cheque is presented for encashment if it satisfies the requirements stipulated in that clause (a) to the proviso to Section 138. There is nothing in that proviso to even remotely suggest that clause (a) would have no application to a cheque presented for the second time if the same has already been dishonoured once. Indeed if the legislative intent was to restrict prosecution only to cases arising out of the first dishonour of a cheque nothing prevented it from stipulating so in clause (a) itself. In the absence of any such provision a dishonour whether based on a second or any successive presentation of a cheque for encashment would be a dishonour within the meaning of Section 138 and clause (a) to proviso thereof. We have, therefore, no manner of doubt that so long as the cheque remains unpaid it is the continuing obligation of the drawer to make good the same by either arranging the funds in the account on which the cheque is drawn or liquidating the liability otherwise. It is true that a dishonour of the cheque can be made a basis for prosecution of the offender but once, but that is far from saying that the holder of the cheque does not have the discretion to choose out of several such defaults, one default, on which to launch such a prosecution. The omission or the failure of the holder to institute prosecution does not, therefore, give any immunity to the drawer so long as the cheque is dishonoured within its validity period and the conditions precedent for prosecution in terms of the proviso to Section 138 are satisfied.

Coming then to the question whether there is anything in Section 142(b) to suggest that prosecution based on subsequent or successive dishonour is impermissible, we need only mention that the limitation which ***Sadanandan Bhadran's case*** (supra) reads into that provision does not appear to us to arise. We say so because while a complaint based on a default and notice to pay must be filed within a period of one month from the date the cause of action accrues,

which implies the date on which the period of 15 days granted to the drawer to arrange the payment expires, there is nothing in Section 142 to suggest that expiry of any such limitation would absolve him of his criminal liability should the cheque continue to get dishonoured by the bank on subsequent presentations. So long as the cheque is valid and so long as it is dishonoured upon presentation to the bank, the holder's right to prosecute the drawer for the default committed by him remains valid and exercisable. The argument that the holder takes advantage by not filing a prosecution against the drawer has not impressed us. By reason of a fresh presentation of a cheque followed by a fresh notice in terms of Section 138, proviso (b), the drawer gets an extended period to make the payment and thereby benefits in terms of further opportunity to pay to avoid prosecution. Such fresh opportunity cannot help the defaulter on any juristic principle, to get a complete absolution from prosecution.

It is trite that the object underlying Section 138 of the Act is to promote and inculcate faith in the efficacy of banking system and its operations, giving credibility to Negotiable Instruments in business transactions and to create an atmosphere of faith and reliance by discouraging people from dishonouring their commitments which are implicit when they pay their dues through cheques. The provision was intended to punish those unscrupulous persons who issued cheques for discharging their liabilities without really intending to honour the promise that goes with the drawing up of such a negotiable instrument. It was intended to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case the cheque was dishonoured and to safeguard and prevent harassment of honest drawers. (See ***Mosaraf Hossain Khan v. Bhagheeratha Engg. Ltd. (2006) 3 SCC 658, C.C. Alavi Haji v. Palapetty Muhammed & Anr. (2007) 6 SCC 555*** and ***Damodar S. Prabhu v. Sayed Babalal H. (2010) 5 SCC 663***). Having said that, we must add that one of the salutary principles of interpretation of statutes is to adopt an interpretation which promotes and advances the object sought to be achieved by the legislation, in preference to an interpretation which defeats such object. This Court has in a long line of decisions recognized purposive interpretation as a sound principle for the Courts to adopt while interpreting statutory provisions. We may only refer to the decisions of this Court in ***New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar, AIR 1963 SC 1207***, wherein this Court observed:

> "8.... It is a recognised rule of interpretation of statutes that expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature. If an expression is susceptible of a narrow or technical meaning, as well as a popular meaning, the Court would be justified in assuming that the Legislature used the expression in the sense which would carry out its object and reject that which renders the exercise of its power invalid."

Reference may also be made to the decision of this Court in ***Custodian v. Official Receiver, AIR 1965 SC 951***, where this Court observed:

> "8... The rules of grammar may suggest that when the section says that the property is evacuee property, it prima facie indicates that the property should bear that character at the time when the opinion is formed. But Mr. Ganapathy Iyer for the appellants has strenuously contended that the construction of s. 7(1) should not be based solely or primarily on the mechanical application of the rules of grammar. He urges that the construction for which Mr. Pathak contents and which, in substance, has been accepted by the High Court, would lead to very anomalous results; and his arguments is that it is open to the Court to take into account the obvious aim and object of the statutory provision when attempting the task of construing its words. If it appears that the obvious aim and object of the statutory provisions would be frustrated by accepting the literal construction suggested by the respondent, then it may be open to the Court to enquire whether an alternative construction which would serve the purpose of achieving the aim and object of the Act, is reasonably possible."

The decision of this Court in ***Nathi Devi v. Radha Devi Gupta, (2005) 2 SCC 271,*** reiterates the rule of purposive construction in the following words:

> "17. Even if there exists some ambiguity in the language or the same is capable of two interpretations, it is trite the interpretation which serves the object and purport of the Act must be given effect to. In such a case the doctrine of purposive construction should be adopted."

To the same effect is the decision of this Court in ***S.P. Jain v. Krishan Mohan Gupta, (1987) 1 SCC 191,*** wherein this Court observed:

> "18. We are of the opinion that law should take (a) pragmatic view of the matter and respond to the purpose for which it was made and also take cognizance of the current capabilities of technology and life-style of the community. It is well settled that the purpose of law provides a good guide to the interpretation of the meaning of the Act. We agree with the views of Justice Krishna Iyer, J. in ***Busching Schmitz Private Ltd. case*** (supra) that legislative futility is to be ruled out so long as interpretative possibility permits."

Applying the above rule of interpretation and the provisions of Section 138, we have no hesitation in holding that a prosecution based on a second or successive default in payment of the cheque amount should not be impermissible simply because no prosecution based on the first default which was followed by

a statutory notice and a failure to pay had not been launched. If the entire purpose underlying Section 138 of the Negotiable Instruments Act is to compel the drawers to honour their commitments made in the course of their business or other affairs, there is no reason why a person who has issued a cheque which is dishonoured and who fails to make payment despite statutory notice served upon him should be immune to prosecution simply because the holder of the cheque has not rushed to the court with a complaint based on such default or simply because the drawer has made the holder defer prosecution promising to make arrangements for funds or for any other similar reason. There is in our opinion no real or qualitative difference between a case where default is committed and prosecution immediately launched and another where the prosecution is deferred till the cheque presented again gets dishonoured for the second or successive time.

The controversy, in our opinion, can be seen from another angle also. If the decision in ***Sadanandan Bhadran's case*** (supra) is correct, there is no option for the holder to defer institution of judicial proceedings even when he may like to do so for so simple and innocuous a reason as to extend certain accommodation to the drawer to arrange the payment of the amount. Apart from the fact that an interpretation which curtails the right of the parties to negotiate a possible settlement without prejudice to the right of holder to institute proceedings within the outer period of limitation stipulated by law should be avoided we see no reason why parties should, by a process of interpretation, be forced to launch complaints where they can or may like to defer such action for good and valid reasons. After all, neither the courts nor the parties stand to gain by institution of proceedings which may become unnecessary if cheque amount is paid by the drawer. The magistracy in this country is over-burdened by an avalanche of cases under Section 138 of Negotiable Instruments Act. If the first default itself must in terms of the decision in ***Sadanandan Bhadran's case*** (supra) result in filing of prosecution, avoidable litigation would become an inevitable bane of the legislation that was intended only to bring solemnity to cheques without forcing parties to resort to proceedings in the courts of law. While there is no empirical data to suggest that the problems of overburdened magistracy and judicial system at the district level is entirely because of the compulsions arising out of the decisions in ***Sadanandan Bhadran's case*** (supra), it is difficult to say that the law declared in that decision has not added to court congestion.

In the result, we overrule the decision in ***Sadanandan Bhadran's case*** (supra) and hold that prosecution based upon second or successive dishonour of the cheque is also permissible so long as the same satisfies the requirements stipulated in the proviso to Section 138 of the Negotiable Instruments Act. The reference is answered accordingly. The appeals shall now be listed before the regular Bench for hearing and disposal in light of the observations made above.

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400. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 142 (b) Proviso

Condonation of delay in filing complaint under Section 138 of the Act, procedure for – Accused is not required to be heard before delay is condoned, as no provision of the Act enables the accused to participate in the enquiry into condonation of delay in filing of the complaint – The matter lies exclusively between the complainant and the Court – Accused can question legality of the order only after the process is issued.

