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न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान

मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

TRAINING COMMITTEE

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH

JABALPUR - 482 007

1.	**Hon'ble Shri Justice A.K. Patnaik**	Chief Justice & Patron
2.	**Hon'ble Shri Justice R.S. Garg**	Chairman
3.	**Hon'ble Shri Justice Dipak Misra**	Member
4.	**Hon'ble Shri Justice Arun Mishra**	Member
5.	**Hon'ble Shri Justice K. K. Lahoti**	Member
6.	**Hon'ble Shri Justice R.S. Jha**	Member

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EDITOR

J.P. Gupta — Director

SUB-EDITOR

Manohar Mamtani — Addl. Director

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FROM THE PEN OF THE EDITOR

J.P. Gupta
Director, JOTRI

Esteemed Readers

The first issue of JOTI Journal of the year 2009 is in your hands and with this issue the Journal has entered into the fifteenth year of its publication. In this span of 14 years, the quality of the Journal has improved a lot looking to the needs of the Judicial Officers of the District Judiciary and moreover it is playing a pivotal role in providing latest updates of various judgments passed by the Hon'ble Supreme Court and High Court to those Judicial Officers who are posted in far flung areas where timely accessibility of most of the legal journals is a major problem. This Journal is not only being supplied to the Judicial Officers of the State but also to the State Judicial Academies of other States where the worth of this Journal is being highly appreciated. Therefore, it becomes our moral responsibility to maintain the high standards of this Journal in future also.

In this regard your involvement and co-operation is very important. In every issue of the Journal, the Institute is publishing legal articles of recurring importance. The source of these articles is bi-monthly training programmes at District Level in which judicial officers discuss the topics sent by the Institute elaborately and prepare articles on the same in concise form and send to the Institute. The best ones are selected and published in the Journal. But sometimes it is noticed that certain districts are not taking this exercise whole-heartedly and sincerely, therefore, the articles received from those districts are of routine nature, defeating the very purpose of this distant training. Therefore, I request you all to take this exercise seriously and enthusiastically in order to improve yourselves and also the standard of the articles.

This year the Institute started its activities with the *Foundation Training Programme* to the directly appointed Additional District Judges. The object of this training was to give them first hand information about the challenges relating to substantive and procedural laws during the administration of justice as well as to their responsibilities as judicial officers. To be a good Judicial Officer, knowledge in the field of law is not the only criterion. He should be an all rounder and be well versed in other fields also. Therefore, apart from imparting training on legal subjects, the Institute lays a lot of stress on those topics

which have crept up in the recent past like Information Technology, Managerial Skills, Ethics and Personality development etc. and the same have been included in the training curriculum.

To enhance the quality of a person, the need of the hour is to develop one's personality. A Judicial Officer is considered as an incarnation of God by the general public, therefore, he should develop his personality befitting the high standards of the Indian Judiciary in order to serve this Institution in an ideal manner. Judicial ethics and personality development go hand in hand.

In Part-I of the issue bi-monthly articles are being included. Part II is abundant with the various pronouncements of the Hon'ble Supreme Court as well as our High Court. Part III contains notification regarding amendment in the Madhya Pradesh Civil Services (Conduct) Rules, 1965. In Part IV Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 finds place.

The constant endeavour of the Institute is to help the judicial officers in all possible ways. Suggestions from your end for the improvement of the Journal are always welcome.

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Self-help is the capacity to stand on one's legs without anybody's help. This does not mean indifference to or rejection of outside help, but it means the capacity to be at peace with oneself to preserve one's self-respect, when outside help is not forthcoming or is refused.

– MAHATMA GANDHI

Group Photograph of participant Judicial Officers of M.P. with Hon'ble the Chief Justice, M.P. High Court and Hon'ble the Chairman, M.P. High Court Training Committee, in the *Regional Judicial Workshop on – Planning and Management for Timely Justice (West Zone)* organized by the National Judicial Academy at Bhopal in association with J.O.T.R.I. (05.12.2008 to 07.12.2008)

HON'BLE SHRI JUSTICE W.A. SHAH DEMITS OFFICE

Hon'ble Shri Justice W.A. Shah demitted office on December 31, 2008 on His Lordship's attaining superannuation. Born on 31.12.1946. Joined State Judicial Services as Civil Judge Class-II on 06.04.1970, promoted as Civil Judge Class-I on 14.06.1982 and as officiating District Judge on 29.04.1987. Worked as District and Sessions Judge at Gwalior, Chhatarapur and Bhind. Also worked as Additional Registrar, High Court of M.P. at Gwalior Bench from June 1994 to October 1994 and as Legal Advisor to Lokayukt from April 1998 to June 2003. Appointed as Additional Judge of the Madhya Pradesh High Court on April 13, 2005 and permanent Judge on February 2, 2007.

We, on behalf of JOTI Journal, wish His Lordship a healthy, happy and prosperous life.

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Goodwill towards all beings is the true religion; cherish in your hearts boundless good will to all that lives.

– LORD BUDDHA

PART - I

स्थानीय अन्वेषण हेतु आयोग जारी करने संबंधी प्रक्रिया, विधि तथा आयुक्त प्रतिवेदन का साक्ष्य में उपयोग तथा महत्व

न्यायिक अधिकारीगण

जिला – नीमच

स्थानीय अन्वेषण करने के लिए कमीशन जारी करने के प्रावधान (विधि एवं प्रक्रिया) सिविल प्रक्रिया संहिता 1908 (संक्षेप में संहिता) की धारा 75 (ख) तथा आदेश 26 नियम 9 से 14 तथा मध्यप्रदेश सिविल न्यायालय नियम 1961 (संक्षेप में नियम) के नियम 264 से 266 में दिये गये हैं।

आदेश 26 नियम 9 व नियम 264 (1) का सार यह है कि न्यायालय स्थानीय अन्वेषण हेतु कमीशन विवाद की विषय वस्तु को स्पष्ट करने के लिए अथवा किसी संपत्ति का बाजार मूल्य ज्ञात करने के लिए अथवा किसी अंतःकालीन लाभों अथवा नुकसानी अथवा वार्षिक शुद्ध लाभ को अभिनिश्चित करने के लिए उस दशा में जारी कर सकता है, जब विवादित विषय का विनिश्चय साक्ष्य से नहीं किया जा सकता हो।

नियम 264 (1) के शब्दों ''स्थानीय अन्वेषण के लिए कमीशन को मात्र उस समय जारी किया जाना चाहिए, जबकि ऐसा अन्वेषण स्वयं न्यायालय के द्वारा सुविधापूर्वक संचालित नहीं किया जा सकता है'' से प्रकट होता है कि न्यायाधीश स्वयं कमिश्नर का कार्य कर सकता है। पुरानी संहिता वर्ष 1882 के नियम 11 के शब्दों "and the same can not be conveniently conducted by the judge in person" को संहिता वर्ष 1908 के नियम 9 से विलोपित कर दिया है। परिणामतः नियम 264 (1) में आये उपरोक्त शब्दों के आधार पर न्यायाधीश स्वयं कमिश्नर का कार्य नहीं कर सकता। *(देखिये अनन्त बनाम गोकुल, 1916 (35) आई.सी. 344 तथा मनीन्द्र कुमार राय बनाम परेश चंद्र डे, ए.आई.आर. 1971 आसाम एण्ड नागालैण्ड 127)*

नियम 264 (2), 265 व 266 यह उपबंध करते हैं कि न्यायालय को कमीशन जारी करने के आवेदन पत्र पर विचार करते समय क्या देखना होगा और किस तरह आदेश पारित कर उसमें क्या–क्या उल्लेख करना होगा।

न्यायालय को न्यायिक स्वप्रेरणा का उपयोग करके *(देखिये महावीर प्रसाद बनाम बारेलाल, 1974 जे. एल.जे. 153 म. प्र., नीमाबाई बनाम सरस्वतीबाई तथा अन्य, 2002 राजस्व निर्णय 416 म. प्र., बलीराम बनाम मेलाराम, ए.आई.आर. 2003 एच.पी. 87 तथा सूर्यभानसिंह बनाम स्टेट ऑफ एम.पी., 2006 (III) एम.पी. वीकली नोट 42)* अथवा पक्षकारों के आवेदन पत्र पर से स्थानीय अन्वेषण करने के लिए कमीशन जारी करना चाहिए। जब न्यायालय न्यायिक स्वप्रेरणा से कमीशन जारी करता है, तब उसे आदेश में कारणों को अभिलिखित करना होगा। *(देखिये के. रघुनाथराव बनाम श्रीमती तुमला, ए.आई.आर. 1988 उड़ीसा 30)*

न्यायालय को सामान्यतः उस दशा में स्थानीय अन्वेषण हेतु कमीशन जारी करना चाहिए, जहाँ विवाद के विषय का विशदीकरण (Elucidation) करना हो। *(कुर्बान हुसैन बनाम श्रीमती असमाबाई, 1990 (III) म. प्र. वी. नोट 40)* अथवा जमीन से संबंधित विवादों में, जहाँ विवाद की विषय वस्तु भूमि की चर्तुसीमा, क्षेत्रफल, भूमि की पहचान, तथा अतिक्रमण का मामला हो और इस विवाद के निराकरण हेतु स्वीकृत नक्शा उपलब्ध न हो अथवा पक्षकारों के पास भिन्न–भिन्न नक्शे हो या विवाद का सुसंगत निराकरण मौखिक साक्ष्य से किया जाना

संभव न हो। *(देखिये उत्तमी बाई बनाम छगनलाल, 1974 एम.पी.एल.जे. नोट 65, दुर्गाप्रसाद बनाम प्रवीण फौजदार, 1975 जे.एल.जे. 440, अरूण कुमार बनाम नामदेव, 1987 (1) म. प्र. वीकली नोट 71 तथा हीरालाल बनाम ठाकुरदास, 2003 (III) एम.पी.एच.टी. 347 म.प्र.)*

परन्तु, न्यायालय स्थानीय अन्वेषण हेतु कमीशन जारी करके कमिश्नर को अपने अधिकार प्रत्यायोजित कर उससे किसी सारभूत विवाद का निराकरण नहीं करा सकता। (देखिये नियम 265 (2) के नीचे अंकित टीप एवं न्याय दृष्टान्त बाबूखान बनाम कप्तान सिंह, 1980 (II) म. प्र. वीकली नोट 261) न्यायालय साक्ष्य का संग्रहण भी नहीं करा सकता *(देखिये कन्हैयालाल बनाम श्रीमती पार्वतीबाई, 1994 (II) म. प्र. वीकली नोट 184 तथा सूर्यभान सिंह बनाम मध्यप्रदेश राज्य,* उपरोक्त और न ही मौके पर वास्तविक कब्जाधारी का पता लगा सकता है। *(देखिये राशिद अली बनाम कादर खान, 1983 म. प्र. वीकली नोट 403, चुन्नीलाल बनाम रामचन्द्र, 2002 (I) म. प्र.वीकली नोट 105 तथा अशोक कुमार पटले बनाम रामनिरंजन दुबे, ए.आई.आर. 2007 एन.ओ.सी. 2162 म.प्र., पुट्टप्पा बनाम रामाप्पा, ए.आई.आर. 1996 कर्नाटक 257 तथा यूनियन ऑफ इण्डिया बनाम कृपाल इंडस्ट्रीज, ए.आई.आर. 1998 राजस्थान 224,)* इसी प्रकार न्यायालय किसी पक्षकार द्वारा छोड़ी गयी त्रुटि या कमी की पूर्ति भी नहीं करा सकता हैं। *(देखिये गीता मंदिर ट्रस्ट बनाम रामचन्द्र, 1988 (II) म.प्र. वीकली नोट 203)*। इसके अतिरिक्त जहां विवादित बिन्दु साक्ष्य द्वारा सिद्ध किया जाना अपेक्षित हो तब इस प्रयोजन हेतु आयोग नियुक्त नहीं किया जा सकता है। *(देखिये हरीशंकर बनाम श्रीलाल, 1993 (II) एम.पी. वीकली नोट, नोट 144)*

नियम 264 (2) (ख) यह कहता है कि कमीशन वाद के प्रारंभिक स्टेज पर जारी करना चाहिए। यदि साक्ष्य अंकित करने के बाद कमीशन जारी करने की प्रार्थना की जाती है तो ऐसी प्रार्थना पर विचार प्रकरण की परिस्थितियों को समग्र रूप से देखकर करना चाहिए।

यदि न्यायालय साक्ष्य अभिलिखित करने के पश्चात् कमीशन नियुक्त करता है तो ऐसी स्थिति में भी न्यायालय को कमीशन की रिपोर्ट पर विचार करना होगा। (देखिये नागाराम बनाम प्रभू, 1999 (I) म. प्र. वि.नो. 171)। अपील न्यायालय को भी कमीशन जारी करने की शक्तियां हैं। *(देखिये भगवत्मठ बनाम महादेव मेमोरियल, 2006 (9) एस.सी.सी. 221 एवं टी.एन.राजशेखर वि. एन. काशी विश्वनाथन आदि, ए. आई.आर. 2005 सु.को. 3794)* इसी प्रकार न्यायालय को कमीशन जारी करते समय आदेश 26 नियम 18 के प्रावधानों का पालन करना आज्ञापक है। *(देखिये ख्यालीलाल बनाम जगन्नाथ, 1999 भाग एक म.प्र.वि.नो.104)*

स्थानीय अन्वेषण करने की प्रक्रिया का उल्लेख संहिता के आदेश 26 नियम 10 एवं नियम 245 से 252 में किया गया हैं। नियम 245 के अनुसार आयोग को वाद–प्रतिवादों की प्रतिलिपियाँ, परिप्रश्न, प्रतिपरिप्रश्न, मानचित्र प्रलेख आदि सामग्री जो, आयोग के संपादन के लिए आवश्यक हो, उस पक्षकार को, जिसके कि आवेदन पत्र पर से आयोग जारी किया गया हो, प्रदान किया जाना चाहिए।

नियम 248 के अनुसार आयोग का कार्य जब एक बार प्रारंभ हो जाता है तो वह दिन–प्रतिदिन उसके पूर्ण होने तक चलते रहना चाहिये जब तक कि आपवादिक परिस्थितियों में स्थगित करना आवश्यक न हो। ऐसी दशा में सूचना न्यायालय को देनी होगी। नियम 265 के अनुसार स्थानीय अन्वेषण का आदेश न्यायाधीश को स्वयं लिखना चाहिए तथा उन बिंदुओं को स्पष्ट कर देना चाहिए जिन पर वह प्रतिवेदन प्राप्त करना चाहता है, आगे यह भी बताया गया है कि आयुक्त को अपनी जाँच सर्वथा उन्हीं बिंदुओं पर सीमित रखना चाहिए जो आयोग में वर्णित हैं।

जब न्यायालय का यह समाधान हो जाये कि आयोग निकालना है तब दोनों पक्षों के हितों की रक्षा करने के लिए न्यायालय को निम्न यथोचित निर्देश देना चाहिए जैसे कि –

(क) आवेदक कम से कम किन्तु युक्तियुक्त समय के भीतर, जिसे न्यायालय नियत करें आदेशिका शुल्क, आयुक्त शुल्क और अन्य आवश्यक व्यय न्यायालय में जमा करें।

(ख) पक्षकारों को यह निर्देश देना चाहिए कि वह आयोग की कार्यवाही के नियत समय पर उपस्थित रहे तथा आवश्यक दस्तावेज व साक्ष्य यदि आवश्यक हो प्रस्तुत करे।

(ग) यथासम्भव आयोग की कार्यवाही का दिनांक, समय व स्थान पूर्व में ही निश्चित कर लेना चाहिए तथा उसकी सूचना हितबद्ध सभी पक्षकारों को दी जानी चाहिए।

(घ) आयोग के निष्पादित होकर लौटने के लिए समय नियत किया जाए, ऐसा समय युक्तियुक्त होना चाहिए, किन्तु अधिक लम्बा नहीं होना चाहिए।

(ड) आयुक्त को यह निर्देश दिया जाना चाहिए कि वह नियत समय के भीतर आयोग को लौटा दे। यदि पक्षकार उपेक्षावान रहा हो, सहयोग न किया हो तब प्रतिवेदन में ऐसी बातों का वर्णन किया जाना चाहिए। आवश्यक होने पर आयुक्त को समय में वृद्धि के लिए न्यायालय में आवेदन करना चाहिए।

नियम 266 के अनुसार स्थानीय जॉच हेतु आयोग परिस्थितियों के अनुसार किसी अभिभाषक या शासकीय अधिकारी या अशासकीय व्यक्ति को जारी किया जा सकता है। शांसकीय अधिकारी को नियुक्त करने में न्यायालय, राज्य शासन द्वारा संहिता के आदेश 26 नियम 9 के अंतर्गत बनाये गये नियमों का पालन करने को बाध्य है।

आदेश 26 नियम 9 का ''परन्तुक'' राज्य सरकार को स्थानीय अन्वेषण करने के लिए, कमीशन जारी करने के लिए नियम बनाने की शक्तियाँ प्रदान करता है। इस परन्तुक के अधीन मध्यप्रदेश राज्य ने '' दि मध्यप्रदेश कमीशन फॉर लोकल इन्वेस्टीगेशन नियम 1962'' के शीर्ष से नियम बनाये हैं। इन नियमों को जोति के वर्ष 1997 के खण्ड 3 भाग 4 पेज 40 से 41 में प्रकाशित किया गया है। उक्त नियमों में वे राजस्व अधिकारी, जिनके नाम आयोग जारी किया जा सकेगा, वर्णित हैं तथा इन नियमों का प्रकाशन मध्यप्रदेश राजपत्र भाग 4 (ग) दिनांक 14.9.1992 पृष्ठ 611 अधिसूचना क्रमांक 29566–4315/21 (ख) पर किया गया है। संक्षेप में इन नियमों का सार उल्लेखित करना भी समीचीन है जो मध्यप्रदेश स्थानीय अन्वेषण हेतु आयोग नियम कहे जाते हैं।

इन नियमों में राजस्व अधिकारी के अंतर्गत तहसीलदार, नायब तहसीलदार, राजस्व लिपिक, मापक एवं पटवारी सम्मिलित है और न्यायालय किसी भी राजस्व अधिकारी के नाम से आयोग जारी कर सकेंगे। ऐसा आयोग उस जिले के जिलाधीश के माध्यम से निकाला जावेगा जिसके अधीनस्थ वह राजस्व अधिकारी है तथा आयोग की प्रकृति, अन्वेषण में लगने वाले अनुमानित समय एवं दैनिक भत्ते के अतिरिक्त जेब खर्च, जो राजस्व अधिकारी का उस समय होगा, को ध्यान में रखकर आयुक्त का शुल्क नियत किया जाएगा और आयोग जारी करने के पूर्व ऐसा शुल्क न्यायालय में जमा कराया जाएगा। आयोग पूर्ण होने के उपरांत राजस्व अधिकारी द्वारा अपना लिखित प्रतिवेदन व यात्रा भत्ता आदि का हिसाब प्रस्तुत करने पर उसे उस शुल्क में से भुगतान कर दिया जावेगा। इसके अलावा न्यायालय राजस्व अधिकारी से भिन्न उच्च अधिकारी के नाम से आयोग भी जारी कर सकेगा, लेकिन न्यायालय को यह विचार करना होगा कि क्या उस अधिकारी की सेवाएं उस कार्य हेतु उपर्युक्त एवं उपलब्ध हैं।

संहिता के आदेश 39 नियम 7 के अधीन न्यायालय द्वारा किसी अभिभाषक को, किसी विशेषज्ञ को,

वाद की विषयवस्तु के निरीक्षण हेतु आयुक्त नियुक्त किया जायेगा, जिनके सम्बन्ध में न्यायालय द्वारा उसी प्रकार से आदेश में बिन्दुओं का उल्लेख किया जायेगा, जिस प्रकार से आदेश 26 नियम 9 के अधीन किया जाता है। संहिता के आदेश 39 नियम 7 के अधीन न्यायालय द्वारा स्थानीय अन्वेषण हेतु नियुक्त आयुक्त द्वारा प्रस्तुत किया गया प्रतिवेदन का उपयोग आदेश 39 नियम 1 व 2 के आवेदन पत्र के निराकरण हेतु किया जायेगा। आदेश 39 नियम 7 के अधीन आयोग द्वारा प्रतिवेदन प्रस्तुत किये जाने पर न्यायालय उभय पक्ष द्वारा प्रस्तुत की गयी आपत्ति का निराकरण संहिता के आदेश 39 नियम 1 व 2 के आवेदन पत्र के निराकरण के पूर्व करेगा। प्रतिवेदन आदेश 39 नियम 1 व 2 के आवेदन पत्र के निराकरण हेतु सहायक हो सकता है। किन्तु यह आवश्यक नहीं है कि प्रतिवेदन में प्रदान किये गये निष्कर्षो के आधार पर ही न्यायालय आदेश पारित करें।

न्यायालय के उस आदेश को, जिसके द्वारा कमीशन जारी करने का आवेदन पत्र खारिज हुआ है, को पुनरीक्षण करके चुनौती दी जा सकती है। [*देखिये कुर्बान हुसैन बनाम श्रीमती अस्माबाई (उपरोक्त)*]

यदि कमिश्नर की, रिपोर्ट पर प्रकरण के पक्षकार आपत्ति नहीं करते अथवा उसके परीक्षण की प्रार्थना नहीं करते तो उसकी रिपोर्ट साक्ष्य में पढ़ी जावेगी। *(देखिये हुकुम सिंह बनाम लज्जाराम, 1973 एम.पी.एल. जे. नोट 117 म.प्र., मांगीलाल व अन्य बनाम गौरीशंकर व अन्य ए.आई.आर. 1992 म.प्र. 309 तथा पोखर सिंह बनाम जंगेसिंह, 1993 (II) म.प्र.वि.नो. 135)* परन्तु यदि कमिश्नर की रिपोर्ट पर पक्षकारों द्वारा आपत्ति की जाती है तो न्यायालय इन आपत्तियों का निराकरण कर ही कमिश्नर की रिपोर्ट को साक्ष्य में पढ़ सकता है। *(देखिये भूरीबाई बनाम फूलचन्द, 1977 (II) एम.पी. वीकली नोट 236)*। कमिश्नर की रिपोर्ट न्यायालय के अभिलेख का अंग होने से उसे कमिश्नर स्वयं द्वारा प्रमाणित करने की आवश्यकता नहीं है। *(देखिये भैरूलाल बनाम शांताबाई, 1989 (II) म. प्र. वि. नो. 56)*

कमिश्नर की रिपोर्ट साक्ष्य का एक भाग है। न्यायालय कमिश्नर की रिपोर्ट को मानने हेतु बाध्य नहीं है। न्यायालय को यह स्वतंत्रता है कि वह कमीशन रिपोर्ट का उपयोग अभिलेख पर उपलब्ध साक्ष्य के मूल्यांकन हेतु करें। *(देखिये शंकर कुमार बनाम मोहनलाल शर्मा, ए. आई. आर. 1998 उड़ीसा 117 तथा प्राज्ञा टूल्स कार्पोरेशन लिमिटेड बनाम मेहबूबन्निसा बेगम, ए.आई.आर. 2001 सु.को. 2361)* न्यायालय कमिश्नर की रिपोर्ट को अभिलेख पर उपलब्ध अन्य साक्ष्य के मुकाबले अमान्य कर सकता है। *(देखिये पदमावती बनाम बाबूलाल, 1994 (I) म.प्र. वि.नो. 87)*

यदि न्यायालय कमिश्नर की रिपोर्ट से असंतुष्ट है अथवा किसी बिन्दु पर कमिश्नर की रिपोर्ट अपूर्ण पाता है अथवा रिपोर्ट में किसी प्रकार की कमी है अथवा मामले की विस्तृत जानकारी चाहता है तो वह पूरक कमिश्नर रिपोर्ट बुला सकता है। इतना ही नहीं न्यायालय दूसरा कमिश्नर नियुक्त कर उससे रिपोर्ट आहूत कर सकता है, परन्तु उसे प्रकरण में प्रथम कमिश्नर की रिपोर्ट को निरस्त करने के कारण बताना होंगे।

न्यायालय अन्तवर्ती आवेदन पत्रों के निराकरण हेतु कमीशन जारी कर सकता है। यदि न्यायालय ने अंतरवर्ती आवेदनपत्रों के निराकरण के लिये यदि संहिता के आदेश 39 नियम 6 एवं 7 के अंतर्गत किन्हीं प्रावधानों पर उभय पक्ष की सहमति से अथवा स्वविवेक से आयोग जारी किया है और यदि आयुक्त द्वारा दिये गये प्रतिवेदन पर उभय पक्ष की आपत्ति आमंत्रित की गई है तो ऐसी आपत्ति के निराकरण के पश्चात् एवं आवश्यक होने पर यदि आयुक्त का परीक्षण भी कर लिया गया है तो चाहे भले ही ऐसे आयोग अंतरवर्ती आवेदन पत्रों के निराकरण के उद्धेश्य से जारी किया गया हो, ऐसी रिपोर्ट को प्रकरण के अंतिम निराकरण में विचार में लिया जा सकता है क्योंकि यदि संहिता के आदेश 26 में आयोग जारी करने संबंधी समस्त औपचारिकताओं की पूर्ति कर ली गई हो और ऐसा प्रतिवेदन यदि न्यायालय को उचित भी प्रतीत होता है तो संहिता के अंतर्गत ऐसी कोई बाधा नहीं है कि ऐसे प्रतिवेदन को प्रकरण के अंतिम निराकरण में विचार में न लिया जा सकेगा।

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THE LEGAL POSITION OF PUBLIC ANALYST REPORT AFTER RECEIVING THE CENTRAL FOOD LABORATORY ANALYSIS REPORT REGARDING THE CONCERNED FOOD SAMPLE UNDER THE PREVENTION OF FOOD ADULTERATION ACT, 1954

Institutional Article
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INTRODUCTION:

The Prevention of Food Adulteration Act was enacted in the year 1954 to strengthen the system for preventing adulteration in articles of food. The Central Government framed Rules known as the "Prevention of Food Adulteration Rules, 1955". Part III of these Rules contains "Definitions and Standards of Quality" of various articles of food. Rule 5 which falls within the said Part says that "the standards of quality of various articles of food specified in Appendix B to these Rules are as defined in that appendix."

When a food inspector takes a sample of food article for analysis, he divides the sample then and there into three parts in the manner prescribed therein and sends one of the parts of the sample to the Public Analyst, while the remaining two parts of the sample shall be forwarded to the Local Health Authority. The main purpose of sending the remaining two parts of the sample to the Local Health Authority is to send one of the parts to the Director of the Central Food Laboratory, if so required, under Section 13 of the Act.

Section 13 contains provisions regarding report of Public Analyst as well as the Certificate of the Director of Central Food Laboratory. The certificate of the Director of the Central Food Laboratory can be brought in evidence only in the post-institutional stage of a case, whereas the report of the Public Analyst can be obtained during pre-institution stage of the prosecution.

When Director of the Central Food Laboratory sends the report to the concerned court, despite the specific provisions of Sections13 (3) and 13 (5), sometimes one of the party to the proceedings insists upon to look into and compare with the Public Analysts' report with the Director CFL report simply pointing out the differences regarding result of a particular test or number or kinds of tests applied and facts stated therein.

Here comes the controversy, which we have to resolve. As the resolution of the question posed for our consideration revolves round the relevant provisions contained in Section 13 of the Prevention of Food Adulteration Act,1954, it would be profitable to reproduce the said section in extenso as under :-

"13. (1) The public analyst shall deliver, in such form as may be prescribed, a report to the local health authority of the result of the analysis of any article of food submitted to him for analysis.

(2) On receipt of the report of the result of the analysis under sub-section (1) to the effect that the article of food is adulterated, the local health authority shall, after the institution of prosecution against the person from whom the sample of the article of food was taken and the person, if any, whose name, address and other particulars have been disclosed under Section 14A, forward, in such manner as may be prescribed, a copy of the report of the result of the analysis to such person or persons, as the case may be informing such person or persons that if it is so desired, either or both of them may make an application to the Court within a period of ten days from the date of receipt of the copy of the report to get the sample of the article of food kept by the local health authority analysed by the central food laboratory.

(2A) When an application is made to the Court under sub-section (2), the Court shall require the local health authority to forward the part or parts of the sample kept by the said authority and upon such requisition being made, the said authority shall forward the part or parts of the sample to the Court within a period of five days from the date of receipt of such requisition.

(2B) On receipt of the part or parts of the sample from the local health authority under sub-section (2A), the Court shall first ascertain that the mark and seal or fastening as provided in Clause (b) of sub-section (1) of Section 11 are intact and the signature or thumb impression, as the case may be, is not tampered with, and despatch the part or, as the case may be one of the parts of the sample under its own seal to the Director of the Central Food Laboratory who shall thereupon send a certificate to the Court in the prescribed form within one month from the date of receipt of the part of the sample specifying the result of the analysis.

(2C) Where two parts of the sample have been sent to the Court and only one part of the sample has been sent by the Court to the Director of the Central Food Laboratory under sub-section (2B), the Court shall, as soon as practicable, return the remaining part to the Local health authority and that authority shall

destroy that part after the certificate from the Director of the Central Food Laboratory has been received by the Court;

Provided that where the part of the sample sent by the Court to the Director of the Central Food Laboratory is lost or damaged, the Court shall require the local health authority to forward the part of the sample, if any, retained by it to the Court and on receipt thereof, the Court shall proceed in the manner provided in sub-section (2B).

(2D) Until the receipt of the certificate of the result of the analysis from the Director of the Central Food Laboratory, the Court shall not continue with the proceedings pending before it in relation to the prosecution.

(2E) If, after considering the report, if any, of the food inspector or otherwise, the local health authority is of the opinion that the report delivered by the public analyst under sub-section (1) is erroneous, the said authority shall forward one of the parts of the sample kept by it to any other public analyst for analysis and if the report of the result of the analysis of that part of the sample by that other public analyst is to the effect that the article of food is adulterated, the provisions of sub-section (2), (2D) shall, so far as may be, apply.

(3) The certificate issued by the Director of the Central Food Laboratory under sub-section (2B) shall supersede the report given by the public analyst under sub-section (1).

(4) Where a certificate obtained from the Director of the Central Food Laboratory under sub-section (2B) is produced in any proceeding under this Act, or under Sections 272 to 276 of the Penal Code, it shall not be necessary in such proceedings to produce any part of the sample of food taken for analysis.

(5) Any document purporting to be a report signed by a public analyst, unless it has been superseded under sub-section (3) or any document purporting to be a certificate signed by the Director of the Central Food Laboratory, may be used as evidence of the facts stated therein in any proceeding under this Act or under Sections 272 to 276 of the Penal Code :

Provided that any document purporting to be a certificate signed by the director of the Central Food Laboratory not being a certificate with respect to the analysis of the part of the sample of any article of food referred to in the proviso to sub-section (1A) of section 16, shall be final and conclusive evidence of the facts stated therein.

Explanation - In this section, and in clause (f) of sub-section (1) of Section 16, "Director of the Central Food Laboratory" shall include the officer for the time being in charge of any food laboratory (by whatever designation he is known) recognised by the Central Government for the purposes of this section"

The Central Food Laboratory is established in accordance with Section 4 of the Act. Rule 4 of the PFA Rules contains provisions to be followed by the Director of Central Food Laboratory on receipt of a part of the sample sent by the Court. Sub-rule (4) prescribes that "receipt of a package containing a sample for analysis the Director or an officer authorized by him, shall compare the seals on the container and the outer cover with specimen impression received separately and shall note the condition of the seal thereon." Sub-rule 5 says that after the analysis the certificate thereof shall be supplied forthwith to the sender in Form II.

Section 13 of the Act contains provisions regarding report of Public Analyst as well as the Certificate of the Director of Central Food Laboratory. After institution of prosecution against the person from whom the sample of the article of food was taken (and/or the person whose name and address were disclosed under Section 14-A), have the right to apply to the Court to get one of the remaining parts of the sample of the food article analysed by the Central Food Laboratory. It is a right conferred on the aforesaid persons in order to defend the prosecution launched against them. For availing of the aforesaid statutory right they have to make application to the Court within the prescribed time. Once the application is made it is not the obligation of the accused to get the result of the analysis made by the Central Food Laboratory.

Sub-section (2-B) of Section 13 requires the Court to despatch one of the parts of the sample under its own seal to the Director of Central Food Laboratory. Once it is despatched it is the duty of the said Director to send a Certificate to the Court "in the prescribed form within one month from the date of receipt of the part of the sample specifying the result of the analysis" and that certificate shall supersede the report given by the public analyst under sub-section (1) as per Section 13 (3) of the Act.

Therefore, despite adverse report by the Public Analyst, valuable right is conferred upon the accused to send through Court another sample to the Central Food Laboratory for analysis as provided under Section 13 (2-B) of the Act.

LAW ABOUT SECTIONS 13 (3) AND 13 (5):

In *Municipal Corporation of Delhi v. Ghisa Ram, AIR 1967 SC 970,* the Director of Central Food Laboratory reported to the trial Court that the part of the sample sent to him became highly decomposed and hence no analysis was possible. The accused was thereupon acquitted and the acquittal was challenged on the contention that in the absence of a Certificate of the Director of the Central Food Laboratory, for any reason whatsoever, the Report of the Public Analyst

will stand and the Court can act on it. The Apex Court has observed that the right of the accused to have the sample analysed by the Director of Central Food Laboratory is a valuable one and such right has been given in order that, for his satisfaction and proper defence, he should be able to have the sample analysed by a greater expert whose certificate is to be accepted by Court as "conclusive evidence".

In *Chetumal v. State of M.P., AIR 1981 SC 1387,* the three judge bench of Apex Court again reiterated that under Section 13 (3) of the Prevention of Food Adulteration Act, the report of the Public Analyst stood superseded by the certificate issued by the Director of the Central Food Laboratory. Having been so superseded, the report of the Public Analyst could not, therefore, be relied upon to base a conviction. The certificate of the Director of the Central Food Laboratory having been excluded from consideration because of the tampering at the seals, there was really no evidence before the Court on the basis of which the appellant could be convicted. The Court could not fall back on the report of the Public Analyst as it had been superseded. The only method of challenging the report of the Public Analyst was by having the sample tested by the Director of the Central Food Laboratory. In the present case the appellant (accused) was deprived of the opportunity to which he was entitled for no fault of his. It was not, therefore, open to the Court to fall back upon the report of the Public Analyst to convict the appellant (accused). **In other words, the report of Central Food Laboratory shall supersede all previous reports and shall be relevant for continuation and/or termination of proceedings**.

In this regard High Court of Madhya Pradesh followed these principles on *Sewa Ram and others v. State of M.P. and others, 2004 (4) MPLJ 134* and observed that as the sample sent to the Central Food laboratory was not found sufficient for analysis and could not be analysed by the Laboratory, petitioner (accused) has lost his valuable right under Section 13 (2) of the Act. As the report of the Public Analyst has already superseded by the certificate of Central Food Laboratory, no conviction can be based on the Public Analyst report. [Also see - *Standard Agencies v. State of M.P., 1998 (1) FAC 188 and Suresh Narayan v. Food Inspector and another, 2003 (2) MPLJ 120*]

LEGAL POSITION ON MAIN ISSUE:

In *Amritsar Municipality v. Shadi Lal, 1975 CriLJ 915,* the Division Bench of the Punjab & Haryana High Court has held that sub-Section (5) of Section 13 of the Prevention of Food Adulteration Act, clearly envisages that once the report of the Director of the Central Food Laboratory has been obtained, the report of the Public Analyst cannot be used as evidence of the facts stated therein. This being the position, it is not open to the accused to contend that it was inconsistent with the report of the Director of the Central Food Laboratory. Once the report of the Director has been obtained, for all intents and purposes, the report of the

Public Analyst is to be ignored, as it cannot be used as evidence of any facts stated therein.

In *J. L. Roy v. Amrit Lal Dey & another, 1980 CriLJ 24 (DB)* the Gauhati High Court observed that a perusal of Section 13 (3) shows that the report of the Director of the Central Food Laboratory supersedes the report of the Public Analyst under sub-section (1) of the Section. In other words, when on an application by the accused under Section 13 (2) the Court sent the sample with the accused to the Director and when the report of the Director is received, the report of the Public Analyst ceases to exist in the eye of law and cannot be taken any notice of. The Magistrate's comparison of the report of the Director with that of the Public Analyst and giving the benefit of the variance between the two reports to the accused are illegal and unsustainable in law.

