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EDITORIAL

Hon'ble Shri Justice U. L. Bhat, the then Chief Justic of M. P High Court while releasing the maiden issue of the "JOTI JOURNAL" had expressed his hope and confidence that the Journal shall continue to grow and will attain its goal of becoming a part of the life of every Judge of subordinate joudicially. His Lordship had also expressed his faith that his worthy successor (Hon'ble Shri Justice A. K. Mathur) will continue to nurse and sustain the Journal and make it grow in a full and matured form. That faith has come true as the present Hon'ble Chief Justice Shri Justice A. K. Mathur has not only evinced keen interest in the publication of the "JOTI JOURNAL" but has also placed all available resources at the disposal of the Directorate of Training for regular publication of the Journal for which his Lordship deserves all acclamations.

The utility of the "JOTI JOURNAL" may be realised by the subordinate Judges, only when this Journal reaches them speedily and in time. From some districts of the State a very distressing feature has been brought to our notice thst the copies of the maiden issue of "JOTI JOURNAL" were not distributed to subordinate Judges even till the end of November and December 1995 though sufficient number of copies of "JOTI JOURNAL" were sent to all the district judges of the State in the month of October 1995 itself. In order to avoid any such complaint from any Judge regarding non receipt of "JOTI JOURNAL" we are now sending the Journal to each Judge personally at his address though it will not only mean voluminons increase of our work but will also entail an expenditure of postage which could be easily avoided if the distribution of the Journal could be ensured-at district level.

We are with this issue taking up the problems sent by Judges and are publishing them with their solution under the caption, "Your problems and their Solution". We hope that in future we may be able to take up more problems in the coming issues of the "JOTI JOURNAL" and make the Journal more and more useful.

B. K. SHRIVASTAVA
Directer

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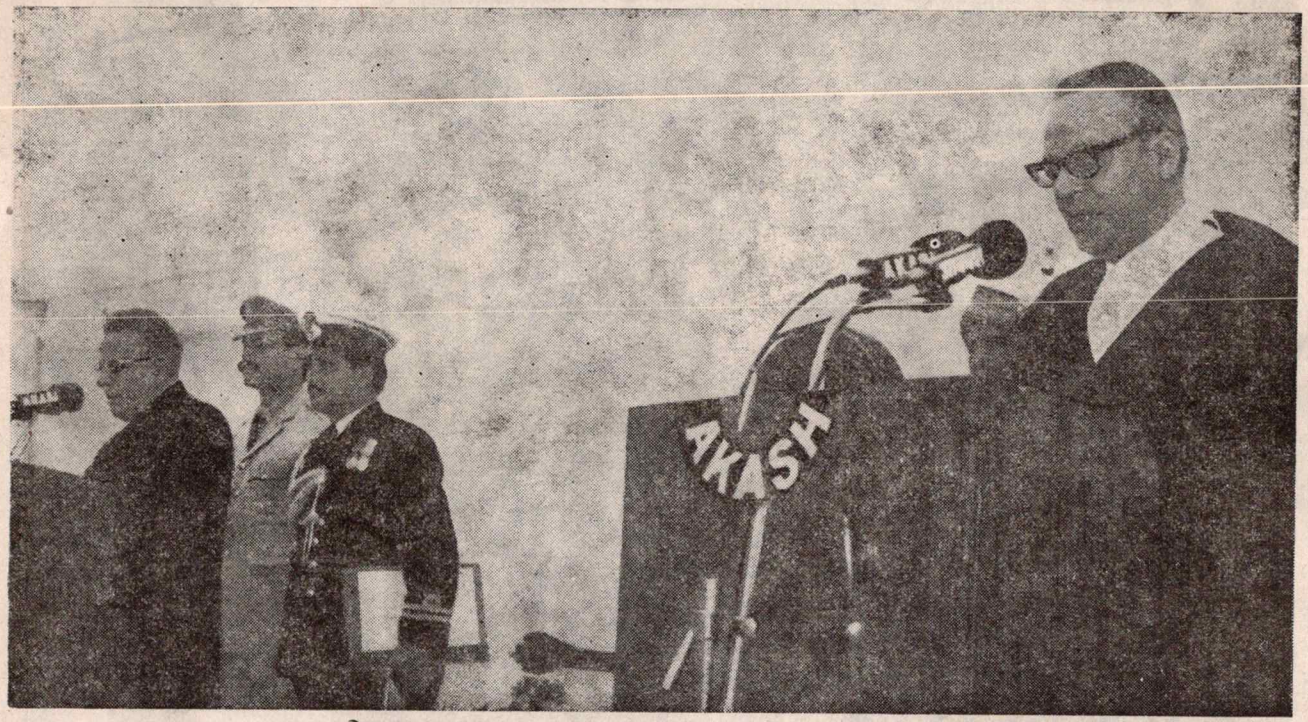
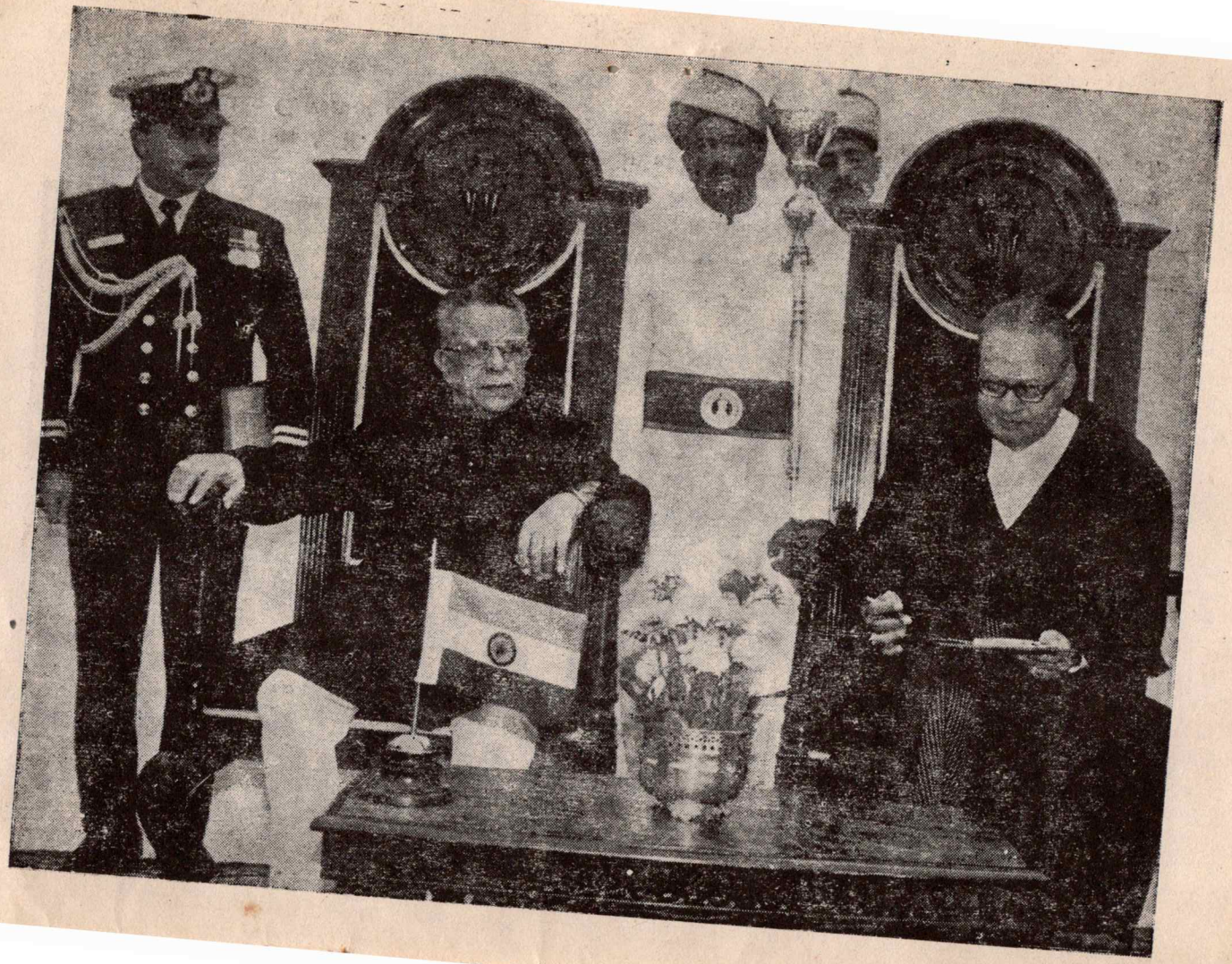