C. K. Chawla v. Shishir Jain

Judgment dated 07.05.2012 passed by the High Court of M.P. in Misc. Cri. Case No. 982 of 2012, reported in 2012 (4) MPHT 299

Held:

The proviso was inserted by Section 9 of Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 w.e.f. 6-2-2003. The relevant extracts of statement of objects and reasons read :-

> "The Negotiable Instruments Act, 1881 was amended by the Banking Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988, wherein a new Chapter XVII was incorporated for penalties in case of dishonor of cheques due to insufficiency of funds in the account of the drawer of the cheque. These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument. The existing provisions in the Negotiable Instruments Act, 1881, namely, Sections 138 to 142 in Chapter XVII have been found deficient in dealing with dishonor of cheques. Not only the punishment provided in the Act has proved to be inadequate, the procedure prescribed for the Courts to deal with such matters has been found to be cumbersome. The Courts are unable to dispose of such cases expeditiously in a time bound manner in view of the procedure contained in the Act.
>
> 2. ..... Keeping in view the large number of complainants under the said Act pending in various Courts, a Working Group was constituted to review Section 138 of the Negotiable Instruments Act, 1881 and make recommendations as to what changes were needed to effectively achieve the purpose of that section.
>
> 3. *** *** ***
>
> 4. Keeping in view the recommendations of the Standing Committee on Finance and other representations. It has been

decided to bring out, inter alia, the following amendments in the Negotiable Instruments Act, 1881, namely :-

(i) *** *** ***

(ii) *** *** ***

(iii) to provide discretion to the Court to waive the period of one month, which has been prescribed for taking cognizance of the case under the Act:

*** *** ***

*** *** ***

(xi) *** *** ***

5. The proposed amendments in the Act are aimed at early disposal of cases relating to dishonor of cheques, ... and ....."

Relying on statement of objects and reasons as well as speech of Finance Minister in course of debate on the Bill in Lok Sabha, the Supreme Court in ***Mandvi Co-op. Bank Ltd. (M/s) v. Nimesh B. Thakore, AIR 2010 SC 1402,*** has pointed out that :-

> "If the Legislature in their wisdom did not think 'it proper to incorporate a word 'accused' with the word 'complainant' in Section 145 (1) of the Act, it was not open to the High Court to fill up the shelf-perceived blank."

The ratio which emerges from the decision is that it is duty of the Court to adopt construction of any provision of the Act, which advances object of the Legislation. Further, as emphasized in ***Shri Ishar Alloy Stels Ltd. v. Jayaswals Neco Ltd., (2001) 3 SCC 609*** :-

> "The main object of the Act is to legislate the system by which instruments contemplated by it could pass from hand to hand by negotiation like any other goods. The purpose of the Act was present an orderly and authoritative statement of the leading rules of law relating to the negotiable instruments. The Act intends to legalise the system under which claims upon mercantile instruments could be equated with ordinary goods passing from hand to hand. To achieve the objective of the Act, the Legislature in its wisdom thought it proper to make provisions in the Act for conferring such privileges to the mercantile instruments contemplated under it and provide special procedure in case the obligation under the instrument was not discharged. It has always to be kept in mind that Section 138 of the Act creates an offence and the law relating to the penal provisions has to be interpreted strictly so that

no-one can ingeniously or insidiously or guilefully or strategically be prosecuted."

The Apex Court had the occasion to deal with the proviso to clause (b) of Section 142 of the Act in ***Subodh S. Salaskar Vs. Jayprakash M. Shah, AIR 2008 SC 3086.*** It was pointed out that :-

> "The provisions of the Act being special in nature, in terms thereof the jurisdiction of the Court to take cognizance of an offence under Section 138 of the Act was limited to the period of thirty days in terms of the proviso appended thereto. The Parliament only with a view to obviate the aforementioned difficulties on the part of the complainant inserted proviso to clause (b) of Section 142 of the Act in 2002. It confers a jurisdiction upon the Court to condone the delay. It is, therefore, a substantive provision and not a procedural one. *The matter might have been different if the Magistrate could have exercised its jurisdiction either under Section 5 of the Limitation Act, 1963 or Section 473 of the Code of Criminal Procedure, 1976. The provisions of the said Acts are not applicable.*"

In this view of the matter, the ruling in ***Krishna's case 1977 Cr. L.J. 90*** that related to provisions of Sections 468 and 473 of the Code, is of no relevance to a prosecution for the offence under Section 138 of the Act. Needless to say that construction of the proviso, by drawing analogy from the decision in ***Krishna's case*** (supra), as he has been done in other cases cited by learned Counsel for the petitioner, also deserves to be ignored as being in conflict with the guideline laid down by the Supreme Court for interpreting the provisions of the Act, in the aforesaid case.

To sum up, in absence of any provision enabling the accused to participate in the inquiry into condonation of delay in filing of the complaint for the offence under the Act, which is a special statute, the matter lies exclusively between the complainant and the Court. It is only after the process is issued that an accused can question legality or otherwise of the order condoning delay on the ground that no sufficient cause was shown for not making a complaint within the period prescribed by clause (b) of Section 142 of the Act.

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401. PREVENTION OF CORRUPTION ACT, 1988 – Sections 7 and 13 (1) (d) Demand and acceptance of tainted money for investigating a complaint by accused police officer proved by prosecution – It is immaterial where the accused police officer himself was not investigating that complaint or non-sending wallet and one untreated note for forensic examination are minor contradictions.

Syed Ahmed v. State of Karnataka

Judgment dated 31.07.2012 passed by the Supreme Court in Criminal Appeal No. 1323 of 2007, reported in AIR 2012 SC 3359

Held:

We agree with the High Court that in view of Explanation (d) to S. 7 of the Prevention of Corruption Act, the issue whether Syed Ahmed could or could not deliver results (as it were) becomes irrelevant in view of the acceptance of the testimony of Nagaraja (PW1) and Sidheshwara Swamy (PW2).

In our opinion, the discrepancy with regard to the attire of Syed Ahmed the ₹ 10 currency note and the forensic examination of the wallet are rather minor matters. What is a minor discrepancy? This has been the subject matter of discussion in ***Abdul Nawaz v. State of West Bengal, AIR 2012 SC 1951 and Jugendra Singh v. State of U.P., AIR 2012 SC 2254.*** After referring to a few earlier decisions of this Court, it was held that a discrepancy would be minor if it did not affect the substratum of the prosecution's case or impact on the core issue. In such an event, the minor discrepancy could be ignored.

As far as we are concerned, whether the absence of the ₹10 currency note could or could not be explained or why Syed Ahmed's wallet was not sent for forensic examination or whether he was wearing trousers or a lungi at the relevant point of time are matters of minor detail which do not impact on the substratum of the prosecution's case. We are required to look at the core issue and at the overall picture of the events that transpired on 28th June, 1993 and not get diverted by minor discrepancies or trivialities.

It is while undertaking this exercise that we find from the evidence of the witnesses that there was sufficient evidence of Syed Ahmed demanding illegal gratification from Nagaraja and receiving and accepting it when given by him. On this basis, we find no reason to interfere with the judgment and order under appeal.

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

Order as to relief under the Act – Magistrate has to take into consideration D.I.R. prepared by Protection Officer before passing such an order.

Shri Rama Singh v. Smt. Maya Singh and others

Judgment dated 15.05.2012 passed by the High Court of M.P. in Misc. Cri. Case No. 2231 of 2012, reported in 2012 (4) MPHT 169

Held:

The averments made in the application suggest that during the preceding period of nearly 10 years, the respondent had been subjected to cruelty and harassment inter alia for the under-mentioned reasons -

(i) Caste-difference.

(ii) Non-satisfaction of the dowry demand for a sum of ₹ 20 lacs.

(iii) Inability to beget a male child.

However, fact of the matter is that the application filed on 2.11.2011 by the respondent neither contains details of any recent incident of domestic violence, as defined in Section 3 of the Act, nor, furnishes any explanation for non presentation of the application at an earlier point of time despite the fact that the Act has been brought into force on 26/10/2006. Further, the order dated 12.1.2012, does not indicate as to what was there in the report of Protection Officer that weighed with learned Magistrate in directing issuance of notice to secure presence of the petitioners on 30.1.2012.

It is, therefore, apparent that the impugned order was passed without taking into consideration the report prepared by the Protection Officer, ignoring the proviso to Section 12, that reads thus –

> "Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider".

The proviso ordinarily carves out an exception from the general rule enacted in the main provision. It is also well settled that the word 'any' would mean one or more out of several and includes all (See: ***Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement AIR 2010 SC 2239***). In this view of the matter, even an interlocutory order directing issuance of notice would not be excluded from the rigour of the proviso. Accordingly, learned Magistrate ought to have passed a reasoned order holding that *prima facie* a case existed for asking the petitioners as to why the reliefs, as claimed in the application, should not be granted.