In *State of Gujarat v. Kutubuddin Isafali, 1981 CriLJ 908* Gujrat High Court stated that the report of the Director of the Central Food Laboratory not only supersedes the one issued by the public analyst but it is final and conclusive evidence of the facts stated therein. In this view of the matter, when there is a report of Central Food Laboratory, the report of the Public Analyst will, for all practical purposes, be treated as non-existent. The report of the Central Food Laboratory will be final and conclusive evidence of the facts stated therein and the question, therefore, of any comparison of that report with the report issued by the Public Analyst which has already been superseded, does not arise. These are statutory provisions and they have to be strictly complied with.

Again in *Prahladbhai v. State of Gujarat, 1984 CriLJ 1642 (FB)* Full Bench of Gujrat High Court has considered this issue in detail and clarified the legal position as under :

- A mere look at Section 13 (3) shows that once the certificate as issued by the Director of the Central Food Laboratory after analysing part of the sample sent to it for analysis at the request of the concerned accused as laid down by Section 13 (2) read with Section 13 (2A), the earlier report of the public analyst analysing part of the very same sample gets superseded.
- The nature and extent of the supersession is highlighted by the provisions of sub-section (5) of Section 13 read with the proviso to the said sub-section (5). A bare look at sub-section (5) of Section 13 shows that a document purporting to be a report signed by the public analyst can be used as evidence of the facts stated therein even though no formal proof as required by the Indian Evidence Act is adduced, provided it is not superseded under sub-section (3) of Section 13.
- Thus, prior to its supersession, it may hold the field and mere tendering of such report would be enough to bring it on record as evidence of its contents. But the moment it gets superseded under Section 13 (3)

by a superior report so to say, of the Director of the Central Food Laboratory on the basis of examination of any part of the same sample as sent to him through Court at the request of the accused as provided by Section 13 (2) read with Section 13 (2A), it ceases to exist of its own and there would remain no occasion for referring to it as evidence of the facts stated therein. In other words, it gets totally exhausted in that eventuality and it is only the certificate of the Director of the Central Food Laboratory which would hold the field.

- Proviso to Section 13 (5) also indicates that what is stated in the later certificate issued by the Director would be final and conclusive evidence of the facts stated in the said certificate. It is obvious that the facts stated would be with respect to the result of the analysis by the Director and the findings reached therein regarding relevant ingredients of the part of the sample sent for analysis and analysed by the Director of the Central Food Laboratory.
- Once this type of conclusive evidence emerges on record, whatever might have been contra-indicated regarding the concerned ingredients of the sample as found in the prior report of the public analyst would be totally pushed out of the arena of contest and cannot be looked at.

  If that is so, there would be no question of considering any variance between the results of the tests carried out by the public analyst on the one hand and the Director of the Central Food Laboratory on the other vis-a-vis two parts of the same sample.

  Any variation or variance between the different ingredients mentioned in these two reports would presuppose comparison between two existing reports on record. But if one of the reports is wholly pushed out of record as enjoined by Section 13 (3) read with Section 13 (5), there is no question of resorting to the exercise of comparison between the contents of these two reports with a view to finding out the supposed variance between the existing and operative report of the Director and earlier report of the public analyst which has ceased to exist on record.
- Once this conclusion is found to clearly follow from the aforesaid statutory scheme of Section 13, it must logically follow that there can be no question of any variance between the non-existent report of the public analyst and existing certificate of the Director of Central Food Laboratory in connection with analysis of the part of the same sample as initially taken by the Food Inspector.
- If such a question is ruled out, further question as to whether the prosecution should explain the variance at the pain of otherwise falling through would become totally irrelevant and besides the point.

- Once sub-sections (3) and (5) of Section 13 are kept in view, it is impossible to countenance the submission of the accused that despite these provisions, non-existing report of the public analyst can still be looked at for the purpose of finding out the alleged variance between the contents of that report and the superseding certificate of the Director of the Central Food Laboratory.
- The word '**supersede**', according to Oxford English Dictionary means "to make of no effect; to render void, nugatory or useless; to annul; to override; to be set aside as useless or obsolete". The word 'supersede', according to *Corpus Juris Secundum,* Vol.83, means to make void or useless or unnecessary by superior power or by coming in the place of; to make unnecessary or superfluous; to set aside; to annul; to repeal, to suspend, to stay, to overrule, to obliterate; to neutralise. The word 'supersede' is further defined as meaning to supplant, to replace, to displace or set aside etc.
- Therefore when sub-section (3) of Section 13 says that the certificate issued by the Director of the Central Food Laboratory shall supersede the report given by the public analyst under sub-section (1), it clearly means that it replaces the public analyst's report, meaning thereby that once the report of the Director is received, the earlier report given by the public analyst is rendered obsolete and stands wiped out.
- Sub-section (5) of Section 13 also makes this position clear when it says that any document purporting to be a report signed by a public analyst, unless it has been superseded under sub-section (3) may be used as evidence of the facts stated therein in any proceeding under the Act. It is obvious that once the report of the public analyst is superseded by the certificate issued by the Director of Central Food Laboratory after analysing another part of the sample, the report of the public analyst cannot be used as evidence of facts stated therein. In other words, it is rendered nugatory or non est.
- We are, therefore, of the opinion that having regard to the language of sub-sections (3) and (5) of Section 13, it is not permissible to the Court to rely on the report of the public analyst once it is superseded by the certificate issued by the Director of the Central Food Laboratory.

In *Narendra Kumar v. Municipal Corporation, Indore, 1986 JLJ 645,* the High Court of Madhya Pradesh has observed that from a combined reading of the provisions embodied in Section 13 (2-B) of the Act and proviso to Section 13 (5) of the Act, it is clear that the certificate signed by Director Central Food Laboratory sent to the Court in prescribed form specify the result of the analyst as final and constitutes conclusive evidence of the facts stated (as distinguished from the opinion) therein.

In *Horilal Thewar v. State of M.P., 1987 (II) FAC 35* our own High Court has observed that after the report of Director, Central Food Laboratory was received, which was against the applicant (accused), he cannot be permitted to turn round and say that he was not bound by the said report.

In *K.V. Kunhikannan v. Food Inspector, Kayyur, 1994 CriLJ 3823 (DB),* the Kerala High Court observed that once the report of the Public Analyst is superseded by the certificate of the Director of Central Food Laboratory there is no report of the Public Analyst available in the eye of law for comparison with the certificate issued by the Director. The Court cannot therefore legitimately make any comparison and arrive at any conclusion, which will be in variance with the certificate issued by the Director. If any comparison is attempted to be made, it will amount to violation of the provisions contained in clauses (3) and (5) of Section 13 of the Act.

The three Judge Bench of Apex Court in *Calcutta Municipal Corporation v. Pawan Kumar Saraf, AIR 1999 SC 738* has lucidly crystalised the legal position and stated that when the statute says that certificate shall supersede the report it means that the report would stand annulled or obliterated. The word "supersede" in law, means "obliterate, set aside, annul, replace, make void or inefficacious or useless, repeal" (vide *Black's Law Dictionary,* 5th Edn.). **Once the Certificate of the Director of Central Food Laboratory reaches the Court the Report of the Public Analyst stands displaced and what may remain is only a fossil of it.**

The Apex Court further observed in this context that the proviso to sub-section (5) of Section 13 of the Act can also be looked at which deals with the evidentiary value of such certificate. The material portion of the proviso is quoted below :

> "Provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory . . . . . shall be final and conclusive evidence of the facts stated therein."

If a fact is declared by a statute as final and conclusive, its impact is crucial because no party can then give evidence for the purpose of disproving that fact. This is the import of Section 4 of the Evidence Act which defines three kinds of presumptions among which the last is "conclusive proof".

> "When one fact is declared by this Act to be conclusive proof of another the Court shall, on proof of the one fact regard the other as proved and shall not allow evidence to be given for the purpose of disproving it."

Thus the legal impact of a Certificate of the Director of Central Food Laboratory is threefold:

(a) it annuls or replaces the report of the Public Analyst,

(b) it gains finality regarding the quality and standard of the food article involved in the case,

(c) it becomes irrefutable so far as the facts stated therein are concerned.

In *Food Inspector, Ernakulam v. P.S. Sreenivasa Shenoy, AIR 2000 SC 2577* the Apex Court again specifically stated that when the Certificate superseded the Report of the Public Analyst the latter stands sunk to the bottom and in that place the Certificate alone would remain on the surface of evidence and hence that certificate alone can be considered as for the facts stated therein regarding the sample concerned.

In *C.L. Yadav and another v. State of M.P. and another, 2007 (2) MPHT 360* following the above law laid down by the Supreme Court in *Calcutta Municipal Corporation (supra), Municipal Corporation of Delhi (supra)* and *Chetumal (supra),* the High Court of Madhya Pradesh has observed that a bare reading of the provision of Section 13 (3) of the Prevention of Food Adulteration Act, 1954 clearly shows that the word "shall" has been used in this provision before the word "supercede" indicating that this provision is mandatory in nature and whatever certificate has been issued by the Director, Central Food laboratory, it supersede the report given by the Public Analyst under sub Section (1) of Section 13 in all respects and looking to the Supreme Court's judgments in the above mentioned cases, it is clear that the certificate of Director of Central Food Laboratory annuls or replaces the report of Public Analyst, it gains finality regarding the quality and standard of the food article involved in the case and it becomes irrefutable so far as the facts stated therein are concerned and there the report of the Public Analyst cannot be looked into for any purpose.

CONCLUSION:

Thus on the basis of aforesaid analysis based on various authorities the legal position culminates can be summarised as under: –

(a) the certificate issued by the Director of the Central Food Laboratory under sub-section (2-B) shall supersede the report given by the Public Analyst under sub-section (1) shall be final and conclusive evidence of the facts stated therein.

(b) once the report of the Director, Central Food Laboratory is received, it annuls or replaces the report of the Public Analyst and the earlier report given by the Public Analyst is rendered obsolete or non est and stands wiped out and what may remain is only a fossil of the Public Analyst report.

(c) when there is a report of Central Food Laboratory, the report of the Public Analyst will for all practical purposes be treated as non existent and comparison of facts stated in the certificate of Director, Central Food Laboratory with the facts of the Public Analyst report is not permissible and is illegal and unsustainable in law.

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LAW REGARDING LIMITATIONS OF IMPOSING SENTENCE OF IMPRISONMENT IN DEFAULT OF PAYMENT OF FINE - WHETHER FINE CAN BE IMPOSED FOR AN OFFENCE UNDER ANY SPECIAL ACT IN ABSENCE OF SPECIFIC PROVISION THEREIN

Judicial Officers
Districts Damoh & Guna

The First Part of the topic can be conveniently divided into two portions:—

(1) Limit of imprisonment for non payment of fine when imprisonment and fine both may be awardable.

(2) Limit of imprisonment for non payment of fine when offence is punishable with fine only.

I. Limit of imprisonment for non-payment of fine when imprisonment and fine both are awardable -

Section 65 Indian Penal Code and Sec. 30 Cr.P.C. prescribe the limit for imposition of punishment for non-payment of fine. Where the offence for which the accused has been convicted is punishable with imprisonment and fine and also in cases where offence is punishable with imprisonment or fine or with both, the term for which the court may direct the offender to be imprisoned in default of payment of fine shall not exceed one- fourth of the term of imprisonment which is maximum fixed for the offence See *Ram Jas v. State of UP, AIR 1974 SC 1811.* Wherein the accused was convicted for an offence u/s 419 IPC, the maximum sentence imposable is only three years in Section 419 IPC therefore imprisonment in default of payment of fine in such case could not exceed nine months.

Here it will not be out of place to mention that Magistrate's powers are specially limited by Section 30 CrPC, they must also be so exercised as not to contravene Section 65 IPC. [See *Chhaju Lal v. State of Rajasathan, 1972 SCC (Criminal) 561 and Kuna Maharana v. State, 1996 Criminal Law Journal 170 Orissa*]

In *Kuna Maharan's case* (supra) it has been laid down that as Court of Magistrate first class can pass a maximum sentence of imprisonment for a term not exceeding three years, therefore, the default sentence cannot be in excess of one fourth of maximum term of imprisonment which he is competent to inflict and therefore, he has no jurisdiction to inflict default sentence at more than nine months of offence punishable under section 326 Penal Code.

On the basis of above discussion, it has become clear that where the sentence is imprisonment and fine, while awarding imprisonment in default of fine, there are two limitations as to the term of such imprisonment for magistrates

i.e. the one imposed by Section 65 IPC and the other by sub-section (1) (b) of Section 30 read with Section 29 of Cr.P.C. Where as for the Court of Session there is only one limitation as provided u/s 65 of Penal Code.

Section 64 prohibits that a sentence in default of payment of fine should run concurrently with a sentence passed previously. The sentence of imprisonment in default of payment of fine is not punishment for the offence for which the offender has been convicted but is punishment for his failure to pay the fine imposed upon him. Therefore the imprisonment awarded for the default of payment of fine cannot be added up to the substantive imprisonment awarded to the accused in order to say that no jurisdiction or power to pass that sentence of imprisonment. That is to say the sentence of imprisonment for default of non-payment of fine cannot be taken into consideration for determining whether the court passing sentence exceed its jurisdiction to impose maximum sentence. (See *P. Balaraman v. State, 1991 Cr.L.J. 166 Madras*).

II. Limit to imprisonment for non-payment of fine when offence is punishable with fine only : —

Section 67 IPC deals with question of imprisonment for default of payment of fine when the offence for which the accused is convicted is punishable with fine only. When the offence for which the accused is convicted is punishable with fine only the following shall be rule for passing sentence for default.

(a) The imprisonment imposed for default of payment shall be simple.

(b) and the term of imprisonment shall not exceed to two months when amount of fine does not exceed rupees fifty and it shall not exceed to four months when the amount of fine not exceed rupees one hundred and in any other case the term of default of fine shall not exceed six months.

Now coming to the second part of the topic whether this can be imposed for an offence of any Special Act in absence of specific provision therein?

Section 40 IPC definesthe term "Offence" as - Except in the Chapters and Sections mentioned in clauses 2 and 3 of this section the word "offence" denotes a thing made punishable by this Code. In Chapter IV, Chapter V-A and in the following sections, namely, Sections 64, 65, 66 67, 71, 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445 the word "offence" denotes a thing punishable under this Code or under any special or local law as hereinafter defined.

And in Sections 141, 176, 177, 201, 202, 212, 216 and 441 the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.

A plain reading of this provision of law makes it crystal clear that the effect of clause (2) of section 40 is to make everything punishable under the special law which is defined as an offence within the meaning of the Indian Penal Code. Similarly Section 4 Cr.P.C. provides as under :

> **Sec. 4 Trial of offences under the Indian Penal Code and other laws**-(1) All offences under the Indian Penal Code shall be investigated, inquires into, tried, and otherwise dealt with according to the provisions hereinafter contained. (2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

Unless the other law prescribes a special procedure for the trial of an offence under that law, the procedure prescribed by the Code shall be applicable for the trial of such offence as for an offence under the IPC as referred to in sub-section (1) of the section 4. [See. *A.R. Antulay v. Ramdas Sriniwas Nayak, AIR 1984 SC 718 : 1984 CRLJ 647 (SC)*]

The existence of a special or local law by itself cannot be taken to exclude the operation of the CrPC unless such law prescribes a special procedure for the trial of an offence, thereby excluding impliedly or expressly, the operation of CrPC in respect of such trial. *[See T.S. Raman v. Superintendent of Prisons, 1984 CriLJ 892].*

We may as well refer to section 25 of the General Clauses Act 1897 which States : —

> **25. Recovery of fines** :- Sections 63 to 70 of the Indian Penal Code (45 of 1860)and the provisions of the Code of Criminal Procedure (5 of 1898) for the time being in force in relation to the issue and the execution of warrants for the levy of fines shall apply to all fines imposed under any Act, Regulation, rule or bye-law unless the Act, Regulation, rule, or bye-law contains an express provision to the contrary.

In the case of *Kishan Lal Sindhi v. Executive Officer, N.A.C. Padampur, 1980 CriLJ 365,* it has been held by Orissa High Court that imposition of substantive sentence though not specifically provided for in the Act is valid u/s 30 of CrPC, Ss. 40 and 67 of IPC r/w S.25 of General Clauses Act, 1897. Similar view has been taken by Bombay High Court in *Daulat Raghunath Derale v. State of Maharashtra, 1991 CriLJ 817.*

From the above provisions it appears that if a person commits any offence under IPC or under any Special Law and when such offence is punishable with

substantive sentence and fine or substantive sentence or fine, or fine only, in default of payment of fine, he can be ordered to undergo imprisonment. Section 65 IPC & Section 30 CrPC prescribes maximum period for which a Court/ Magistrate may award imprisonment in default of payment of fine.

★It will be useful to refer some othercase laws in this regard. The earliest case which dealt with this problem is *Queen Empress v. Yaqub Sahib, ILR (1899) 22 Madras 238.* In this case his Lordship Benson, J. Discussed the provision contained in Section 64 of the IPC and he concluded that from the wordings of Section 64, it must be admitted, that the legislature intended by it to provide for the award of imprisonment in default of payment of fine in all cases in which fine can be imposed. Yet another case on this point is *Sukhdeo Singh v. Calcutta Corporation, AIR 1953 Calcutta 41.*

A similar question came up for consideration before the Hon'ble Supreme Court in *Sharif v. State of Bihar, AIR 1957 SC 645* and it was held by Hon'ble The Supreme Court that it was open to the Court to order imprisonment of the accused in default of payment of fine, even when there was no specific provision under the Code to provide imprisonment in default of payment of fine.

The latest case in string of cases is *Shantilal v. State of M.P., 2008 Criminal Law Journal 386 (SC)* in which Hon'ble the Apex Court after discussing almost all the provisions has opined that even in absence of specific provision under the Act empowering a Court to order imprisonment in default of payment of fine, such power is implicit and is possessed by a Court administering criminal justice. In this case section 18 of the Narcotic Drugs and Psychotropic Substance Act was discussed in which imprisonment in default of payment of fine is not specifically provided and Hon'ble the Supreme Court laid down the law that the law is clear and settled and it has been held since more than a century that such a order can be passed by the competent Court of law having power to impose fine as one of the punishment. Sections 63 to 70 of the IPC and Section 30 of the Code of Criminal Procedure Code relating to award of imprisonment in default of payment of fine would apply to all cases wherein fines have been imposed on an offender unless "a Code, regulation, rule or by-laws contains an express provision to the contrary".

In view of the aforesaid discussion it can be concluded that sentence of imprisonment in default of fine can be imposed for an offence of any Special Act even in absence of specific provision therein.★

NOTE : **This portion is taken from the article received from District Guna.*

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विधिक समस्याऐं एवं समाधान

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

Whether the plaintiff can combine the two causes of action; one under the Copyright Act, 1957 in connection with 'infringement of copyright' and the other under the Trade and Merchandise Marks Act, 1958 in connection with 'passing off' in a situation where the Court has territorial jurisdiction in so far as cause of action under the Copyright Act is concerned but has no jurisdiction to entertain the cause of action under the Trade and Merchandise Marks Act?

This question arose for the first time before Hon'ble the Apex Court in the case of *Dhodha House v. S.K. Maingi, (2006) 9 SCC 41* and again very recently the same question was dealt with in *Dabur India Limited v. K.R. Industries, (2008) 10 SCC 595.* In the light of the aforesaid judgments of the Hon'ble Apex Court, this question can be answered in the following manner:

The territorial jurisdiction conferred upon the court in terms of the provisions of Section 20 of the Code of Civil Procedure, indisputably shall apply to a suit or proceeding under the Copyright Act, 1957 as also to the Trade and Merchandise Marks Act, 1958. Sub-section (2) of Section 62 of the 1957 Act provides for a non obstante clause also conferring jurisdiction upon the District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the persons instituting the suit or other proceedings have been residing.

The Apex Court in *Exphar Sa v. Eupharma Laboratories Ltd., (2004) 3 SCC 688* has held that the object and reasons for the introduction of sub-section (2) of Section 62 of the Copyright Act, 1957 was not to restrict the owners of the copyright to exercise their rights but to remove any impediment from their doing so. Section 62 (2) cannot be read as limiting the jurisdiction of the District Court only to cases where the person instituting the suit or other proceeding, or where there are more than one such persons, any of them actually and voluntarily resides or carries on business or presently works for gain. It prescribes an additional ground for attracting the jurisdiction of a court over and above the "normal" grounds as laid down in Section 20 of the Code.

There cannot be any doubt whatsoever that the Parliament having inserted sub-section (2) in Section 62 of the 1957 Act, the jurisdiction of the Court

thereunder would be wider than the one under Section 20 of the Code. The object and reasons for enactment of sub-section (2) of Section 62 would also appear from the report of the Committee. The provision has been specially designed to confer an extra benefit upon the authors who were not in a position to instate copyright infringement proceeding before the Courts.

In terms of sub-section (1) of Section 62, suit can be instituted and the proceedings can be initiated in respect of matters arising about the infringement of the copyright in any work or the infringement of any other right conferred thereunder. It does not confer jurisdiction upon a District Court where the plaintiff resides, if a cause of action arises about passing off under the 1958 Act.

The Apex Court in the case of *Dhodha House* (supra) has held: (SCC p. 56, para 54)

> "54. For the purpose of invoking the jurisdiction of a court only because two causes of action joined in terms of the provisions of the Code of Civil Procedure, the same would not mean that thereby the jurisdiction can be conferred upon a court which had jurisdiction to try only the suit in respect of one cause of action and not the other. Recourse to the additional forum, however, in a given case, may be taken if both the causes of action arise within the jurisdiction of the court which otherwise had the necessary jurisdiction to decide all the issues."

In the case of *Dabur India Limited* (supra), the Apex Court having referred to the *Dhodha House case* (supra) has also made an observation about the composite suit. A composite suit would not entitle a court to entertain a suit in respect whereof it has no jurisdiction, territorial or otherwise. Order II, Rule 3 of the Code specifically states so and, thus, there is no reason as to why the same should be ignored. A composite suit within the provisions of the 1957 Act as considered in *Dhoda House case* (supra), therefore, would mean the suit which is founded on infringement of a copyright and wherein the incidental power of the Court is required to be invoked. A plaintiff may seek a remedy which can otherwise be granted by the court. It was that aspect of the matter which had not been considered in *Dhoda House case* (supra) but it never meant that two suits having different causes of action can be clubbed together as a composite suit.

In view of the aforesaid discussion, the answer to the aforementioned question is that the suit having different causes of action cannot be clubbed together as a composite suit under a given circumstance where a court has territorial jurisdiction to try only the suit in respect of one cause of action (infringement of copyright) and not the other (infringement of passing off).

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क्या सिविल न्यायालय को ऐसे मिश्रित वाद के श्रवण का अधिकार है जिसमें निष्कासन हेतु लिये गये अन्य आधारों के साथ–साथ एक या अधिक आधार म.प्र. स्थान नियंत्रण अधिनियम के अध्याय III-A के अन्तर्गत होकर भाड़ा नियंत्रक प्राधिकार के क्षेत्राधिकार के अन्तर्गत हो?

म.प्र. स्थान नियंत्रण अधिनियम (एतत्मीन पश्चात मात्र अधिनियम) के अध्याय III A के अन्तर्गत निवास एवं व्यवसाय हेतु सदभावपूर्ण आवश्यकता के आधार पर किरायेदार के किरायेदारी भाग से निष्कासन हेतु ऐसे भूमि स्वामियों के लिये उपबंध किये गये है जो अधिनियम की धारा 23–J के अन्तर्गत परिभाषित है, यथा जो किसी सरकार के कर्मचारी या सरकार के स्वत्व या नियंत्रण की कम्पनी के कर्मचारी है या कोई विधवा या विच्छिन्न विवाह पत्नी या विंकलाग व्यक्ति आदि हैं।

अधिनियम की धारा 45 (1) के अन्तर्गत उन मामलों में सिविल न्यायालय की क्षेत्राधिकारिता का वर्जन किया गया है जिन्हें निराकृत करने की अधिकारिता भाड़ा नियंत्रक प्राधिकार को प्राप्त है। जबकि अधिनियम की धारा 45 (2) के अन्तर्गत सिविल न्यायालय ऐसे वाद आदि के विचारण हेतु सक्षम है जिसमें किसी किरायेदारी स्थान के स्वत्व का प्रश्न या किसी किरायेदारी स्थान के किराये की प्राप्ति के अधिकार संबंधी प्रश्न अन्तर्वलित हो।

इसी प्रकार अधिनियम की धारा 12 (1) (a) से लेकर (p) तक में वर्णित एक या अधिक आधारों पर, जिनमें सद्भाविक आवश्यकता के आधार (e) और (f) भी सम्मिलित है, निष्कासन हेतु वाद का श्रवणाधिकार सिविल न्यायालय को प्राप्त है।

अब प्रश्न यह उत्पन्न होता है कि क्या सिविल न्यायालय को ऐसे मिश्रित वाद का श्रवणाधिकार है जिसमें निष्कासन हेतु लिये गये अन्य आधारों के साथ–साथ एक या अधिक आधार म.प्र. स्थान नियंत्रण अधिनियम के अध्याय III A के अन्तर्गत होकर भाड़ा नियंत्रक प्राधिकार के श्रेत्राधिकार के अन्तर्गत हो?

पूर्व में म.प्र. उच्च न्यायालय द्वारा *नंदलाल विरूद्ध मांगीबाई, 2006 (2) एम.पी. एच.टी. 300* में यह विनिश्चित किया गया था कि उक्त प्रकृति के मिश्रित वाद का श्रवणाधिकार सिविल न्यायालय को नहीं है एवं ऐसा वाद प्रस्तुत होने पर सिविल न्यायालय मात्र उन्हीं आधारों पर वाद का विचारण कर सकता है जो भाड़ा नियंत्रक प्राधिकार के क्षेत्राधिकार के अन्तर्गत नहीं आते है, अर्थात न्यायालय अधिनियम की धरा 23–J में वर्णित भूमिस्वामी की सद्भाविक आवश्यकता के आधार मात्र पर आधारित वाद का विचारण नहीं करेगा।

न्यायदृष्टॉत नंदलाल (उपरोक्त) को आधार मान कर मध्यप्रदेश उच्च न्यायालय खण्डपीठ इन्दौर द्वारा पुनः *राजेन्द्र सिंह विरूद्ध सुलोचना, द्वितीय अपील क्र. 260/2004 में दिनांक 28.09.2006* को निर्णय पारित करते हुए यह मत व्यक्त किया गया कि सिविल न्यायालय को ऐसे मिश्रित वाद की श्रवणाधिकारिता प्राप्त नहीं है।

उक्त निर्णय के विरूद्ध संस्थित अपील *(सुलोचना विरूद्ध राजेन्द्र सिंह, ए.आई.आर. 2008 सु.को. 2611)* में सर्वोच्च न्यायालय द्वारा यह अभिमत व्यक्त किया गया कि सिविल न्यायालय के क्षेत्राधिकार का वर्जन करने वाली विधि की व्याख्या कठोरता से की जाना चाहिये एवं उच्चतम न्यायालय द्वारा म.प्र. उच्च न्यायालय के मिश्रित वाद संबंधी उपरोक्त मत को पुष्टि योग्य न मानते हुए यह न्याय सिद्धान्त प्रतिपादित किया

गया कि ऐसा मामला जो Stricto Sensu अधिनियम के अध्याय III A की परिधि में नहीं आता है, वह सिविल न्यायालय द्वारा विचारणीय है एवं ऐसे मिश्रित निष्कासन संबंधी वाद का श्रवणाधिकार सिविल न्यायालय को प्राप्त हैं।

अतः अधिनियम की धारा 45 (2) के प्रावधान एवं न्याय दृष्टॉत सुलोचना (उपरोक्त) से यह स्पष्ट होता है कि अधिनियम की धारा 23– J में वर्णित प्रकृति के भूमिस्वामी द्वारा मात्र सद्भाविक आवश्यकता संबंधी आधार पर प्रस्तुत वाद के संबंध में सिविल न्यायालय का क्षेत्राधिकार वर्जित होगा किन्तु उक्त आधार के अतिरिक्त अन्य आधार भी वाद में लिये जाने पर ऐसे मिश्रित वाद का श्रवणाधिकार सिविल न्यायालय को प्राप्त होगा ।

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

It is not the eye that sees the beauty of the heaven, nor the ear that hears the sweetness of music or the glad tidings of a prosperous occurrence, but the soul, that perceives all the relishes of sensual and intellectual perfections; and the more noble and excellent the soul is the greater and more savoury are its perceptions.

– JEREMY TAYLOR

PART - II

NOTES ON IMPORTANT JUDGMENTS

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

(i) **Bonafide requirement – Pleading of alternate accommodation in plaint – Not necessary as landlord was not owner of alleged alternate accommodation at the time of institution of suit – Judgment of court below set-aside and suit for eviction decreed– Appeal allowed.**

(ii) **Suit for eviction on ground of bonafide requirement of two sons – Examination of one son only – Held, it is not the law that each and every person for whose requirement suit is filed has to be examined – Judgment of court below set-aside – Suit decreed – Appeal allowed.**

Harvilas through LRs. Smt. Premlata & ors. v. M/s Sharma Motor Transport Co. & ors.

Reported in I.L.R. (2008) M.P. 3189

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*2. **ARBITRATION AND CONCILIATION ACT, 1996 – Sections 28, 34, 35 & 37**
WORDS AND PHRASES:
ADMINISTRATIVE LAW:

(i) **Award – Challenge of award – The appellant No.1 entering into an agreement with respondent No.1 for lifting of sand from various places/mines for the period from 24.05.2003 to 23.05.2006 – Clause 16 of the agreement provided that in special circumstances, M.D. is entitled to extend the period of lease and amount of instalment – Period of lease was not extended by M.D. without assigning any reason – A dispute was raised before arbitrator – Arbitrator in award extended the further period of 15 to 17 months – Civil court affirmed the award – In appeal award challenged on the ground that the arbitrator exceeded in his jurisdiction by extending the period of contract – Held, Clause 19 of the agreement provided that in case of any dispute between the parties, the matter could be decided either by the M.D. or by a person nominated by him under the Act – At this stage, the appellants would not be allowed to say that the question referred to the arbitrator could not be decided by him and he committed an error in excess of the jurisdiction conferred upon him.**

(ii) **'Arbitrator' & 'Conciliator" – Distinguished – The arbitrator acts as an arbitrator and not as a conciliator – Arbitrator cannot ignore the law or misapply it in order to do what he thinks just and reasonable – The arbitrator acts as a tribunal and decides the**

matter in accordance with law and according to the 'legal rights' of the parties.

(iii) Exercise of discretion by Administrative Authority – When discretion is to be exercised by an authority then it would be free to exercise the discretion as it likes but that does not mean that such authority can exercise the discretion in illegal, unjudicious or arbitrary manner – Arbitrariness runs contrary to the justice, principles of equity and equality – If on the given set of facts, the discretion is exercised in favour of one party then on the same facts, an authority cannot refuse to exercise the discretion in favour of the other party.

Managing Director, M.P. State Mining Corporation Ltd. & anr. v. M/s Narmada Enterprises & ors.

Reported in I.L.R. (2008) M.P. 2956

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3. **ARBITRATION AND CONCILIATION ACT, 1996 – Section 34, 2 (1)(e) & 42 M.P. CIVIL COURTS ACT, 1958 – Section 7 (2)**

Whether an application u/s 34 of the Arbitration and Conciliation Act is maintainable before the Additional District Judge in view of definition of Court u/s 2 (1) (e) of the Act? Held, Additional District Judge is empowered to hear the application as he has power to discharge any of the functions of the District Judge by virtue of Section 7 (2) of M.P. Civil Courts Act.

Madhya Pradesh State Electricity Board & Anr. v. ANSALDO Energia, S.P.A. & Anr.

Reported in AIR 2008 MP 328

Held:

Mr. N. P. Shah, learned counsel appearing for the respondents, resisting the aforesaid submissions, has raised the following proponements :-

(i) The construction placed by the learned counsel for the petitioners is unacceptable if the language of both the provisions are properly construed inasmuch as the provision does not include certain categories of Courts and the Court of Additional District Judge does not fall in that excluded category.

(ii-iii) The decisions rendered by the High Courts of Allahabad and Chhattisgarh are not correctly decided as a very restricted meaning has been placed on the provisions and further the scenario in Madhya Pradesh is different from that discussed in the aforesaid said cases.

(iv) The decision rendered by the Orissa High Court is distinguishable as there is exclusionary clause in the Local Act.

(v) The purpose of non-obstante clause has to be properly understood and should not be given more meaning that what is necessitous to be given more so when the non-obstante provision is absolutely plain, clear and unambiguous.

(vi) The submission that the District Judge having dealt with the application under Section 9 of the Act at the initial stage is under an obligation to deal with such subsequent applications does not stand to reason and the same does not flow from Section 42 of the Act and, in fact, if such construction is placed on the said provision, the same would lead to absurdity.

To bolster the aforesaid submissions, he has placed reliance on the decisions rendered in *Globsyn Technologies Ltd. v. Eskaycee Infosys, 2004 (2) ALT 174 and M/s. Badrilal Jodhraj and Sons, Indore v. Girdharilal and another, AIR 1988 MP 24.*

To appreciate the rivalized submissions raised at the Bar, it is apposite to refer to Section 2(1)(e) which defines the term "Court". It reads as under :

> "2(1)(e) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes."

The provision u/s 7 (2) of M.P. Civil Courts Act came to be interpreted in *Babulal v. Dattatraya, 1971 MPLJ 765* wherein it has been held as under :-

> "7.....Sub-section (2) of Section 7 provides that an Additional District Judge shall discharge any of the functions of a District Judge, including the functions of the Principal Civil Court of original jurisdiction, which the District Judge may, by general or special order, assign to him and in the discharge of such functions he shall exercise the same powers as the District Judge. From this provision it is clear that an Additional District Judge is a delegate of the powers entrusted to him by the District Judge and in the case of such delegation he exercises all the powers of the District Judge, including those of the Principal Civil Court of original jurisdiction. It thus follows that any statutory jurisdiction conferred on the District Judge can also be exercised by the Additional District Judge if the same is entrusted to him by the District Judge."

In *M/s. Badrilal Jodhraj and Sons, Indore* (supra) the Division Bench of this Court expressed the view that the Additional Judge to the Court of District Judge enjoys the same powers and discharges the same functions as the District Judge. He can even discharge the functions of a District Judge including the functions of principal Civil Court of original jurisdiction, which the District Judge may, by general or special order, assign to him and in the discharge of such functions he shall exercise the same powers as the District Judge. The Division Bench further opined that the Additional District Judge is not the subordinate District Judge.

In *Rasheed Khan and another v. Peer Mohammad, 1992 MPLJ 607*, the learned single Judge of this Court, while dealing with the definition of "District Judge" under Section 2(bb) of the Indian Succession Act, has expressed the view that Section 7 of the 1958 Act makes the position clear that the Additional Judge to the Court of District Judge is the Principal Civil Court of original jurisdiction and he is entitled to discharge "any of the functions of the District Judge".

In *Malik Singh Chawla v. Surendra Kumar Lakhers and others, AIR 1998 MP 312,* it has been held that an Additional Judge is empowered to discharge any of the functions of the District Judge including the functions of Principal Civil Court of original jurisdiction which the District Judge may, by general or special order, assign to him and in the discharge of the same, he shall exercise the same powers as the District Judge.

Recently, in *N. K. Sexena and Anr. v. State of M. P. and Anr., 2008 (2) MPHT 365,* the Division Bench has expressed the view that a reading of provisions of the 1958 Act as amended by Act No. 17 of 1982 would show that although the Court of District Judge and the Court of Additional District Judge have been classified as two separate classes yet belong to one and the same cadre and they exercise the same judicial powers. The Division Bench has referred to sub-section (2) of Section 7 and expressed the view that the District Judge includes the 'Additional District Judge to that Court. Be it noted, in the said case, the issue was whether a person can be appointed as the Chairman, M. P. State Co-operative Tribunal inasmuch as Section 77(3)(a) of the M. P. Co-operative Societies Act, 1960 provides that the said post shall be held by a person who has been Judge of the High Court or has held the Office of the District Judge for not less than five years. In the said case, the Bench expressed the view as under :-

> "17. From 1982, therefore, the office of the District Judge and the office of the Additional District Judge have been equated in all respects with regard to powers, functions and duties. The respondent No. 2 has worked as District Judge and Additional District Judge after 1982 for about seven years and, therefore, held the office of the District Judge for more than five years and is qualified under Section 77(3)(a) of the Co-operative Societies Act to be

appointed as Chairman of the Tribunal. We, therefore, do not find any merit in the writ petition and accordingly dismiss the same....."