In the ordinary course, the matter would have been remanded for recording a reasoned order, but, I refrain from doing so simply because even if the allegations made against the petitioners in the application, are taken at their face value and accepted in their entirety, no justification for initiation of action against them would be made out in view of the admitted fact that during the relevant period, they were residing separately from the respondent. As such, the matter falls under categories (1), (5) and (7) of the cases, as enumerated in ***State of Haryana v. Bhajan Lal, AIR 1992 SC 604,*** attracting interference under the inherent powers.

For these reasons, the petition stands allowed and the proceedings in MJC No.314/11 (above) are hereby quashed.

●

403. PUBLIC GAMBLING ACT, 1867 – Section 4

Accused were found gaming or present for the purpose of gaming – If there is no evidence to show that the premises were a Common Gaming House, the accused cannot be convicted u/s 4 of the Act.

Anurudh Mishra v. State of M.P.

Judgment dated 29.06.2012 passed by the High Court of M.P. in M.Cr.C. No. 3213 of 2012, Reported in ILR (2012) M. P. 2303

Held:

Under Section 4 of the Act, what is made offence is gambling in a Common Gaming House. It is evident from the definition of 'Common Gaming House' given in Section 1 that thing necessary to be proved is that owner or occupier or user or keeper of the house was, in some way or the other, deriving profit from the use of instruments of gaming kept in the house. Obviously, profit is the essence of the offence, under Section 4 of the Act.

However, the presumption mentioned in the later part of the Section would not depend upon the presence of instruments of gaming or on the fact that the accused were found gaming or present for the purpose of gaming. If there is no evidence to show that the premises were a Common Gaming House, the accused cannot to be convicted under Section 4 of the Act.

●

404. SCHEDULED CASTES & SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 18

CRIMINAL PROCEDURE CODE, 1973 – Section 438

Bar created by Section 18 of SC/ST (PA) Act, how to be applied? A duty is cast on the Court to verify the allegation made in the complaint and to find out whether an offence under Section 3 (1) of the SC/ST Act has been prima facie made out or not – If there is specific averment in the complaint, namely, insult or intimidation with intent to humiliate with the caste name, bar will apply and accused will not be entitled to anticipatory bail, but in above stage, scope for appreciation of evidence and other material on record, is limited.

Vilas Pandurang Pawar and Anr. v. State of Maharashtra and Ors.

Judgment dated 10.09.2012 passed by the Supreme Court in SLP (Cri.) No. 6432 of 2012, reported in AIR 2012 SC 3316

Held:

Section 18 of the SC/ST Act creates a bar for invoking S. 438 of the Code. However, a duty is cast on the court to verify the averments in the complaint and to find out whether an offence u/s 3(1) of the SC/ST Act has been prima facie made out. In other words, if there is a specific averment in the complaint,

namely, insult or intimidation with intent to humiliate by calling with caste name, the accused persons are not entitled to anticipatory bail.

The scope of Section 18 of the SC/ST Act read with S. 438 of the Code is such that it creates a specific bar in the grant of anticipatory bail. When an offence is registered against a person under the provisions of the SC/ST Act, no Court shall entertain application for anticipatory bail, unless it prima facie finds that such an offence is not made out. Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is limited. Court is not expected to indulge in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail u/s. 438 of the Code, the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence.

●

405. SERVICE LAW

Regularisation of temporary/ad hoc judges appointed under temporary Fast Track Court scheme in regular cadre – FTC Judges were appointed under a separate set of Rules than Rules governing regular appointment of State Higher Judicial Services – Appointment of FTC Judges would be ad hoc and temporary and appointees shall not derive any benefit from such appointments and cannot claim any right either to regularization or absorption.

Brij Mohan Lal v. Union of India and Others

Judgment dated 19.04.2012 passed by the Supreme Court in Transferred Cases (C) No. 22 of 2001, reported in (2012) 6 SCC 502

Held:

The prayer for regularization of service and absorption of the Petitioners-appointees against the vacancies appearing in the regular cadre has been made not only in cases involving case of State of Orissa, but even in other States. Absorption in service is not a right. Regularization also is not a statutory or a legal right enforceable by the persons appointed under different rules to different posts. Regularization shall depend upon the facts and circumstances of a given case as well as the relevant Rules applicable to such class of persons.

As already noticed, on earlier occasions also, this Court has declined the relief of regularization of the persons and workmen who had been appointed against a particular scheme or project. A Constitution Bench of this Court has clearly stated the principle that in matters of public employment, absorption, regularization or permanent continuance of temporary, contractual or casual daily wage or ad hoc employees appointed and continued for long in such public employment would be de hors the Constitutional scheme of public employment

and would be improper. It would also not be proper to stay the regular recruitment process for the concerned posts. [Refer *State of Karnataka v. Umadevi (3), (2006) 4 SCC 1.*]

We have already noticed that the FTC Judges were appointed under a separate set of Rules than the Rules governing the regular appointment to the State Higher Judicial Services. It has been clearly stipulated that such appointments would be ad hoc and temporary and that the appointees shall not derive any benefit from such appointments.

●

406. SPECIFIC RELIEF ACT, 1963 – Section 34
EVIDENCE ACT, 1872 – Section 114 Ill (g)

(i) Suit for declaration – Suit seeking declaration of title of ownership, but where possession is not sought, is hit by proviso of Section 34 of Specific Relief Act, 1963.

(ii) Adverse inference under Section 114 Ill. (g) of Evidence Act – It is the duty of the party to lead best evidence in his possession, which can throw light on the issue in controversy and in case such material evidence is withheld, the Court may draw adverse inference – Situation which the presumption in terms of Section 114 Ill. (g) can be drawn discussed.

Union of India v. Ibrahim Uddin and Another

Judgment dated 17.07.2012 passed by the Supreme Court in Civil Appeal No. 1374 of 2008, reported in (2012) 8 SCC 148

Held:

Section 34 of the Specific Relief Act, 1963 provides that courts have discretion as to declaration of status or right, however, it carves out an exception that a court shall not make any such declaration of status or right where the complainant, being able to seek further relief than a mere declaration of title, omits to do so.

In *Ram Saran & Anr. v. Smt. Ganga Devi, AIR 1972 SC 2685,* this Court had categorically held that the suit seeking for declaration of title of ownership but where possession is not sought, is hit by the proviso of Section 34 of Specific Relief Act, 1963 (hereinafter called "Specific Relief Act") and, thus, not maintainable.

In *Vinay Krishna v. Keshav Chandra & Anr., AIR 1993 SC 957*, this Court dealt with a similar issue where the plaintiff was not in exclusive possession of property and had filed a suit seeking declaration of title of ownership. Similar view has been reiterated observing that the suit was not maintainable, if barred by the proviso to Section 34 of the Specific Relief Act. [See also: *Gian Kaur v. Raghubir Singh, (2011) 4 SCC 567*]

In view of above, the law becomes crystal clear that it is not permissible to claim the relief of declaration without seeking consequential relief.

In the instant case, suit for declaration of title of ownership had been filed, though/Respondent 1 was admittedly not in possession of the suit property. Thus, the suit was barred by the provision of Section 34 of the Specific Relief Act and, therefore, ought to have been dismissed solely on this ground. The High Court though framed a substantial question on this point but for unknown reasons did not consider it proper to decide the same.

Generally, it is the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy and in case such material evidence is withheld, the Court may draw adverse inference under Section 114 Illustration (g) of the Evidence Act notwithstanding, that the onus of proof did not lie on such party and it was not called upon to produce the said evidence. [Vide: ***Murugesam Pillai v. Manickawasaka Pandara, AIR 1917 PC 6; Hiralal v. Badkulal, AIR 1953 SC 225; A. Raghavamma v. A. Chenchamma, AIR 1964 SC 136; Union of India v. Mahadeolal Prabhu Dayal, AIR 1965 SC 1755; Gopal Krishnaji Ketkar v. Mohamed Haji Latif, AIR 1968 SC 1413; Bharat Heavy Electrical Ltd. v. State of U.P. & Ors., AIR 2003 SC 3024; Musauddin Ahmed v. State of Assam, AIR 2010 SC 3813;*** and ***Khatri Hotels Pvt. Ltd. v. Union of India, (2011) 9 SCC 126***].

In ***R.B.I., Bangalore v. S. Mani, (2005) 5 SCC 100,*** this Court dealt with the issue wherein the Industrial Tribunal directed the employer to produce the attendance register in respect of the first party workmen. The explanation of the appellant was that the attendance registers being very old, could not be produced. The Tribunal, however, in its award noticed the same and drew an *adverse inference* against the appellants for non-production of the attendance register alone. This Court reversed the finding observing:

> "27. As noticed hereinbefore, *in this case also the respondents did not adduce any evidence whatsoever. Thus, in the facts and circumstances of the case, the Tribunal erred in drawing an adverse inference.*
>
> 28. Burden of Proof : The initial burden of proof was on the workmen to show that they had completed 240 days of service. The Tribunal did not consider the question from that angle. It held that the burden of proof was upon the appellant on the premise that they have failed to prove their plea of abandonment of service"

[See also: ***A. Jayachandra v. Aneel Kaur, AIR 2005 SC 534; R.M. Yellatti v. Assistant Executive Engineer, AIR 2006 SC 355; and Pratap Singh & Anr. v. State of M.P., AIR 2006 SC 514***].

●

407. STAMP ACT, 1899 – Sections 35, 36 and 61

Objection as to admissibility of document not duly stamped – Once a document is admitted in evidence without any objection, the document shall not be called in question at any stage of the same proceedings on the ground that it has not been duly stamped except to challenge the validity of the Order in revision u/s 61 of the Act.

Man Kha v. Mohanlal and others

Judgment dated 18.10.2011 passed by the High Court of M.P. in W.P. No. 1527 of 2011, reported in 2012 (3) MPLJ 632

Held :

Section 35 of Indian Stamp Act lays down that no instrument chargeable with duty shall be admissible in evidence for any purpose by any person. Section 36 of Indian Stamp Act puts a rider according to which once the document is admitted in evidence, such evidence shall not except as provided in section 61, be called in question at any stage of the same proceedings on the ground that the instrument have not been duly stamped. Section 61 of Indian Stamp Act gives right to an aggrieved party to challenge the validity of the order in revision whereby the document has admitted in evidence which was not properly stamped. The procedure and the forum is laid down in this section which is self contained. Proviso to section 49 of the Act lays down that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act be registered may be received as evidence of any collateral transaction not required to be effected by registered instrument.

In the matter of ***S. Kaladevi v. V.R. Somasundaram, 2010 (3) MPLJ 500 (SC) = (2010) 5 SCC 401*** wherein the question was with regard to the admissibility of unregistered sale deed in evidence, Hon'ble Apex Court observed that the unregistered sale deed tendered not as evidence of completed sale but as proof of oral agreement of sale, can be received I evidence by making endorsement that it was received only as evidence of oral agreement of sale under the proviso to section 49. In the matter of ***Shyamlal Kumar Roy v. Sushil Kumar Agrawal, (2006) 11 SCC 331*** Hon'ble Apex Court had an occasion to deal with the status of an instrument admitted in evidence but inadequately stamped and it was observed that section 36 would operate even if a document has been improperly admitted in evidence. It is of little or no consequence as to whether a document has been admitted in evidence on determination of a question as regards admissibility thereof or upon dispensation of formal proof therefor. If a party to the lis intends that an instrument produced by the other party being insufficiently stamped should not be admitted in evidence, he must raise objection thereto at the apprapriate stage. He may not do so only at his peril. Objection as regards admissibility of a document, thus, specifically is required to be taken that it was not duly stamped. On such objection only, the question is required to be determined judicially.

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***408. SUCCESSION ACT, 1925 – Section 63**

Execution of Will – It is the duty of propounder to satisfy the Court by adducing evidence that testator was in sound and disposing state of mind, understood the nature and effect of his dispositions at the relevant time and only thereafter, he signed the document of his own free will – Attesting witnesses to the Will are not the residents of same village – Residents of same village have specifically stated that testator had lost his sight, unable to walk as well as he was hard of hearing – Testator was old and aged about 70-72 years – Testimony of neighbours about the physical condition of testator of Will appears to be more reliable – Will was also prepared without preparing any draft and without typing any khasra number of land – Trial Court rightly held that appellants have failed to prove the execution of Will beyond suspicion.

Prahlad & others v. Jamuna Bai/Jamnabai (Deceased) & others

Judgment dated 09.08.2011 passed by the High Court of M.P. in F. A. No. 142 of 1991, reported in ILR (2012) M.P. 2153

●

409. TRANSFER OF PROPERTY ACT, 1882 – Sections 105 and 107

Whether unregistered rent note can be made the basis to prove the relationship of landlord and tenant? Held, No – But such relationship can be proved by other undisputed facts as admission made by tenant in his pleadings or oral evidence, etc. – In a suit for recovery of rent, decree cannot be reversed only on the ground that rent note is not registered.

Ahmedsaheb (D) by L.Rs. & Ors. v. Sayed Ismail

Judgment dated 19.07.2012 passed by the Supreme Court in Civil Appeal No. 5316 of 2012, reported in AIR 2012 SC 3320

Held:

At the very outset, it will have to be stated that even while holding that Exhibits 68-69 being unregistered documents cannot be accepted in evidence, the relationship of the appellants and the respondent as landlord and tenant was not in controversy. Even according to the respondent himself, the rent payable was ₹ 800 per year which was admittedly not paid by him right from day one when the tenancy commenced. It was an admitted case of the respondent that the rent was due from him from October, 1971 till the third suit was filed. We are unable to appreciate as to how the appellants could have been non-suited solely on the ground that Exhibit-69 was not admissible in evidence. It is needless to emphasize that admission of a party in the proceedings either in the pleadings or oral is the best evidence and the same does not need any further corroboration. In our considered opinion, that vital aspect in the case (viz) the admission of the respondent in the written statement about the rate of rent and

the further admission about its non- payment for the entire period for which the claim was made in the three suits was sufficient to support the suit claim. The High Court failed to note the said factor while deciding the Second Appeal which led to the dismissal of the appeals. Even while eschewing Exhibit-69 from consideration, the High Court should have noted that the relationship of landlord and tenant as between the plaintiffs and the defendants was an established factor and the rate of rent was admitted as ₹ 800 per year.

When we apply the principles laid down by this Court in ***Anthony v. K.C. Itoop & Sons & Ors., AIR 2000 SC 3523*** in juxtaposition with the stand of the respondent that the lease was in fact created in respect of the demised premises on an annual rent of ₹ 800, and the trial Court, based on the evidence placed before it, reached a categorical finding that such lease was between the plaintiff and the respondent based on unimpeachable evidence available on record, having regard to the clear cut finding as regards the arrears of rent payable by the respondent, the High Court ought to have upheld the decree for payment of arrears of rent by either directing the trial Court to calculate the actual amount payable by respondent or by modifying the decree to that extent.

In the written submissions of the appellants, it was contended that Exhibit 69, though an unregistered document, can still be relied upon for collateral purposes. In support of the said contention reliance was placed upon the decision of this Court in ***S. Kaladevi v. V.R. Somasundaram and Ors., AIR 2010 SC 1654.*** The said decision is clearly distinguishable. In the case on hand Exhibit 69 was relied upon not for any collateral purpose but for the support of the main claim of arrears of rent. The suit was for arrears of rent and Exhibit 69 was filed to show the agreement of lease of the demised premises, the other terms of the lease and the rate of rent between the parties. Therefore, the contention that the document was filed merely for establishing some collateral transaction cannot be accepted. In that respect, the conclusion of the High Court as regards Exhibit 69 cannot be faulted. However, for reasons set out in the earlier paragraphs of our judgment we reiterate that the claim of the appellants for recovery of rent was established by the Defendant's own categorical admission about the rate as well its non-payment right from day one.

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NOTE: (*) Asterisk denotes short notes

PART - III

CIRCULARS/NOTIFICATIONS

NOTIFICATION DATED 9th NOVEMBER, 2012 OF MINISTRY OF WOMEN AND CHILD DEVELOPMENT REGARDING THE DATE OF ENFORCEMENT OF PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

[*Published in Gazette of India (Extraordinary) Part II Section 3(ii) dated 9-11-2012 Page 1*]

S. O. 2705(E). – In exercise of the powers conferred by sub-section (3) of Section 1 of the **Protection of Children from Sexual Offences Act, 2012 (No.32 of 2012),** the Central Government hereby appoints the 14th November, 2012, as the date on which the provisions of the said Act shall come into force.

●

A man who dares to waste one hour of time has not discovered the value of life

- Charles Darwin

Don't aspire to make a living. Aspire to make a difference

- Denzel Washington

SUCCESS

Success is doing the best you can,
In as many ways as you can.

It is being just and honest and true –
Not in a few things, but in everything you do

Always look ahead and never look back,
Believe you can make all your dreams come true.

Always believe in the best you can be
And have faith in the things that you do.

Forget about mistakes you've made yesterday,
The lessons you learn will prove valuable for today

Never give up and think that you're through –
A chance to begin brand new.