In view of the aforesaid pronouncements of law, as far as Madhya Pradesh is concerned, the Additional District Judge is equated with the Principal Civil Court of original jurisdiction. Section 2(1)(e) does not include any civil Court of grade inferior to such Principal Civil Court or any Court of Small Causes. As is evincible from the enunciation of law which we have referred to above, the Additional District Judge is not inferior to the District Judge. Section 42 refers to the term "Court". The Court has to take the meaning from the definition. In this context, it is worth noting that the dictionary clause refers to two categories of Courts, namely, the High Court which has the original civil jurisdiction and also the Principal Civil Court. If any party to the agreement invokes the original jurisdiction of the High Court, he cannot thereafter go to the Principal Civil Court. He also cannot approach any other Court having the jurisdiction after approaching once to the said Court. This view has been rendered in *Strojexport Company Ltd. v. Indian Oil Corporation, AIR 1997 Raj 120.* We are in respectful agreement with the same.

In view of the aforesaid analysis on the bedrock of 1958 Act, the irresistible conclusion is that the Additional District Judge meets the requirements as engrafted under Section 2(1)(e) of the 1996 Act. We also respectfully agree with the view expressed in the decisions rendered in *Globsyn Technologies Ltd. (supra) and B. V. Sharma v. Skuast and others, 2007 (1) JKJ 161.* Ergo, the objection raised under Section 34 of 1996 Act can be dwelled upon and dealt with by the learned Additional District Judge. That being the position in law, the impugned order passed by the learned Additional District Judge is neither vulnerable nor susceptible. We give the stamp of approval to the same.

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***4. CIVIL PROCEDURE CODE, 1908 (As stood prior to amendment came into force w.e.f. 01.02.1977) – Sections 2 (2), 47 & 11 and Order 21 Rules 99, 100, 101 & 103**

Prior to amendment, determination of any question under Section 47 of CPC was having force of a decree as prior to amendment defined under Section 2 (2) CPC

Prior to amendment, an adjudication or determination of any question under Section 47 of CPC determining rights of the parties was a decree between parties – Such order has attained finality and is having effect of res judicata between the parties – Held, suit filed by plaintiffs was barred under Section 11 of CPC – They were not entitled to file a fresh suit for adjudication of questions which were already decided under Section 47 of CPC.

Objectors' objections under Order 21 Rules 99, 100 and 101 CPC were dismissed by the trial court on 16.10.1975 – After dismissal of the

objections, objectors ought to have filed a suit as required under Order 21 Rule 103 CPC and limitation of one year was provided under Article 98 of Limitation Act, 1963 – Order 21 Rule 103 CPC was amended and a new rule was substituted w.e.f. 01.02.1977 – Now Rule specifically provides that order deciding an application under Rule 98 or Rule 100 of Order 21 shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree, meaning thereby that an order under Order 21 Rules 98 and 100 CPC has been given effect to as of decree and no fresh suit is maintainable.

Sheikh Hameed & ors. v. Sheikh Majhar & anr.

Reported in I.L.R. (2008) M.P. 2947

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5. **CIVIL PROCEDURE CODE, 1908 – Sections 9 & 24**

Civil Court shall have jurisdiction to try all suits of a civil nature howsoever frivolous the claim may be unless barred by law – For the said purpose only factual averments made in the plaint are to be considered – Arguable questions, whether legal or factual, should not be summarily dismissed without recording reasons.

Abdul Gafur and another v. State of Uttarakhand and others

Judgment dated 11.08.2008 passed by the Supreme Court in Civil Appeal No. 4982 of 2008, reported in (2008) 10 SCC 97

Held:

Section 9 of the Code provides that civil court shall have jurisdiction to try all suits of a civil nature excepting the suits of which their cognizance is either expressly or impliedly barred. To put it differently, as per Section 9 of the Code, in all types of civil disputes, civil courts have inherent jurisdiction unless a part of that jurisdiction is carved out from such jurisdiction, expressly or by necessary implication by any statutory provision and conferred on other Tribunal or Authority. Thus, the law confers on every person an inherent right to bring a suit of civil nature of one's choice, at one's peril, howsoever frivolous the claim may be, unless it is barred by a statute.

In *Smt. Ganga Bai v. Vijay Kumar & Ors., (1974) 2 SCC 393,* this Court had observed as under: (SCC p. 397, para 15)

> "15. .... There is an inherent right in every person to bring suit of a civil nature and unless the suit is barred by statute one may, at ones peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit."

In *Dhannalal v. Kalawatibai & Ors., (2002) 6 SCC 16* relying on the afore-extracted observation in *Ganga Bai's case* (supra), this Court had held as follows: (SCC p. 30, para 23)

> "23. Plaintiff is dominus litis, that is, master of, or having dominion over, the case. He is the person who has carriage and control of an action. In case of conflict of jurisdiction the choice ought to lie with the plaintiff to choose the forum best suited to him unless there be a rule of law excluding access to a forum of plaintiff's choice or permitting recourse to a forum will be opposed to public policy or will be an abuse of the process of law."

It is trite that the rule of pleadings postulate that a plaint must contain material facts. When the plaint read as a whole does not disclose material facts giving rise to a cause of action which can be entertained by a civil court, it may be rejected in terms of Order 7, Rule 11 of the Code. Similarly, a plea of bar to jurisdiction of a civil court has to be considered having regard to the contentions raised in the plaint. For the said purpose, averments disclosing cause of action and the reliefs sought for therein must be considered in their entirety and the court would not be justified in determining the question, one way or the other, only having regard to the reliefs claimed *de hors* the factual averments made in the plaint. (See: *Church of North India v. Lavajibhai Ratanjibhai & Ors., (2005) 10 SCC 760*).

If the Court is convinced that the plaint read as a whole does not disclose any cause of action, it may reject the plaint in terms of Order 7 Rule 11 of the Code. As a matter of fact, as observed by *V.R. Krishna Iyer, J., in T. Arivandandam v. T.V. Satyapal, (1977) 4 SCC 467* , if on a meaningful - not formal - reading of the plaint, it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the court should exercise its power - under the said provision. And if clever drafting has created an illusion of a cause of action, it should be nipped in the bud at the first hearing by examining the party searchingly under Order 10 CPC. Nonetheless, the fact remains that the suit has to be disposed of either by the High Court or by the courts subordinate to it in a meaningful manner as per the procedure prescribed in the Code and not on one's own whims.

It is true that under Section 24 of the Code, the High Court has jurisdiction to *suo motu* withdraw a suit or appeal, pending in any court subordinate to it, to its file and adjudicate itself on the issues involved therein and dispose of the same. Unless the High Court decides to transfer the suit or the appeal, as the case may be, to some other court or the same court, it is obliged to try, adjudicate and dispose of the same. It needs little emphasis that the High Court is competent to dispose of the suit on preliminary issues, as contemplated in Order 14 Rule 1 & 2 of the Code, which may include the issues with regard to maintainability of the suit.

It must be kept in mind that one of the fundamental norms of judicial process is that arguable questions either legal or factual, should not be summarily dismissed without recording a reasoned order.

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***6. CIVIL PROCEDURE CODE, 1908 – Section 11**

***Res Judicata*, applicability of – Findings recorded by the Trail Court in the earlier suit were reversed in appeal pursuant to compromise entered into between the parties – Held, the said findings no more exist in the eye of law and therefore will not operate as *Res Judicata*.**

Rakesh Chandra Agrawal (L.Rs of deceased Ghanshyam) and others v Roopkishore and others

Reported in 2008 (4) MPLJ 505

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7. CIVIL PROCEDURE CODE, 1908 – Section 80

Notice to the public officer is required when the suit is filed against the act which has been done in the official capacity – In case where mere consequential relief is claimed against the public officer, no need of notice.

Ram Kumar and another v. State of Rajasthan and others

Judgment dated 29.09.2008 passed by the Supreme Court in Civil Appeal No. 115 of 2001, reported in (2008) 10 SCC 73

Held:

In *State of Maharashtra and Anr. v. Shri Chander Kant, AIR 1977 SC 148,* this Court laid down the principle as to when service of notice on the State/ defendants under Section 80 of the CPC was necessary. In the said decision, this Court observed as follows:-

> "The language of Section 80 of the Code of Civil Procedure is that a notice is to be given against not only the Government but also against the Public Office in respect of any act purporting to be done in his official capacity. The Registrar is a Public Officer. The order is an act purporting to be done in his official capacity.
>
> In the present case, the suit is to be set aside the order made by a Public Officer in respect of an act done in the discharge of his official duties. Therefore, notice under Section 80 of the Code of Civil Procedure was required."

From the aforesaid, it would be evident that this Court held that service under Section 80 of the CPC was necessary as in that case, the suit was filed for setting aside an order passed by a public officer in respect of an act done in the discharge of his official duties. In that view of the matter, in that decision, it was held that service of notice under Section 80 of the CPC was necessary and

in the absence of that service, the suit must be dismissed. This is not the factual position in this case.

If we look at the plaint in the present case, it would be clear that in the plaint, no act of respondent No. 3 is being challenged. The appellants do not seek to set aside any order of the respondent No. 3 or to declare illegal any of the acts of respondent No. 3, it merely seeks a decree for recovery of possession in the suit to hand over possession of the suit land to the appellants. The suit which is not in respect of any act done by the respondent No. 3, as a public officer, and in which no act of respondent No. 3 is either challenged or sought to be set aside is not a suit to which Section 80 of the CPC can very well apply. Therefore, in the facts and circumstances of the present case, the respondent No. 3 had not acted in his official capacity for which service of notice under Section 80 of the CPC was necessary. That apart, it is not in dispute that the respondent No. 2 was Administrator and overall in-charge including the Government Middle Schools (Students Institutions) in the District and the notice served on the State Government through District Collector of the District was sufficient compliance with the requirements of Section 80 of the CPC. In view of the aforesaid fact, it was not necessary to separately serve a notice to respondent No. 3 as we find that no order was passed by the District Education Officer, which was under challenge in the suit itself.

A look at the reliefs claimed in the plaint would clearly show that only a consequential relief was claimed in the suit to the extent that possession of the suit land should be restored in favour of the appellants by the respondent No. 3. Therefore, in view of the aforesaid discussion made hereinabove, we hold that even in the absence of service of notice on the respondent No. 3 under Section 80 of the CPC, the suit was maintainable in law.

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***8. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11**
MOHAMMEDAN LAW:
Inheritance – Suit for declaration, partition and separate possession – Dismissed on the ground that under Mohammedan Law, sons of predeceased son are not entitled to claim property of their grandfather – Appellate court reversed the finding and remanded the case – Held, Suit involved mixed questions of law and fact – Property was agriculture holdings and what would be the position of devolution of agriculture holdings of a person governed by Mohammedan Law has to be decided on merits – Appellate court committed no error in remanding case – Revision dismissed.
Sheikh Ikar v. Sheikh Shamim Ahmad & ors.
Reported in I.L.R. (2008) M.P. 2989

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9. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11
Rejection of plaint – Grounds must be drawn from averments made in the plaint – No amount of evidence can be considered at this stage.
Kamala & Ors. v. K.T. Eshwara Sa & Ors.
Reported in AIR 2008 SC 3174

Held:

Order VII, Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order VII, Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order VII, Rule 11 of the Code is the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order VII, Rule 11 of the Code is one, Order XIV, Rule 2 is another.

For the purpose of invoking Order VII, Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject matter of an order under the said provision.

The principles of *res judicata,* when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a preliminary issue or at the final hearing, but, the said question cannot be determined at that stage.

It is one thing to say that the averments made in the plaint on their face discloses no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law.

The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact of law. In the event, the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject matter thereof, the application for rejection of plaint should be entertained.

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10. CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 58

Adjudication of objections to attachment of property, requirement of – Objection summarily dismissed without holding any enquiry and without providing any opportunity to the objector to adduce evidence – Held, the procedure adopted by the executing court is wholly unwarranted under the law – The word 'adjudicate' means an enquiry or recording of evidence – Setting aside the impugned order, the case was remanded back to the Executing Court to re-decide the objections after providing opportunity to the parties to lead evidence

Smt. Laxmi Sarda v. M/s. Khushal Chand Khimji & Company and others

Reported in 2008 (5) MPHT 428

Held:

On going through Rule 58 of Order XXI, it is revealed that the word 'adjudicate' has been mentioned which would mean an enquiry or recording of evidence. In Corpus Juris Secundum Vol. II Page 49, the meaning of the word 'adjudicate' has been explained. It will be apposite to quite that paragraph which reads as under :-

> "To adjudicate in its strictest sense; to determine finally; to settle in the exercise of Judicial Authority to determine in the exercise of judicial power; to solemnly or deliberately determine by judicial power upon a hearing of the rights and interests of the parties involved on the issues, and the evidence to be taken and submitted according to some prescribed method, or in the absence thereof, the usual method of procedure known to the statutes or the common law, and after a hearing in respect of the matters in issue to decide and decree what are the respective rights of the parties as they may appear from the law and evidence adduced."

Thus, the term 'adjudicate', which has been mentioned in Rule 58 of Order XXI cannot be construed in a narrow sense but the said word is having a wider connotation, which includes recording the evidence as well.

Single Bench of this Court in *Ram Gopal v. Ram Narain, 1959 JLJ 621,* has categorically held that where a property is attached at the instance of the decree-holder and the legal representatives of the deceased/judgment-debtor objects to the attachment on the ground that the property is his, it is for the decree-holder to establish at least prima facie that the property belonged to the deceased/judgment-debtor. In a case where the judgment-debtor is dead, the decree-holder can proceed against only such assets as may be found to be in the hands of legal representative of the deceased/judgment-debtor. It is the duty of the decree-holder to prove at least prima facie, that the particular property that he seeks to be attached and sold belonged to the judgment- debtor. It would be profitable to quote that portion of Para 4 of the said decision, which reads thus :-

"It is the duty of the decree-holder to prove in the first instance that the property belonged to the Saligram. Merely because the appellants are sons of Saligram it cannot be presumed that the house originally belonged to Saligram. Thus in my opinion the Executing Court, which tried the objection of the appellants was clearly in error, in wrongly placing the onus on them. I am satisfied that both the Courts below have not decided the case with a correct approach and both the judgments should therefore, be set aside."

In the present case also, since seriously it has been objected by the appellant/objector, who is also the daughter of judgment-debtor Ram Gopal, who is dead, that the property is not of the judgment-debtor.

In another decision of the Court in *Ashok Kumar v. Bachhulal, 1961JLJ SN 449,* it has been held that under Order XXI Rule 58, CPC, if a decree is against father and the property is of joint family of father and sons attached by decree-holder, sons are entitled to object to attachment on the ground that decreetal debt incurred for immoral purpose and if the immoral purpose is proved by the sons, their share must be released from attachment.

In the present case, objections of the appellant/objector filed under Order XXI Rule 58, CPC have been disposed of without affording any opportunity to lead evidence to her and therefore, I am of the view that the procedure so adopted by learned Executing Court is wholly unwarranted under the law. On this point, I may place reliance on two Single Bench decisions of this Court they are *Ram Krishnadas v. Ramjidas and another, 1978 (I)MPWN 182 and Jagdish Chandra v. M/s. Gokuldas Purshottamdas, 1997 (I) MPWN 131.*

In the present case, the Executing Court without affording opportunity to lead evidence to the appellant/objector has rejected her application under Order XXI Rule 58, CPC. I am of the view that the modus operandi, which has been adopted by the Executing Court rejecting the objections is divorcing and deviating from the terminology 'to adjudicate the claim'. Indeed, the Executing Court was obliged to provide opportunity to the appellant/objector to demonstrate by leading evidence that the property which has been attached is not of the deceased judgment-debtor Ram Gopal and, therefore, the same is not liable to be attached and it was incumbent upon the Executing Court to record the evidence before passing any order on the objections filed by the objector.

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11. CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 33 and Section 96 Powers of the First Appellate Court – The appellate Court can reappraise, re-appreciate and review the entire evidence; oral as well as documentary and can come to its own conclusion – However, the conclusions of Trial Court should not normally be disturbed unless the approach of the trial Court in appraisal of evidence is erroneous and contrary to well established principles of law or unreasonable – The Appellate Court has to deal with the reasons recorded and conclusions arrived at by the Trial Court.

Jagdish Singh v. Madhuri Singh

Judgment dated 28.04.2008 passed by the Supreme Court in Civil Appeal No. 2997 of 2008, reported in (2008) 10 SCC 497

Held:

It is no doubt true that the High Court was exercising power as first appellate court and hence it was open to the Court to enter into not only questions of law but questions of fact as well. It is settled law that an appeal is a continuation of suit. An appeal thus is a re-hearing of the main matter and the appellate court can re-appraise, re-appreciate and review the entire evidence - oral as well as documentary- and can come to its own conclusion.

At the same time, however, the appellate court is expected, nay bound, to bear in mind a finding recorded by the trial court on oral evidence. It should not forget that the trial court had an advantage and opportunity of seeing the demeanour of witnesses and, hence, the trial court's conclusions should not normally be disturbed. No doubt, the appellate court possesses the same powers as that of the original court, but they have to be exercised with proper care, caution and circumspection. When a finding of fact has been recorded by the trial court mainly on appreciation of oral evidence, it should not be lightly disturbed unless the approach of the trial court in appraisal of evidence is erroneous, contrary to well- established principles of law or unreasonable.

Before more than a century, in *Coghlan v. Cumberland, (1898) 1 Ch 704,* Lindley, M.R. pronounced the principle thus;

> "Even where the appeal turns on a question of fact, the Court of appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions and when the question arises which witness is to be believed rather than another; and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is

credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

[See also observations of Lord Thankerton in *Watt v. Thomas, (1947) 1 All ER 582 (HL)*]

In *Sara Veeraswami v. Talluri Narayya, AIR 1949 PC 32,* the Judicial Committee of the Privy Council, after referring to relevant decisions on the point, stated;

> ".....but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

This Court also, before more than half a century in *Sarju Pershad v. Jwaleshwari, AIR 1951 SC 120,* stated: (AIR p. 121, para 7)

> "7. The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of oral evidence adduced in the case. In such cases, the appellate court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. The rule is and it is nothing more than a rule of practice that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact.

Referring to several cases on the point, the Court concluded; (*Sarju Pershad case* (supra), AIR p. 123, para 15)

> "15. The duty of the appellate court in such cases is to see whether the evidence taken as a whole can reasonably justify the conclusion which the trial court arrived at or whether there is an element of improbability arising from proved circumstances which, in the opinion of the court, outweighs such finding."

After about a decade, in *Radha Prasad Singh v. Gajadhar Singh, AIR 1960 SC 115,* this Court reiterated: (AIR p. 118, para 14)

> "14. The position in law, in our opinion, is that when an appeal lies on facts it is the right and the duty of the Appeal Court to consider what its decision on the question of facts should be; but in coming to its own decision it should bear in mind that it is looking at the printed record and has not the opportunity of seeing the witnesses and that it should not lightly reject the Trial Judge's conclusion that the evidence of a particular witness should be believed or should not be believed particularly when such conclusion is based on the observation of the demeanour of the witness in Court. But, this does not mean that merely because an appeal court has not heard or seen the witness it will in no case reverse the findings of a Trial Judge even on the question of credibility, if such question depends on a fair consideration of matters on record. When it appears to the Appeal Court that important considerations bearing on the question of credibility have not been taken into account or properly weighed by the Trial Judge and such considerations including the question of probability of the story given by the witnesses clearly indicate that the view taken by the Trial Judge is wrong, the Appeal Court should have no hesitation in reversing the findings of the Trial Judge on such questions. Where the question is not of credibility based entirely on the demeanour of witnesses observed in Court but a question of inference of one fact from proved primary facts the Court of Appeal is in as good a position as the Trial Judge and is free to reverse the findings if it thinks that the inference made by the Trial Judge is not justified".

In *T.D. Gopalan v. Commr. of Hindu Religious & Charitable Endowments, (1972) 2 SCC 329,* this Court said: (SCC p. 333, para 9)

"9. The High Court next proceeded to reproduce a summary of the statement of each of the witnesses produced by the defendants. No attempt whatsoever was made to discuss the reasons which the learned District Judge had given for not accepting their evidence except for a general observation here and there that nothing had been suggested in the cross-examination of a particular witness as to why he should have made a false statement. We apprehend that the uniform practice in the matter of appreciation of evidence has been that if the trial court has given cogent and detailed reasons for not accepting the testimony of a witness the appellate court in all fairness to it ought to deal with those reasons before proceeding to form a contrary opinion about accepting the testimony which has been rejected by the trial court. We are, therefore, not in a position to know on what grounds the High Court disagreed with the reasons which prevailed with the learned District Judge for not relying on the evidence of the witnesses produced by the defendants".

Yet in another decision in *Madhusudan Das v. Narayanibai, (1983) 1 SCC 35* this Court said: (SCC pp. 39-40, para 8)

"8. ....At this stage, it would be right to refer to the general principle that, in an appeal against a trial court decree, when the appellate court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies. ... The principle is one of practice and governs the weight to be given to a finding of fact by the trial court. There is, of course, no doubt that as a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on a misreading of the evidence or on conjectures and surmises the appellate court is entitled to interfere with the finding of fact.

Three requisites should normally be present before an appellate court reverses a finding of the trial court :

(i) it applies its mind to reasons given by the trial court;

(ii) it has no advantage of seeing and hearing the witnesses; and

(iii) it records cogent and convincing reasons for disagreeing with the trial court.

If the above principles are kept in mind, in our judgment, the decision of the High Court falls short of the grounds which would allow the first appellate court to reverse a finding of fact recorded by the trial court. As already adverted earlier, the High Court has 'virtually' reached a conclusion without recording reasons in support of such conclusion. When the Court of original jurisdiction has considered oral evidence and recorded findings after seeing the demeanour of witnesses and having applied its mind, the appellate court is enjoined to keep that fact in mind. It has to deal with the reasons recorded and conclusions arrived at by the trial court. Thereafter, it is certainly open to the appellate court to come to its own conclusion if it finds that the reasons which weighed with the trial Court or conclusions arrived at were not in consonance with law.

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***12. CONSTITUTION OF INDIA – Article 14**
SERVICE LAW:
Promotion – Denial of promotion to petitioner on account of two adverse entries in his preceding five years ACRs – One adverse entry was never communicated and the other which was though communicated but petitioner's representation against it was not decided – Held, non-communication of an entry in the ACRs and the denial of opportunity to represent against it, are violation of natural justice – Impugned order set-aside – Petition allowed.
Om Prakash Lashkari v. State of M.P. & ors.
Reported in I.L.R. (2008) M.P. 2863

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13. CONSTITUION OF INDIA – Article 21
Handcuffing without justification, consequences of – Undertrial prisoners were handcuffed during their transit from jail to Court – No valid justification shown for such handcuffing – Compensation of Rs. 10,000/- awarded to each of the handcuffed persons – The State was given liberty to recover compensation from officers found guilty in disciplinary proceedings.
Ms. Shamim Modi v. Ms. Sudha Chowdhary, District Collector, Betul and others
Reported in 2008 (5) MPHT 13 (DB)

Held:

After taking into consideration the observations of the Supreme Court in *Prem Shankar Shukla and others v. Delhi Administration, (1990) 3 SCC 526,* the Supreme Court had held in *Sunil Gupta and others v. State of M.P. and others, (1990) 3 SCC 119,* cited by the petitioner that taking of persons from prison to the Court or back from the Court to the prison by the escort party is only under the judicial orders of the Court and, therefore, even if extreme circumstances necessitate the escort party to bind the prisoners in fetters, the escort party should record the reasons for doing so in writing and intimate the Court so that the Court considering the circumstances either approve or disapprove the action of the escort party and issue necessary directions. In the aforesaid case of *Sunil Gupta and others v. State of M.P. and others* (supra), the Supreme Court found that the escort party without any justification had handcuffed the petitioners when taking them from the prison to the Court and then from Court to prison and accordingly directed the State Government to take appropriate action against the erring officials who had unjustly and unreasonably handcuffed the petitioners in violation of the rights guaranteed under Article 21 of the Constitution.

In *State of Maharashtra and others v. Ravikant S. Patel, (1991) 2 SCC 373,* the Supreme Court relying on *Sunil Gupta and others v. State of M.P. and others* (supra) and *Rudul Shah v. State of Bihar and another, (1983) 4 SCC 141* upheld the award of compensation of Rs. 10,000/- by the High Court of Bombay to an under-trial prisoner who had been handcuffed and taken through the streets in a procession by the Police during investigation for violation of his right under Article 21 of the Constitution.

The records of the present case reveal that Mr. Patel ASI, who was heading the Police personnel carrying Mangal Singh, Phool Singh and Sukhram from jail to the Court of SDM, stated before the Court on 03.05.2007 that as per the directions of the SDM, Betul, he brought the three persons from jail to the Court. Mr. Patel did not dispute that the three persons were handcuffed by a long chain when they were brought to the Court of SDM, Betul. The SDM, Betul who appeared before the Court on 16.05.2007, however stated that the three persons were not handcuffed when they were produced before the Court. No valid justification has thus been given for the handcuffing of the three persons when they were brought from jail to the Court and no orders appear to have been passed by the SDM for handcuffing all these three persons. Since no valid justification has been shown in the returns filed by the respondents for handcuffing Mangal Singh, Phool Singh and Sukhram, we award a compensation of Rs. 10,000/- (Rupees Ten thousand) to each one of these three persons, namely, Mangal Singh, Phool Singh and Sukhram and the respondent No. 4, State of Madhya Pradesh, is directed to pay the compensation within a period of two months from today. It will be open for the State of M.P. to recover the compensation from the police personnel or the officers found guilty in the

disciplinary proceedings for such blatant violation of the law laid down by the Supreme Court.

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14. CONSTITUTION OF INDIA, – Articles 21
Right to life & personal liberty – Violation of – A tutor was arrested and prosecuted for offence under Section 420 IPC r/w/s 34 IPC – He had been handcuffed unnecessarily and there was delay of 5 years in his Trial – Trial ended in his favour and he was acquitted from the charges levelled against him – Held, accused's fundamental right to speedy trial and not to be handcuffed without valid justification has been violated and his dignity as a human being had been affected – The State directed to pay a sum of Rs. 70,000/- as compensation.

Hardeep Singh Anand v. State of M.P. and others
Reported in 2008 (5) MPHT 172

Held :

In the instant case, the appellant was well educated person and was coaching students for entrance tests and examinations for admissions to MBBS, Engineering. IIT. Etc. and it is alleged in Para 5.6 of the writ petition that when he was already in Police custody in Gorakhpur Police Station at 10.00 p.m. on 8-6-1992, he was unnecessarily handcuffed by the police and number of daily newspapers published the photographs of the appellant handcuffed and his sister, who loved him as son, saw the photographs in the newspapers and was shocked and expired on 17-6-1992. The appellant has produced before us a newspaper in which his photograph with the handcuff has been published. In Paragraph 8 of the return filed on 4-2-2006, the respondent No. 1 denied that the appellant was handcuffing was necessary.

The next question is whether the appellant is entitled to any compensation from the respondent No. 1- State for delay of five years in the trial and for handcuffing in violation of his fundamental rights under Art. 21 of the Constitution. In *Rudul Sah v. State of Bihar and another, AIR 1983 SC 1086,* the Supreme Court has taken a view that one of the effective ways in which violation of fundamental rights under Art. 21 of the Constitution can reasonably be prevented, is to direct the State to pay compensation to the person whose rights under Art. 21 of the Constitution is affected. In the language of the Supreme Court :-

> "..... Article 21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and the compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant

> infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilization is not to perish in this country as it has perished in some others too well-known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."

The next question is how much compensation the appellant is entitled ? In *D.K.Basu v. State of West Bengal, AIR 1997 SC 610* the supreme Court, after examining the liability of the State to its citizens for infringement of their fundamental right laid down the principle for assessment of compensation to be paid by the State as under :-

> "In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the Criminal Courts in which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortuous act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait-jacket formula can evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights to the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not interrogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit."

During the five years of delay in the trial from 15-3-1999 to 6-5-2004 caused by the State, the appellant's liberty was not affected in as much as he was not under imprisonment but was on bail. Hence, the appellant will not be entitled to a huge amount of compensation as claimed by him. Nonetheless, the appellant

was handcuffed without a valid justification and his dignity as a human being had been affected. In the circumstances, an expeditious trial and his acquittal would have restored his personal dignity as early as possible. But the State instead of taking timely steps to produce and examine the prosecution witnesses delayed the trial for long five years. In the facts and circumstances of the case, we award a compensation of Rs.70,000/- (Rupees seventy thousand only) to the appellant. This compensation will be without prejudice to any claim that the appellant may make in a Civil Court for damages.

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15. CONSTITUTION OF INDIA – Articles 226 & 227
SERVICE LAW
Order of termination when may be held to be stigmatic and punitive – Form of the order is not conclusive and innocuously worded order can be passed on a foundation of grave charge – It is foundation (on which the order is based) which makes the order punitive in nature.
Jitendra v. State of Madhya Pradesh and others
Reported in 2008 (5) MPHT 146

Held:

True, it is that in the impugned order no allegation about unsatisfactory record or misconduct has been mentioned. However, a reference has been made in the said order of termination about the decision dated 14.6.05 taken by the said State Level Appointment Committee in an enquiry conducted behind the back of the petitioner. Having regard to this and the stand taken by the respondents in reply as referred to above it is graphically clear that foundation of the impugned order of termination is punitive in nature. On scrutiny of the entire factual scenario leading to the termination of the petitioner's services, there remains no doubt that order of termination passed against the petitioner is stigmatic in nature and cannot be regarded as termination simpliciter. The foundation of impugned order is decision of the State Level Appointment Committee, which is based upon the enquiry report of the three Member Committee, which had conducted the enquiry behind the back of the petitioner.

In the case of *Shamshersingh v. State of Punjab, AIR 1974 SC 423* it has been held by the Supreme Court that form of the order is not conclusive and innocuously worded order can be passed on a foundation of grave charge. In the case of *State of U.P. v. Ramchandra Trivedi, AIR 1976 SC 2547,* it was held by the Supreme Court, that the motive in passing an order of terminations is not a relevant factor. What is determinative is the foundation on which it is based. It is foundation which makes the order punitive in nature. In the case of *Dipti Prakash Banerjee v. Satyendra Nath Bose, National Centre for Basic Sciences, Calcutta and others, AIR 1999 SC 983* it has been held by the Supreme Court that the material which amounts stigma need not be mentioned in the order of termination of the Probationer but might be contained in any document referred in the termination order or in its annexures. Obviously such a document could

be asked for or called for by any future employer of the probationer. In such case, the order of termination would stand vitiated on the ground that no regular inquiry was conducted. In the case of *Radheshyam Gupta v. U.P. Industries Agro, (1999) 2 SCC 21,* the Supreme Court has held that where the termination is preceded by an enquiry and evidence is received and findings as to misconduct or a definitive nature are arrived at behind back of the officer and where on the basis of such a report, the termination order is issued, such an order will be violative of the principles of natural justice inasmuch as the purpose of the enquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental enquiry. In such cases, the terminations is to be treated as based or founded upon misconduct and will be punitive. In some what identical situation, learned Single Judge of this Court in the case of *Rahul Tripathi v. Rajeev Gandhi Shiksha Kendra, 2001 (3) MPHT 397 = 2001 (3) MPLJ 616* has quashed the termination order and held that petitioner shall reap all the consequential benefits.

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16. CONSUMER PROTECTION ACT, 1986

Maintainability of complaint under Consumer Protection Act – Agreement for building construction between landowner and builder – Agreement deed having title of joint venture – Mere use of word "joint venture" or "collaboration" in the title of agreement does not make the transaction a joint venture.

Concept of "joint venture" explained – Terms of agreement make it clear that it is not truly a joint venture – Hence in such case the landowner would be "consumer" and builder would be "service provider" – Therefore, complaint is maintainable.

Faqir Chand Gulati v. Uppal Agencies Private Limited and another Judgment dated 10.07.2008 passed by the Supreme Court in Civil Appeal No. 3302 of 2005, reported in (2008) 10 SCC 345

Held:

There is no dispute or doubt that a complaint under the Act will be maintainable in the following circumstances:

(a) Where the owner/holder of a land who has entrusted the construction of a house to a contractor, has a complaint of deficiency of service with reference to the construction.

(b) Where the purchaser or intending purchaser of an apartment/flat/ house has a complaint against the builder/ developer with reference to construction or delivery or amenities.

But we are concerned with a third hybrid category which is popularly called as 'joint-venture agreements' or "development agreements" or "collaboration agreements" between a land-holder and a builder. In such transactions, the

land-holder provides the land. The builder puts up a building. Thereafter, the land owner and builder share the constructed area. The builder delivers the `owner's share' to the land-holder and retains the 'Builder's share'. The land-holder sells/transfers undivided share/s in the land corresponding to the Builder's share of the building to the builder or his nominees. As a result each Apartment owner becomes the owner of the Apartment with corresponding undivided share in the land and an undivided share in the common areas of the building. In such a contract, the owner's share may be a single apartment or several apartments. The land-holder who gets some apartments may retain the same or may dispose of his share of apartments with corresponding undivided shares to others. The usual feature of these agreements is that the land-holder will have no say or control in the construction. Nor will he have any say as to whom and at what cost the builder's share of apartments are to be dealt with or disposed of. His only right is to demand delivery of his share of constructed area in accordance with the specifications. The builders contend that such agreements are neither contracts for construction, nor contracts for sale of apartments, but are contracts entered for mutual benefit and profit and in such a contract, they are not `service-providers' to the land-owners, but a co-adventurer with the land-holder in a `joint venture', in developing the land by putting up multiple-housing (Apartments) and sharing the benefits of the project. The question is whether such agreements are truly joint-ventures in the legal sense.

This Court had occasion to consider the nature of 'joint-venture' in *New Horizons Ltd v. Union of India, (1995) 1 SCC 478.* This Court held: (SCC pp. 493-94, para 24)

> "24. The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. [Black's Law Dictionary; Sixth Edition, p. 839]. According to Words and Phrases, Permanent Edition, a joint venture is an association of two or more persons to carry out a single business enterprise for profit (P.117, Vol. 23)."

The following definition of 'joint venture' occurring in American Jurisprudence (2nd Edn., Vol. 46 pages 19, 22 and 23) is relevant:

> "A joint venture is frequently defined as an association of two or more persons formed to carry out a single business enterprise for profit. More specifically, it is in association of

persons with intent, by way of contract, express or implied, to engage in and carry out a single business venture for joint profit, for which purpose such persons combine their property, money, effects, skill, and knowledge, without creating a partnership, a corporation or other business entity, pursuant to an agreement that there shall be a community of interest among the parties as to the purpose of the undertaking, and that each joint venturer must stand in the relation of principal, as well as agent, as to each of the other coventurers within the general scope of the enterprise.

Joint ventures are, in general, governed by the same rules as partnerships. The relations of the parties to a joint venture and the nature of their association are so similar and closely akin to a partnership that their rights, duties, and liabilities are generally tested by rules which are closely analogous to and substantially the same, if not exactly the same as those which govern partnerships. Since the legal consequences of a joint venture are equivalent to those of a partnership, the courts freely apply partnership law to joint ventures when appropriate. In fact, it has been said that the trend in the law has been to blur the distinctions between a partnership and a joint venture, very little law being found applicable to one that does not apply to the other. Thus, the liability for torts of parties to a joint venture agreement is governed by the law applicable to partnerships.

A joint venture is to be distinguished from a relationship of independent contractor, the latter being one who, exercising an independent employment, contracts to do work according to his own methods and without being subject to the control of his employer except as to the result of the work, while a joint venture is a special combination of two or more persons where, in some specific venture, a profit is jointly sought without any actual partnership or corporate designation."