It is in dreaming the greatest dreams
And seeking the highest goals,.
That we build the brightest tomorrows

There is no limit to the goals you can attain,
Or the success you can achieve –
Your possibilities are as endless as your dreams

Whatever it is that you seek in life,
Whatever your dreams and what you hope to achieve,
Whatever you try to reach, whatever you plan,
Can all be yours – if you only believe you can!

Larry S. Chengges

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

(No. 32 of 2012*)

[19th June, 2012]

An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.

Whereas clause (3) of article 15 of the Constitution, inter alia, empowers the State to make special provisions for children;

And whereas, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child;

And whereas it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child;

And whereas it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child;

And whereas the State Parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and multilateral measures to prevent –

(a) the inducement or coercion of a child to engage in any unlawful sexual activity;

(b) the exploitative use of children in prostitution or other unlawful sexual practices;

(c) the exploitative use of children in pornographic performances and materials;

And whereas sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.

Be it enacted by Parliament in the Sixty-third Year of the Republic of India as follows:-

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* Received the assent of the President on the 19th June, 2012 and Act Published in the Gazette of India (Extraordinary) Part II Section 1 dated 20-6-2012 Pages 1-14 [S.No. 34]

CHAPTER I
Preliminary

1. Short title, extent and commencement. – (1) This Act may be called the Protection of Children from Sexual Offences Act, 2012.

(2) It extends to the whole of India, except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions. – (1) In this Act, unless the context otherwise requires, -

(a) "aggravated penetrative sexual assault" has the same meaning as assigned to it in Section 5;

(b) "aggravated sexual assault" has the same meaning as assigned to it in Section 9;

(c) "armed forces or security forces" means armed forces of the Union or security forces or police forces, as specified in the Schedule;

(d) "child" means any person below the age of eighteen years;

(e) "domestic relationship" shall have the same meaning as assigned to it in clause (f) of Section 2 of the Protection of Women from Domestic Violence Act, 2005 (43 of 2005);

(f) "penetrative sexual assault" has the same meaning as assigned to it in Section 3;

(g) "prescribed" means prescribed by rules made under this Act;

(h) "religious institution" shall have the same meaning as assigned to it in the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988);

(i) "sexual assault" has the same meaning as assigned to it in Section 7;

(j) "sexual harassment" has the same meaning as assigned to it in Section 11;

(k) "shared household" means a household where the person charged with the offence lives or has lived at any time in a domestic relationship with the child;

(l) "Special Court" means a court designated as such under Section 28;

(m) "Special Public Prosecutor" means a Public Prosecutor appointed under Section 32;

(2) The words and expressions used herein and not defined but defined in the Indian Penal Code (45 of 1860), the Code of Criminal Procedure, 1973 (2 of

1974), the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) and the Information Technology Act, 2000 (21 of 2000) shall have the meanings respectively assigned to them in the said Codes or the Acts.

CHAPTER II

Sexual offences against children

A. Penetrative sexual assault and punishment therefor

3. Penetrative sexual assault. – A person is said to commit "penetrative sexual assault" if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

4. Punishment for penetrative sexual assault. – Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

B. Aggravated penetrative sexual assault and punishment therefore

5. Aggravated penetrative sexual assault. – (a) whoever, being a police officer, commits penetrative sexual assault on a child-

(i) within the limits of the police station or premises at which he is appointed; or

(ii) in the premises of any station house, whether or not situated in the police station, to which he is appointed; or

(iii) in the course of his duties or otherwise; or

(iv) where he is known as, or identified as, a police officer; or

(b) whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child –

(i) within the limits of the area to which the person is deployed; or

(ii) in any areas under the command of the forces or armed forces; or

(iii) in the course of his duties or otherwise; or

(iv) where the said person is known or identified as a member of the security or armed forces; or

(c) whoever being a public servant commits penetrative sexual assault on a child; or

(d) whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection established by or under any law of the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or

(e) whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or

(f) whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or

(g) whoever commits gang penetrative sexual assault on a child.

Explanation. – When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

(h) whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

(i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(j) whoever commits penetrative sexual assault on a child, which –

(i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (1) of Section 2 of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or

(ii) in the case of female child, makes the child pregnant as a consequence of sexual assault;

(iii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or

(k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child; or

(l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or

(m) whoever commits penetrative sexual assault on a child below twelve years; or

(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or

(o) whoever being, in the ownership, or management, or staff, of any institution providing services to the child, commits penetrative sexual assault on the child; or

(p) whoever being in a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else; or

(q) whoever commits penetrative sexual assault on a child knowing the child is pregnant; or

(r) whoever commits penetrative sexual assault on a child and attempts to murder the child; or

(s) whoever commits penetrative sexual assault on a child in the course of communal or sectarian violence; or

(t) whoever commits penetrative sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or

(u) whoever commits penetrative sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated penetrative sexual assault.

6. Punishment for aggravated penetrative sexual assault.– Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment of life and shall also be liable to fine.

C. – Sexual assault and punishment therefore

7. Sexual Assault. – Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

8. Punishment for sexual assault. – Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.

D. Aggravated sexual assault and punishment therefor

9. Aggravated Sexual Assault. –

(a) whoever, being a police officer, commits sexual assault on a child –

(i) within the limits of the police station or premises where he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) in the course of his duties or otherwise; or

(iv) where he is known as, or identified as a police officer; or

(b) whoever, being a member of the armed forces or security forces, commits sexual assault on a child –

(i) within the limits of the area to which the person is deployed; or

(ii) in any areas under the command of the security or armed forces; or

(iii) in the course of his duties or otherwise; or

(iv) where he is known or identified as a member of the security or armed forces; or

(c) Whoever being a public servant commits sexual assault on a child; or

(d) whoever being on the management or on other staff of a jail, or remand home or protection home or observation home, or other place of custody or care and protection established by or under any law for the time being in force commits sexual assault on a child being inmate of such jail or remand home or protection home or observation home or other place of custody or care and protection; or

(e) whoever being on the management or staff of a hospital, whether Government or private, commits sexual assault on a child in that hospital; or

(f) whoever being on the management or staff of a hospital, whether Government or private, commits sexual assault on a child in that hospital; or

(g) whoever commits gang sexual assault on a child.

Explanation. – When a child is subjected sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

(h) whoever commits sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

(i) whoever commits sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(j) whoever commits sexual assault on a child, which –

(i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (1) of Section 2 of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or

(ii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or

(k) whoever, taking advantage of a child's mental or physical disability, commits sexual assault on the child; or

(l) whoever commits sexual assault on the child more than once or repeatedly; or

(m) whoever commits sexual assault on a child below twelve years; or

(n) whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child; or

(o) whoever, being in the ownership or management or staff, of any institution providing services to the child, commits sexual assault on the child in such institution; or

(p) whoever, being in a position of trust or authority of a child, commits sexual assault on the child in an institution or home of the child or anywhere else; or

(q) whoever commits sexual assault on a child knowing the child is pregnant; or

(r) whoever commits sexual assault on a child and attempts to murder the child: or

(s) whoever commits sexual assault on a child in the course of communal or sectarian violence; or

(t) whoever commits sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force: or

(u) whoever commits sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated sexual assault.

10. Punishment for aggravated sexual assault. – Whoever, commits aggravated sexual assault shall be punished with imprisonment of either

description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

E. – Sexual harassment and punishment therefor

11. Sexual harassment. – A person is said to commit sexual harassment upon a child when such person with sexual intent, –

(i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or

(ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or

(iii) shows any object to a child in any form or media for pornographic purposes; or

(iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or

(v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or

(vi) entices a child for pornographic purposes or gives gratification therefore.

Explanation. – Any question which involves "sexual intent" shall be a question of fact.

12. Punishment for sexual harassment. – Whoever commits sexual harassment upon a child shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

CHAPTER III

Using child for pornographic purposes and punishment therefor

13. Use of child for pornographic purposes. – Whoever, uses a child in any form of media (including programme or advertisement telecast by television channels or internet or any other electronic form or printed form, whether or not such programme or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, which includes –

(a) representation of the sexual organs of a child;

(b) usage of a child engaged in real or simulated sexual acts (with or without penetration);

(c) the indecent or obscene representation of a child, shall be guilty of the offence of using a child for pornographic purposes.

Explanation. – For the purposes of this section, the expression "use a child" shall include involving a child through any medium like print, electronic, computer or any other technology for preparation, production, offering, transmitting, publishing, facilitation and distribution of the pornographic material.

14. Punishment for using child for pornographic purposes. – (1) Whoever, uses a child or children for pornographic purposes shall be punished with imprisonment of either description which may extend to five years and shall also be liable to fine and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also be liable to fine.

(2) If the person using the child for pornographic purposes commits an offence referred to in Section 3, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(3) If the person using the child for pornographic purposes commits an offence referred to in Section 5, by directly participating in pornographic acts, he shall be punished with rigorous imprisonment for life and shall also be liable to fine.

(4) If the person using the child for pornographic purposes commits an offence referred to in Section 7, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than six years but which may extend to eight years, and shall also be liable to fine.

(5) If the person using the child for pornographic purposes commits an offence referred to in Section 9, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than eight years but which may extend to ten years, and shall also be liable to fine.

15. Punishment for storage of pornographic material involving child. – Any person, who stores, for commercial purposes any pornographic material in any form involving a child shall be punished with imprisonment of either description which may extend to three years or with fine or with both.

CHAPTER IV

Abetment of and attempt to commit an offence

16. Abetment of an offence. – A person abets an offence, who –

Firstly. – Instigates any person to do that offence; or

Secondly. – Engages with one or more other person or persons in any conspiracy for the doing of that offence, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that offence; or

Thirdly. – Intentionally aids, by any act or illegal omission, the doing of that offence.

Explanation I. – A person who, by wilful misrepresentation, or by wilful concealment of a material fact, which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure a thing to be done, is said to instigate the doing of that offence.

Explanation II. – Whoever, either prior to or at the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

Explanation III. – Whoever employs, harbours, receives or transports a child, by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position, vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of any offence under this Act, is said to aid the doing of that act.

17. Punishment for abetment. – Whoever abets any offence under this Act, if the act abetted is committed in consequence of the abetment, shall be punished with punishment provided for that offence.

Explanation. – An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy or with the aid, which constitutes the abetment.

18. Punishment for attempt to commit an offence. – Whoever attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.

CHAPTER V

Procedure for reporting of cases

19. Reporting of offences. – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to, –

(a) the Special Juvenile Police Unit; or

(b) the local police.

(2) Every report given under sub-section (1) shall be –

(a) ascribed an entry number and recorded in writing;

(b) be read over to the informant;

(c) shall be entered in a book to be kept by the Police Unit.

(3) Where the report under sub-section (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.

(4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection (including admitting the child into shelter home or to the nearest hospital) within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).

20. Obligation of media, studio and photographic facilities to report cases. – Any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities, by whatever name called, irrespective of the number of persons employed therein, shall, on coming across any material or object which is sexually exploitative of the child (including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium, shall provide such information to the Special Juvenile Police Unit, or to the local police, as the case may be.

21. Punishment for failure to report or record a case. – (1) Any person, who fails to report the commission of an offence under subsection (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

(3) The provisions of sub-section (1) shall not apply to a child under this Act.

22. Punishment for false complaint or false information. – (1) Any person, who makes false complaint or provides false information against any person, in respect of an offence committed under sections 3, 5, 7 and section 9, solely with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both.

(2) Where a false complaint has been made or false information has been provided by a child, no punishment shall be imposed on such child.

(3) Whoever, not being a child, makes a false complaint or provides false information against a child, knowing it to be false, thereby victimising such child in any of the offences under this Act, shall be punished with imprisonment which may extend to one year or with fine or with both.

23. Procedure for media. – (1) No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy.

(2) No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child:

Provided that for reasons to be recorded in writing, the Special Court, competent to try the case under the Act, may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

(3) The publisher or owner of the media or studio or photographic facilities shall be jointly and severally liable for the acts and omissions of his employee

(4) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both.

CHAPTER VI

Procedures for recording statement of the child

24. Recording of statement of a child. – (1) The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector.

(2) The police officer while recording the statement of the child shall not be in uniform.

(3) The police officer making the investigation, shall, while examining the child, ensure that at no point of time the child come in the contact in any way with the accused.

(4) No child shall be detained in the police station in the night for any reason.

(5) The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child.

25. Recording of statement of a child by Magistrate. – (1) If the statement of the child is being recorded under section 164 of the Code of Criminal Procedure, 1973 (2 of 1974) (herein referred to as the Code), the Magistrate recording such statement shall, notwithstanding anything contained therein, record the statement as spoken by the child:

Provided that the provisions contained in the first proviso to sub-section (1) 164 of the Code shall, so far it permits the presence of the advocate of the accused shall not apply in this case.

(2) The Magistrate shall provide to the child and his parents or his representative, a copy of the document specified under section 207 of the Code, upon the final report being filed by the police under section 173 of that Code.

26. Additional provisions regarding statement to be recorded. – (1) The Magistrate or the police officer, as the case may be, shall record the statement as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence.

(2) Wherever necessary, the Magistrate or the police officer, as the case may be, may take the assistance of a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, while recording the statement of the child.

(3) The Magistrate or the police officer, as the case may be, may, in the case of a child having a mental or physical disability, seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed, to record the statement of the child.

(4) Wherever possible, the Magistrate or the police officer, as the case may be, shall ensure that the statement of the child is also recorded by audio-video electronic means.

27. Medical examination of a child. – (1) The medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding that a First Information Report or complaint has not been registered for the offences under this Act, be conducted in accordance with section 164A of the Code of Criminal Procedure, 1973 (2 of 1974).

(2) In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.

(3) The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence.

(4) Where, in case the parent of the child or other person referred to in sub-section (3) cannot be present, for any reason, during the medical examination of the child, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution.

CHAPTER VII

Special Courts

28. Designation of Special Courts. – (1) For the purposes of providing a speedy trial, the State Government shall in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, designate for each district, a Court of Session to be a Special Court to try the offences under the Act:

Provided that if a Court of Session is notified as a children's court under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006) or a Special Court designated for similar purposes under any other law for the time being in force, then, such court shall be deemed to be a Special Court under this section.

(2) While trying an offence under this Act, a Special Court shall also try an offence other than the offence referred to in sub-section (1)], with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(3) The Special Court constituted under this Act, notwithstanding anything in the Information Technology Act, 2000 (21 of 2000), shall have jurisdiction to try offences under Section 67B of that Act in so far as it relates to publication or transmission of sexually explicit material depicting children in any act, or conduct or manner or facilitates abuse of children online.

29. Presumption as to certain offences. – (1) Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed the offence as the case may be, unless the contrary is proved.

30. Presumption of culpable mental state. – (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.— In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

31. Application of Code of Criminal Procedure, 1973 to proceedings before a Special Court. – Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.

32. Special Public Prosecutors.– (1) The State Government shall, by notification in the Official Gazette, appoint a Special Public Prosecutor for every Special Court for conducting cases only under the provisions of this Act.

(2) A person shall be eligible to be appointed as a Special Public Prosecutor under sub-section (1) only if he had been in practice for not less than seven years as an advocate.

(3) Every person appointed as a Special Public Prosecutor under this section shall be deemed to be a Public Prosecutor within the meaning of clause (u) of section 2 of the Code of Criminal Procedure, 1973 and provision of that Code shall have effect accordingly.

CHAPTER VIII

Procedure and Powers of Special Courts and Recording of Evidence

33. Procedure and powers of Special Court. – (1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.

(6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation.— For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

(8) In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

(9) Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973 for trial before a Court of Session.

34. Procedure in case of commission of offence by child and determination of age by Special Court.– (1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000.

(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person.

35. Period for Recording of evidence of child and disposal of case. – (1) The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.

(2) The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.

36.Child not to see accused at the time of testifying. – (1) The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.

(2) For the purposes of sub-section (1), the Special Court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device.

37. Trials to be conducted in camera. – (1) -The Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence:

Provided that where the Special Court is of the opinion that the child needs to be examined at a place other than the court, it shall proceed to issue a commission in accordance with the provisions of section 284 of the Code of Criminal Procedure, 1973.

38. Assistance of an interpreter or expert while recording evidence of child. – (1) Wherever necessary, the Court may take the assistance of a translator or interpreter having such qualifications, experience and on payment of such fees as may be prescribed, while recording the evidence of the child.

(2) If a child has a mental or physical disability, the Special Court may take the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed to record the evidence of the child.

CHAPTER IX

Miscellaneous

39. Guidelines for child to take assistance of experts, etc. – Subject to such rules as may be made in this behalf, the State Government shall prepare guidelines for use of non-governmental organisations, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre-trial and trial stage to assist the child.

40. Right of child to take assistance of legal practitioner. – Subject to the proviso to section 301 of the Code of Criminal Procedure, 1973 the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act:

41. Provisions of Sections 3 to 13 not to apply in certain cases. – (1) The provisions of sections 3 to 13 (both inclusive) shall not apply in case of medical examination or medical treatment of a child when such medical examination or medical treatment is undertaken with the consent of his parents or guardian.

42. Alternative punishment. – (1) Where an act or omission constitute an offence punishable under this Act and also under any other law for the time being in force, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under such law or this Act as provides for punishment which is greater in degree.