To the same effect is the definition in *Corpus Juris Secundum* (Vol. 48-A, pp. 314-315):

" 'Joint venture,' a term used interchangeably and synonymous with 'joint adventure', or coventure, has been defined as a special combination of two or more persons wherein some specific venture for profit is jointly sought without any actual partnership or corporate designation, or as an association of two or more persons to carry out a single business enterprise for profit or a special combination

> of persons undertaking jointly some specific adventure for profit, for which purpose they combine their property, money, effects, skill, and knowledge..... Among the acts or conduct which are indicative of a joint venture, no single one of which is controlling in determining whether a joint venture exists, are: (1) joint ownership and control of property; (2) sharing of expenses, profits and losses, and having and exercising some voice in determining division of net earnings; (3) community of control over, and active participation in, management and direction of business enterprise; (4) intention of parties, express or implied; and (5) fixing of salaries by joint agreement."

Black's Law Dictionary (7th Edition, page 843) defines 'joint venture' thus:

> "**Joint Venture**: – A business undertaking by two or more persons engaged in a single defined project. The necessary elements are: (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each member's equal voice in controlling the project."

An illustration of joint venture may be of some assistance. An agreement between the owner of a land and a builder, for construction of apartments and sale of those of apartments so as to share the profits in a particular ratio may be a joint venture, if the agreement discloses an intent that both parties shall exercise joint control over the construction/development and be accountable to each other for their respective acts with reference to the project.

In a true joint venture agreement between the land-owner and another (whether a recognized builder or fund provider), the land-owner is a true partner or co-adventurer in the venture where the land owner has a say or control in the construction and participates in the business and management of the joint venture, and has a share in the profit/loss of the venture. In such a case, the land owner is not a consumer nor is the other co- adventurer in the joint venture, a service provider. The land owner himself is responsible for the construction as a co-adventurer in the venture. But such true joint ventures are comparatively rare. What is more prevalent are agreements of the nature found in this case, which are a hybrid agreement for construction for consideration and sale and are pseudo joint-ventures.

The basic underlying purpose of the agreement is the construction of a house or an apartment (ground floor) in accordance with the specifications, by the builder for the owner, the consideration for such construction being the transfer of undivided share in land to the builder and grant of permission to the builder to construct two floors. Such agreement whether called as a 'collaboration agreement' or a 'joint-venture agreement', is not however a 'joint-venture'. There is a contract for construction of an apartment or house for the

appellant, in accordance with the specifications and in terms of the contract. There is a consideration for such construction, flowing from the landowner to the builder (in the form of sale of an undivided share in the land and permission to construct and own the upper floors). To adjust the value of the extent of land to be transferred, there is also payment of cash consideration by the builder. But the important aspect is the availment of services of the builder by the land-owner for a house construction (construction of owner's share of the building) for a consideration. To that extent, the land-owner is a consumer, the builder is a service-provider and if there is deficiency in service in regard to construction, the dispute raised by the land owner will be a consumer dispute. We may mention that it makes no difference for this purpose whether the collaboration agreement is for construction and delivery of one apartment or one floor to the owner or whether it is for construction and delivery of multiple apartments or more than one floor to the owner. The principle would be the same and the contract will be considered as one for house construction for consideration. The deciding factor is not the number of apartments deliverable to the land owner, but whether the agreement is in the nature of a joint-venture or whether the agreement is basically for construction of certain area for the land-owner.

Normally a professional builder who develops properties of others is not interested in sharing the control and management of the business or the control over the construction with the land owners. Except assuring the land owner a certain constructed area and/or certain cash consideration, the builder ensures absolute control in himself, only assuring the quality of construction and compliance with the requirements of local and municipal laws, and undertaking to deliver the owners' constructed area of the building with all certificates, clearances and approvals to the land owner.

Learned counsel for the respondent contended that the agreement was titled as "collaboration agreement" which shows an intention to collaborate and therefore it is a joint venture. It is now well settled that the title or caption or the nomenclature of the instrument/document is not determinative of the nature and character of the instrument/document, though the name may usually give some indication of the nature of the document. The nature and true purpose of a document has to be determined with reference to the terms of the document, which express the intention of the parties. Therefore, the use of the words `joint venture' or `collaboration' in the title of an agreement or even in the body of the agreement will not make the transaction a joint venture, if there are no provisions for shared control of interest or enterprise and shared liability for losses.

In this case we may notice here that if there is a breach by the landowner of his obligations, the builder will have to approach a civil court as the landowner is not providing any service to the builder but merely undertakes certain obligations towards the builder, breach of which would furnish a cause of action for specific performance and/or damages. On the other hand, where the builder commits breach of his obligations, the owner has two options. He has the right

to enforce specific performance and/or claim damages by approaching the civil court. Or he can approach the Forum under Consumer Protection Act, for relief as consumer, against the builder as a service-provider. Section 3 of the Act makes it clear that the remedy available under the Act is in addition to the normal remedy or other remedy that may be available to the complainant.

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17. COURT FEES ACT, 1870 (As amended by M.P. Amendment Act of 2008 w.e.f. 02.04.2008 – Schedule 1, Article I
Interpretation – Court fee payable on plaint, counterclaim etc. when amount or value exceeds Rs. 10 lac – Trial courts have interpreted the clause to mean that the plaintiffs/suitors were required to pay not only Rs. 95,000 on such suit but a further amount to a maximum of Rs. 1,50,000 over and above Rs. 95,000 – Held – The subject matter in dispute exceeds Rs. 10 lac, the court fee payable by the plaintiffs/ suitors would be subject to a maximum of Rs. 1,50,000 – The maximum court fee required to be paid on all such suits would be Rs, 1,50,000 only and no more.

Mohanlal v. Kaji Vakiluddin & ors.
Reported in I.L.R. (2008) M.P. 3152

Held:

The language of Article 1-A clearly shows that on a plaint or a counter claim/set off along with the written statement or memorandum of appeal, which requires the payment of ad-valorem court fee, when the amount or value of the subject matter in dispute does not exceed rupees five lacs, suitor is required to pay a court fee of twelve percent on the valuation of the suit. However, even in matters involving petty claims, a minimum of court fee of rupees on hundred has been provided. Similarly, when the claim exceeds rupees five lacs, but does not exceed rupees ten lacs, the court fee has to be paid as rupees sixty five thousand plus seven percent on the amount or value in excess of rupees five lacs. In the case of a suitor, where the claim/value exceeds rupees ten lacs,a suitor is required to pay court fee of rupees ninety five thousand plus three percent on the amount in excess of rupees ten lacs. In the last situation however, there is a rider. The maximum amount of court fee payable by such a suitor, has been indicated as rupees one lac fifty thousand. In fact, it would be wholly unnecessary to reiterate that the provisions of Court Fees Act are not for the imposition of a tax payable by a plaintiff/claimant, but the court fee is required to be paid by a plaintiff/claimant, merely with a view to meet some of the expenses incurred by the State in providing a system for adjudication. A right to seek judicial review and approach, the Courts is one of the basic features of the Constitution of India. In a welfare State, an inexpensive system for administration of justice is not only an obligation of the State, But is also a fundamental right of a citizen, under the Constitution of India. Thus, the court fee chargeable from a person approaching the Court, has to be kept in such reasonable limits, by the

State, as may be deemed appropriate. It is with the aforesaid goal and objective in view that the provisions of the Court Fees Act, more-so Article 1-A of Schedule 1, have been framed. Thus, when the aforesaid provisions provide for a minimum court fee of rupees hundred to be paid by a plaintiff/suitor, then it is apparent that a maximum ceiling of rupees one lac fifty thousand has also been fixed. In my considered view, the stand taken on behalf of the State Government is just and appropriate and reflects the true intention of the Legislature and thereof, needs to be accepted by the Court.

Consequently, it is directed that in a suit when the amount or value of the subject matter in dispute exceeds rupees ten lacs, the court fee payable thereupon by the plaintiff would be rupees ninety five thousand plus three percent on the amount or value in excess of rupees ten lacs, but the total court fee payable by the plaintiff would be subject to a maximum of rupees one lac fifty thousand. For the sake of clarification, it is specified that the maximum court fee required to be paid by a plaintiff on all such suits would be rupees one lac fifty thousand only and no more.

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18. CRIMINAL PROCEDURE CODE, 1973 – Sections 24 and 406
Criminal case transferred from one State to another State by the Supreme Court – In absence of specific direction of the said Court the Government of State where case is transferred can appoint Public Prosecutor – However, the expenditure will be borne by the State from where the case is transferred.

Jayendra Saraswati Swamigal alias Subramaniam v. State of Tamil Nadu

Reported in AIR 2008 SC 2997

Held:

The appellant preferred a Revision Petition challenging the order passed by the Principal District and Sessions Judge, Pondicherry. The High Court of Madras confirmed the decision of the Sessions court and held that the offence had been committed within the State of Tamil Nadu, the investigation was done by the Tamil Nadu police and the committal proceedings had also taken place in the court at Tamil Nadu and hence the Government of Tamil Nadu had the domain over that sessions case and unless this Court, considering the special circumstances, directs in a particular case, appointment of a Special Public Prosecutor by the State to which the case has been transferred in the interest of justice, the transferee State cannot normally venture to appoint any Special Public Prosecutor to handle the case which it received as per the orders of this Court. The High Court was also of the view that it would be unjust to direct the transferee State Government to open the purse stings to meet out the expenditure for the appointment of a Special Public Prosecutor.

The appellant has challenged the order passed by the Sessions court as well as the High Court by which the Special Prosecutor and Additional Special Public Prosecutors were appointed to conduct the trial of the case.

For the purpose of understanding the scheme of appointment of a Public Prosecutor to conduct the trial it is necessary to look into various provisions of Chapter II of the Cr. P.C. Section 6 of Cr.P.C. prescribes that in every State there shall be following classes of criminal courts : Courts of Sessions, Judicial Magistrate of the First Class (and in any Metropolitan area, Metropolitan Magistrate), the Judicial Magistrate of the second class and Executive Magistrate. Section 7(1) prescribes that every State shall have a sessions division or shall consist of several sessions divisions and every sessions division shall, for the purposes of the Code, be a district or consist of districts. It also prescribes that every metropolitan area shall be a separate sessions division and district. Sub-section (2) provides that the State may alter the limits of such division and districts after consultation with the High Court. Section 9 requires that the State Government shall establish a court of sessions for every sessions division, and every court of sessions shall be presided over by a Judge to be appointed by the High Court. Section 10 deals with the constitution of the Assistant Sessions Judge and Section 11 deals with the constitution of the court of Judicial Magistrates. Section 12 deals with the appointment of Chief Judicial Magistrate and Additional Chief Judicial Magistrate. Sections 16, 17 and 18 deal with the constitution of the various Metropolitan Magistrates' courts and Section 20 deals with appointment of Executive Magistrate. Section 24 deals with the appointment of Public Prosecutors. "Public Prosecutor" has been defined under Section 2(u) of the Cr.P.C.: –

> "Public Prosecutor" means any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor."

Section 24 (1) deals with the appointment of Public Prosecutor or Additional Public Prosecutor for conducting any prosecution, appeal or other proceedings on behalf of the Central Government or State Government in the High Court. Sub-section (3) of Section 24 requires that for every district, the State Government shall appoint a Public Prosecutor and one or more Additional Public Prosecutors. Sub-sections (3) to (7) deal with appointment of Public Prosecutor, Additional Public Prosecutor for the district. The power of appointment is given to the State Government and such appointment should be from a panel of names prepared by the District Magistrate in consultation with the Sessions Judge. Sub-section (7) of Section 24 provides that a person shall be eligible to be appointed as a Public Prosecutor or as an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (6) only if he has been in practice as an advocate for not less than seven years. A conjoint reading of all these provisions would clearly show that the State Government has the power of appointment of Public Prosecutor or Additional Public Prosecutor for each

district or court of Sessions in the sessions division in the State to conduct any prosecution, appeal or other proceedings pending before the courts in that State. The power of the State Government to appoint a Public Prosecutor and Additional Public Prosecutor would extend only for conducting any prosecution, appeal or other proceedings in the courts within the State. As per the procedure prescribed under Section 24, the State of Tamil Nadu can appoint a Public Prosecutor to conduct criminal cases in any of the court in that State. Such powers cannot be exercised by the State Government to conduct cases in any other State. Once the case is transferred as per Section 406 of the Cr.P.C. to another State, the transferor State no longer has control over the prosecution to be conducted in a court situated in a different State to which the case has been transferred. It is the prerogative of the State Government to appoint a Public Prosecutor to conduct the case which is pending in the sessions division of that State. Of course, this Court while passing order of transfer, can give an appropriate direction as to which State should appoint the Public Prosecutor to conduct that particular case. Such orders are passed having regard to the circumstances of the case and the grounds on which the transfer has been effected. This Court can certainly give directions irrespective of the provisions contained in Section 24 of the Cr.P.C. But so far as this case is concerned, nothing had been stated in the order of the transfer. The provisions contained in the Section 24 of Cr.P.C. shall prevail and it is for the appropriate State Government within whose area the trial is conducted to appoint Public Prosecutor under sub-sections (3) to (7) of Section 24 of the Cr.P.C. is the Government of the State to which the case has been transferred.

Sub-section (8) of Section 24 of Cr.P.C. is a special provision regarding the appointment of a Special Prosecutor. This power can be exercised by the Central Government and the State Government for the purpose of any case or class of cases, and a person who has been in practice as an advocate for not less than ten years may be appointed as a Special Public Prosecutor. These powers are also to be exercised by the State Government of the transferee court where the sessions case is pending. Of course, the transferee State can appoint any person having qualification under sub-section (8) of Section 24 of the Cr.P.C.

The purpose of transfer of the criminal case from one State to another is to ensure fair trial to the accused. In this case, the main ground on which the transfer of the sessions case was ordered from the Sessions court of Chinglepet in Tamil Nadu to the Principal District and Sessions Judge, Pondicherry, was that the action of the prosecution agency had created a reasonable apprehension in the mind of the accused-appellant that he would not get justice if the trial was held in the State of Tamil Nadu. The Public Prosecutor plays a key role during trial of a Sessions case. Though the Sessions Judge has got a supervising control over the entire trial of the case, it is the Public Prosecutor who decides who are the witnesses to be examined on the side of the prosecution and which witness is to be given up, or which witness is to be recalled for further examination. For proper conduct of a criminal case the Public Prosecutor plays a vital role. It may

also be noticed herein that under Section 225 of the Cr.P.C. during every trial before the court of Sessions, the prosecution shall be conducted by the Public Prosecutor and as regards withdrawal also, the Public Prosecutor in charge of the case has to make the application for withdrawal of prosecution as per Section 321 of the Cr.P.C. In case of acquittal of the accused the State Government may direct the Public Prosecutor to file an appeal.

As is evident from various provisions of the Cr.P.C., the State Government of Tamil Nadu can only appoint a Public Prosecutor or an Additional Public Prosecutor or a Special Public Prosecutor under Section 24 of the Cr.P.C. to conduct the prosecution and appeal, or other proceeding in any criminal courts in respect of any case pending before the courts of Tamil Nadu and in respect of any case pending before the Courts at Pondicherry, the State Government of Pondicherry is the appropriate Government to appoint Public Prosecutor, Additional Public Prosecutor or Special Public Prosecutor.

However, we make it clear that the State of Pondicherry can appoint any counsel as Public Prosecutor having requisite qualifications as prescribed under sub-section (8) of Section 24 of Cr.P.C. whether he is a lawyer in the State of Pondicherry or any other State. As it is a criminal case registered by the State of Tamil Nadu the expenses for conducting the trial are to be borne by the State of Tamil Nadu. The Advocate fees payable to the Public Prosecutor, Additional Public Prosecutor or Special Public Prosecutor by the State of Pondicherry shall be borne by the State of Tamil Nadu and the Home Departments of the two States may undertake consultations with each other and an appropriate decision may be taken by the concerned authorities in this regard.

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19. CRIMINAL PROCEDURE CODE, 1973 – Section 125

Maintenance – Date of entitlement is from the date of application – Whether express order is necessary? No – Special reasons however are required.

Maintenance of wife – Consideration for determination of quantum – Possession of cultivable land belongs to her husband and living in husband's house are relevant and material considerations.

Shail Kumari Devi and another v. Krishan Bhagwan Pathak alias Kishun B. Pathak

Judgment dated 28.07.2008 passed by the Supreme Court in Civil Appeal No 4666 of 2008, reported in (2008) 9 SCC 632

Held:

In *Krishna Jain v. Dharam Raj Jain, 1992 CriLJ 1028 (MP),* the Division Bench of the High Court of Madhya Pradesh considered the ambit and scope of sub-section (2) of Section 125 in the light of other provisions of the Code. It overruled *Mohd. Inayatullah Khan v. Salma Bano, 1983 Jab LJ 55, Rameshwar v. Ramibai, 1987 CriLJ 1952 (MP) and Lachhmani v. Ramu, (1983) 1 Crimes 590*

(MP) referred to above and held that plain reading of sub-section (2) of Section 125 makes it clear that allowance of maintenance can be awarded from the date of the order or from the date of the application. To hold that, normally maintenance should be made payable from the date of the order and not from the date of the application unless such order is backed by reasons would amount to inserting something more in the sub-section which the legislature never intended. The Court observed that it was unable to read in sub-section (2) laying down any rule to award maintenance from the date of the order or that the grant from the date of the application is an exception.

Regarding recording of reasons, the Bench observed that in either case i.e. grant of maintenance from the date of the order or from the date of the application, the court is required to record reasons. The Court referred to sub-section (6) of Section 354 of the Code which reads thus:

> "354. (6) Every order under Section 117 or sub-section (2) of Section 138 and every final order made under Section 125, Section 145 or Section 147 shall contain the point or points for determination, the decision thereon and the reasons for the decision."

It was, therefore, observed that every final order under Section 125 of the Code [and other sections referred to in sub-section (c) of Section 354] must contain points for determination, the decision thereon and the reasons for such decision.

Maintenance is a right which accrues to a wife against her husband the minute the former gets married to the latter. It is not only a moral obligation but is also a legal duty cast upon the husband to maintain his wife. Hence, whenever a wife does not stay with her husband and claims maintenance, the only question which the court is called upon to consider is whether she was justified to live separately from her husband and still claim maintenance from him? If the reply is in the affirmative, she is entitled to claim maintenance. It is, therefore, open to the Magistrate to award maintenance from the date of application and there is nothing which requires recording of "special reasons" though he must record reasons as envisaged by sub-section (6) of Section 354 of the Code in support of the order passed by him.

While deciding an application under Section 125 of the Code, a Magistrate is required to record reasons for granting or refusing to grant maintenance to wives, children or parents. Such maintenance can be awarded from the date of the order, or, if so ordered, from the date of the application for maintenance, as the case may be. For awarding maintenance from the date of the application, express order is necessary. No special reasons, however, are required to be recorded by the court. In our judgment, no such requirement can be read in sub-section (1) of Section 125 of the Code in absence of express provision to that effect.

From the material on record, it is clear that Appellant 1 wife is residing in the house belonging to the respondent husband and such finding has been recorded even by the Family Court. It is also in evidence that she was receiving income from the land in her possession which belonged to her husband, the respondent herein. It is true that the respondent could not state as to the actual amount received by the wife from the cultivation of the land. But it is also one of the considerations which is relevant and material while fixing the amount of maintenance. Moreover, Appellant 1 has inherited some land from the father.

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20. CRIMINAL PROCEDURE CODE, 1973 – Sections 156 (3), 190 & 200 Cognizance, meaning of – On presentation of complaint, instead of examining the complainant at once, the Magistrate proceeded to fix next date for recording of preliminary evidence – The matter was further adjourned twice for the purpose – Thereafter on the next date the Magistrate forwarded the complaint to the police for investigation under Section 156 (3) of the Code with a direction to submit report on the next date – Held, the Magistrate had taken cognizance of the offence on the date of presentation of complaint by applying his mind and fixing a date for recording of evidence of complainant – Further held, the Magistrate committed a serious error of jurisdiction by ordering investigation under Section 156 (3) of the Code after taking cognizance.

In Re : Deepak Agrawal

Reported in 2008 (5) MPHT 106

Held:

The facts giving rise to this revision may be summed up as under :-

(a) The complaint was presented on 6-10-2007. However, instead of examining the complainant at once as per the mandate of Section 200 of the Code, the learned Magistrate proceeded to fix 6-11-2007 as the date for recording of the preliminary evidence. The matter was further adjourned for the purpose to 27-12-2007 and 28-1-2008 respectively.

(b) On 28-1-2008, the learned Magistrate, upon the request made by the complainant, forwarded the complaint to the SHQ, Itarsi for investigation under Section 156(3) of the Code with a direction to submit report on 18-3-2008.

(c) On 6-2-2008, in view of the fact that the consequent registration of case by the police had received wide publicity through media, the learned Magistrate recorded an explanation that he had neither taken cognizance of the offence, under Section 190 of the Code nor instructed the SHO to register a case. He also directed the SHO to submit report.

(d) On 7-2-2008, the SHO reported that he had not received any order to conduct investigation into the matter.

Taking note of the palpable jurisdictional errors committed by the Magistrate, this revision was entertained and notice was issued to the complainant to show cause as to why the order dated 6-10-2007 and subsequent proceedings initiated upon his complaint should not be quashed. In response, the complainant/noticee, instead of filing a reply, has preferred to submit written arguments. With reference to these arguments, I have also heard learned Panel Lawyer at length.

The declaration made by the learned Magistrate, in the order dated 6-2-2008, that he had not taken cognizance of the offences, is apparently misconceived as he had taken cognizance of the offences on 6-10-2007 only by applying his mind and fixing a date for recording of the preliminary evidence of the complainant (*Devarapalli Lakshminarayana Reddy Vs. V. Narayana Reddy, AIR 1976 SC 1672, referred to). Further, in CREF Finance Ltd. Vs. Shree Shanti Homes Pvt. Ltd. AIR 2005 SC 4284 and again in Chief Enforcement Officer Vs. Videocon International Ltd. (2008) 2 SCC 492, while reaffirming the view taken in Ajit Kumar Palit Vs. State of W.B. AIR 1963 SC 765,* that the words "cognizance taken" need not be mentioned in the corresponding order, the Supreme Court proceeded to quote the following illuminating observation:-

> "The word "Cognizance" has no esoteric or mystic significance in criminal law or procedure. It merely means become aware of and when used with reference to a Court or Judge, to take notice of judicially. It was stated in *Gopal Marwari Vs. Emperor* (AIR 1943 Pat 245) by the learned Judges of the Patna High Court in a passage quoted with approval by this Court in *R. R. Chari Vs. State of Uttar Pradesh* (1951 SCR 312, 320) that the word, 'cognizance' was used in the Code to indicate the point when the Magistrate or Judge takes judicial notice of an offence and that it was a word of indefinite import, and is not perhaps always used in exactly the same sense. As observed in *Emperor Vs. Sourindra Mohan Chuckerbutty* (1910 ILR 37 Cal 412, 416), " taking cognizance does not involve any formal action; or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence"."

As explained in *Gopal Das Sindhi Vs. State of Assam, AIR 1961 SC 986,* the provisions of Section 190 do not mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. However, A Magistrate can order investigation under Section 156(3) of the Code only at the pre-cognizance stage even if the offence

complained of is exclusively triable by Court of Session. This point has been elucidated in his inimitable style by S. Murtaza Fazal Ali, J., in the following terms:-

> While Chapter 14 (under which Section 190 falls) deals with post-cognizance stage, Chapter 12 (under which Section 156 falls), so far as the Magistrate is concerned, deals with pre-cognizance stage. Sections 190 and 156(3) are mutually exclusive and work in totally different spheres. A Magistrate can order investigation under Section 156(3) only before taking cognizance under Sections 190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter 14 he is not entitled in law to order any investigation under Section 156(3) though in cases not falling within the proviso to Section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by Section 202 of the Code (See : *Tula Ram Vs. Kishore Singh, AIR 1977 SC 2401*).

Accordingly, in the factual scenario of the present case, the learned Magistrate committed a serious error of jurisdiction by ordering investigation under Section 156(3) of the Code. The corresponding order passed on 28-01-2008, therefore, deserves to be set aside.

There are some other aspects of the matter. The offences were allegedly committed at New Delhi. The offence under Section 124-A of the IPC is exclusively triable by the Court of Session whereas, by virtue of Section 196(1) of the Code, cognizance of the offence punishable under Section 295-A of the IPC cannot be taken except with the previous sanction of the Central Government or of the State Government. But, copies of corresponding order-sheets reflect that the matter could not be viewed from these angles as even the complainant has not been examined by the Magistrate before taking cognizance of the offences. In the words of Termes delaley, "Jurisdiction is a DIGNITY which a man hath by a power to do justice in causes of complaint made before him" (quoted with approval in *Brij Kishore Singh Vs. Nutan Singh, 1995 Cr.L.J. 1486*). Nevertheless, under Section 201 of the Code, a Magistrate, who is not competent to take cognizance of the offence for want of territorial jurisdiction or for any other reason, may return the complaint for presentation to the proper Court. However, even this can only be done because the Court has competence to deal with the matter (*State of M.P. Vs. Bhooraji, (2001) 7 SCC 679 relied on*).

For the foregoing reasons, the order dated 28-01-2008 deserves to be interfered with. However, a wrong procedure adopted by the Magistrate for directing investigation under Section 156(3) of the Code would not be sufficient to quash the entire proceedings initiated on the complaint. This view is fortified by the decision of the Apex Court in *Narmada Prasad Sonkar @ Ramu Vs. Sardar Avtar Singh Chabara, (2006) 9 SCC 601.*

Consequently, the order dated 28-01-2008 is set aside and all subsequent proceedings pertaining to the complaint are hereby quashed. However, the Magistrate shall be at liberty to proceed with the complaint in accordance with law from the stage that was in existence prior to passing of the order directing investigation under Section 156(3) of the Code. Needless to say that while doing so, he would take into account all the material aspects of the matter as highlighted hereinabove.

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*21. **CRIMINAL PROCEDURE CODE, 1973 – Section 173 (2)**
Natural justice – Complainant not heard before accepting the Final Report and not taking cognizance of the offence – Held, a report under Section 173 (2) of CrPC is submitted to a Magistrate by I.O. – Magistrate chooses not to take cognizance of offence or drop the proceedings against the accused or accused persons mentioned in F.I.R. – It is obligatory for Magistrate to provide an opportunity of hearing by issuance of notice to the complainant – Admittedly, the aforesaid opportunity has not been provided – The complainant who moves the criminal law into motion is entitled to know its result.
Sangeeta Sharma v. State of M.P.
Reported in I.L.R. (2008) M.P. 3345

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22. **CRIMINAL PROCEDURE CODE, 1973 – Sections 227, 228 & 209**
INDIAN PENAL CODE, 1860 – Sections 120-A & 120-B
(i) **Scope of discharge explained – If two views are equally possible and the Judge is satisfied that evidence produced before him gives rise to suspicion only as distinguished from grave suspicion, he will be fully within his right to discharge the accused – At this stage he is not to see as to whether the trial will end in conviction or not – The broad test to be applied is whether the material placed on record if unrebutted makes a conviction reasonably possible.**
(ii) **Criminal conspiracy – Existence and its charge – How to be inferred from circumstance and conduct of the accused explained.**
Yogesh alias Sachin Jagdish Joshi v. State of Maharashtra
Judgment dated 28.04.2008 passed by the Supreme Court in Criminal Appeal No. 744 of 2008, reported in (2008) 10 SCC 394

Held:

Chapter XVIII of the Code lays down the procedure for trial before the Court of Sessions, pursuant to an order of commitment under Section 209 of the Code. Section 227 contemplates the circumstances whereunder there could be a discharge of an accused at a stage anterior in point of time to framing of charge under Section 228. It provides that upon consideration of the record of

the case, the documents submitted with the police report and after hearing the accused and the prosecution, the Court is expected, nay bound to decide whether there is "sufficient ground" to proceed against the accused and as a consequence thereof either discharge the accused or proceed to frame charge against him.

It is trite that the words "not sufficient ground for proceeding against the accused" appearing in the Section postulate exercise of judicial mind on the part of the Judge to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. However, in assessing this fact, the Judge has the power to sift and weigh the material for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine a prima facie case depends upon the facts of each case and in this regard it is neither feasible nor desirable to lay down a rule of universal application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him gives rise to suspicion only as distinguished from grave suspicion, he will be fully within his right to discharge the accused. At this stage, he is not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the materials on record, if unrebutted, makes a conviction reasonably possible. [See: *State of Bihar v. Ramesh Singh, (1977) 4 SCC 39* and *Union of India v. Prafulla Kumar Samal, (1979) 3 SCC 4*]

(ii) The basic ingredients of the offence of criminal conspiracy are: (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. It is, therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is *sine qua non* of criminal conspiracy. Yet, as observed by this Court in *Shivnarayan Laxminarayan Joshi & Ors. v. State of Maharashtra, (1980) 2 SCC 465,* a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the common intention of the conspirators. Therefore, the meeting of minds of the conspirators can be inferred from the circumstances proved by the prosecution, if such inference is possible.

In *Mohd. Usman Mohammad Hussain Maniyar v. State of Maharashtra, (1981) 2 SCC 443,* it was observed that for an offence under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agree to do and/or cause to be done the illegal act, the agreement may be proved by necessary implication.

In *Kehar Singh v. State (Delhi Admn.), (1988) 3 SCC 609,* the gist of the offence of the conspiracy has been brought out succinctly in the following words: (SCC p. 731, para 271)

> "271. ....The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme

> or agreement between the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, *per se*, enough."

Again in *State of Maharashtra & Ors. v. Som Nath Thapa & Ors., (1996) 4 SCC 659,* a three-Judge Bench of this Court held that to establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or service in question could not be put to any lawful use.

More recently, in *State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru, (2005) 11 SCC 600,* making exhaustive reference to several decisions on the point, including in *State Through Superintendent of Police, CBI/SIT v. Nalini & Ors., (1999) 5 SCC 253,* Venkatarama Reddi, J. observed thus: (*Navjot Sandhu* case, SCC p. 689, para 97)

> "97. Mostly, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair. Usually both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused (per Wadhwa, J. in *Nalini's* case at page 516). The well known rule governing circumstantial evidence is that each and every incriminating circumstance must be clearly established by reliable evidence and "the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible." In *Tanviben Pankajkumar Divetia v. State of Gujarat, (1997) 7 SCC 156,* SCC page 185, para 45). G.N. Ray, J. in *Tanvi Ben* observed that this Court should not allow the suspicion to take the place of legal proof."

Thus, it is manifest that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is *sine qua non* of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. But the incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. It is well settled that an offence of conspiracy is a substantive offence and renders the mere agreement to commit an offence punishable even if an offence does not take place pursuant to the illegal agreement.

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***23. CRIMINAL PROCEDURE CODE, 1973 – Sections 227, 228, 238 & 240**

(i) Framing of charge/discharge – While framing charge, the trial Court can only look into the materials produced by the prosecution – At the stage of framing charge roving and fishing inquiry is impermissible and a mini-trial cannot be conducted at such stage. At the stage of framing of charge the submissions on behalf of the accused has to be confined to the material produced by the investigating agency as observed in *State of Orissa v. Debendra Nath Padhi, (2005) 1 SCC 568.*

(ii) Once a charge has been framed and the accused pleads 'not guilty', the trial Court is required to proceed with the trial to its logical end – It cannot discharge the accused – It can only either acquit or convict the accused. [Also see *Ratilal Bhanji Mithani v. State of Maharashtra, (1979) 2 SCC 179*]

Bharat Parikh v. Central Bureau of Investigation and another

Judgment dated 14.07.2008 passed by the Supreme Court in Criminal Appeal No. 1076 of 2008, reported in (2008) 10 SCC 109

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24. CRIMINAL PROCEDURE CODE, 1973 – Sections 227, 239 & 245

Framing of charge – Only "prima facie case" test to be applied – Strong suspicion about commission of offence and accused's involvement is sufficient to framing of charge at that stage – Formulating opinion about the prospects of conviction is not necessary.

Sanghi Brothers (Indore) Private Limited v. Sanjay Choudhary and others

Judgment dated 03.10.2008 passed by the Supreme Court in Criminal Appeal No. 1578 of 2008, reported in (2008) 10 SCC 681

Held:

Sections 227, 239 and 245 deal with discharge from criminal charge. In *State of Karnataka v. L. Muniswamy, (1977) 2 SCC 699* it was noted that at the stage of framing the charge the court has to apply its mind to the question whether or not there is any ground for presuming the commission of offence by the accused. The Court has to see while considering the question of framing the charge as to whether the material brought on record could reasonably connect the accused with the trial. Nothing more is required to be inquired into. (See *Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia, (1989) 1 SCC 715* and *State of West Bengal v. Mohd. Khalid, (1995) 1 SCC 684.*

In *R.S. Nayak v. A.R. Antulay, (1986) 2 SCC 716* this Court referred to Sections 227 and 228 so far as they are relatable to trial. Sections 239 and 240 are relatable to trial of warrant cases and Section 245 (1) and (2) relatable to summons cases.

After analyzing the terminology used in the three pairs of sections it was held in *Antulay's case* (supra) that despite the differences there is no scope for doubt that at the stage at which the court is required to consider the question of framing of charge, the test of a prima facie case to be applied.

In *State of Maharashtra and Ors. v. Som Nath Thapa and Ors., (1996) 4 SCC 659* this Court observed as follows:

> "31. Let us note the meaning of the word 'presume'. In Black's Law Dictionary it has been defined to mean 'to believe or accept upon probable evidence'. (emphasis ours). In Shorter Oxford English Dictionary it has been mentioned that in law 'presume' means 'to take as proved until evidence to the contrary is forthcoming'. Stroud's Legal Dictionary has quoted in this context a certain judgment according to which 'A presumption is a probable consequence drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged'. In Law Lexicon by P. Ramanath Aiyar the same quotation finds place at p. 1007 of 1987 Edn.
>
> 32. The aforesaid shows that if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence; a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the Offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage."

Even if there is a strong suspicion about the commission of offence and the involvement of the accused, it is sufficient for the court to frame a charge. At that stage, there is no necessity of formulating the opinion about the prospect of conviction.

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25. CRIMINAL PROCEDURE CODE, 1973 – Sections 239, 245 & 258 NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 & 142

(i) Applicability of Sections 239, 245 & 258 of the Code in complaint under Section 138 of N.I. Act – Applicant filed complaint under Section 138 of Act – Non applicant filed an application under Section 245 of Code for dismissal of complaint as it being barred by limitation – Magistrate allowed the application and dismissed the complaint as time barred – Order challenged in High Court under Section 482 of Code – Held, present complaint is a summon

case – Provisions of Sections 239 & 245 of Code are applicable in warrant cases – Though the provisions of Section 258 of Code are applicable in summons cases but only in those summons cases which are instituted otherwise than upon complaint – Magistrate has committed error in allowing the application under Section 245 of Code – Petition allowed.

(ii) Delay – Condonation – Magistrate is empowered to condone the delay as per proviso to clause (b) of Section 142 of the Act, which came into force on 06.02.2003.

Giriraj Patwa v. Dayaram

Reported in I.L.R. (2008) M.P. 3309

Held:

A mere reading of Criminal Procedure Code indicates that the provisions of section 245 are applicable for the trial of warrant cases by Magistrates. Undisputedly, the criminal cases registered against the respondent is summon case and therefore the provisions of section 239 Cr.P.C. do not attract in the present case pending against the respondent. It is also clear from the perusal of section 258 Cr.P.C. that though the provisions of section 258 Cr.P.C. are applicable in summons cases but only in those summons cases which are instituted otherwise than upon complaints. Undoubtedly, the present criminal case has been instituted upon complaint filed by the petitioner. It is, therefore, abundantly clear that the provisions of these two sections do not apply in the present criminal case and therefore the learned Magistrate has committed error in allowing the application filed by the respondent under section 245 of Cr.P.C.

The Hon'ble Apex Court in the case of *Adalat Prasad v. Rooplal Jindal and others (2004) 7 SCC 338* has held that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provisions of Sections 200 and 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking Section 203, Cr.P.C., because the Code does not contemplate a review of an order. Hence, in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482, Cr.P.C.