43. Public awareness about Act. – The Central Government and every State Government, shall take all measures to ensure that—

(a) the provisions of this Act are given wide publicity through media including the television, radio and the print media at regular intervals to make the general public, children as well as their parents and guardians aware of the provisions of this Act;

(b) the officers of the Central Government and the State Governments and other concerned persons (including the police officers) are imparted periodic training on the matters relating to the implementation of the provisions of the Act.

44. Monitoring of implementation of Act. – (1) The National Commission for Protection of Child Rights constituted under Section 3, or as the case may be, the State Commission for Protection of Child Rights constituted under Section 17, of the Commissions for Protection of Child Rights Act, 2005, shall, in addition to the functions assigned to them under that Act, also monitor the implementation of the provisions of this Act in such manner as may be prescribed.

(2) The National Commission or, as the case may be, the State Commission, referred to in sub-section (1), shall, while inquiring into any matter relating to any offence under this Act, have the same powers as are vested in it under the Commissions for Protection of Child Rights Act, 2005.

(3) The National Commission or, as the case may be, the State Commission, referred to in sub-section (1), shall, also include, its activities under this section, in the annual report referred to in section 16 of the Commissions for Protection of Child Rights Act, 2005.

45. Power to make rules. -- (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:—

(a) the qualifications and experience of, and the fees payable to, a translator or an interpreter, a special educator or any person familiar with the manner of communication of the child or an expert in that field, under sub-section (4) of Section 19; sub-sections (2) and (3) of Section 26 and Section 38;

(b) care and protection and emergency medical treatment of the child under sub-section (5) of Section 19;

(c) the payment of compensation under sub-section (8) of section 33;

(d) the manner of periodic monitoring of the provisions of the Act under sub-section (1) of Section 42B

(3) Every rule made under sub-section (1) shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

46. Power to remove difficulties.— (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to it to be necessary or expedient for removal of the difficulty:

Provided that no order shall be made under this section after the expiry of the period of two years from the commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

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THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES RULES, 2012

New Delhi, the 14th November, 2012

Ministry of Women and Child Development Notification No. G.S.R. 823(E) dated the 14th November, 2012. Published in Gazette of India (Extraordinary) Part II Section 3(i) dated 14-11-2012 pages 13-22

[Note : The Protection of Children from Sexual Offences Act, 2012 (No. 32 of 2012), which is an Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences, came into force on 14.11.2012. Under this Act, the power to make rules rests with the Central Government.]

In exercise of the powers conferred by sub-section(1), read with clauses (a) to (d) of sub-section (2), of Section 45 of the **Protection of Children from Sexual Offences Act, 2012 (32 of 2012),** the Central Government hereby makes the following rules, namely, –

1. Short title and commencement — (1) These rules may be called the **Protection of Children from Sexual Offences Rules, 2012.**

(2) These rules shall come into force on the date of their publication in the Official Gazette.

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

(a) "Act" means the Protection of Children from Sexual Offences Act, 2012 (32 of 2012);

(b) "District Child Protection Unit" (DCPU) means the District Child Protection Unit established by the State Government under Section 62A of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006;

(c) "Expert" means a person trained in mental health, medicine, child development or other related discipline, who may be required to facilitate communication with a child whose ability to communicate has been affected by trauma, disability or any other vulnerability;

(d) "Special educator" means a person trained in communication with children with special needs in a way that addresses the child's individual differences and needs, which include challenges with learning and communication, emotional and behavioural disorders, physical disabilities, and developmental disorders;

(e) "Person familiar with the manner of communication of the child" means a parent or family member of a child or a member of his shared household or any person in whom the child reposes trust and confidence, who is familiar with that child's unique manner of

communication, and whose presence may be required for or be conducive to more effective communication with the child;

(f) "Support person" means a person assigned by a Child Welfare Committee, in accordance with sub–rule (8) of Rule 4, to render assistance to the child through the process of investigation and trial, or any other person assisting the child in the pre-trial or trial process in respect of an offence under the Act.

(2) Words and expressions used and not defined in these rules but defined in the Act shall have the meaning respectively assigned to them under the Act.

3. Interpreters, translators and Special educators. – (1) In each district, the DCPU shall maintain a register with names, addresses and other contact details of interpreters, translators and special educators for the purposes of the Act, and this register shall be made available to the Special Juvenile Police Unit (hereafter referred to as "SJPU"), local police, Magistrate or Special Court, as and when required.

(2) The qualifications and experience of the interpreters, translators, Special educators, and experts engaged for the purposes of sub-section (4) of Section 19, sub-sections (3) and (4) of Section 26 and Section 38 of the Act, shall be as indicated in these rules.

(3) Where an interpreter, translator, or Special educator is engaged, otherwise than from the list maintained by the DCPU under sub-rule (1), the requirements prescribed under sub-rules (4) and (5) of this rule may be relaxed on evidence of relevant experience or formal education or training or demonstrated proof of fluency in the relevant language by the interpreter, translator, or special educator, subject to the satisfaction of the DCPU, Special Court or other authority concerned.

(4) Interpreters and translators engaged under sub-rule (1) should have functional familiarity with language spoken by the child as well as the official language of the state, either by virtue of such language being his mother tongue or medium of instruction at school at least up to primary school level, or by the interpreter or translator having acquired knowledge of such language through his vocation, profession, or residence in the area where that language is spoken.

(5) Sign language interpreters, Special educators and experts entered in the register under sub–rule (1) should have relevant qualifications in sign language or special education, or in the case of an expert, in the relevant discipline, from a recognized University or an institution recognized by the Rehabilitation Council of India.

(6) Payment for the services of an interpreter, translator, Special educator or expert whose name is enrolled in the register maintained under sub-rule (1) or otherwise, shall by made by the State Government from the Fund maintained under Section 61 of the Juvenile Justice Act, 2000, or from other funds placed at the

disposal of the DCPU, at the rates determined by them, and on receipt of the requisition in such format as the State Government may prescribe in this behalf.

(7) Any preference expressed by the child at any stage after information is received under sub-section (1) of Section 19 of the Act, as to the gender of the interpreter, translator, Special educator, or expert may be taken into consideration, and where necessary, more than one such person may be engaged in order to facilitate communication with the child.

(8) The interpreter, translator, Special educator, expert, or person familiar with the manner of communication of the child engaged to provide services for the purposes of the Act shall be unbiased and impartial and shall disclose any real or perceived conflict of interest. He shall render a complete and accurate interpretation or translation without any additions or omissions, in accordance with Section 282 of the Code of Criminal Procedure, 1973.

(9) In proceedings under section 38, the Special Court shall ascertain whether the child speaks the language of the court adequately, and that the engagement of any interpreter, translator, Special educator, expert or other person familiar with the manner of communication of the child, who has been engaged to facilitate communication with the child, does not involve any conflict of interest.

(10) Any interpreter, translator, Special educator or expert appointed under the provisions of the Act or its rules shall be bound by the rules of confidentiality, as described under Section 127 read with Section 126 of the Indian Evidence Act, 1872.

4. Care and Protection. – (1) Where an SJPU or the local police receives any information under sub-section (1) of Section 19 of the Act from any person including the child, the SJPU or local police receiving report of such information shall forthwith disclose to the person making the report, the following details: –

(i) his name and designation;

(ii) the address and telephone number;

(iii) the name, designation and contact details of the officer who supervises the officer receiving the information.

(2) Where an SJPU or the local police, as the case may be, receives information in accordance with the provisions contained under sub-section (1) of Section 19 of the Act in respect of an offence that has been committed or attempted or is likely to be committed, the authority concerned shall, where applicable, –

(a) proceed to record and register a First Information Report as per the provisions of Section 154 of the Code of Criminal Procedure, 1973, and furnish a copy thereof free of cost to the person making such report, as per sub–section (2) of Section 154 of the Code;

(b) where the child needs emergency medical care as described under sub–section (5) of Section 19 of the Act or under these rules, arrange for the child to access such care, in accordance with Rule 5;

(c) take the child to the hospital for the medical examination in accordance with Section 27 of the Act;

(d) ensure that the samples collected for the purposes of the forensic tests are sent to the forensic laboratory at the earliest;

(e) inform the child and his parent or guardian or other person in whom the child has trust and confidence of the availability of support services including counselling, and assist them in contacting the persons who are responsible for providing these services and relief;

(f) inform the child and his parent or guardian or other person in whom the child has trust and confidence as to the right of the child to legal advice and counsel and the right to be represented by a lawyer, in accordance with Section 40 of the Act.

(3) Where the SJPU or the local police receives information under sub–section 10 of Section 19 of the Act, and has a reasonable apprehension that the offence has been committed or attempted or is likely to be committed by a person living in the same or shared household with the child, or the child is living in a child care institution and is without parental support, or the child is found to be without any home and parental support, the concerned SJPU, or the local police shall produce the child before the concerned Child Welfare Committee (hereafter referred to as "CWC") within 24 hours of receipt of such report, together with reasons in writing as to whether the child is in need of care and protection under sub-section (5) of Section 19 of the Act, and with a request for a detailed assessment by the CWC.

(4) Upon receipt of a report under sub–rule (3), the concerned CWC, must proceed, in accordance with its powers under sub–section (1) of Section 31 of the Juvenile Justice Act, 2000, to make a determination within three days, either on its own or with the assistance of a social worker, as to whether the child needs to be taken out of the custody of his family or shared household and placed in a children's home or a shelter home.

(5) In making determination under sub–rule (4), the CWC shall take into account any preference or opinion expressed by the child on the matter, together with the best interests of the child, having regard to the following considerations :

(i) the capacity of the parents, or of either parent, or of any other person in whom the child has trust and confidence, to provide for the immediate care and protection needs of the child, including medical needs and counselling;

(ii) the need for the child to remain in the care of his parent, family and extended family and to maintain a connection with them;

(iii) the child's age and level of maturity, gender, and social and economic background;

(iv) disability of the child, if any;

(v) any chronic illness from which a child may suffer;

(vi) any history of family violence involving the child or a family member of the child; and,

(vii) any other relevant factors that may have a bearing on the best interests of the child:

Provided that prior to making such determination, an inquiry shall be conducted in such a way that the child is not unnecessarily exposed to injury or inconvenience.

(6) The child and his parent or guardian or any other person in whom the child has trust and confidence and with whom the child has been living who is affected by such determination, shall be informed that the determination is being considered.

(7) The CWC, on receiving a report under sub-section (6) of Section 19 of the Act or on the basis of its assessment under sub–rule (5), and with the consent of the child and his parent or guardian or other person in whom the child has trust and confidence, may provide a support person to render assistance to the child through the process of investigation and trial. Such support person may be a person or organisation working in the field of child rights or child protection, or an official of a children's home or shelter home having custody of the child, or a person employed by the DCPU :

Provided that nothing in these rules shall prevent the child and his parents or guardian or other person in whom the child has trust and confidence from seeking the assistance of any person or organisation for proceedings under the Act.

(8) The support person shall at all times maintain the confidentiality of all information pertaining to the child to which he has access. He shall keep the child and his parent or guardian or other person in whom the child has trust and confidence, informed as to the proceedings of the case, including available assistance, judicial procedures, and potential outcomes. He shall also inform the child of the role he may play in the judicial process and ensure that any concerns that the child may have, regarding his safety in relation to the accused and the manner in which he would like to provide his testimony, are conveyed to the relevant authorities.

(9) Where a support person has been provided to the child, the SJPU or the local police shall, within 24 hours of making such assignment, inform the Special Court in writing.

(10) The services of the support person may be terminated by the CWC upon request by the child and his parent or guardian or person in whom the child has trust and confidence,s and the child requesting the termination shall not be required to assign any reason for such request. The Special Court shall be given in writing such information.

(11) It shall be the responsibility of the SJPU, or the local police to keep the child and his parent or guardian or other person in whom the child has trust and confidence, and where a support person has been assigned, such person, informed about the developments, including the arrest of the accused, applications filed and other court proceedings.

(12) The information to be provided by the SJPU, local police, or support person, to the child and his parents or guardian or other person in whom the child has trust and confidence, includes but is not limited to the following : –

(i) the availability of public and private emergency and crisis services;

(ii) the procedural steps involved in a criminal prosecution;

(iii) the availability of victims' compensation benefits;

(iv) the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation;

(v) the arrest of a suspected offender;

(vi) the filing of charges against a suspected offender;

(vii) the schedule of court proceedings that the child is either required to attend or is entitled to attend;

(viii) the bail, release or detention status of an offender or suspected offender;

(ix) the rendering of a verdict after trial; and

(x) the sentence imposed on an offender.

5. Emergency medical care . – (1) where an officer of the SJPU, or the local police receives information under Section 19 of the Act that an offence under the Act has been committed and is satisfied that the child against whom an offence has been committed is in need of urgent medical care and protection, he shall, as soon as possible, but not later than 24 hours of receiving such information, arrange to take such child to the nearest hospital or medical care facility centre for emergency medical care:

Provided that where an offence has been committed under Sections 3,5,7, or 9 of the Act, the victim shall be referred to emergency medical care.

(2) Emergency medical care shall be rendered in such a manner as to protect the privacy of the child, and in the presence of the parent or guardian or any other person in whom the child has trust and confidence.

(3) No medical practitioner, hospital or other medical facility centre rendering emergency medical care to a child shall demand any legal or magisterial requisition or other documentation as a pre-requisite to rendering such care.

(4) The registered medical practitioner rendering emergency medical care shall attend to the needs to the child, including-

(i) treatment for cuts, bruises, and other injuries including genital injuries, if any;

(ii) treatment for exposure to sexually transmitted diseases(STDs) including prophylaxis for identified STDs;

(iii) treatment for exposure to Human Immunodeficiency Virus (HIV) including prophylaxis for HIV after necessary consultation with infectious disease experts;

(iv) possible pregnancy and emergency contraceptives should be discussed with the pubertal child and her parent or any other person in whom the child has trust and confidence; and;

(v) wherever necessary, a referral or consultation for mental or psychological health or other counselling should be made.

(5) Any forensic evidence collected in the course of rendering emergency medical care must be collected in accordance with Section 27 of the Act.

6. Monitoring of implementation of the Act. – (1) The National Commission for the protection of Child Rights (hereafter referred to as "NCPCR") or the State Commission for the Protection of Child Right (hereafter referred to as "SCPCR"), as the case may be, shall in addition to the functions assigned to them under the commission for Protection of Child Right Act, 2005, perform the following functions for implementation of the provisions of the Act:-

(a) to monitor the designation of Special Courts by State Governments;

(b) to monitor the appointment of public Prosecutors by State Governments;

(c) to monitor the formulation of the guidelines described in Section 39 of the Act by the State Governments, for the use of non-governmental organisations, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre-trial and trial stage to assist the child, and to monitor the application of these guidelines;

(d) to monitor the designing and implementation of modules for training police personnel and other concerned persons, including officers of the Central and State Governments, for the effective discharge of their functions under the Act;

(e) to monitor and support the Central Government and State Governments for the dissemination of information relating to the

provisions of the Act through media including the television, radio and print media at regular intervals, so as to make the general public, children as well as their parents and guardians aware of the provisions of the Act.

(2) The NCPCR or the SCPCR, as the case may be, may call for a report on any specific case of child sexual abuse falling within the jurisdiction of a CWC.

(3) The NCPCR or the SCPCR, as the case may be, may collect information and data on its own or from the relevant agencies regarding reported cases of sexual abuse and their disposal under the processes established under the Act, including information on the following:-

(i) number and details of offences reported under the Act;

(ii) whether the procedures prescribed under the Act and rules were followed, including those regarding time frames;

(iii) details of arrangement for care and protection of victims of offences under this Act. Including arrangements for emergency medical care and, medical examination; and

(iv) details regarding assessment of the need for care and protection of a child by the concerned CWC in any specific case.

(4) The NCPCR or the SCPCR, as the case may be, may use the information so collected to assess the implementation of the provisions of the Act. The Report on monitoring of the Act shall be included in a separate chapter in the Annual Report of the NCPCR or the SCPCR.

7. Compensation. – (1) The Special Court may, in appropriate cases, on its or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the First Information Report. Such interim compensation paid to the child shall be adjusted against the final compensation, if any.

(2) The Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

(3) Where the Special Court, under sub-section (8) of Section 33 of the Act read with sub-section (2) and (3) of section 357A of the Code of Criminal Procedure, makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim. Including the following :-

(i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;

(ii) the expenditure incurred or likely to be incurred on his medical treatment for physical and/or mental health;

(iii) loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(iv) loss of employment as a result of the offence, including from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(v) the relationship of the child to the offender, if any;

(vi) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;

(vii) whether the child became pregnant as a result of the offence;

(viii) whether the child contracted a sexually transmitted disease (STD) as a result of the offence;

(ix) whether the child contracted Human Immunodeficiency Virus (HIV) as a result of the offence;

(x) any disability suffered by the child as a result of the offence;

(xi) financial condition of the child against whom the offence has been committed so as to determine his need for rehabilitation;

(xii) any other factor that the Special Court may consider to be relevant.

(4) The compensation awarded by the Special Court is to be paid by the Sate Governments from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under Section 357A of the Code of Criminal Procedure or any other laws for the time being in force, or, where such fund or scheme does not exist, by the State Government.

(5) The State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

(6) Nothing in these rules shall prevent a child or his parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules of scheme of the central Government or State Government.

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