Here in the present case notice was issued in time on 15.12.06. Clause (c) of proviso to Section 138 provides that the Section shall not apply unless the drawer of the cheque fails to make payment within 15 days of the receipt of the said notice. The respondent failed to pay the amount within 15 days and gave an assurance for payment of the amount upto 15.03.07. The petitioner waited for the said period filed the complaint on 2.11.07 and assigned reasons in Para 4 and 5 of the complaint for condonation of delay as to why the petitioner has not filed the complaint within the stipulated time. The learned Magistrate is empowered to condone the delay as pere Proviso to clause (b) of Section 142 of the NI Act, which came into force on 6.2.2003.

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26. CRIMINAL PROCEDURE CODE, 1973 – Sections 329, 331 & 332
Trial of insane accused, resumption of – Court is required to record its satisfaction under Section 332 of the Code before proceeding with the trial that accused is ceased to be insane and is capable of making his defence.

State of Madhya Pradesh v. Dilip Bankar
Reported in 2008 (5) MPHT 53 (DB)

Held:

Under Section 332, Cr.P.C. if the accused appears again before the Court and the Court finds him capable of making his defence it shall proceed with the trial. Thus, the satisfaction of the Court on the basis of material placed on record is paramount consideration. The purpose of referring the several order sheets of Trial Court is that there was overwhelming materials before the learned Trial Court that accused was of unsound mind and he was undergoing treatment in Central Jail, Gwalior in Psychiatric Ward. The doctor of the Mental Hospital, Gwalior from time to time opined that accused is not fit to defend himself and, therefore, it was incumbent upon the learned Sessions Judge before proceeding with the trial before 11-1-2007 to record its satisfaction under Section 332, Cr.PC that accused is ceased to be insane and is capable of making his defence.

The word "considers" appearing in Section 332, Cr.PC empowers the Court not only to examine the Medical Certificate and also the doctor, if necessary, but, also should consider other factors and the accused should also be interrogated by the Court and only after due application of mind the Court should come to the conclusion that accused is capable of making of his defence. This power should be strictly complied with because it relates to personal liberty of accused. The aim and object of the provisions as to accused persons of unsound mind (Sections 328 to 332, Cr.PC) is that the accused who is of unsound mind should not be put to trial because he is unable to defend himself and, therefore, there must be a specific order of the Court recording a finding that insanity of the accused has been ceased and he is in fit mental condition to defend himself. In absence of any such finding, if the accused is put to trial, according to our firm view not only the conviction but the trial is also vitiated.

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***27. CRIMINAL PROCEDURE CODE, 1973 – Section 374 (2)**
N.D.P.S. ACT, 1985 – Section 8 r/w Section 20 (b) (iii) (b)
Appellant No. 1 was convicted for the charge that on search of his house 12 kg Ganja was found – Whereas appellant No.2 was convicted on the allegation that at the time of search he was present and weights, measures and Rs. 743/- were seized from him – Appellants challenged their conviction before High Court – Held, no evidence is produced that appellant No. 2 was also selling Ganja with appellant No. 1 – Merely his presence is not sufficient to prove

that he was dealing in Ganja – There is no evidence to connect complicity of appellant No. 2 with his offence – Defence story of appellant No. 2 that he suggested police officer not to use third degree methods against appellant No. 1 on account of which he has been implicated in this case – Cannot be said to be unreasonable – Conviction of appellant No. 2 set-aside – Appeal partly allowed.

Kuldeep Sahu & anr. v. State of M.P.

Reported in I.L.R. (2008) M.P. 2985

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28. **CRIMINAL PROCEDURE CODE, 1973 – Sections 378 & 386 Principles of law in deciding appeal against acquittal – Appellate Court may only overrule or otherwise disturb the trial Court's acquittal if it has "very substantial and compelling reasons" for doing so – Instances by way of illustration stated.**

Ghurey Lal v. State of Uttar Pradesh

Judgment dated 30.07.2008 passed by the Supreme Court in Criminal Appeal No. 155 of 2006, reported in (2008) 10 SCC 450

Held:

We deem it appropriate to deal with some of the important cases which have been dealt with under the 1898 Code by the Privy Council and by this Court. We would like to crystallize the legal position in the hope that the appellate courts do not commit similar lapses upon dealing with future judgments of acquittal.

The earliest case that dealt with the controversy in issue was *Sheo Swarup v. King Emperor, AIR 1934 PC 227 (2).* In this case, the ambit and scope of the powers of the appellate court in dealing with an appeal against acquittal has been aptly elucidated by the Privy Council. Lord Russell writing the judgment has observed as under: (at p. 230):

> "..the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses..."

The law succinctly crystallized in this case has been consistently followed by this Court. On proper analysis of the ratio and findings of this case, it is revealed that the findings of the trial court are based on the fundamental principles of the criminal jurisprudence. Presumption of innocence in favour of the accused further gets reinforced and strengthened by the acquittal of the

trial court. The appellate court undoubtedly has wide powers of re-appreciating and re-evaluating the entire evidence but it would be justified in interfering with the judgment of acquittal only when the judgment of the trial court is palpably wrong, totally ill-founded or wholly misconceived, based on erroneous analysis of evidence and non-existent material, demonstrably unsustainable or perverse.

The same principle has been followed in *Atley v. State of U.P. AIR 1955 SC 807* wherein the Court said: (AIR p. 809, para 5),

> "5. ...It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.
>
> It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal."

A Constitution Bench of this Court in *M.G. Agarwal v. State of Maharashtra AIR 1963 SC 200,* observed as under: (AIR pp. 205 & 208 paras 16 & 17),

> "There is no doubt that the power conferred by clause (a) which deals with an appeal against an order of acquittal is as wide as the power conferred by clause (b) which deals with an appeal against an order of conviction, and so, it is obvious that the High Court's powers in dealing with criminal appeals are equally wide whether the appeal in question is one against acquittal or against conviction. That is one aspect of the question. The other aspect of the question centres round the approach which the High Court adopts in dealing with appeals against orders of acquittal. In dealing with such appeals, the High Court naturally bears in mind the presumption of innocence in favour of an accused person and cannot lose sight of the fact that the said presumption is strengthened by the order of acquittal passed in his favour by the trial Court and so, the fact that the accused person is entitled for the benefit of a reasonable doubt will always be present in the mind of the High Court

when it deals with the merits of the case. As an appellate Court the High Court is generally slow in disturbing the finding of fact recorded by the trial Court, particularly when the said finding is based on an appreciation of oral evidence because the trial Court has the advantage of watching the demeanour of the witnesses who have given evidence. Thus, though the powers of the High Court in dealing with an appeal against acquittal are as wide as those which it has in dealing with an appeal against conviction, in dealing with the former class of appeals, its approach is governed by the overriding consideration flowing from the presumption of innocence. .....

The test suggested by the expression "substantial and compelling reasons" should not be construed as a formula which has to be rigidly applied in every case, and so, it is not necessary that before reversing a judgment of acquittal, the High Court must necessarily characterize the findings recorded therein as perverse.

The question which the Supreme Court has to ask itself, in appeals against conviction by the High Court in such a case, is whether on the material produced by the prosecution, the High Court was justified in reaching the conclusion that the prosecution case against the appellants had been proved beyond a reasonable doubt, and that the contrary view taken by the trial Court was erroneous. In answering this question, the Supreme Court would, no doubt, consider the salient and broad features of the evidence in order to appreciate the grievance made by the appellants against the conclusions of the High Court."

Ultimately on the basis of cases referred above and also in cases of *Khedu Mohton & Others v. State of Bihar, (1970) 2 SCC 450, Shivaji Sahabrao Bobade & Another v. State of Maharashtra, (1973) 2 SCC 793, Lekha Yadav v. State of Bihar, (1973) 2 SCC 424, Khem Karan v. State of U.P. AIR 1974 SC 1567, K. Gopal Reddy v. State of A.P. (1979) 1 SCC 355, Tota Singh & Another v. State of Punjab, (1987) 2 SCC 529, Ram Kumar v. State of Haryana, 1995 Supp. (1) SCC 248, Chandrappa & Others v. State of Karnataka, (2007) 4 SCC 415,* the following principles emerge :–

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

   A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of the Ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive

2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused.

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

Period of anticipatory bail – Cognizance of offences under Sections 406 and 420 r/w/s 34 IPC was taken upon the complaint – Applicants granted anticipatory bail for a period of 60 days – Petition under Section 482 of Code filed to quash proceedings – High Court stayed further proceedings – Prayer made to extend the period of anticipatory bail till decision of petition under Section 482 of Code – Held, anticipatory bail orders cannot be kept in abeyance or cannot be extended for indefinite period – In case petition under Section 482 of Code is dismissed, applicants can re-agitate prayer for extension of anticipatory bail within period of 10 days from the date of order. (1980) 4 SCC 286 (ref.)

Gopichand Khatri & ors. v. Sushil Kumar Pamnani & anr.

Reported in I.L.R. (2008) M.P. NOC 85

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***30. EVIDENCE ACT, 1872 – Sections 3 & 157**

INDIAN PENAL CODE, 1860 – Section 302

(i) Reliability of hostile witness – The evidence of a hostile witness cannot be treated as effaced or washed off from the record altogether, but the same can be accepted to the extent the version of such witness is found to be dependeable on a careful scrutiny thereof.

(ii) Eye-witness, who is a son of deceased was present and witnessed the occurrence of deadly assault on his parents by appellant – Corroborated from F.I.R. lodged by him and also corroborated from testimony of witnesses to whom the incident is narrated soon after the incident – No reason why he would twice depose against appellant – It does not appeal to reason that he would falsely implicate the appellant who is real uncle – Witness cannot be disbelieved merely on ground that he has been declared hostile by the prosecution – Conviction and sentence under Section 302 affirmed – Appeal dismissed.

(iii) The evidence of such witnesses to whom the incident is narrated soon after the incident is admissible as corroborative evidence under Section 157 of the Act.

Ramsiya v. State of M.P.

Reported in I.L.R. (2008) M.P. 3010

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*31. EVIDENCE ACT, 1872 – Section 9
INDIAN PENAL CODE, 1860 – Sections 395 & 397
CRIMINAL PROCEDURE CODE, 1973 – Section 452

(i) Test identification parade – Dacoity – Identification parade after more than 2 months of incident – No evidence lead by prosecution that after arrest till holding of identification parade, investigating agency observed requisite precautions to hide identity of accused – Witnesses did not disclose personality, description and special feature of accused in F.I. R. – Held, evidence of solitary witness cannot be relied upon for fixing the identity of accused – Appellants acquitted – Appeal allowed.

(ii) Test identification of articles – Dacoity – Recovery of articles from appellants – Cash without any specific mark of identification seized from appellants – No evidence adduced that other seized articles purchased from looted cash – Held, prosecution failed to prove its case beyond all reasonable doubts against appellants – Appellants acquitted – Appeal allowed.

(iii) Disposal of property – Appellant denied seizure of property from himself – He failed to lead any evidence to establish entitlement to have possession of property – Held, for return of property the appellant has to claim property and establish that he is the person entitled for possession – Appellant not entitled for property – Cash amount directed to be returned to the society instead of complainant who was employee of that society – Judgment of trial court amended.

Mahendra Singh v. State of M.P.

Reported in I.L.R. (2008) M.P. 2989

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*32. **EVIDENCE ACT, 1872 – Section 9**
CRIMINAL PROCEDURE CODE, 1973 – Sections 162
Test identification parade – Test identification parade conducted by police officer is not admissible in evidence – Any statement made by identifying witness to the police officers during investigation would be hit by Section 162 of Code and will not be admissible in evidence – Identification parade of the accused was to be conducted by some Magistrate.
State of M.P. v. Tidda @ Sonu
Reported in I.L.R. (2008) M.P. NOC 90

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*33. **EVIDENCE ACT, 1872 – Section 108**
Presumption under Section 108 of the Evidence Act, scope of – Presumption is confined only to presuming the factum of death of the person whose life or death is in issue – There can be no presumption as to date or time of death under Section 108 of the Act.
[See Darshan Singh v. Gujjar Singh, (2002) 2 SCC 62]
National Insurance of Co. Ltd. v. Shantidevi and others
Reported in 2008 (4) MPLJ 328

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34. **EVIDENCE ACT, 1872 – Section 113-A**
INDIAN PENAL CODE, 1860 – Section 306
Presumption as to abetment of suicide – The Court has to see the nature of cruelty and all other circumstances of the case with the fact of suicide of woman within 7 years and cruelty by husband.
No direct evidence or other circumstances to establish that mother-in-law either aided or instigated her to commit suicide – Evidence disclosed that the deceased was unhappy as her husband was illiterate and poor and mother-in-law used to ask her to run hand-driven flour mill – Thus the presumption u/s 113-A of Evidence Act cannot be drawn.
Rajbabu & Anr. v. State of M.P.
Reported in AIR 2008 SC 3212

Held:

In the instant case there is no direct evidence to establish that the appellant either aided or instigated the deceased to commit suicide or entered into any conspiracy to aid her in committing suicide. In the absence of direct evidence the prosecution has relied upon Section 113-A of the Evidence Act, under which the court may presume on proof of circumstances enumerated therein, and having regard to all the other circumstances of the case, that the suicide had been abetted by the accused. The explanation to Section 113-A further clarifies

that cruelty shall have the same meaning as in Section 498-A of the IPC. Under Section 113-A of the Evidence Act, the prosecution has first to establish that the woman concerned committed suicide within a period of seven years from the date of her marriage and that her husband or any relative of her husband had subjected her to cruelty. Section 113-A gives a discretion to the court to raise such a presumption, having regard to all the other circumstances of the case, which means that where the allegation is of cruelty it must consider the nature of cruelty to which the woman was subjected, having regard to the meaning of the word "cruelty" in Section 498-A IPC. The mere fact that a woman committed suicide within seven years of her marriage and that she had been subjected to cruelty by her husband or any relative of her husband, does not automatically give rise to the presumption that the suicide had been abetted by her husband or any relative of her husband. The court is required to look into all the other circumstances of the case. One of the circumstances which has to be considered by the court is whether the alleged cruelty was of such nature as was likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health of the woman. The law has been succinctly stated in *Ramesh Kumar v. State of Chhattisgarh reported in (2001) 9 SCC 618* wherein this Court observed:

> "12. This provision was introduced by the Criminal Law (Second) Amendment Act, 1983 with effect from 26-12-1983 to meet a social demand to resolve difficulty of proof where helpless married women were eliminated by being forced to commit suicide by the husband or in-laws and incriminating evidence was usually available within the four corners of the matrimonial home and hence was not available to anyone outside the occupants of the house. However, still it cannot be lost sight of that the presumption is intended to operate against the accused in the field of criminal law. Before the presumption may be raised, the foundation thereof must exist. A bare reading of Section 113-A shows that to attract applicability of Section 113-A, it must be shown that (i) the woman has committed suicide, (ii) such suicide has been committed within a period of seven years from the date of her marriage, (iii) the husband or his relatives, who are charged had subjected her to cruelty. On existence and availability of the above said circumstances, the court may presume that such suicide had been abetted by her husband or by such relatives of her husband. Parliament has chosen to sound a note of caution. Firstly, the presumption is not mandatory; it is only permissive as the employment of expression 'may presume' suggests. Secondly, the existence and availability of the abovesaid three circumstances shall not, like a formula, enable the presumption being drawn; before the

presumption may be drawn the court shall have to have regard to `all the other circumstances of the case'. A consideration of all the other circumstances of the case may strengthen the presumption or may dictate the conscience of the court to abstain from drawing the presumption. The expression — 'the other circumstances of the case' used in Section 113-A suggests the need to reach a cause-and-effect relationship between the cruelty and the suicide for the purpose of raising a presumption. Last but not the least, the presumption is not an irrebuttable one. Inspite of a presumption having been raised the evidence adduced in defence or the facts and circumstances otherwise available on record may destroy the presumption. The phrase 'may presume' used in Section 113-A is defined in Section 4 of the Evidence Act, which says — 'Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.'

In *State of W.B. v. Orilal Jaiswal reported in (1994) 1 SCC 73* this Court observed:

"15. We are not oblivious that in a criminal trial the degree of proof is stricter than what is required in a civil proceedings. In criminal trial however intriguing may be facts and circumstances of the case, the charges made against the accused must be proved beyond all reasonable doubts and the requirement of proof cannot lie in the realm of surmises and conjectures. The requirement of proof beyond reasonable doubt does not stand altered even after the introduction of Section 498-A IPC and Section 113-A of the Indian Evidence Act. Although, the court's conscience must be satisfied that the accused is not held guilty when there are reasonable doubts about the complicity of the accused in respect of the offences alleged, it should be borne in mind that there is no absolute standard for proof in a criminal trial and the question whether the charges made against the accused have been proved beyond all reasonable doubts must depend upon the facts and circumstances of the case and the quality of the evidences adduced in the case and the materials placed on record. Lord Denning in *Bater v. Bater (1950) 2 All ER 458 (All ER at p. 459)* has observed that the doubt must be of a reasonable man and the standard adopted must be a standard adopted by a reasonable and just man for coming to a conclusion considering the particular subject-matter."

Having regard to the principles aforesaid, we may now advert to the fact of the present case. Here is a case where the evidence on record discloses that the deceased wanted to be married in a literate family. She was not happy with the fact that her husband was illiterate and also with the status and condition of the family of her husband. She was also required to do some domestic work as the family was poor, for which she was not happy. The deceased was of the view point that her life has been spoiled by marrying Appellant No. 1. The letter reflects the attitude of the in-laws of the deceased towards the deceased. In the said letter there was no reference of any act or incident whereby the appellants were alleged to have committed any willful act or omission or intentionally aided or instigated the deceased to commit suicide.

On such slender evidence, therefore, we are not persuaded to invoke the presumption under Section 113-A of the Evidence Act to find the appellant guilty of the offence under Section 306 IPC.

The next question which remains for our consideration is whether an offence is made out under section 498A of IPC. Though the letter allegedly written by the deceased mentions the fact that the attitude of the family was not good towards the deceased and she was not treated well but there is no mentioned about any of such incident. PW1 and PW3 in their statements have emphasized that the mother-in-law of the deceased used to ask the deceased to run hand driven flourmill to which she was not habitual. In the year 1988 when the abovementioned incident occurred, the hand driven flourmills were generally used by women in the poor families in the villages and even till today one may find use of the same in some villages in the country. Thus asking one to run the same at that point of time may not amount to an act of cruelty.

In the said statements there is also a mention of an incident were the deceased had been beaten by her husband. The mother-in-law (appellant No. 2) cannot be held liable for the said act; rather there is evidence on record of PW3 who had stated that appellant No. 2 had once restrained her son. Though in the statement of PW 1 there is mention of one or two incident when the present appellant had beaten the deceased but there appears to be possibility of embellishment. The father of the deceased (PW2), in his statement has not made any statement regarding cruelty being committed on his daughter in her in-laws house. After analyzing the said evidence and the statements made by PW1 and PW3 we are of the opinion that the benefit of doubt should be granted to appellant No. 2.

We, therefore, set aside the conviction under Sections 306 and 498A of the IPC passed against the appellant No. 2 and acquit her granting her benefit of doubt. The appeal is allowed in so far as appellant No. 2 is concerned. The appeal has abated in so far as appellant No. 1 is concerned. The appellant No. 2 is already on bail. She is released from the terms of her bail bonds.

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35. EVIDENCE ACT, 1872 – Section 115

The doctrine of promissory estoppel may apply even in relation to Statute/Notification – The aforesaid fact is beyond any dispute but it depends on nature of statute.

Tamil Nadu Electricity Board & Anr. v. Status Spining Mills Ltd. & Anr.

Reported in AIR 2008 SC 2838

Held:

The Division Bench of the High Court had rightly or wrongly opined that the doctrine of promissory estoppel has no application. The fact that the said doctrine may apply even in relation to a statute is beyond any dispute as has been held by this Court in *Mahabir Vegetable Oils (P) Ltd. and another v. State of Haryana and others, (2006) 3 SCC 620, A.P. Steel Re-Rolling Mill Ltd. v. State of Kerala, (2007) 2 SCC 725, Pawan Alloys and Casting Pvt. Ltd. v. U.P. State Electricity Board and others, (1997) 7 SCC 251 and Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO and others, (2007) 5 SCC 447.*

Strong reliance has been placed by *Mr. Parasarn on Shah v. Shah, 2002 Q.B. 35 : (2001) 4 All ER 138* to contend that the doctrine of promissory estoppel is applicable even in the field of the statute. Therein, it was held:

> "In the *Godden case, 1997 NPC 1* an attempt was made to defeat by an estoppel the provision in section 2(1) of the 1989 Act that "a contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are being exchanged, in each". Simon Brown LJ stated that the argument that "although Parliament has dictated that a contract involving the disposition of land made otherwise than in compliance with section 2 is void, the defendants are not allowed to say so" was "an impossible argument". Simon Brown LJ regarded the principle stated in Halsbury's Laws as a "cardinal rule" the "absolute nature" of which cannot be "outflanked by one of the equitable techniques or types of estoppels sought to be deployed in the present case". Thorpe LJ and Sir John Balcombe agreed with Simon Brown LJ.
>
> *Yaxley v Gotts, (2000) Ch 162* was also concerned with section 2 of the 1989 Act. An oral agreement purporting to grant an interest in land, though void and unenforceable under section 2, was held still to be enforceable on the basis of a constructive trust under section 2(5) which provides that "nothing in this section affects the creation or operation of resulting, implied or constructive trusts". Robert Walker LJ stated, at p 175:

"Parliament's requirement that any contract for the disposition of an interest in land must be made in a particular documentary form, and will otherwise be void, does not have such an obviously social aim as statutory provisions relating to contracts by or with moneylenders, infants, or protected tenants. Nevertheless it can be seen as embodying Parliament's conclusion, in the general public interest, that the need for certainty as to the formation of contracts of this type must in general outweigh the disappointment of those who make informal bargains in ignorance of the statutory requirement. If an estoppel would have the effect of enforcing a void contract and subverting Parliament's purpose it may have to yield to the statutory law which confronts it, except so far as the statute's saving for a constructive trust provides a means of reconciliation of the apparent conflict." Clarke LJ stated, at p 182, that where a particular estoppel relied upon would offend the public policy behind a statute it is necessary to consider the mischief at which the statute is directed. Where a statute had been enacted as the result of the recommendations of the Law Commission it is appropriate to consider those recommendations. He stated that in his opinion: "the contents of that report [Transfer of Land: Formalities for Contracts of Sale etc of Land (1987) (Law Com No 164)] will be of the greatest assistance in deciding whether or not the principles of particular types of estoppel should be held to be contrary to the public policy underlying the Act. In this regard it seems to me that the answer is likely to depend upon the facts of the particular case." Beldam LJ stated, at p 191, that "The general principle that a party cannot rely on an estoppel in the face of a statute depends upon the nature of the enactment, the purpose of the provision and the social policy behind it."

The said decision has also been referred to *Actionstrength Ltd. (trading as Vital Resources) v. International Glass Engineering IN.GL.EN SpA and another, 2003 (2) All. E.R. 615 at 619,* but therein it was held that the doctrine of promissory estoppel may not be applicable in case of a statute. As would appear from the discussions hereinafter, applicability of the said doctrine would depend upon various factors including the nature and purport of the Statute, the object it seeks to achieve, the purpose for grant of concession/exemption etc.

It, therefore, depends on the nature of the statute as also applicability of the doctrine, as noticed hereinabove.

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36. HINDU MARRIAGE ACT, 1955 – Section 12

Petition for annulment of marriage under Section 12 (1) (d) on the ground that the respondent was pregnant at the time of marriage – Period of limitation, reckoning of – Period of limitation for the petition is one year – The starting point is from the date of marriage and not from the date of discovery of the fact alleged.

Vijay Jaiswal v. Smt. Nisha Jaiswal

Reported in 2008 (5) MPHT 263 (DB)

Held :

The main question for consideration in view of the uncontroverted facts is about the period of limitation, from which date the period of limitation of one year has to be computed, with effect from the date of marriage or with effect from the date of discovery of the fact that wife was pregnant from someone else at the time of performance of marriage. Section 12 (1) (d) of the Act provides exigency in case respondent was at the time of marriage pregnant by some person other than the husband. Such marriage shall be voidable and may be annulled by decree of nullity on such ground. Sub-section (2) of Section 12 contains non-obstante clause and provides for limitation and certain other conditions as safeguards to the wife. Since, we are concerned with Section 12 (1) (d), the non-obstante protection is provided in clause (b) of sub-section (2) of Section 12, firstly that the husband was at the time of marriage was ignorant of the fact of pregnancy from someone else at the time of marriage, secondly the proceedings have been instituted in the case of marriage solemnized after commencement of the Act within one year from the date of marriage and third requirement is that the marital intercourse with the consent of petitioner has not taken place since the discovery by the petitioner of the existence of the factum of pregnancy by some other person.

Plain reading of three requirements of clause (b) of sub-section (2) of Section 12 of the Act makes it clear that all three have to co-exist at the same time. Husband must not be aware at the time of performance of marriage of the factum of pregnancy from someone else, and in case the marriage has been solemnized after commencement of the Act, the application has to be filed within one year from the date of marriage, and further after the date of discovery of the fact by petitioner marital intercourse with the consent of petitioner has not taken place as would constitute waiver of the ground. Sub-clause (iii) of clause (b) of sub-section (2) of Section 12 is not independent provision and it has to coexist with requirement of other sub-clauses of clause (b) of sub-section (2) of Section 12 of the Act. The provision of sub-clause (iii) of Section 12 (2) (b) has no effect on the question of limitation dealt with in sub-clause (ii) of clause (b) of sub-section (2) of Section 12.

A Division Bench of this Court in *Nandkishor v.Smt. Munnibai, AIR 1979 MP 45* has held that petition for annulling of marriage under Section 12 (1) (d) of the Act has to be preferred as provided in Section 12 (2) (b) (ii) of the Act within

one year from the date of marriage. Section 5 of Limitation on Act is not applicable to such: —

> "Yet another submission in this regard which remains to be considered is this. Section 12 (2) (b) (ii) of the Act requires that the petition should be preferred within one year of the date of marriage. Counsel urges that for computing the period of one year the starting point should not be the date of marriage but the date when the fact of pregnancy was revealed to the appellant. According to him, in construing this clause, equitable considerations applicable to statutes of limitation may be invoked. The Counsel invited our attention to Section 17 of the Indian Limitation Act and urged that the time should not start running until the fraud is discovered. It is not the period of limitation which the Act prescribed in the sense the statutes of limitation do. All that it says is that action beyond specified period cannot be founded upon certain grounds. *In Vellinayagi v. Subramaniam, AIR 1969 Mad 479,* Section 5 of the Limitation Act has not been held applicable to petition under Section 12 of the Hindu Marriage Act. Considering like provisions under the *Matrimonial Cause Act, 1937, the Court of Appeal in Chaplin v. Chaplin, (1948) 2 ALL ER,408* held that such equitable principles could not be applied to matrimonial causes, Provisions of Section 7 (1) of the Matrimonial Causes Act, 1937, appear to be practically similar to those contained in clause (b) of Section 12 (2) of the Act. What has been observed in that case is this: -
>
> "One must appreciate the subject matter with which it is dealing viz., proceedings to alter the status of the parties, the result of which will affect the children of the marriage, and that in all the cases specified in the sub-section. Parliament has thought fit to prescribe in the clearest possible language that the Court shall not grant a decree unless it is satisfied that proceedings were instituted within a year of the date of the marriage."
>
> It is pertinent to note that in earlier part of the Act, i.e., Section 12 (2) (a) (i), it is specifically mentioned that the action should be launched within one year of the discovery of the fraud. We cannot read such words even by implication while construing sub-section (2) (b) (ii) of Section 12. That course is not permissible. This contention of the learned Counsel also fails."

Similar is the view taken in *Savlaram Kacharoo Mhatre v. Yeshodabai Savlaram Mhatre, AIR 1962 Bombay 190 and in Vellinayagi v. T. Subramaniam, AIR 1969 Madras 479.*

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***37. HINDU MARRIAGE ACT, 1955 – Section 13 (i-a)**
Cruelty – What amounts to? Wife levelling allegation with respect to demand of dowry harassment, torture by husband and potency of husband – There is no evidence to draw inference about such allegation – False allegations causes grave mental agony and pain amounts to cruelty.
Vandhana Gupta (Smt.) v. Rajesh Gupta
Reported in I.L.R. (2008) M.P. 3213

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***38. INDIAN PENAL CODE, 1860 – Section 300 Exception 4**
Murder or culpable homicide not amounting to murder – Appellant No. 4 had scuffled with deceased and appellant No. 2 picked up a spade and dealt repeated blows from the blunt side on the head of deceased – Lacerated wounds with depressed fractures of skull bone and laceration of brain found – Lower jaw was also broken at three places – Held, for bringing in operation with Exception 4 of Section 300, it has to be established that act was committed without premeditation in a sudden fight in heat of passion upon a sudden quarrel without offender taking undue advantage and having not acted in cruel or unusual manner – Appellant No. 2 has caused death of deceased with intention of causing death – Conviction of appellant No. 2 u/s 302 upheld.
Tok Singh v. State of M.P.
Reported in I.L.R. (2008) M.P. 2980

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39. INDIAN PENAL CODE, 1860 – Sections 300, 326 and 149
Murder Trial – No specific charge u/s 149 of the Code but ingredients of the offence implicit and patent in charges framed – No prejudice caused.
Order of High Court that in the absence of charge u/s 302 r/w/s/ 149 IPC accused could not have been convicted u/s 302 of the Code – Liable to be set aside.
Dumpala Chandra Reddy v. Nimakayala Balireddy and Ors.
Reported in AIR 2008 SC 3069

Held:

Where in a murder trial no charge was framed under S. 149 (S. 300 read with S. 149), However, the charges as framed made it clear that Court specified that accused persons were members of unlawful assembly and in prosecution

of the common object of such assembly, i.e. in order to commit murder of deceased, committed offence and at that time they were armed with daggers etc. to bring in the application of Section 148 and in charge No. 3 there was a specific reference to the transactions, as mentioned in the first charge, and the object to commit murder by hacking on the body of the deceased with daggers and casuing his intentional death and thereby committing offence punishable under Section 302 IPC, the charge in relation to offence punishable under Section 149 IPC was thus, not only implicit but also patent in the charges and no prejudice could have been caused to accused due to non-framing of charge under S. 300 read with S.149. Consequently, order of High Court that in the absence of charge under Section 302 read with Section 149 IPC, they could not have been convicted under Section 302 but that each would be liable for conviction for offence punishable under Section 326 would be liable to be set aside. Further, if conviction under S. 300 read with S.149 could not have been made in the absence of charge, conviction in terms of S.326 also could not be made.

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***40. INDIAN PENAL CODE, 1860 – Section 302**
CRIMINAL PROCEDURE CODE, 1973 – Section 154
POLICE REGULATIONS – Regulation 744

(i) Murder – Appellants assaulted deceased with deadly weapons – Evidence of eye witness corroborated by report of F.S.L. – In doctors report appellants were not shown as assailants – Held, primary duty of doctor is to treat a patient and not to find out by whom the injury was caused – Non-disclosure of names to doctor is of no consequence – Conviction and sentence affirmed – Appeal dismissed.

(ii) F.I.R dictated by I.O. to another Sub-Inspector and scribe not examined in court – Held, F.I.R. shall be reduced to writing by officer-in-charge of police station to whom the report was made or can be recorded under his direction – There is no requirement to examine scribe – Case of prosecution not vitiated on account of flaw in F.I.R. or procedure adopted for recording F.I.R. – Regulation 744 is not applicable in the matters relating to the recording of F.I.R.

Ashok & ors. v. State of M.P.
Reported in I.L.R. (2008) M.P. 2997

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41. INDIAN PENAL CODE, 1860 – Sections 302 & 304
What should be the appropriate conviction in single blow cases – Legal position reiterated.

Bangaru Venkata Rao v. State of Andhra Pradesh
Judgment dated 05.08.2008 passed by the Supreme Court in Criminal Appeal No. 885 of 2005, reported in (2008) 9 SCC 707

Held:

In *Pappu v. State of M.P., (2006) 7 SCC 391* it was inter- alia observed as follows:

> "14. It cannot be laid down as a rule of universal application that whenever one blow is given, Section 302 IPC is ruled out. It would depend upon the weapon used, the size of it in some cases, force with which the blow was given, part of the body on which it was given and several such relevant factors."

In *Ramkishan v. State of Maharashtra, (2007) 3 SCC 89* at para 8 it was observed as follows:

> "8. The assault undisputedly was made in the course of sudden quarrel, without premeditation and without the accused taking any undue advantage."

The residuary plea [relates to the] applicability of Exception 4 of Section 300 IPC.

For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception

4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In *Kikar Singh v. State of Rajasthan, AIR 1993 SC 2426* it was held that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that by using the blows with the knowledge that they were likely to cause death, he had taken undue advantage. In the instant case blows on vital parts of unarmed persons were given with brutality. The abdomens of two deceased persons were ripped open and internal organs had come out. In view of the aforesaid factual position, Exception 4 to Section 300 I.P.C. has been rightly held to be inapplicable.

In this case it was established that there was sudden quarrel between the accused (husband) and the deceased (wife) and single blow of a knife was given in the left side of the abdomen. Considering the factual background, conviction altered from Section 302 IPC to Section 304 Part I of IPC and custodial sentence of 10 years imposed.

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42*. INDIAN PENAL CODE, 1860 – Sections 302 & 304 Part II

(i) Murder – Medical Evidence – Witnesses stated that injury on head was caused by lathi – In M.L.C., doctor opined that injury was incised wound and was caused by sharp edged weapon – In postmortem, doctor found lacerated wound – Held, deceased was in serious condition when he was brought to hospital – Doctor hastily and cursorily examined his injuries whereas autopsy doctor examined injuries minutely – Evidence of

autopsy doctor more reliable if examined in juxtaposition of evidence of eye witnesses – No discrepancy in oral and medical evidence.

(ii) **Murder or culpable homicide not amounting to murder – Appellants went to house of deceased and admonished him for his making false allegation against acquitted accused of theft of buffalos – This led to hot altercation and appellants gave lathi blow on head and shoulder of deceased – Held, only one injury found on head of deceased – Difficult to hold that who caused injury on head as witnesses have stated that both appellants each had dealt one lathi blow on head – None of the doctors have stated that injury was sufficient to cause death – It can be held that appellants No. 2 and 3 knew that by their acts they were likely to cause his death – Convicted u/s 304 Part II – Sentenced to undergo 5 years R.I. – Appeal partly allowed.**

Bhaiyalal & ors. v. State of M.P.
Reported in I.L.R. (2008) M.P. 3309

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43. **INDIAN PENAL CODE, 1860 – Section 304 Part II and 304-A Applicability of Section 304 Part II of IPC or Section 304-A of IPC – When accused pushed down the deceased from hill – Presence of intention or knowledge – Section 304 Part II would attract; in contrary Section 304-A would attract.**

Girish Singh v. State of Uttaranchal
Reported in AIR 2008 SC 3136

Held:

Background facts in a nutshell are as follows:

Sageer Ansari (hereinafter referred to as the 'deceased') was a carpenter, who used to live in Hotel Hari Om in Uttarkashi. On 27.3.2005, he was coming from Hari Om Hotel towards Uttarkashi town. Accused/appellant Girish Singh was coming from opposite direction towards Sageer Ansari-deceased. When both of them reached near Tambakhani they had some altercations between them. Suddenly, accused-appellant Girish Singh pushed deceased Sageer Ansari from the road. Consequently, Sageer Ansari fell down from the hill and suffered injuries due to the fall from Uttarkashi - Tehri Road. The incident took place at 1.00 p.m. PW3 Israil Mian, brother of the deceased, and PW4 Mazhar Ansari, son of the deceased, who were following Sageer Ansari (deceased), witnessed the incident. The two rushed to the place of incident and took the injured to the hospital where he succumbed to the injuries suffered by him in the incident. PW3 Israil Mian, brother of the deceased, lodged first information report (Ext. A-3) with the police station. Investigation was undertaken and on completion of investigation charge sheet was filed. As accused abjured guilt, trial was held.

Placing reliance on the evidence of two eye witnesses i.e. Israil Mian (PW3) and Mazhar Ansari (PW4) (brother and son of the deceased respectively), the Trial Court found the accused-appellant guilty and convicted him and imposed sentence accordingly.

In appeal before the High Court the stand of the accused was that this in not a case where Section 304 Part II IPC is applicable. On the other hand, this is a case where even if the prosecution version is accepted in toto, it would, at the most, an offence punishable under Section 304A IPC. Another plea related to acceptance of the evidence of PWs 3 and 4 on the ground that they are related to the deceased. Both the pleas were rejected and appeal was dismissed. The stand taken before the High Court was reiterated by the learned counsel for the appellant.

In response, learned counsel for the respondent-State supported the judgments of the Trial Court as upheld by the High Court.

The plea relating to relative's evidence has no substance, when such evidence has credence it can be acted upon.

Coming to the plea of the applicability of Section 304-A, it is to be noted that the said provision relates to death caused by negligence. Section 304-A applies to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death. The provision relates to offences outside the range of Sections 299 and 300 IPC. It applies only to such acts which are rash and negligent and are directly the cause of death of another person. Rashness and negligence are essential elements under Section 304-A. It carves out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide under Section 299 or murder in Section 300 IPC. Doing an act with the intent to kill a person or knowledge that doing an act was likely to cause a person's death is culpable homicide. When the intent or knowledge is the direct motivating force of the act, Section 304-A IPC has to make room for the graver and more serious charge of culpable homicide.

In order to be encompassed by the protection under Section 304-A there should be neither intention nor knowledge to cause death. When any of these two elements is found to be present, Section 304-A has no application.

When the background facts are considered in the light of the legal principles set out above, the inevitable conclusion is that stand of the appellant is clearly unsustainable.

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44. INDIAN PENAL CODE, 1860 – Section 304-A
WORDS & PHRASES:
Meaning of words 'negligence' and 'recklessness'.
The truck was being driven at very high speed carrying more than 50 persons – Conviction on account of rash and negligent driving is correct and accused does not deserve to be dealt with leniently.

Kuldeep Singh v. State of Himachal Pradesh
Reported in AIR 2008 SC 3062

Held:

Section 304-A IPC applies to cases where there is no intention to cause death and no knowledge that the act done, in all probabilities, will cause death. This provision is directed at offences outside the range of Sections 299 and 300 IPC. Section 304-A applies only to such acts which are rash and negligent and are directly the cause of death of another person. Negligence and rashness are essential elements under Section 304-A

What constitutes negligence has been analysed in *Halsbury's Laws of England (4th Edition) Volume 34* paragraph 1 (para 3) as follows:

> "Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence, where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property. The degree of care required in the particular case depends on the surrounding circumstances, and may vary according to the amount of the risk to be encountered and to the magnitude of the prospective injury. The duty of care is owed only to those persons who are in the area of foreseeable danger, the fact that the act of the defendant violated his duty of care to a third person does not enable the plaintiff who is also injured by the same act to claim unless he is also within the area of foreseeable danger. The same act or omission may accordingly in some circumstances involve liability as being negligent although in other circumstances it will not do so. The material considerations are the absence of care which is on the part of the defendant owed to the plaintiff in the circumstances of the case and damage suffered by the plaintiff, together with a demonstrable relation of cause and effect between the two".

In this context the following passage from Kenny's Outlines of Criminal Law, 19th Edition (1966) at page 38 may be usefully noted :

"Yet a man may bring about an event without having adverted to it at all, he may not have foreseen that his actions would have this consequence and it will come to him as a surprise. The event may be harmless or harmful, if harmful, the question rises whether there is legal liability for it. In tort, (at common law) this is decided by considering whether or not a reasonable man in the same circumstances would have realised the prospect of harm and would have stopped or changed his course so as to avoid it. If a reasonable man would not, then there is no liability and the harm must lie where it falls. But if the reasonable man would have avoided the harm then there is liability and the perpetrator of the harm is said to be guilty of negligence. The word `negligence' denotes, and should be used only to denote, such blameworthy inadvertence, and the man who through his negligence has brought harm upon another is under a legal obligation to make reparation for it to the victim of the injury who may sue him in tort for damages. But it should now be recognized that at common law there is no criminal liability for harm thus caused by inadvertence. This has been laid down authoritatively for manslaughter again and again. There are only two states of mind which constitute mens rea and they are intention and recklessness. The difference between recklessness and negligence is the difference between advertence and inadvertence they are opposed and it is a logical fallacy to suggest that recklessness is a degree of negligence The common habit of lawyers to qualify the word "negligence" with some moral epithet such as 'wicked' 'gross' or 'culpable' has been most unfortunate since it has inevitably led to great confusion of thought and of principle. It is equally misleading to speak of criminal negligence since this is merely to use an expression in order to explain itself."

"Negligence", says the Restatement of the Law of Torts published by the American Law Institute (1934) Vol. I. Section 28 "is conduct which falls below the standard established for the protection of others against unreasonable risk of harm". It is stated in Law of Torts by Fleming at page 124 (Australian Publication 1957) that this standard of conduct is ordinarily measured by what the reasonable man of ordinary prudence would do under the circumstances. In *Director of Public Prosecutions v. Camplin (1978) 2 All ER 168* it was observed by Lord Diplock that "the reasonable man" was comparatively late arrival in the laws of provocation. As the law of negligence emerged in the first half of the 19th century it became the anthropomorphic embodiment of the standard of care required by law. In order to objectify the law's abstractions like "care"

"reasonableness" or "foreseeability" the man of ordinary prudence was invented as a model of the standard of conduct to which all men are required to conform.

In *Syed Akbar v. State of Kamataka, (1980) 1 SCC 30,* it was held that "where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. As pointed out by *Lord Atkin in Andrews v. Director of Public Prosecutions (1937) 2 All ER 552* simple lack of care such as will constitute civil liability, is not enough; for liability under the criminal law a very high degree of negligence is required to be proved. Probably, of all the epithets that can be applied 'reckless' most nearly covers the case."

According to the dictionary meaning 'reckless' means 'careless', 'regardless' or heedless of the possible harmful consequences of one's acts'. It presupposes that if thought was given to the matter by the doer before the act was done, it would have been apparent to him that there was a real risk of its having the relevant harmful consequences; but, granted this, recklessness covers a whole range of states of mind from failing to give any thought at all to whether or not there is any risk of those harmful consequences, to recognizing the existence of the risk and nevertheless deciding to ignore it. In *R. v. Briggs (1977) 1 All ER 475* it was observed that a man is reckless in the sense required when he carries out a deliberate act knowing that there is some risk of damage resulting from the act but nevertheless continues in the performance of that act.

In *R. v. Caldwell, (1981) 1 All ER 961,* it was observed that: –

> "Nevertheless, to decide whether someone has been 'reckless', whether harmful consequences of a particular kind will result from his act, as distinguished from his actually intending such harmful consequences to follow, does call for some consideration of how the mind of the ordinary prudent individual would have reacted to a similar situation. If there were nothing in the circumstances that ought to have drawn the attention of an ordinary prudent individual to the possibility of that kind of harmful consequence, the accused would not be described as 'reckless' in the natural meaning of that word for failing to address his mind to the possibility; nor, if the risk of the harmful consequences was so slight that the ordinary prudent individual on due consideration of the risk would not he deterred from treating it as negligible, could the accused be described as reckless in its ordinary sense, if, having considered the risk, he decided to ignore it. (In this connection the gravity of the possible harmful consequences would be an important factor. To endanger life must be one of the most grave). So, to this extent, even if one ascribes to 'reckless' only the restricted meaning adopted by the Court of Appeal in

> Stephenson and Briggs, of foreseeing that a particular kind of harm might happen and yet going on to take the risk of it, it involves a test that would be described in part as 'objective' in current legal jargon. Questions of criminal liability are seldom solved by simply asking whether the test is subjective or objective."

The decision of *R. v Caldwell* (supra) has been cited with approval in R v. Lawrence (1981) 1 All ER 974 and it was observed that: –

> "– Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting 'recklessly' if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognized that there was such risk, he nevertheless goes on to do it".

The above position was highlighted in *Naresh Giri v. State of M.P., (2008) 1 SCC 791.*

The evidence of PWs 1, 3 & 4 clearly show that the vehicle was being driven at a very high speed. Evidence on record show that more than 50 persons were there in the truck and the appellant was driving the same at a very high speed. One of the witnesses has stated that the truck was being driven as if it was an aeroplane. Therefore, the conviction as recorded cannot be faulted.

Coming to the question of sentence, in *Dalbir Singh v. State of Haryana (2000) 5 SCC 82* it has been stated as follows: –

> ".....While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the

offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles."

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45*. **INDIAN PENAL CODE, 1860 – Sections 306 & 107**
Abetment to commit suicide – Abetment of suicide under Section 306 involves a mental process of instigating a person or intentionally aiding that person in doing a thing – More active role which can be described as instigating or aiding doing of a thing is thus required before a person can be said to be abetting suicide – Cruel or insulting behaviour cannot be taken as an act of abetting suicide – Ingredients of Section 306 IPC not established – Conviction of accused found to be improper.
Radha (Smt.) v. State of M.P.
Reported in I.L.R. (2008) M.P. 3333

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46. **INDIAN PENAL CODE, 1860 – Section 307**
Offence under Section 307 – Attempt to murder – Intention or knowledge of accused is essential factor – Irrespective of result of the act. Acquittal of accused on the basis of result is improper.
State of Madhya Pradesh v. Imrat & Anr.
Reported in AIR 2008 SC 2967

Held:

It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The Section makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. Therefore, an accused charged under Section 307 IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt.

This position was highlighted in *State of Maharashtra v. Balram Bama Patil and Ors., (1983) 2 SCC 28, Girija Shanker v. State of Uttar Pradesh, (2004) 3 SCC 793, R. Parkash v. State of Karnataka, JT 2004 (2) SC 348 and State of M.P. v. Saleem @ Chamaru and Anr., (2005) 5 SCC 554.*

In *Sarju Prasad v. State of Bihar, AIR 1965 SC 843* it was observed in para 6 that mere fact that the injury actually inflicted by the accused did not cut any

vital organ of the victim, is not by itself sufficient to take the act out of the purview of Section 307. Whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case. The circumstances that the injury inflicted by the accused was simple or minor will not by itself rule out application of Section 307 IPC. The determinative question is intention or knowledge, as the case may be, and not nature of the injury. The basic differences between Sections 333 and 325 IPC are that Section 325 gets attracted where grievous hurt is caused whereas Section 333 gets attracted if such hurt is caused to a public servant.

Section 307 deals with two situations so far as the sentence is concerned. Firstly, whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and secondly if hurt is caused to any person by such act the offender shall be liable either to imprisonment for life or to such punishment as indicated in the first part i.e. 10 years. The maximum punishment provided for Section 333 is imprisonment of either description for a term which may extend to 10 years with a liability to pay fine.

It is seen that the High Court had arrived at erroneous hypothetical conclusions ignoring the fact that the nature of injuries were grievous and were caused by use of sufficient force by sharp edged weapons. The injuries were so serious that both the investigating agency and the doctor felt that dying declaration was to be recorded. That being so, the High Court's conclusion that the offence under Section 307 was not made out is clearly indefensible. The order of the High Court is set aside and that of the trial Court is restored.

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47. INDIAN PENAL CODE, 1860 – Section 376 or 354
Prosecutrix in her statement loosely described accused's act as "fondling" – It is clear that accused outraged the modesty but had not raped her.
Premiya alias Prem Prakash v. State of Rajasthan
Judgment dated 22.09.2008 passed by the Supreme Court in Criminal Appeal No. 1504 of 2008, reported in (2008) 10 SCC 81

Held:

There was no unexplained delay in lodging the FIR. So far as absence of the injury on the private parts of the prosecutrix is concerned, admittedly she was a married lady. But on a close reading of the evidence of the prosecutrix, it is clear that the accused outraged the modesty but had not raped her. Prosecutrix has not stated specifically about the act, but has loosely described as "fondling". It is un-natural that a married lady belonging to the rural areas would falsely implicate the accused with whom she or her husband had no enmity.

In order to constitute the offence under Section 354 IPC mere knowledge that the modesty of a woman is likely to be outraged is sufficient without any deliberate intention of having such outrage alone for its object. There is no abstract conception of modesty that can apply to all cases. [See *State of Punjab v. Major Singh (AIR 1967 SC 63*]. A careful approach has to be adopted by the court while dealing with a case alleging outrage of modesty. The essential ingredients of the offence under Section 354 IPC are as under:

(i) that the person assaulted must be a woman;

(ii) that the accused must have used criminal force on her; and

(iii) that the criminal force must have been used on the woman intending thereby to outrage her modesty.

Intention is not the sole criterion of the offence punishable under Section 354 IPC, and it can be committed by a person assaulting or using criminal force to any woman, if he knows that by such act the modesty of the woman is likely to be affected. Knowledge and intention are essentially things of the mind and cannot be demonstrated like physical objects. The existence of intention or knowledge has to be culled out from various circumstances in which and upon whom the alleged offence is alleged to have been committed. A victim of molestation and indignation is in the same position as an injured witness and her testimony should receive the same weight.

In the instant case after careful consideration of the evidence, the trial court and the High Court have found the accused guilty. But the offence is Section 354 IPC and not under Section 376 IPC. Therefore we alter the conviction accordingly.

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48. INDIAN PENAL CODE, 1860 – Section 376 (2) (g)
Value of precedents in appreciation of evidence in criminal trial – Precedent is not applicable as the matter is to be decided on facts.
Lalliram and another v. State of Madhya Pradesh
Judgment dated 15.09.2008 passed by the Supreme Court in Criminal Appeal No. 791 of 2006, reported in (2008) 10 SCC 69

Held:

The injury is not a *sine qua non* for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case. As was observed by this Court in *Pratap Misra and Ors. v. State of Orissa, (1977) 3 SCC 41* where allegation is of rape by many persons and several times but no injury is noticed that certainly is an important factor if the prosecutrix's version is credible, then no corroboration is necessary. But if the prosecutrix's version is not credible then there would be need for corroboration. [See *Aman Kumar & Ors. v. State of Haryana, (2004) 4 SCC 379*].

In criminal cases the question of a precedent particularly relating to appreciation of evidence is really of no consequence. In *Aman Kumar's case*

(supra) it was observed that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than the injured witness. In the latter case there is injury in the physical form while in the former both physical as well as psychological and emotional. However, if the court finds it difficult to accept the version of a prosecutrix on the face value it may search for evidence direct or circumstantial.

In this case the testimony of prosecutrix found to be self-contradictory and also inconsistent with testimonies of other witnesses as well as with medical evidence. Hence, acquittal of accused held, justified.

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49. INDIAN PENAL CODE, 1860 – Section 396

Dacoity with murder – Six persons were prosecuted – Two of them were acquitted – Rest of the accused being less than five could not be convicted for dacoity – Conviction of accused u/s 396 of the Code set aside.

Raj Kumar alias Raju v. State of Uttaranchal (now Uttarakahand)
Reported in AIR 2008 SC 3248

Held:

Chapter XVII (Sections 378 to 462) deals with offences against property. Sections 378 to 382 relate to theft. Sections 383 to 389 concern offences of extortion. Sections 390 to 402 deal with robbery and dacoity. Section 391 defines dacoity and it reads thus:

> **391. Dacoity:** – When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

Whereas Section 395 provides punishment for dacoity, Section 396 prescribes penalty for an offence of dacoity with murder. The said section reads thus:

> **396. Dacoity with murder:**–If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

In *Ram Lakhan v. State of Uttar Pradesh, (1983) 2 SCC 65,* this Court held that conviction for an offence of dacoity of less than five persons is not

sustainable. In that case, the appellant was convicted for an offence punishable under Section 395, IPC and sentenced to seven years rigorous imprisonment. FIR was registered against nine persons. The trial Court, however, acquitted five persons and convicted four. On appeal, the High Court acquitted three persons out of four and conviction of one of the accused, appellant before this Court, was upheld. This Court, while allowing the appeal and acquitting the accused, held that before an offence under Section 395 can be made out there must be an assembly of five or more persons. On the findings of the courts below, it was manifest that only one person was left, who could not be convicted for an offence under Section 395.

In *Saktu & Anr. v. State of U.P., (1973) 1 SCC 202,* the case of the prosecution was that 15-16 persons entered the house of one Jwala Prasad and looted the property. First Information Report was lodged by the informant-Jwala Prasad. All the accused were charged for offences punishable under Sections 395, 397 and 412, IPC. The trial Court acquitted one of the accused. In appeal, the High Court of Allahabad acquitted some other accused but convicted three accused (Nos. 1, 6 & 7).

It was contended before this Court that as the High Court found that only three persons had participated in the occurrence, there was an error in convicting them for dacoity, since the offence of dacoity could not be committed by less than five persons. This Court, however, negatived the contention observing as under:

> "The charge in the instant case is that apart from the named seven or eight persons, there were five or six others who had taken part in the commission of the dacoity. The circumstance therefore that all except the three accused, have been acquitted by the High Court will not militate against the conviction of those three for dacoity. It is important that it was at no time disputed that more than thirteen or fourteen persons had taken part in the robbery. The High Court acquitted a large number of the accused because their identity could not be established. The High Court, however, did not find that the group which committed robbery in the house of Jwala Prasad consisted of less than five persons".

It is thus clear that for recording conviction of an offence of robbery, there must be five or more persons. In absence of such finding, an accused cannot be convicted for an offence of dacoity. In a given case, however, it may happen that there may be five or more persons and the factum of five or more persons is either not disputed or is clearly established, but the Court may not be able to record a finding as to identity of all the persons said to have committed dacoity and may not be able to convict them and order their acquittal observing that their identity is not established. In such case, conviction of less than five persons or even one- can stand. But in absence of such finding, less than five persons cannot be convicted for an offence of dacoity.

The learned counsel appearing for the State, however, referred to *Ram Shankar Singh & Ors. v. State of Uttar Pradesh, AIR 1956 SC 441.* In that case, six accused were placed on trial for an offence of dacoity. Three of them belonged to complainant's village whereas remaining three belonged to adjoining village. The trial Court convicted all the six accused. The High Court, however, acquitted three accused and convicted the remaining three under Section 395, IPC. This Court held that the High Court erred in making a distinction between the three accused belonging to the complainant's village while the remaining three belonged to an adjoining village. This Court observed that the High Court, having come to the conclusion that three out of six accused were not guilty, should have gone into the question whether there was satisfactory evidence to show that the three remaining accused could be convicted under Section 395, IPC on the charge as framed. This Court further held that the charge was framed against six persons and they were placed on trial. It did not indicate that those six persons along with other unknown persons committed dacoity. On the finding arrived at by the trial Court that all the six persons committed the offence of dacoity punishable under Section 395, IPC, nothing more was necessary. When the High Court set aside conviction of three accused and acquitted them out of six persons jointly tried, it was left only with three appellants as the persons concerned with the crime. The High Court, in the circumstances, according to this Court, ought to have considered whether there was satisfactory evidence to show that the three appellants could be convicted of the lesser offence of robbery under Section 392, IPC if there was evidence to show that they had committed acts of theft and used violence while committing the theft.

In the case on hand, both the Courts below have considered the case of the prosecution and acquitted two accused completely. Moreover, all the accused were acquitted for commission of offence of criminal conspiracy as also of receiving stolen property in commission of dacoity and the said acquittal has attained finality.

Shyam Behari v. State of Uttar Pradesh, AIR 1957 SC 320 also does not carry the matter further. There, a finding was recorded that the accused and his companions, who were more than five, attempted to commit dacoity but they failed in their attempt as the villagers raised hue and cry. Residents of village reached at the place and the miscreants ran away without collecting booty. They were chased by some persons and caught one of the dacoits. He fired a pistol shot which hit a villager who subsequently died. This Court held that the offence of dacoity was complete and it ended the moment the dacoits took to their heels and another and a separate transaction took place when one of the accused shot at a villager. Hence, even though he could not be convicted of having committed an offence under Section 396, IPC, he could be convicted for an offence under Sections 395 and 302, IPC.

Ramdeo Rai Yadav v. State of Bihar, (1990) 2 SCC 675 : JT 1990 (1) SC 356 is clearly distinguishable. In that case, charge was framed against the accused for commission of offence punishable under Section 396, IPC but alternative charge

was also framed for an offence punishable under Section 302, IPC. In the light of framing of alternative charge, this Court held that conviction of the appellant-accused for an offence punishable under Section 302, IPC can be sustained.

Similar is the ratio in *Anshad & Ors. v. State of Karnataka, (1994) 4 SCC 381 : JT 1993 (3) SC 324.* There five accused were tried for offences punishable under Sections 396, 449, 395 and 307, IPC and were convicted. In the light of the factual position, the Court held that conviction of accused Nos. 1, 2 and 3 could be altered to one under Section 302 read with Section 34, IPC, Section 394 read with Section 34, IPC and Section 379 read with Section 34, IPC.

In the instant case, as observed earlier, there were six accused. Out of those six accused, two were acquitted by the trial Court without recording a finding that though offence of dacoity was committed by six persons, identity of two accused could not be established. They were simply acquitted by the Court. In our opinion, therefore, as per settled law, four persons could not be convicted for an offence of dacoity, being less than five which is an essential ingredient for commission of dacoity. Moreover, all of them were acquitted for an offence of criminal conspiracy punishable under Section 120B, IPC as also for receiving stolen property in the commission of dacoity punishable under Section 412, IPC. The conviction of the appellant herein for an offence punishable under Section 396, IPC, therefore, cannot stand and must be set aside.

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50. INTELLECTUAL PROPERTY:

TRADE AND MERCHANDISE MARKS ACT, 1958 – Sections 18, 28 & 29 Proposed registration or application for registration does not confer right to sue to restrain others from passing off* their goods using the trademark.

(* Passing off means the act or instance of falsely representing one's own product as that of another in an attempt to deceive potential buyers.)

K. Narayanan and another v. S. Murali

Judgment dated 05.08.2008 passed by the Supreme Court in Civil Appeal No. 4480 of 2002, reported in (2008) 10 SCC 479

Held:

Before registration is granted for the trade mark, there is no right in the person to assert that the mark has been infringed and that a proposed registration which may, or may not be granted will not confer a cause of action to the plaintiff, whether the application for registration is filed by the plaintiff, or the defendant.

In this connection, the following decisions of this Court may be strongly relied upon. In *Wander Ltd. and another v. Antox India P. Ltd., 1990 Supp SCC 727* it has been observed as follows: (SCC p. 734, para 16)

> "16. ....Passing-off is said to be a species of unfair trade competition or of actionable unfair trading by which one person, through deception, attempts to obtain an economic benefit of the reputation which another has established for

himself in a particular trade or business. The action is regarded as an action for deceit. The tort of passing-off involves a misrepresentation made by a trader to his prospective customers calculated to injure, as a reasonably foreseeable consequence, the business or goodwill of another which actually or probably, causes damages to the business or good of the other trader."

In the present case, mere filing of a trade mark application cannot be regarded as a cause of action for filing a suit for passing off since filing of an application for registration of trade mark does not indicate any deception on the part of the respondent to injure business or goodwill of the appellants.

In *Dhodha House v. S.K. Maingi, (2006) 9 SCC 41,* it has been observed as follows:-

"A cause of action will arise only when a registered trade mark is used and not when an application is filed for registration of the trade mark. In a given case, an application for grant of registration certificate may or may not be allowed. The person in whose favour a registration certificate has already been granted (sic) indisputably will have an opportunity to oppose the same by filing an application before the Registrar, who has the requisite jurisdiction to determine the said question. In other words, a suit may lie where an infringement of trade mark or copyright takes place but a cause of action for filing the suit would not arise within the jurisdiction of the court only because an advertisement has been issued in the Trade Marks Journal or any other journal, notifying the factum of filing of such an application."

In the aforesaid decision, this Court has expressed its concurrence with the views observed by the Division Bench of the High Court of Madras in *Premier Distilleries Pvt. Ltd. v. Sushi Distilleries, 2001 (3) CTC 652,* which observed as under: (CTC p. 654, para 9)

"9. The cause of action in a suit for passing off, on the other hand and as already observed, has nothing at all to do with the location of the Registrar's office or the factum of applying or not applying for registration. It is wholly unnecessary for the plaintiff to prove that he had applied for registration. The fact that the plaintiff had not applied for registration will not improve the case of the defendant either. Filing of an application for registration of a trade mark, therefore, does not constitute a part of cause of action where the suit is one for passing off."

In this view of the matter, we are, therefore, of the opinion that filing of an application for registration of a trade mark does not constitute a part of cause of

action in a suit for passing off. The appellants cannot file the suit in the High Court of Madras seeking an injunction to restrain the respondent from passing off his goods using the trade mark A-ONE, based only on the claims made in the trade mark application of respondent filed before the Trade Mark Registry, since the necessary requirements of an action for passing off are absent.

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51. INTELLECTUAL PROPERTY:
DESIGNS ACT, 2000 – Sections 2 (d), 2(j), 4 & 5
WORDS AND PHRASES :

(i) Expressions "Design", "Proprietor" and "New or Original Design" explained.

(ii) Purpose of Designs Act, 2000 is to protect intellectual property of a person who has created new or original design – Such protection is with reference to a particular object on which it is applied.

(iii) Registration of design in question was obtained with the purpose of applying it to glass sheet, which was new or original – Protected under the Act.

Bharat Glass Tube Limited v. Gopal Glass Works Limited
Judgment dated 01.05.2008 passed by the Supreme Court in Civil Appeal No. 3185 of 2008, reported in (2008) 10 SCC 657

Held:

"Design" has been defined in section 2(d) which means that a feature of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process. That means that a feature or a pattern which is registered with the registering authority for being produced on a particular article by any industrial process whether manual, mechanical or chemical or by any other means which appears in a finished article and which can be judged solely by eye appeal. The definition of design as defined in section 2(d) read with application for registration and rule 11 with form 1 makes it clear that the design which is registered is to be applied to any finished article which may be judged solely by eye appeal. A conjoined reading of these three provisions makes it clear that a particular shape or a particular configuration is to be registered which is sought to be produced on any article which will have visual appeal. Such design once it is registered then it cannot be pirated by any other person.

The concept of design is that a particular figure conceived by its designer in his mind and it is reproduced in some identifiable manner and it is sought to be applied to an article. Therefore, whenever registration is required then those configuration has to be chosen for registration to be reproduced in any article. The idea is that the design has to be registered which is sought to be reproduced on any article. Therefore, both the things are required to go together, i.e. the design and the design which is to be applied to an article.

'Proprietor' as defined in Section 2 (j) of the Act means that any person who acquires the design or right to apply the design to any article, either exclusively of any other person or otherwise, means, in the respect and to the extent in and to which the design or right has been so acquired.

Section 4 which is couched in the negative terms, says that the design which is not a new or original then such design cannot be registered. The expression, "new or original" appearing in Section 4 means that the design which has been registered has not been published anywhere or it has been made known to the public. The expression, "new or original" means that it had been invented for the first time or it has not been reproduced by anyone.

The sole purpose of this Act is protection of the intellectual property right of the original design for a period of ten years or whatever further period extendable. The object behind this enactment is to benefit the person for his research and labour put in by him to evolve the new and original design. This is the sole aim of enacting this Act. Such original design which is new and which has not been available in the country or has not been previously registered or has not been published in India or in any other country prior to the date of registration shall be protected for a period of ten years. Therefore, it is in the nature of protection of the intellectual property right. This was the purpose as is evident from the statement of objects and reasons and from various provisions of the Act. In this connection, the law of *Copyright and Industrial Designs by P. Narayanan* (4th Edn.), Para 27.01 needs to be quoted.

> "**27.01. Object of registration of designs.** The protection given by the law relating to designs to those who produce new and original designs, is primarily to advance industries, and keep them at a high level of competitive progress.
>
> 'Those who wish to purchase an article for use are often influenced in their choice not only by practical efficiency but the appearance. Common experience shows that not all are influenced in the same way. Some look for artistic merit. Some are attracted by a design which is a stranger or bizarre. Many simply choose the article which catches their eye. Whatever the reason may be one article with a particular design may sell better than one without it: then it is profitable to use the design. And much thought, time and expense may have been incurred in finding a design which will increase sales'. The object of design registration is to see that the originator of a profitable design is not deprived of his reward by others applying it to their goods.
>
> The purpose of the Designs Act is to protect novel designs devised to be applied to (or in other words, to govern the shape and configuration of) particular articles to be manufactured and marketed commercially. It is not to protect principles of operation or invention which, if profitable (sic

protectable) at all, ought to be made the subject- matter of a patent. Nor is it to prevent the copying of the direct product of original artistic effort in producing a drawing. Indeed the whole purpose of a design is that it shall not stand on its own as an artistic work but shall be copied by embodiment in a commercially produced artefact. Thus the primary concern, is what the finished article is to look like and not with what it does and the monopoly provided for the proprietor is effected by according not, as in the case of ordinary copyright, a right to prevent direct reproduction of the image registered as the design but the right, over a much more limited period, to prevent the manufacture and sale of article of a design not substantially different from the registered design. The emphasis therefore is upon the visual image conveyed by the manufactured article."

What is required to be registered is a design which is sought to be reproduced on an article. In the present case respondent Company purchased rollers from a German company through which they could produce a particular design on glass sheets. They registered this design as produced on glass sheet under the Designs Act, 2000. The respondent alleged that appellant Company was infringing their right by reproducing their design on glass sheets. The appellant Company made a counter move by filing an application with the Controller of Patents and Designs that the design was not new or original and therefore, its registration should be cancelled. The appellant Company's plea was that a similar design created by another company, prior to registration of the design in question, was registered with UK Patent Office and was available on website of that office. This Court found as a fact that the rollers acquired by the respondent Company from the German Company were capable of producing design not only on glass sheets but also on plastic, rexine and leather. It was the respondent Company which obtained registration of the design in question for its application to glass sheets only. This was the roller which was designed and if it is reproduced on an article it will give such visual feature to the design. No evidence was produced by the complainant before the Assistant Controller that anywhere in any part of the world or in India this design was reproduced on glass or it was registered anywhere in India or in any part of the world. The German company only manufactured the roller and this roller could have been used for bringing a particular design on the glass, rexin or leather but we are concerned here with the reproduction of the design from the roller on glass which has been registered before the registering authority. Therefore, this design which is to be reproduced on the article i.e. glass has been registered for the first time in India and the proprietary right was acquired from the German Company.

Section 4 clearly says that the Controller will only register a design on application made under Section 5 by the proprietor of any new or original design not previously published in any country and which is not contrary to public order

or morality and it further says that this application shall be in a prescribed form and the prescribed form has been given in Form 1. That shows that for name of the article on which the design is sought to be transcripted has to be mentioned at the time of registration. The respondent moved an application filling this form that this roller which has been manufactured by the German company with that design shall be reproduced on the glass. Therefore, when the application was filed by the respondent for registration, it was registered on the basis that the roller which will be used by mechanical process will bring design on a glass which is registered. Therefore, what is sought to be protected is that the design which will be reproduced on the roller by way of mechanical process and that design cannot be reproduced on glass by anybody else. Now, the question is whether it is new or original design. For that it is clear that there is no evidence to show that this design which is reproduced on the glass sheet was either registered in India or in Germany or for that matter in United Kingdom.

Therefore, it is for the first time registered in India which is new and original design that is reproduced on glass sheet. It cannot, therefore, be accepted that the design in question was not new. On the contrary, it was a new and original design.

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52. LABOUR LAW:

INDUSTRIAL DISPUTES ACT, 1947 – Sections 2 (s), 25-B & 25-F

Provisions regarding "workman" and "continuous service" are applicable to part time workman also and he would be entitled to benefit of Section 25-F of the Act.

Divisional Manager, New India Assurance Company Limited v. A. Sankaralingam

Judgment dated 03.10.2008 passed by the Supreme Court in Civil Appeal No. 4445 of 2006, reported in (2008) 10 SCC 698

Held:

The question for consideration, which has been hotly debated, is the status of a part time employee and as to whether such an employee falls within the definition of "workman". Section 2 (s) of the Act deals with the definition of "workman" whereas section 25B talks about "continuous service". A bare perusal of the two definitions would reveal that their applicability is not limited to only full time employees but all that is required is that the workman claiming continuous service must fulfill the specific conditions amongst others laid down in the two provisions so as to seek the shelter of Section 25F.

The preponderance of judicial opinion that a workman working even on a part time basis would be entitled to benefit of Section 25F of the Act is clear from the various judgments. In *Silver Jubilee Tailoring House v. Chief Inspector of Shops & Establishments, (1974) 3 SCC 498* which is a judgment rendered by a 3-Judge Bench of this Court, the question was as to whether the workers who were paid on piece-rate basis though working in the shop, were workmen in terms of Section 2(s) of the Act. That is what the Court had to say:

> "11. The question for decision was whether the agrarians were workmen as defined by Section 2(s) of the Industrial Disputes Act of 1947 or whether they were independent contractors. The Court said that the prima facie test to determine whether there was relationship between employer and employee is the existence of the right in the master to supervise and control the work done by the servant not only in matter of directing what work the employee is to do but also the manner in which he has to do the work. In other words, the proper test according to this Court is, whether or not the master has the right to control the manner of execution of the work. The Court further said that the nature of (sic) extent of the control might vary from business to business and is by its nature incapable of precise definition, that it is not necessary for holding that a person is an employee, that the employer should be proved to have exercised control over his work, that even the test of control over the manner of work is not one of universal application and that there are many contracts in which the master could not control the manner in which the work was done."

For arriving at this conclusion, the Supreme Court referred to various judgments of this Court including *Birdichand Sharma v. Civil Judge, AIR 1961 SC 644* but distinguished the judgment in *Shankar Balaji Waje v. State of Maharashtra, AIR 1962 SC 517* (rendered by two Hon'ble Judges) by observing that the workman who was claiming that status was not called upon to attend duties in the factory itself as he was permitted to take the tobacco from the factory owner and role the bidis at his residence at any time without any fixed hour of work and that there was absolutely no supervision of the so called employer over his work. In conclusion, the Bench observed in *Silver Jubilee Tailoring House* (supra) (SCC p. 510 para 37):

> "37. That the workers are not obliged to work for the whole day in the shop is not very material. There is of course no reason why a person who is only employed part time, should not be a servant and it is doubtful whether regular part time service can be considered even prima facie to suggest anything other than a contract of service. According to the definition in Section 2(14) of the Act, even if a person is not wholly employed, if he is principally employed in connection with the business of the shop, he will be a 'person employed' within the meaning of the sub-section. Therefore, even if he accepts some work from other tailoring establishments or does not work whole time in a particular establishment, that would not in any way derogate from his being employed in the shop where he is principally employed."

It will be seen from a perusal of the aforequoted passages that the observations made therein clearly suggest that a workman employed on a part time basis but under the control and supervision of an employer is a workman in term of Section 2(s) of the Act, and is entitled to claim the protection of Section 25F thereof, should the need so arise. The fact that the workman was working under the control and supervision of the appellant employer is admitted on all sides. We also find that the preponderance of judicial opinion in the High Courts is also to this effect.

We are in respectful agreement with the opinions expressed by the various High Courts in the cases of *Simla Devi v. Presiding Officer, (1997) 1 LLJ 788 (P&H) (DB), Telecom v. Naresh Brijlal Charote, 2001 Lab IC 2127 (Bom), Coal India Ltd. v. Labour Court, (2001) 2 LLJ 45 (Del), Kailash Chand Saigal v. Om Prakash, (2006) 132 DLT 192 (Del), Govindbhai Kanabhai Maru v. N.K. Desai, 1988 Lab IC 505 (Guj), Yashwant Singh Yadav v. State of Rajasthan, 1990 Lab IC 1451 (Raj) (DB).*

In view of the above discussion, the question as to whether a part-time workman would be covered within the definition in Section 2(s) of the Act and whether he would be entitled to the benefit of continuous service under section 25B and the benefit of Section 25F, is answered in favour of the workman-respondent.

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53. LAND ACQUISITION ACT, 1894 – Section 23
Determination of compensation – The rates of small plot may be the basis of fixation after necessary deduction – Deduction for development charge when acquired land is an agricultural land – Deduction of 60% instead of 70% would be appropriate as the area where the land is situated is already developed.
Kanta Devi & Ors. v. State of Haryana & Anr.
Reported in AIR 2008 SC 3107

Held:

This Court has observed in the case of *Lucknow Development Authority v. Krishna Gopal Lahoti and Ors., 2007 (12) SCALE 685* where deduction for development charges at the rate of 1/3 of the amount of compensation was accepted to be normal. However, it was also indicated that there may be various factors which were required to be taken into consideration while deciding the amount of deduction to be made towards developmental charges. While in some cases, it could be more than 1/3, in other cases it could be less, having regard to the difference between a developed area or an area having potential value which is yet to be developed.

In the same decision, while observing that where a large area is the subject matter of acquisition the rate at which small plots are sold cannot be said to be a safe criteria, it was also observed that it could not be laid down as an absolute proposition that the rates fixed for small plots could not be the basis for fixation

of the value of the acquired land. However, in such cases necessary deduction/ adjustments have to be made while determining the value and in the said context it was held that a deduction of 1/3 of the compensation amount was considered to be normal.

In the instant case excluding all the other exemplars, the High Court had chosen to rely on Ex. P.6, where a small tract of land (148 sq. yards) had been sold at the rate of Rs.9,60,000/- per acre and the compensation had been worked out on such basis after applying deduction of 70% of the market value towards developmental charges, since the lands acquired were agricultural and huge investment was required to be made by the State to make the same suitable for the purpose for which they had been acquired, namely, the setting up of a new grain market with all the ancillary infrastructure needed by the Market Committee, Ismailabad.

It was submitted that the deduction of 70%, which had been applied by the High Court, was quite reasonable as the sale deed relied upon by the appellants related to lands sold for shops etc. and Ex. P.6 and other sale instances had been relied upon by the appellants for smaller areas. It was urged that in *Viluben Jhalejar Contractor (Dead) by LRs. v. State of Gujarat, (2005) 4 SCC 789,* this Court had held that there can be different deductions depending upon various factors. It was submitted that in various other decisions and in particular in *K.S. Shivadevamma vs. Assistant Commissioner of Land Acquisition Officer, (1996) 2 SCC 262,* it was held that although as a general rule 33-1/2 per cent is required to be deducted for laying of roads and other amenities, deduction to the extent of 53% was not improper and the extent of deduction depends upon the development need in each case. In *Vasavva (Smt) and others vs. Special Land Acquisition Officer and others, (1996) 9 SCC 640,* this Court upheld a deduction of 65%.

As an alternative argument it was urged on behalf of the State-respondent that since the High Court had relied only on Ex. P.6 which related to the sale of only 4 marlas of land, the matter could be remanded to the High Court for consideration of all the various sale deeds which were produced on behalf of the parties, to arrive at a fresh valuation for the acquired lands.

It was submitted that in view of the above the submissions made on behalf the claimants under Section 51-A of the LA Act was not relevant for determination of the point raised in these appeals.

Having carefully considered the submissions made on behalf of the respective parties we see no reason to interfere with the decision of the High Court.

The learned Single Judge of the High Court has taken into consideration the nature of the land sought to be acquired in relying on Ex.P.6 in assessing the market value thereof and has applied a deduction of 70% in arriving at the compensation to be awarded to the claimants in respect of the said lands. The various other documents which were produced on behalf of the claimants were in respect of the lands which were similar to the lands forming the subject matter of Ex.P.6. The learned Single Judge has given reasons for not relying on all the

other exemplars in choosing to rely on Ex.P.6 alone. But the rate of deduction applied appears to be on the high side in relation to the developmental work involved in making the acquired land suitable for the purposes for which they were so acquired. The acquired lands are adjacent to the village abadi which is already developed. Having regard to the consistent view that a deduction of 1/3rd of the market value is normal, though higher deduction is permissible, we are of the view that deduction of 60% would meet the expenditure towards developmental charges considering the proximity of the acquired lands to the areas already developed.

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54. M.P. LOK DHAN (SHODHYA RASHIYON KI VASULI) ADHINIYAM, 1988 – Sections 3 & 4
M.P. LAND REVENUE CODE, 1959 – Sections 147 & 154-A
Loan obtained from Bank after mortgaging agricultural land – Recovery of sum due as arrears of land revenue by selling land through auction – Legal and valid.
Special provision of the Adhiniyam would prevail over general provisions of Sections 147 & 154-A of M.P.L.R.C.
Smt. Savita Ben Thakur Das Patel and etc. v. State of Madhya Pradesh & Ors.
Reported in AIR 2008 MP 334

Held:

The only submission made on behalf of the petitioners is that their land, being an agricultural land measuring less than four hectares, could not have been attached and sold for the recovery of dues as the attachment and sale of such land is not permissible under Sec. 147 read with 154-A of the Madhya Pradesh Land Revenue Code, (in short, "the Code"). According to their learned counsel, the recovery proceedings against the petitioners were, therefore, bad in law and deserved to be quashed. The learned counsel for the Bank, on the other hand, justified the validity of the recovery proceedings.

The object and purpose of the Adhiniyam is to provide for the speedy recovery of certain classes of dues payable to the State Government, Government Companies and certain categories of Corporations and Banking Companies. The respondent, Bank, admittedly falls within the meaning of "Banking Company" as defined under Section 2(b) of the Adhiniyam and Section 3 provides the procedure for recovery of dues of the Banking Company as arrear of land revenue under the Code. There is also a saving provision Section 4 in the Adhiniyam which reads as under :

4. Savings.- (1) Nothing in Section 3 shall,-

> (a) affect any interest of the State Government, a Corporation, a Government company or any banking company in any property, created by any mortgage, charge, pledge or other encumbrance;

or

(b) affect any right or remedy against any person other than a person referred to in that Section, in respect of a contract of indemnity or guarantee entered into in relation to an agreement referred to in that section or in respect of any interest referred to in clause (a).

(2) Where the property of any person referred to in Section 3 is subject to any mortgage, charge, pledge or other encumbrance in favour of the State Government, a Corporation, a Government Company or a banking company, then-

(a) in every case of a pledge or hypothecation of goods, proceedings shall first be taken for sale of goods pledged or hypothecated and if the proceeds of such sale are less than the sum due, then proceedings shall be taken for recovery of the balance as arrear of land revenue :

Provided that where the Collector is of the opinion that it is necessary so to do for ensuring the recovery of the sum due to the State Government or to a Corporation, a Government company or a banking company, as the case may be, he may for reasons to be recorded, direct proceedings to be taken for recovery of the sum due, as arrear of land revenue before or at the same time the proceedings to be taken for sale of the goods pledged;

(b) in every case of a mortgage, charge or other encumbrance on immovable property, such property or, as the case may be, the interest of the defaulter therein, shall first be sold in proceedings for recovery of the sum due from that person as arrear of land revenue, and any other proceedings may be taken thereafter only if the Collector certifies that there is no prospect of realization of the entire sum due through the first mentioned process within a reasonable time".

Section 147 of the Code enumerates more than one process for recovery of arrear of land revenue. Under clause (b) the process provided for recovery is by attachment and sale of the holding but proviso to the section clearly states that process specified in clause (b) shall not permit attachment and sale of holding where the defaulter holds less than six hectares of land in the scheduled

area. Section 154-A was substituted in the Code by Madhya Pradesh Act No. 1 of 1971 and it provides where the arrear of land revenue is due in respect of a holding the Tahsildar, after attachment of holding under clause (b) of Section 147, shall let out that holding to any person other than the defaulter for a period not exceeding ten years upon such terms and conditions as the Collector may fix.

A combined reading of sub-section (2) and clause (b) of the Saving Section 4 of Adhiniyam makes it clear that where the property of any person (defaulter) referred to in Section 3 is subject to any mortgage in favour of the State Government, a Corporation, a Government Company or a Banking Company then in every case of a mortgage on immovable property, such property, or the interest of the defaulter therein shall first be sold in proceedings for recovery of the sum due from that person as arrear of land revenue and any other proceedings would be taken thereafter only when the Collector certifies that there is no prospect of realization of the entire sum due through sale within a reasonable time. This provision especially deals with the recovery of dues as arrear of land revenue from a person whose immovable property is mortgaged with the State Government, a Corporation, a Government Company or a Banking Company by first direct sale of that immovable property. The Saving provision of section 4 of the Adhiniyam is, therefore, a special provision whereas the provisions of Sections 147 and 154-A of the Code are general in nature. This is also obvious from the fact that Sections 147 and 154-A do not deal, in any manner, with the recovery of dues of loan obtained by mortgaging the land in favour of the State Government, a Corporation, a Government Company or a Banking Company. The question now is which of the two conflicting provisions, one of the Adhiniyam and the other of Code, would apply in the case at hand. The rule of harmonious construction in this regard is well settled that out of the two apparently conflicting provisions, if a special provision is made on a certain matter, that matter is excluded from the general provision. The principle is expressed in the maxims Generalia specialibus non derogant (General things do not derogate from special things) and Generalibus specialia derogant (Special things derogate from general things). These principles have also been applied in resolving a conflict between two different Acts. (See Justice G. P. Singh's Principles of Statutory Interpretation, 11th Edition, pp. 141, 142). I have already held that the Saving provision of Section 4 of the Adhiniyam is a special provision and, therefore, this provision would prevail over the general provisions of Sections 147 and 154-A of the Code. Thus, since the agricultural land of petitioners was mortgaged with the Bank as a security for financial assistance, the recovery of sum due from them by selling the land through auction was neither illegal nor invalid.

A submission was also made on behalf of the Bank that the dues of the Bank were not arrear of land revenue but were recovered as arrear of land revenue under Section 155 of the Code and that an arrear of land revenue is distinct and separate from money recoverable as arrear of land revenue. It is not necessary to decide whether sections 147 and 154-A of the Code do not apply for recovery of any sum whatsoever recoverable as arrear of land revenue

because I have held that it has no application for recovery as arrear of land revenue of loan secured by mortgage of immovable property in favour of the State Government, a Corporation, a Government Company or a Banking Company.

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*55. **M.P. LOK PARISAR (BEDAKHALI) ADHINIYAM, 1974 – Section 10**
Order for eviction of unauthorized occupants passed by duly appointed competent authority under the Act is not open to question in any original suit – Civil Court cannot pass any injunction in respect of any action taken pursuant to or to be taken pursuant to such order because Section 10 of the Act excludes the jurisdiction of Civil Court.
Karan Singh and others v. State of M.P. and others
Reported in 2008 (4) MPLJ 338

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56. **MINES AND MINERALS (DEVELOPMENT AND REGULATION) ACT, 1957 – Section 1**
CONSTITUTION OF INDIA – Article 246 and Seventh Schedule, List-I, Entry 54
LAND REVENUE CODE, 1959 (M.P.) – Sections 57 & 247
MINERAL CONCESSION RULES, 1960 – Rule 22 (3) (i) (h)
Mining lease, grant of – Whether the consent of the owner of the private land and an opportunity of hearing to the owner of the private land are mandatory before grant of a mining lease? Held, No – Further held, consent of the owner is required for entering into the lease area and for starting mining operations.
Shyam Bihari Singh v. State of M.P. and others
Reported in 2008 (4) MPLJ 255

Held:

A reading of Rule 22 (3) (i) (h) of Mineral Concession Rules, 1960 would show that where the land is owned by some private owner, the statement in writing has to be made by the applicant that the consent of such owner for starting mining operations has been obtained. The language of Clause (h) is clear that consent of the owner is required "for starting mining operations" and not for grant of mining lease. Similarly, the second proviso to Clause (h) states that consent of the owner "for starting mining operations" in the area or part thereof may be furnished "after the execution of the lease-deed" but "before entry into the area". The expression "after execution of the lease deed" again would show that no consent is required for execution of the lease-deed. The expression "before entry into the area" confirms that consent is required not for execution of lease-deed but for entering into the lease area. Rule 22 (3) (i) (h) therefore does not indicate that consent of the owner of the land is a pre-condition for a mining lease in favour of the lessee. All that it indicates is that such consent is required before entering into the lease area.

The next question is what happens if an owner of a private land in respect of which an application is made for a mining lease withholds his consent.

Clause (2) of Part VIII of Form K of the 1960 Rules is titled "The Covenants of the State Government" and Clause (2) of Part-VIII of Form K reads as follows:-

> **"Acquisition of land of third parties and compensation thereof:**
>
> (2) If in accordance with the provisions of Clause (4) of Part-VII of this Schedule, the lessee/lessees shall offer to pay to an occupier of the surface of any part of the said lands compensation for any damage or injury which may arise from the proposed operations of the lessee/lessees and the said occupier shall refuse his consent to the exercise of the right and powers reserved to the State Government and demised to the lessee/lessees by these presents and the lessee/lessees shall report the matter to the State Government and shall deposit with it the amount offered as compensation and if the Central/State Government is satisfied that the amount of compensation offered is fair and reasonable or if it is not so satisfied and the lessee/ lessees shall have deposited with it such further amount as the State and Central Government shall consider fair and reasonable the State Government shall order the occupier to allow the lessee/lessees to enter the land and to carry out such operations as may be necessary for the purpose of this lease. In assessing the amount of such compensation the State Government shall be guided by the principles of the Land Acquisition Act."

Hence Clause (2) is titled "Acquisition of land of third parties and compensation thereof and provides that the lessee shall offer to pay to an occupier of a surface of any part of the land compensation for any loss or injury which may arise from the proposed operations by the lessee and if the occupier refuses his consent to the exercise of the right and powers reserved to the State Government and demised to the lessee by the mining lease, the lessee shall report the matter to the State Government and shall deposit with the State Government the amount offered as compensation and if the Central/State Government is satisfied that the amount of compensation offered is fair and reasonable, the Central/State Government shall order the occupier to allow the lessee to enter the land and carry out such operations as may be necessary for the purpose of mining lease. It will, thus, be clear that the consequence of refusal by the owner of the private land is not that a mining lease cannot be granted by the Government.

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*57. **MOTOR VEHICLES ACT, 1988 – Section 147**

The deceased while travelling as a passenger in a tractor fell down due to rash and negligent driving of the driver – Tribunal held the Insurance Company liable to pay compensation – Held, the deceased travelled as a passenger in the tractor which was not meant for carrying passenger – Provisions of the Motor Vehicles Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carriage and the insurer would have no liability therefor – Consequently the insurer exonerated from liability.

Kamlabai and other v Kamlesh and others

Reported in 2008 (5) MPHT 190

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58. **MOTOR VEHICLES ACT, 1988 – Sections 147 & 149**

Comprehensive policy, effect of – Vehicle insured under comprehensive insurance policy – Risk for death or bodily injury of any person including the occupant carried in the motor vehicle not carried for hire or reward would be covered.

National Insurance Company Limited v. Brijlata and others

Reported in 2008 (4) MPLJ 529 (DB)

Held :

The Insurance Company has issued comprehensive "B" policy and as per the term of Section II (i) of the said policy, risk for death or bodily injury of any person including the occupant carried in the motor vehicle provided he is not carried for hire or regard is included in the definition of "third party". The Insurance Company has charged a sum of Rs. 509/- as a basic premium under the head 'liability of public risk' and thus, has covered the risk of a passenger. On the head of the schedule it is clearly mentioned "comprehensive" and considering this fact, it is clear that the Insurance Company has covered the risk of passengers travelling in a private car. In a case of taxi, additional premium of Rs. 350/- is payable for covering the risk of passenger, while there is no provision for paying extra premium for passenger for private car. Thus, there is no provision in the tariff for payment of extra premium for passenger in a private car which also shows that the passengers in a private car are covered without paying any additional premium. Considering all these facts the Insurance Company is liable for payment of compensation on account of the death of the deceased due to accident of the Jeep borrowed by him. The owner, driver and Insurance Company are jointly and severally liable for payment of compensation of Rs. 6,40,000/-

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59. MOTOR VEHICLES ACT, 1988 – Sections 147 & 168
Motor accident – Composite and contributory negligence are different components.
Accident between motorbike and bus – No automatic inference about 50:50 negligence – Extent of contributory negligence of bike driver (deceased) can be proportioned at 1: 4 instead of 1: 2.
A.P.S.R.T.C. & Anr. v. K. Hemalatha & Ors.
Reported in AIR 2008 SC 2851

Held:

Precisely, it was the case of the Corporation that the bus of the Corporation did not hit the motorbike at all; as such, there was no negligence on the part of the driver of the bus of the Corporation, to claim compensation from it.

The Tribunal has noticed that the deceased was driving vehicle at high speed with a view to attend the marriage function. Manner of the accident as deposed by the claimant's witnesses indicate that the deceased was partially responsible for the accident. The High Court was wrong in holding that the deceased had not contributed to the accident and there was no contributory negligence. Taking into account the evidence of the witnesses it can be certainly said that there was contributory negligence. The proportion can be fixed at 1 : 4. From the compensation as awarded a sum of Rs. 1,00,000/- with round figures needs to be deducted. Therefore, the compensation is fixed at Rs. 4,18,800/-. Considering the date of the accident, the rate of interest should be 8%.

In an accident involving two or more vehicles, where a third party (other than the drivers and/or owners of the vehicles involved) claims damages for loss or injuries, it is said that compensation is payable in respect of the composite negligence of the drivers of those vehicles. But in respect of such an accident, if the claim is by one of the drivers himself for personal injuries, or by the legal heirs of one of the drivers for loss on account of his death, or by the owner of one of the vehicles in respect of damages to his vehicle, then the issue that arises is not about the composite negligence of all the drivers, but about the contributory negligence of the driver concerned.

'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the Court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his

contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error.

The above position was highlighted in *T. O. Anthony v. Karvarnan and Ors. (2008 (3) SCC 748.*

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60. MOTOR VEHICLES ACT, 1988 – Sections 163-A, 166 & 168 WORKMEN'S COMPENSATION ACT, 1923 – Sections 2 (e) & 2 (i) Quantum of compensation in permanent disability, determination thereof – Difference in nature of relief available in context to Sections 163-A and 166 explained.

Ramprasad Balmiki v. Anil Kumar Jain and others

Judgment dated 01.10.2008 passed by the Supreme Court in Civil Appeal No. 5949 of 2008, reported in (2008) 9 SCC 492

Held:

The jurisdiction of the Tribunal to make an award is confined to determination of the kind of compensation which appears to it to be just. The jurisdiction exercised by the Tribunal in terms of Section 163-A and Section 166 of the Act is different. This distinction has been noticed by this Court in *Rajesh Kumar v. Yudhvir Singh, (2008) 7 SCC 305* holding: (SCC pp. 307-08, paras 8-10)

> "8. The claim petition was filed under Section 166 of the Act and not under Section 163-A thereof. It was contended by the appellant claimant that the driver of the bus in question was rash and negligent as a result whereof, the accident took place. By reason of Section 167 of the Act, an injured person had the option either to file a claim under the Motor Vehicles Act or the Workmen's Compensation Act, if both the Acts apply. It is, therefore, a case where the claimant could have filed at his option an application under the Workmen's Compensation Act.

9. Section 163-A provides for filing of a claim petition where an accident took place by reason of use of the motor vehicle. It is not necessary to prove any fault on the part of the driver or the vehicle. The Tribunal in a proceeding arising under Section 166 of the Act is required to hold a fullfledged trial. It is required to collect datas on the basis whereof the amount of compensation can be determined. Under Section 163-A of the Act, however, the question of liability and extent of proof thereof are not justiciable. The Tribunal can determine the amount on the basis of the basic datas provided therefor. The Explanation appended to Section 163-A of the Act, reads, thus:

> *'Explanation.*– For the purposes of this sub-section, "permanent disability" shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).'

10. The reference to the Workmen's Compensation Act by incorporation was only for the purpose of sub-section (1) of Section 163-A. It was not meant to apply in a case falling under Section 166 of the Act. Had the provisions of the Workmen's Compensation Act been applicable, the procedure laid down therein would also apply. For the purpose of the definition of total disablement as also person who can grant a certificate therefor, namely a qualified medical practitioner. Sections 2 (e) and 2 (i) would be attracted. In terms of the 1923 Act, the amount of compensation is required to be determined as specified in Section 4. The Rules made in terms of Section 32 of the Act known as the Workmen's Compensation Rules, 1924, would also be applicable."

In *Pratap Narain Singh Deo v. Srinivas Sabata, (1976) 1 SCC 289* whereupon reliance has been placed by Mr. Mody, this Court was dealing with a case under the 1923 Act. The respondent therein suffered injuries resulting in amputation of his left arm from the elbow. In that view of the matter, the Commissioner of Workmen's Compensation adjudged him to have lost 100 per cent of his earning capacity' as by loss of his left hand he was evidently rendered unfit for the work of carpenter as the same was not possible to be done by one hand only. This Court, however, although took notice of the definition of the term "total disablement" as contained in Section 2 (1) (l) of the 1923 Act but had no occasion to consider the proviso appended thereto, which reads as under:

> "Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of Schedule I or from an combination of injuries specified in Part II thereof where the aggregate percentage of the loss

of earning capacity, as specified in the said Part II against those injuries amount to one hundred per cent or more;"

There exists a distinction between a "total disablement" and "total permanent disablement" as contained in Schedule I part I of the 1923 Act. Sufferance of fracture by itself resulting in shortening of leg to some extent does not come within the purview of the "permanent total disablement" even under the 1923 Act.

The decision in *Grifan v. Sarbjeet Singh, (2000) 9 SCC 338* relied upon by Mr. Mody does not lay down any legal principle. Although therein medical evidence showed that the claimant had suffered 80% disability, the overall disability was taken at 50% only; of course, the future prospects have been taken into consideration. As in that case also the right leg of the claimant had to be amputated. Some shortening of the legs can be made up with specially manufactured shoes. A person can drive a vehicle even with artificial limbs.

A claim for obtaining 100% compensation for his permanent disability must be supported by reason as has been held by this Court in *National Insurance Co. Ltd. v. Mibasir Ahmed, (2007) 2 SCC 349.*

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***61. MOTOR VEHICLES ACT, 1988 – Sections 173 & 96 (2) (b)**
Liability of the Insurance Company – Driver having a valid licence carrying passengers in a tractor trolley insured for agricultural purpose without the knowledge of the owner – Insurance Company alleging breach of policy – Held, breach means infringement or violation of a promise – The insurer has also to satisfy the tribunal or the court that such violation or infringement on the part of the insurer was willful – No evidence on record that the passengers, who were carried in the tractor trolley, were carried with due knowledge or permission of the owner – Insurance Company cannot repudiate its statutory liability.
National Insurance Company Ltd. v. Vidhyabai & ors.
Reported in I.L.R. (2008) M.P. 3270

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***62. MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986 – Section 3 (1)**
MUSLIMWOMEN (PROTECTION OF RIGHTS ON DIVORCE) RULES, 1986 – Rule 4
An application u/s 3 (1) of the Act was filed by non applicant for recovery of mehar and maintenance – Before Magistrate, applicant and non-applicant have filed their evidence on affidavit – order of maintenance passed by Magistrate – Revisional Court affirmed the order – Order challenged before High Court on the ground that evidence not be taken in the presence of applicant as per Rule 4 of Rules 1986 – Non-applicant has taken a plea that none of the parties

have raised such objection before Magistrate – Now applicant cannot take this objection in view of principle of estoppel – Held, there can be no estoppel against statute and no rule of estoppel between the parties – Cannot compel court to take any action contrary to express words of statute – Admittedly, evidence not recorded in the presence of applicant against whom order of maintenance was made – Order passed by Magistrate and revisional court illegal – Therefore, set-aside with the direction to record fresh evidence in presence of applicant and pass order in accordance with law. 2005 (II) MPJR 20 (ref.)

Mohiuddin v. Smt. Azra Bano

Reported in I.L.R. (2008) M.P. NOC 88

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63. **N.D.P.S. ACT, 1985 – Sections 2 (viib), 8 and 21**

Smack – Commercial and non-commercial quantity – Determination of – In the mixture of a narcotic drug or a psychotropic substance with one or more neutral substances, the quantity of the neutral substance (s) is not to be taken into consideration while determining the small quantity or commercial quantity of a drug or substance – It is only the actual content by weight of the narcotic drug, which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity.

Kamlesh Singh v. State of Madhya Pradesh

Reported in 2008 (5) MPHT 318

Held :

So far as conviction of the appellant for non-commercial quantity of smack is concerned, this Court finds substance on the basis of the judgment passed by the Apex Court in case of *E. Michel Raj v.Intelligence Officer, Narcotic Bureau, 2008 AIR SCW 2365.* Supreme Court in this case has specifically held that the accused can be convicted for pure quantity mixed with in neutral substance. In this case, 4.07 kg heroin was seized from the possession of the appellant E. Michel Raj and two samples were sent and in each sample 1.6% pure morphine was found. On mathematical calculation, in 4.07 kg heroin only 60 gm pure heroin/morphine was present. The conviction of the appellant under Section 8/21 (c) has been set aside by the learned Apex Court and he has been convicted under Section 8/21 (b) of the Act having in possession of non-commercial quantity and more than small quantity. In the case at hand, total quantity seized was 1.10 kg and 10.47% pure Di Acetyl Morphine was found in sample of 25 gm, therefore, the pure quantity of morphine would be 115.17gm. This quantity is less than commercial quantity, i.e., 250 gm.

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*64. **NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138**
INDIAN PENAL CODE, 1860 – Section 420
Offence under Section 138 of N.I. Act and under Section 420 IPC, taking cognizance of – Accused 'A' neither issued cheque by his signature for payment of any amount to the complainant nor he contacted to the complainant for supply of milk powder – It was another accused 'B' who instructed complainant to supply milk powder to the accused 'A' and issued cheque for the payment of the amount under his signature – Held, as there was no privity of contract between accused 'A' and complainant and accused 'A' did not issue the concerning cheque, accused 'A' cannot be held liable for prosecution under Section 420 IPC or under Section 138 of N.I. Act – Further, held, to hold a person guilty of the offence of cheating, it is necessary to show that he had fraudulent or dishonest intention at the time of making promise – Mere failure to keep up promise subsequently is not sufficient in itself to presume that the promisor had such a culpable intention right from the beginning.
Makson Food Private Limited v. Sterling Agro Industries Ltd.
Reported in 2008 (4) MPLJ 586

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65. **NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 142 (b), Proviso**
INDIAN PENAL CODE, 1860 – Section 420
(i) **Dishonour of cheque – The provision of belated compliance, power of Court to condone the delay u/s 142 (b), Proviso of the Act is not retrospective because it is substantive provision and not a procedural one.**
(ii) **Cheating – As per allegations, post dated cheques have been issued – The cheques were dishonoured on the ground of non-operation of account and was closed subsequently – Intention to cheat right from the date of issuance of cheque cannot be inferred – Therefore, offence u/s 420 IPC is not made out.**
Subodh S. Salaskar v. Jayprakash M. Shah & Anr.
Reported in AIR 2008 SC 3086

Held:

Ex facie, it was barred by limitation. No application for condonation of delay was filed. No application for condonation of delay was otherwise maintainable. 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, 1973. The provisions of the said Acts are not applicable. In any event, no such application for condonation of delay was filed. If the proviso appended to Clause (b) of Section 142 of the Act contained a substantive provision and not a procedural one, it could not have been given a retrospective effect. A substantive law, as it is well-settled, in absence of an express provision, cannot be given a retrospective effect or retroactive operation.

In *Madishetti Bala Ramul (Dead) By LRs. v. Land Acquisition Officer, (2007) 9 SCC 650,* this Court held as under: –

> "18. It is not the case of the appellants that the total amount of compensation stands reduced. If it had not been, we fail to understand as to how Section 25 will have any application in the instant case. Furthermore, Section 25 being a substantive provision will have no retrospective effect. The original award was passed on 8-2-1981: Section 25, as it stands now, may, therefore, not have any application in the instant case."

The question is now covered by a judgment of this Court in *Anil Kumar Goel v. Kishan Chand Kaura, 2008 AIR SCW 295* holding:

> "8. All laws that affect substantive rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations, unless the legislative intent is clear and compulsive. Such retrospective effect may be given where there are express words giving retrospective effect or where the language used necessarily implies that such retrospective operation is intended. Hence the question whether a statutory provision has retrospective effect or not depends primarily on the language in which it is couched. If the language is clear and unambiguous, effect will have to be given to the provision is question in accordance with its tenor. If the language is not clear then the court has to decide whether, in the light of the surrounding circumstances, retrospective effect should be given to it or not. (See: *Punjab Tin Supply Co., Chandigarh etc. etc. v. Central Government and Ors., AIR 1984 SC 87).*
>
> 9. There is nothing in the amendment made to Section 142(b) by the Act 55 of 2002 that the same was intended to operate retrospectively. In fact that was not even the stand of the respondent. Obviously, when the complaint was filed on 28.11.1998, the respondent could not have foreseen that in future any amendment providing for extending the period of limitation on sufficient cause being shown would be enacted."

Therefore, there cannot be any doubt whatsoever that the courts below committed a manifest error in applying the proviso to the fact of the instant case. If the complaint petition was barred by limitation, the learned Magistrate had no jurisdiction to take cognizance under Section 138 of the Act. The direction to issue summons on the appellant, therefore, being illegal and without jurisdiction was a nullity. Section 415 of the Indian Penal Code defines "cheating". The said provision requires: (i) deception of any person, (ii) whereby fraudulently or dishonestly inducing that person to deliver any property to any person or to consent that any person shall retain any property, or (iii) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. Deception of any person is common to the second and third requirements of the provision. [See *Devender Kumar Singla v. Baldev Krishan Singla, (2005) 9 SCC 15*]

Noticing the ingredients of cheating, this Court in *Suryalakshmi Cotton Mills Ltd. v. Rajvir Industries Ltd. and Ors., JT 2008 (1) SC 340,* held : –

> "A bare perusal of Section 415 read with Section 420 of the Indian Penal Code would clearly lead to the conclusion that fraudulent or dishonest inducement on the part of the accused must be at the inception and not at a subsequent stage.

For the said purpose, we may only notice that blank cheques were handed over to the accused during the period 2000-2004 or use thereof for business purposes but the dispute between the parties admittedly arose much thereafter i.e. in 2005.

In *B. Suresh Yadav v. Sharifa Bee 2007 (12) SCALE 364,* it was held;

> 13. For the purpose of establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. In a case of this nature, it is permissible in law to consider the stand taken by a party in a pending civil litigation. We do not, however, mean to lay down a law that the liability of a person cannot be both civil and criminal at the same time. But when a stand has been taken in a complaint petition which is contrary to or inconsistent with the stand taken by him in a civil suit, it assumes significance. Had the fact as purported to have been represented before us that the appellant herein got the said two rooms demolished and concealed the said fact at the time of execution of the deed of sale, the matter might have been different. As the deed of sale was executed on 30.9.2005 and the purported demolition took place on 29.9.2005, it was expected that the complainant/first respondent would come out with her real grievance in the written statement filed by her in the aforementioned suit.

She, for reasons best known to her, did not choose to do so. No case for proceeding against the respondent under Section 420 of the Indian Penal Code is therefore, made out.

Filling up of the blanks in a cheque by itself would not amount to forgery. Whereas in the complaint petition, allegations have been made that it was respondent Nos. 2 and 3 who had entered into a conspiracy to commit the said offence as indicated hereinbefore, in the counter affidavit, it has been alleged that the employees of the Respondent Company did so."

The cheques were post dated ones. Admittedly they were issued in the year 1996. They were presented before the bank on a much later date. They were in fact presented only on 10.01.2001. When the cheques were issued, the accounts were operative. Even assuming that the account was closed subsequently the same would not mean that the appellant had an intention to cheat when the post dated cheques were issued. Even otherwise the allegations made in the complaint petition, even if given face value and taken to be correct in its entirety do not disclose commission of an offence under Section 420 of the Indian Penal Code. They do not satisfy the ingredients of the suit provision. It is, therefore, in the fact situation obtaining in the instant case, difficult to hold that the provisions of Section 420 of the Indian Penal Code were attracted.

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66. PARTNERSHIP ACT, 1932 – Section 69

Suit for dissolution of partnership firm and rendition of account – Provision barring institution of suit unless partnership firm is registered – Held, provision not applicable in instant suit – Purpose of registration is to protect the interests of third parties and disability is confined to suits to enforce a right arising from a contract or conferred by the Act.

Madanlal & ors. v. Smt. Badambai

Reported in I.L.R. (2008) M.P. 3249

Held:

A careful analysis of section 69 of the Partnership Act shows that the section is divided in four parts. First part prevents a person from suing as a partner in a firm, either the firm or a person who is alleged to be a partner in the firm in respect of any right arising out of a contract of partnership or any other right conferred by the Act, unless the firm is registered. Second part deals with and prevents a similar suit against a third person in respect of any contract by the firm unless it is registered and it is shown that the persons suing on behalf of the firm are partners in the firm. Third part provides that above embargo would be attracted to a claim of set-off or other proceeding to enforce a right arising from a contract, but fourthly, it also carves out exceptions to the embargo in two cases, viz.(1) enforcement of any right to sue for the dissolution of the firm or for accounts of a dissolved firm or any right or power to realise the property of a dissolved firm; and(2) the power of an official assignee, receiver or Court for

realisation of property of an insolvent partner. Thus, it is clear that a suit for dissolution of the firm and rendition of accounts is not barred and can be filed and perused notwithstanding absence of registration of the partnership firm, The purpose of registration firm is to protect the interests of third parties and disability is confined to suits to enforce a right arising from a contract or conferred by the Act. The non-registration of the firm does bar other classes of suit.

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67. PREVENTION OF CORRUPTION ACT, 1947 – Section 5
Demand and acceptance of bribe – Accused asked to pass money to A – Money was delivered to A who in turn handed over to accused – The same currency notes were recovered from the accused – Offence proved.
Raj Rajendra Singh Seth v. State of Jharkhand & Anr.
Reported in AIR 2008 SC 3217

Held:

Much has been made of the fact that most of the witnesses were in the same office. The evidence is to the effect that the appellant had asked PW-3 to pay money to co-accused Nag Narain who was to pass the money to him. PW-2 in his evidence has categorically stated that the decision was taken in CBI office that money is to be paid to Nag Narain who has made payment to the accused. Similarly, PW-10 while making verification about the genuineness of the allegations made by PW-3 has stated that he went to the residence of the appellant and he hid himself behind the bush and from there he heard talks between PW-3 and appellant. He has stated that the appellant asked PW-3 to make payment to Nag Narain. PW-3 corroborated this part of the statement of PW-10 who is a constable. He was entrusted with the job to verify the genuine ness of the allegations made by PW-3. He went to his chamber and Nag Narain was present there. PWs 1 and 2 were independent witnesses and in their presence money was delivered to Nag Narain by PW-3. This was done because when PW-3 and others reached at the hospital, the chamber was found locked. PW-3 met Nag Narain and paid money to him and proceeded to residence of the appellant. After reaching there PW-3 and Nag Narain went inside the gate and PW-2 and others remained at the gate. It is clear from the evidence that the appellant came out after the call bell was pressed and Nag Narain passed the money to him. PW-2 who saw passing of money to the appellant, gave a signal and immediately thereafter Nag Narain and the appellant were arrested and money was recovered from the right hand of the appellant and both the hands of the accused persons were washed in separate solution and they turned pink. The currency notes were also recovered and the requisite formalities were followed. The plea that there is no demand made by the appellant is clearly belied by the evidence on record. The evidence clearly establishes that the appellant had asked the money to be passed on to Nag Narain who in turn handed over the money to the appellant.

In *B. Noha v. State of Kerala and Anr. (2006) 12 SCC 277* it was, inter alia, observed by this Court as follows:

> "10. The evidence shows that when PW-1 told the accused that he had brought the money as directed by the accused, the accused asked PW-1 to take out and give the same to him. When it is proved that there was voluntary and conscious acceptance of the money, there is no further burden cast on the prosecution to prove by direct evidence, the demand or motive. It has only to be deduced from the facts and circumstances obtained in the particular case. It was held by this Court in *Madhukar Bhaskarrao Joshi v. State of Maharashtra (2000) 8 SCC 571* as follows :
>
> "12. The premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted 'as motive or reward' for doing or forbearing to do any official act. So the word 'gratification' need not be stretched to mean reward because reward is the outcome of the presumption which the court has to draw on the factual premises that there was payment of gratification. This will again be fortified by looking at the collocation of two expressions adjacent to each other like 'gratification or any valuable thing'. If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do an official act, the word 'gratification' must be treated in the context to mean any payment for giving satisfaction to the public servant who received it."
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> 11. This decision was followed by this Court in *M. Narsinga Rao v. State of A.P., (2001) 1 SCC 691.* There is no case of the accused that the said amount was received by him as the amount which he was legally entitled to receive or collect from PW-1. It was held in the decision in *State of A.P. v. Kommaraju Gopala Krishna Murthy (2000) 9 SCC 752,* that when amount is found to have been passed to the public servant the burden is on public servant to establish that it was not by way of illegal gratification. That burden was not discharged by the accused."

In the case at hand all the requisites for proving the demand and acceptance of bribe have been established.

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68. PREVENTION OF CORRUPTION ACT, 1947 – Section 5 (2) Bribery – Allegation is that money was demanded for stalling recovery from complainant – Demand and recovery of notes from the accused proved – The fact that recovery order was already issued – It cannot frustrate allegation of complainant as recovery order contained signature of the accused.

State of U.P. v. Bhaiya Lal Verma

Reported in AIR 2008 SC 2831

Held:

One of the reasons which has weighed with the High Court to direct acquittal is the statement of PW 1. According to High Court his evidence clearly proved that recovery order was issued against the complainant on 29.3.1984 and it contained signatures of the superior officer as well as the accused. The High Court came to hold that once the recovery order has been issued, the accused could not have frustrated the recovery on any ground. The recovery can be frustrated only before the issuance of the recovery order. The reasoning of the High Court is clearly fallacious in as much as it overlooked the fact that the recovery order itself contained the signature of the accused. If that is so, there was no question of his being not involved in recovery. The High Court noted that in the personal search one currency note of Rs.100/- having No.AA/35 377745 and the other currency note of Rs.50/- having No.3 DH 3555826 were recovered from him.

It is not to understand how the root of the prosecution case of demand of bribe was rendered vulnerable. Merely because the accused enquired from the police the reason for his arrest, that does not establish the innocence. The question as to why he was being arrested and then telling the complainant that he had not done a good thing to him and he had deceived him rather goes to show that the accused was blaming the complainant for having betrayed him. It was not a statement of innocence and on the contrary it was a statement showing anguish that the complainant had got him caught. As noted above, the recovery of the money has not been disputed. The evidence of PW 3 clearly establishes the demand and acceptance of bribe and the recovery. The High Court had recorded contradictory findings. On one hand it has noted that the recovery order contained the signature of the accused but at another place it says that the copy of the recovery memo was neither handed over to the accused nor his signature was obtained on that. With this erroneous conclusion the High Court came to hold that the recovery memo was prepared behind the back of the accused. According to the High Court's own conclusion it was not really so. Interestingly, the suggestion made by the accused during the cross-examination of PW 3 was that he had handed over the money to the accused stating that the amount is the price of ghee for the Project Officer. This is an indirect way of accepting that money has been received by him. In fact there was practically no denial of this aspect and the recovery has also not been denied.

Above being the position, the order of the High Court is clearly indefensible and is set aside. The order of conviction recorded by the trial court is restored.

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69. PREVENTION OF CORRUPTION ACT, 1988 – Section 20
Presumption – U/s 20 of the Act there is a statutory presumption of acceptance of bribe if offence u/s 7 or 11 or 13 (1) (a) or 13 (1) (b) is proved – It is for accused to explain and rebut the presumption by leading evidence.
Baijnath Prasad Patel v. State of M.P.
Reported in I.L.R. (2008) M.P. 3304

Held:

Under section 20 of the Act there is statutory presumption of acceptance of bribe if the offence under section 7 or section 11 or clause (a) or (b) of sub-section (1) of section 13 is proved and it is for the accused to explain and rebut the presumption. Though the defence of appellant in his statement recorded under section 313, Cr.P.C. is that in order to get the criminal case closed against complainant for which he was not agreeing, he has been falsely implicated, but in support of this defence, he has not examined any witness. From the statement of prosecution witnesses the defence is not found to be probable because only suggestion has been made in this regard. The Supreme Court in the case of *Girija Prasad v. State of M.P. (2007) 7 SCC 625* has held, once it is proved that the amount has been received by the accused, presumption under section 4 (corresponding section 20 of the Act of 1988) would get attracted. In such a case, it would be wholly immaterial whether the said acceptance of amount was for him or for someone else. It would also be immaterial whether the accused was or was not in a position to oblige the complainant. The Supreme Court has further held that an accused can rebut the said presumption by leading evidence. In paras 21 and 31 of the said decision the Supreme Court has laid down the law that the doctrine of preponderance and probability would not be applicable where no evidence was adduced by the accused to rebut the statutory presumption. The Apex Court held that merely by taking the defence of 'total denial' and 'false application' the said doctrine would not be attracted. In the present case also no evidence has been led by the appellant in regard to his defence. Hence the decision of *Girija Prasad* (Supra) is fully applicable in the present case.

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70. PROPERTY LAW:
MOHAMMEDAN LAW :
TRANSFER OF PROPERTY ACT, 1882 – Sections 1 & 54
Pre-emption in Mohammedan Law– Right of pre-emption arises only after a transaction of sale has taken place by virtue of which title of the property passes from vendor to vendee.
An agreement of sale does not create interest in the property as

per Section 54 of the Transfer of Property Act – Therefore, no right of pre-emption accrues – Hence the suit of pre-emption is not maintainable because of application of Transfer of Property Act which cannot be overridden by personal law relating to transfer of property.

Kumar Gonsusab and others v. Mohammed Miyan urf Baban and others

Judgment dated 19.08.2008 passed by the Supreme Court in Civil Appeal No. 157 of 2001, reported in (2008) 10 SCC 153

Held:

Chapter XIII of the Mohammedan Law, (Ed. 19 by Mulla) deals with pre-emption under the Mohammedan Law. Section 226 says that right of pre-emption is a right which the owner of an immovable property possesses to acquire by purchase another immoveable property which has been sold to another person.

Section 232 of the Mohammedan Law would also be relevant which runs as under:

> "232. **Sale alone gives rise to pre-emption** – The right of pre-emption arises only out of a valid (a), complete (b), and bonafide (c) sale. It does not arise out of gift (hiba), sadaquah (s.171), wakf, inheritance, bequest (d), or a lease even though in perpetuity (e), Nor does it arise out of a mortgage even though it may be by way of conditional sale (f); but the right will accrue, if the mortgage is foreclosed (g). An exchange of properties between two persons subject to an option to either of them to cancel the exchange and take back his property at any time during his life, stands on the same footing as a conditional sale; such an exchange does not extinguish the ownership in the property and does not give rise to the right of pre-emption. But if one of the parties dies without canceling the exchange, the transaction will mature into two sales and will give rise to the right of pre-emption (h). It has been held by the High Court of Allahabad that a transfer of property by a husband to his wife in lieu of dower is a sale, and is therefore subject to a claim for pre-emption (i). On the other hand, the Chief Court of Oudh has held that the transaction amounts to a hiba-bil-ewaz, and no claim for pre-emption can therefore arise (j)."

On a plain reading of Sections 226 and 232 of the Mohammedan Law, it is clearly evident that the right of pre-emption can only accrue to an owner of immoveable property when another immoveable property is sold to another person. Section 232 of the Mohammedan Law also indicates that sale alone gives rise to pre-emption. Such being the provision made in Sections 226 and 232 and in view of the admitted fact that in this case admittedly sale was not

affected by appellant No. 3 in favour of the appellant Nos. 1 and 2 in respect of the suit property, we are not in a position to hold that the suit for pre-emption was maintainable as there was no cause of action to file such suit in the absence of a sale deed effected in respect of the said agreement for sale.

In this connection, Section 54 of the Transfer of Property Act may also be referred to. Section 54 of the Transfer of Property Act says that a contract for sale does not, of itself, create any interest in or charge on immoveable property. Therefore, where the parties enter into a mere agreement to sell, it creates no interest in the suit property in favour of the vendee and the proprietary title does not validly pass from the vendors to the vendee and until that is completed no right to enforce pre-emption arises. Therefore, in our view, the suit for pre-emption brought on the basis of such an agreement was without any cause of action as there was no right of pre-emption in the respondents which could be enforced under the law.

In *Radhakishan Laxminarayan Toshniwal v. Shridhar Ramchandra Alshi & Ors., AIR 1960 SC 1368,* this Court has held that the transfer of property, where the Transfer of Property Act applies, has to be under the provisions of the Act only and Mohammedan Law or any other personal law of transfer of property cannot override the statute. Therefore, unless title to the suit property has passed in accordance with the Act, no right to enforce pre-emption arises.

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71. REGISTRATION ACT, 1908 – Section 17

A family partition deed revealing that previously there was an oral partition amongst the family members by metes and bounds and that the members were also placed in physical possession – Held, such a document is not compulsorily registrable.

Chandra Prakash Soni v. Dwarka Prasad Soni and others

Reported in 2008 (5) MPHT 296

Held :

When a deed of partition reduced in writing in a formal document intended to be an evidence of partition is compulsory registrable under the Registration Act, 1908. However, if it does not evidence any partition in meets and bounds, but is a mere recital of a former partition orally made, it would be outside the purview of Section 17 (1) of the Act of 1908.

In the case of *K.G. Shivalingappa v. G.S.Eswarappa, AIR 2004 SC 4130,* Their Lordships were pleased to observe:

> "13. In *Nani Bai v. Gita Bai Kom Rama Gunge, AIR 1958 SC 706,* it has been held by this Court that though partition amongst the Hindus may be effected orally but if the parties reduce it in writing to a formal document which is intended to be evidence of partition, it would have the effect of declaring the exclusive title of the coparcener to whom a particular property was allotted in partition and thus the

document would be required to be compulsory registered under Section 17 (1) (b) of the Registration Act. However, if the document did not evidence any partition by metes and bounds, it would be outside the purview of Section 17 (1) of the Indian Registration Act. This decision was followed in *Shiromani and others v. Hem Kumar and others, AIR 1968 SC 1299 and Roshan Singh v. Zil Singh, AIR 1988 SC 881. In Sk. Sattar Sk. Mohd. Choudhari v. Gundappa Ambadas Bukate, (1996) 6 SCC 373,* after analyzing the judgments, referred to above this Court observed:

"Partition, specially among the coparceners, would be a "Transfer" for purpose of Registration Act, 1908 or not has been considered in *Nani Bai v. Gita Bai Kom Rama Gunge, AIR 1958 SC 706* and it has been held that though a partition may be effected orally, if the parties reduce the transaction to a formal document which was intended to be evidence of partition, it would have the effect of declaring the exclusive title of the coparcener to whom a particular property was allotted (by partition) and thus the document would fall within the mischief of Section 17 (1) (b) of the Registration Act under which the document is compulsorily registrable. If, however, that document did not evidence any partition by meters and bounds, it would be outside the purview of that section. This decision has since been followed in *Siromani v. Hemkumar, AIR 1968 SC 1299 and Roshan Singh v. Zile Singh, AIR 1988 SC 881."*

A perusal of family partition deed, Annexure P-3 reveals that there was a former oral partition amongst the family members in metes and bounds and the respective members were placed in physical possession, and therefore, the same was not registrable under Section 17 (2) (i) of the Act of 1908.

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72. SERVICE LAW:
CONSTITUTION OF INDIA – Article 141
EMPLOYMENT EXCHANGES (COMPULSORY NOTIFICATION OF VACANCIES) ACT, 1959 – Section 4
Regularisation of employee – Disrespect to the binding precedent is breach of judicial discipline.

Official Liquidator v. Dayanand and others

Judgment dated 04.11.2008 passed by the Supreme Court in Civil Appeal No. 2985 of 2007, reported in (2008) 10 SCC 1

Held:

By virtue of Article 141 of the Constitution, the judgment of the Constitution Bench in, *State of Karnataka v. Uma Devi, (2006) 4 SCC 1* is binding on all the courts including this Court till the same is overruled by a larger Bench. The ratio

of the Constitution Bench judgment has been followed by different two-Judges Benches for declining to entertain the claim of regularization of service made by ad hoc/temporary/ daily wage/casual employees or for reversing the orders of the High Court granting relief to such employees - *Indian Drugs and Pharamaceuticals Ltd. v. Workmen, (2007) 1 SCC 408, Gangadhar Pillai v. Siemens Ltd., (2007) 1 SCC 533, Kendriya Vidyalaya Sangathan v. L.V. Subramanyeswara, (2007) 5 SCC 326, Hindustan Aeronautics Ltd. v. Dan Bahadur Singh, (2007) 6 SCC 207. However, in U.P. SEB v. Pooran Chand Pandey, (2007) 11 SCC 92* on which reliance has been placed by Shri Gupta, a two-Judges Bench has attempted to dilute the Constitution Bench judgment by suggesting that the said decision cannot be applied to a case where regularization has been sought for in pursuance of Article 14 of the Constitution and that the same is in conflict with the judgment of the seven-Judges Bench in *Maneka Gandhi v. Union of India, (1978) 1 SCC 248.* But the two-Judge had no occasion to make any adverse comment on the binding character of the Constitution Bench judgment in *State of Karnataka v. Umadevi* (supra).

There have been several instances of different Benches of the High Courts not following the judgments/orders of coordinate and even larger Benches. In some cases, the High Courts have gone to the extent of ignoring the law laid down by this Court without any tangible reason. Likewise, there have been instances in which smaller Benches of this Court have either ignored or bypassed the ratio of the judgments of the larger Benches including the Constitution Benches. These cases are illustrative of non-adherence to the rule of judicial discipline which is *sine qua non* for sustaining the system. In *Mahadeolal Kanodia v. Administrator General of W.B., 1960 (3) SCR 578,* this Court observed: (AIR p. 941, para 19)

> "19. ...If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of coordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view the result would be utter confusion. The position would be equally bad where a Judge sitting singly in the High Court is of opinion that the previous decision of another Single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case lawyers would not know how to advise their clients and all courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between dissentient judgments of their own High Court."

In *Lala Shri Bhagwan v. Ram Chandra, AIR 1965 SC 1767, Gajendragadkar, C.J. observed : (AIR p. 1773, para 18)*

> "18. ....It is hardly necessary to emphasize that considerations of judicial propriety and decorum require that if a learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as a Single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned Single Judge departed from this traditional way in the present case and chose to examine the question himself."

In *Union of India v. Raghubir Singh, (1989) 2 SCC 754 R.S. Pathak, C.J.* while recognizing need for constant development of law and jurisprudence emphasized the necessity of abiding by the earlier precedents in following words: (SCC p. 766, para 9)

> "9. The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of law, besides providing assurance to the individual as to the consequence of transaction forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court."

We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass root will not be able to decide as to which of the judgment lay down the correct law and which one should be followed.

We may add that in our constitutional set up every citizen is under a duty to abide by the Constitution and respect its ideals and institutions. Those who have been entrusted with the task of administering the system and operating various constituents of the State and who take oath to act in accordance with the Constitution and uphold the same, have to set an example by exhibiting

total commitment to the Constitutional ideals. This principle is required to be observed with greater rigour by the members of judicial fraternity who have been bestowed with the power to adjudicate upon important constitutional and legal issues and protect and preserve rights of the individuals and society as a whole. Discipline is *sine qua non* for effective and efficient functioning of the judicial system. If the Courts command others to act in accordance with the provisions of the Constitution and rule of law, it is not possible to countenance violation of the constitutional principle by those who are required to lay down the law.

In the light of what has been stated above, we deem it proper to clarify that the comments and observations made by the two-Judges Bench in *UP State Electricity Board v. Pooran Chandra Pandey* (supra) should be read as obiter and the same should neither be treated as binding by the High Courts, Tribunals and other judicial foras nor they should be relied upon or made basis for bypassing the principles laid down by the Constitution Bench.

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***73. STATE BAR COUNCIL OF MADHYA PRADESH – Rule 143-A**
CONSTITUTION OF INDIA – Article 14
Maximum age limit for entry in the legal profession, fixation of – Rule 143-A of the Rules, prescribing the maximum age of 45 years for entry in the legal profession held, ultra vires as being arbitrary, discriminatory and violative of Article 14 of the Constitution.
Dr. Shekhar Seth and another v. M.P. State Bar Council and another
Reported in 2008 (5) MPHT 42 (DB)

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***74. TRADE MARKS ACT, 1999 – Sections 134 & 135**
CIVIL PROCEDURE CODE, 1908 – Section 20

(i) Suit for injunction and damages – Allegation of using phonetically similar mark and passing off product – Trade marks phonetically similar not seriously disputed – Ex parte decree based on large number of witnesses and exhibited documents – Offending label exploited on commercial scale in an area, the evidence with regard to actual sale is unnecessary and redundant – Held, damages cannot be awarded due to delay – Token damages awarded – However, order of injunction affirmed – Decree modified.

(ii) Territorial jurisdiction – Articles in large number found within jurisdiction of trial court – Section 138 does not override provision of Code – Cause of action having arisen within jurisdiction – Held, the trial court did not suffer from lack of jurisdiction – Suit was maintainable.

Rasiklal Manikchand Dhariwal; and Dhariwal Industries Ltd. v. M/s M.S.S. Food Products
Reported in I.L.R. (2008) M.P. 3225

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75. TRANSFER OF PROPERTY ACT, 1882 – Section 60

Registered mortgage deed executed – Change of status from a 'mortgagee' to a 'lessee' on the basis of unregistered deed of mortgage – Is not permissible.

The term of 'registered document' could be varied or altered only by another registered deed.

Chandrakant Shankarrao Machale v. Smt. Parubai Bhairu Mohite (dead) through L.Rs.

Reported in AIR 2008 SC 3255

Held:

The Deed of Mortgage dated 28.2.1983 was a registered document. The terms of a registered document could be varied or altered only by another registered document. A fihding of fact has been arrived at that the appellant could not prove his possession as a tenant. We have noticed hereinbefore that the appellant was put in possession as a mortgagee. It was, therefore, in our opinion, impermissible in law to change his status from a mortgagee to that of a lessee by reason of an unregistered deed of lease (even if we assume that the same had been executed).

The learned Court of Appeal may not be entirely correct in taking recourse to Section 92 of the Indian Contract Act or holding that the deed of lease required registration even for the purpose of month to month tenancy, but, as indicated hereinbefore, we have considered the question from a different angle.

Furthermore, the only question of law which was pressed before the High Court was :

> "The lower appellate court ought to have held that the respondents and appellant executed an agreement dated 28.2.1983 i.e. Exh.62 and immediately on the next day, i.e., on 1.3.1983 executed the agreement for tenancy which is a subsequent agreement. Hence it ought to have been held that the parties have by their conduct agreed to treat the transaction as a lease and hence suit filed by respondents for redemption of mortgage is not maintainable in law and ought to have been dismissed with costs."

No substantial question of law, thus, had been raised.

The deed of mortgage was a registered one. It fulfilled the conditions of a valid mortgage. Its terms could not have been varied or altered by reason of an unregistered document so as to change the status of the parties from mortgagee to a lessee. [See *S. Saktivel (dead) by L.Rs. v. M. Venugopal Pillai & Ors., AIR 2000 SC 2633 para 67*]

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NOTE : Asterisk (*) denotes brief notes

PART - III

CIRCULARS/NOTIFICATIONS

NOTIFICATION REGARDING AMENDMENT IN THE MADHYA PRADESH CIVIL SERVICES (CONDUCT) RULES, 1965

Notification No. C-5-2-2008-3-I dated the 27th September, 2008. *[Published in M.P. Rajpatra (Asadharan) dated 27.9.2008 Page 1150]*– In exercise of the powers conferred by the proviso to **Article 309 of the Constitution of India,** the Governor of Madhya Pradesh, hereby makes the following further **amendment in the Madhya Pradesh Civil Services (Conduct) Rules, 1965,** namely: –

In the said Rules, after Rule 12, the following Rule shall be inserted namely:-

"12-A. Communication of Official Information. – Every Government servant shall, in performance of his duties in good faith, communicate information to a person in accordance with the provisions of Right to Information Act, 2005 (22 of 2005) and the rules made thereunder:

Provided that no Government servant shall, except in accordance with any general or special order of the Government or in performance in good faith of the duties assigned to him, communicate, directly or indirectly, any official document or any part thereof or classified information to any Government servant or any other person to whom he is not authorized to communicate such document or classified information."

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Advice is like show, the softer it falls, the longer it dwells upon and the deeper it sinks into the mind.

– S.T. COLERIDGE

When in the company of sensible men, we ought to be doubly cautious of talking too much, lest we lose two good things – their good opinion and our own improvement; for what we have to say we know, but what they have to say we know not.

– C.C. COLTON

It is very important to make certain that our conversation is pleasing. It will be if with everyone we are humble, patient, respectful, cordial, gracious and yielding in all things permissible.

– ST FRANCIS DE SALES

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE SCHEDULED TRIBES AND OTHER TRADITIONAL FOREST DWELLERS (RECOGNITION OF FOREST RIGHTS) ACT, 2006

No. 2 of 2007* **[29th December, 2006.]**

BE it enacted by Parliament in the Fifty-seventh Year of the Republic of India as follows:-

CHAPTER 1
Preliminary

1. **Short title and commencement.** - (1) This Act may be called the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

(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.-** In this Act, unless the context otherwise requires,-

(a) "community forest resource" means customary common forest land within the traditional or customary boundaries of the village or seasonal use of landscape in the case of pastoral communities, including reserved forests, protected forests and protected areas such as Sanctuaries and National Parks to which the community had traditional access;

(b) "critical wildlife habitat" means such areas of National Parks and Sanctuaries where it has been specifically and clearly established, case by case, on the basis of scientific and objective criteria, that such areas are required to be kept as inviolate for the purposes of wildlife conservation as may be determined and notified by the Central Government in the Ministry of Environment and Forests after open process of consultation by an Expert Committee, which includes experts from the locality appointed by that Government wherein a representative of the Ministry of Tribal Affairs shall also be included, in determining such areas according to the procedural requirements arising from sub-sections (1) and (2) of section 4;

*Received the assent of the President on the 29th December, 2006 and Act published in the Gazette of India (Extraordinary) Part II Section 1 dated 2-1-2007 Pages 1-9 [S. No. 2].

(c) "forest dwelling Scheduled Tribes" means the members or community of the Scheduled Tribes who primarily reside in and who depend on the forests or forest lands for bona fide livelihood needs and includes the Scheduled Tribe pastoralist communities;

(d) "forest land" means land of any description falling within any forest area and includes unclassified forests, undemarcated forests, existing or deemed forests, protected forests, reserved forests, Sanctuaries and National Parks;

(e) "forest rights" means the forest rights referred to in section 3;

(f) "forest villages" means the settlements which have been established inside the forests by the forest department of any State Government for forestry operations or which were converted into forest through the forest reservation process and includes forest settlement villages, fixed demand holdings, all types of taungya settlements, by whatever name called, for such villages and includes lands for cultivation and other uses permitted by the Government;

(g) "Gram Sabha" means a village assembly which shall consist of all adult members of a village and in case of States having no Panchayats, Padas, Tolas and other traditional village institutions and elected village committees, with full and unrestricted participation of women;

(h) "habitat" includes the area comprising the customary habitat and such other habitats in reserved forests and protected forests of primitive tribal groups and pre-agricultural communities and other forest dwelling Scheduled Tribes;

(i) "minor forest produce" includes all non-timber forest produce of plant origin including bamboo, brush wood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or kendu leaves, medicinal plants and herbs, roots, tubers and the like;

(j) "nodal agency" means the nodal agency specified in section 11;

(k) "notification" means a notification published in the Official Gazette;

(l) "prescribed" means prescribed by rules made under this Act;

(m) "Scheduled Areas" means the Scheduled Areas referred to in clause (1) of article 244 of the Constitution;

(n) "sustainable use" shall have the same meaning as assigned to it in clause (o) of section 2 of the Biological Diversity Act, 2002;

(o) "other traditional forest dweller" means any member or community who has for at least three generations prior to the 13th day of December, 2005 primarily resided in and who depend on the forest or forests land for bona fide livelihood needs.

Explanation.- For the purpose of this clause, "generation" means a period comprising of twenty-five years;

(p) "village" means-

(i) a village referred to in clause (b) of section 4 of the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 (40 of 1996) or

(ii) any area referred to as a village in any State law relating to Panchayats other than the Scheduled Areas; or

(iii) forest villages, old habitation or settlements and unsurveyed villages, whether notified as village or not; or

(iv) in the case of States where there are no Panchayats, the traditional village, by whatever name called;

(q) "wild animal" means any species of animal specified in Schedules I to IV of the Wild Life (Protection) Act, 1972 and found wild in nature.

CHAPTER II

Forest Rights

3. Forest rights of Forest dwelling Scheduled Tribes and other traditional forest dwellers.- (1) For the purposes of this Act, the following rights, which secure individual or community tenure or both, shall be the forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers on all forest lands, namely:-

(a) right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers;

(b) community rights such as *nistar*, by whatever name called, including those used in erstwhile Princely States, Zamindari or such intermediary regimes;

(c) right of ownership, access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries;

(d) other community rights of uses or entitlements such as fish and other products of water bodies, grazing (both settled or transhumant) and traditional seasonal resource access of nomadic or pastoralist communities;

(e) rights including community tenures of habitat and habitation for primitive tribal groups and pre-agricultural communities;

(f) rights in or over disputed lands under any nomenclature in any State where claims are disputed;

(g) rights for conversion of *Pattas* or leases or grants issued by any local authority or any State Government on forest lands to titles;

(h) rights of settlement and conversion of all forest villages, old habitation, unsurveyed villages and other villages in forests, whether recorded, notified or not into revenue villages;

(i) right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use;

(j) rights which are recognised under any State law or laws of any Autonomous District Council or Autonomous Regional Council or which are accepted as rights of tribals under any traditional or customary law of the concerned tribes of any State;

(k) right of access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity;

(l) any other traditional right customarily enjoyed by the forest dwelling Scheduled Tribes or other traditional forest dwellers, as the case may be, which are not mentioned in clauses (a) to (k) but excluding the traditional right of hunting or trapping or extracting a part of the body of any species of wild animal;

(m) right to *in situ* rehabilitation including alternative land in cases where the Scheduled Tribes and other traditional forest dwellers have been illegally evicted or displaced from forest land of any description without receiving their legal entitlement to rehabilitation prior to the 13th day of December, 2005.

(2) Notwithstanding anything contained in the Forest (Conservation) Act, 1980 (69 to 1980), the Central Government shall provide for diversion of forest land for the following facilities managed by the Government which involve felling of trees not exceeding seventy-five trees per hectare, nemely:-

(a) schools;

(b) dispensary or hospital;

(c) anganwadis;

(d) fair price shops;

(e) electric and telecommunication lines;

(f) tanks and other minor water bodies;

(g) drinking water supply and water pipelines;

(h) water or rain water harvesting structures;

(i) minor irrigation canals;

(j) non-conventional source of energy;

(k) skill upgradation or vocational training centres;

(l) roads; and

(m) community centres:

Provided that such diversion of forest land shall be allowed only if,-

(i) the forest land to be diverted for the purposes mentioned in this sub-section is less than one hectare in each case; and

(ii) the clearance of such developmental projects shall be subject to the condition that the same is recommended by the Gram Sabha.

CHAPTER III

Recognition, restoration and vesting of forest rights and related matters

4. Recognition of, and vesting of, forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers. - (1) Notwithstanding anything contained in any other law for the time being in force, and subject to the provisions of this Act, the Central Government hereby recognises and vests forest rights in-

(a) the forest dwelling Scheduled Tribes in States or areas in States where they are declared as Scheduled Tribes in respect of all forest rights mentioned in section 3;

(b) the other traditional forest dwellers in respect of all forest rights mentioned in section 3.

(2) The forest rights recognised under this Act in critical wildlife habitats of National Parks and Sanctuaries may subsequently be modified or resettled, provided that no forest rights holders shall be resettled or have their rights in any manner affected for the purposes of creating inviolate areas for wildlife conservation except in case all the following conditions are satisfied, namely:-

(a) the process of recognition and vesting of rights as specified in section 6 is complete in all the areas under consideration;

(b) it has been established by the concerned agencies of the State Government, in exercise of their powers under the Wild Life (Protection) Act, 1972 (53 of 1972) that the activities or impact of the presence of holders of rights upon wild animals is sufficient to cause irreversible damage and threaten the existence of said species and their habitat;

(c) the State Government has concluded that other reasonable options, such as, co-existence are not available;

(d) a resettlement or alternatives package has been prepared and

communicated that provides a secure livelihood for the affected individuals and communities and fulfils the requirements of such affected individuals and communities given in the relevant laws and the policy of the Central Government;

(e) the free informed consent of the Gram Sabhas in the areas concerned to the proposed resettlement and to the package has been obtained in writing;

(f) no resettlement shall take place until facilities and land allocation at the resettlement location are complete as per the promised package:

Provided that the critical wildlife habitats from which rights holders are thus relocated for purposes of wildlife conservation shall not be subsequently diverted by the State Government or the Central Government or any other entity for other uses.

(3) The recognition and vesting of forest rights under this Act to the forest dwelling Scheduled Tribes and to other traditional forest dwellers in relation to any State or Union territory in respect of forest land and their habitat shall be subject to the condition that such Scheduled Tribes or tribal communities or other traditional forest dwellers had occupied forest land before the 13th day of December, 2005.

(4) A right conferred by sub-section (1) shall be heritable but not alienable or transferable and shall be registered jointly in the name of both the spouses in case of married persons and in the name of the single head in the case of a household headed by a single person and in the absence of a direct heir, the heritable right shall pass on to the next-of- kin.

(5) Save as otherwise provided, no member of a forest dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is complete.

(6) Where the forest rights recognised and vested by sub-section (1) are in respect of land mentioned in clause (a) of sub-section (1) of section 3 such land shall be under the occupation of an individual or family or community on the date of commencement of this Act and shall be restricted to the area under actual occupation and shall in no case exceed an area of four hectares.

(7) The forest rights shall be conferred free of all encumbrances and procedural requirements, including clearance under the Forest (Conservation) Act, 1980 (69 of 1980), requirement of paying the 'net present value' and 'compensatory afforestation' for diversion of forest land, except those specified in this Act.

(8) The forest rights recognised and vested under this Act shall include the right of land to forest dwelling Scheduled Tribes and other traditional forest

dwellers who can establish that they were displaced from their dwelling and cultivation without land compensation due to State development interventions, and where the land has not been used for the purpose for which it was acquired within five years of the said acquisition.

5. Duties of holders of forest rights.- The holders of any forest right, Gram Sabha and village level institutions in areas where there are holders of any forest right under this Act are empowered to-

(a) protect the wild life, forest and biodiversity;

(b) ensure that adjoining catchments area, water sources and other ecological sensitive areas are adequately protected;

(c) ensure that the habitat of forest dwelling Scheduled Tribes and other traditional forest dwellers is preserved from any form of destructive practices affecting their cultural and natural heritage;

(d) ensure that the decisions taken in the Gram Sabha to regulate access to community forest resources and stop any activity which adversely affects the wild animals, forest and the biodiversity are complied with.

CHAPTER IV

Authorities and procedure for vesting of forest rights

6. Authorities to vest forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers and procedure thereof. - (1) The Gram Sabha shall be the authority to initiate the process for determining the nature and extent of individual or community forest rights or both that may be given to the forest dwelling Scheduled Tribes and other traditional forest dwellers within the local limits of its jurisdiction under this Act by receiving claims, consolidating and verifying them and preparing a map delineating the area of each recommended claim in such manner as may be prescribed for exercise of such rights and the Gram Sabha shall, then, pass a resolution to that effect and thereafter forward a copy of the same to the Sub-Divisional Level Committee.

(2) Any person aggrieved by the resolution of the Gram Sabha may prefer a petition to the Sub-Divisional Level Committee constituted under sub-section (3) and the Sub-Divisional Level Committee shall consider and dispose of such petition:

Provided that every such petition shall be preferred within sixty days from the date of passing of the resolution by the Gram Sabha:

Provided further that no such petition shall be disposed of against the aggrieved person, unless he has been given a reasonable opportunity to present his case.

(3) The State Government shall constitute a Sub-Divisional Level Committee to examine the resolution passed by the Gram Sabha and prepare the record of

forest rights and forward it through the Sub-Divisional Officer to the District Level Committee for a final decision.

(4) Any person aggrieved by the decision of the Sub-Divisional Level Committee may prefer a petition to the District Level Committee within sixty days from the date of decision of the Sub-Divisional Level Committee and the District Level Committee shall consider and dispose of such petition:

Provided that no petition shall be preferred directly before the District Level Committee against the resolution of the Gram Sabha unless the same has been preferred before and considered by the Sub-Divisional Level Committee:

Provided further that no such petition shall be disposed of against the aggrieved person, unless he has been given a reasonable opportunity to present his case.

(5) The State Government shall constitute a District Level Committee to consider and finally approve the record of forest rights prepared by the Sub-Divisional Level Committee.

(6) The decision of the District Level Committee on the record of forest rights shall be final and binding.

(7) The State Government shall constitute a State Level Monitoring Committee to monitor the process of recognition and vesting of forest rights and to submit to the nodal agency such returns and reports as may be called for by that agency.

(8) The Sub-Divisional Level Committee, the District Level Committee and the State Level Monitoring Committee shall consist of officers of the departments of Revenue, Forest and Tribal Affairs of the State Government and three members of the Panchayati Raj Institutions at the appropriate level, appointed by the respective Panchayati Raj Institutions, of whom two shall be the Scheduled Tribe members and at least one shall be a woman, as may be prescribed.

(9) The composition and functions of the Sub-Divisional Level Committee, the District Level Committee and the State Level Monitoring Committee and the procedure to be followed by them in the discharge of their functions shall be such as may be prescribed.

CHAPTER V

Offences and penalties

7. Offences by members or officers of authorities and Committees under this Act.- Where any authority or Committee or officer or member of such authority or Committee contravenes any provision of this Act or any rule made thereunder concerning recognition of forest rights, it, or, they, shall be deemed to be guilty of an offence under this Act and shall be liable to be proceeded against and punished with fine which may extend to one thousand rupees:

Provided that nothing contained in this sub-section shall render any member of the authority or Committee or head of the department or any

person referred to in this section liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

8. Cognizance of offences.- No court shall take cognizance of any offence under section 7 unless any forest dwelling Scheduled Tribe in case of a dispute relating to a resolution of a Gram Sabha or the Gram Sabha through a resolution against any higher authority gives a notice of not less than sixty days to the State Level Monitoring Committee and the State Level Monitoring Committee has not proceeded against such authority.

CHAPTER VI
Miscellaneous

9. Members of authorities, etc., to be public servants.- Every member of the authorities referred to in Chapter IV and every other officer exercising any of the powers conferred by or under this Act shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860).

10. Protection of action taken in good faith. - (1) No suit, prosecution or other legal proceeding shall lie against any officer or other employee of the Central Government or the State Government for anything which is in good faith done or intended to be done by or under this Act.

(2) No suit or other legal proceeding shall lie against the Central Government or the State Government or any of its officers or other employees for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act.

(3) No suit or other legal proceeding shall lie against any authority as referred to in Chapter IV including its Chairperson, members, member-secretary, officers and other employees for anything which is in good faith done or intended to be done under this Act.

11. Nodal agency.- The Ministry of the Central Government dealing with Tribal Affairs or any officer or authority authorised by the Central Government in this behalf shall be the nodal agency for the implementation of the provisions of this Act.

12. Power of Central Government to issue directions.- In the performance of its duties and exercise of its powers by or under this Act, every authority referred to in Chapter IV shall be subject to such general or special directions, as the Central Government may, from time to time, give in writing.

13. Act not in derogation of any other law.- Save as otherwise provided in this Act and the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 (40 of 1996), the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

14. Power to make rules. - (1) The Central Government may, by notification, and subject to the condition of previous publication, make rules for carrying out the provisions 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) procedural details for implementation of the procedure specified in section 6;

(b) the procedure for receiving claims, consolidating and verifying them and preparing a map delineating the area of each recommended claim for exercise of forest rights under sub-section (1) of section 6 and the manner of preferring a petition to the Sub-Divisional Committee under sub-section (2) of that section;

(c) the level of officers of the departments of Revenue, Forest and Tribal Affairs of the State Government to be appointed as members of the Sub-Divisional Level Committee, the District Level Committee and the State Level Monitoring Committee under sub-section (8) of section 6;

(d) the composition and functions of the Sub-Divisional Level Committee, the District Level Committee and the State Level Monitoring Committee and the procedure to be followed by them in the discharge of their functions under sub-section (9) of section 6;

(e) any other matter which is required to be, or may be, prescribed.

(3) Every rule made by the Central Government under this Act 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.

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