Hon'ble Shri Justice A. K. Mathur being sworn in as the Chief Justice of M. P. High Court by his Excellency the Governor of Madhya Pradesh on 3rd of February 1996, at Raj Bhavan, Bhopal.



LECTURE DELIVERED BY HON'BLE SHRI JUSTICE S. K. DUBEY, CHAIRMAN TRAINING COMMITTEE M. P. HIGH COURT, JABALPUR IN CENTRAL INDIA LAW INSTITUTE, JABALPUR ON LAW DAY 1995 (26th NOV. 1995)

Today is the day to celebrate the Law Day as most auspicious solemn function On this day in the year 1949 the Constitution of India was adopted which came into force on 26-1-1950, therefore, it was decided to celebrate this day as Law Day by the then chief justice of India in the year 1979 who inaugurated and proclaimed 26th November, as 'Law Day' to be observed throughout the country every year. The Constitution of India is Supreme. Any law which is inconsistent with it is void. The word of Constitution prevails everywhere, it is the conscience of India. These words have to be understood in the light of the preamble of the Constitution. The preamble of the Constitution which is the key to the Constitution reads thus :-

> We the people of India having solemnly resol ved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens;
>
> Justice, Social economic and political; Liberty of thought, expression, belief, faith and worship;
>
> Equality of status and opportunity; and to promote among them all; Fraternity assuring the dignity of the individual and the unity and integrity of the Nation
>
> IN OUR CONSTITUTENT ASSEMBLY, this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT, AND GIVE TO OURSELVES THIS CONSTITUTION."

2. The preamble lays down what India stands for. It is first a sovereign authority not subject to any external or internal power. By the preamble to the Constitution we have declared ourselves to be socialist state. Social justice is the signature tune of our constitution which while guaranteeing fundamental rignts to individuais, promises tos ecure justice, social Economic and political in the country. Social justice is the recognition of greater good to a larger number without deprivation or accrual of legal rights of anybody. If such a thing can be done,

then social justice must prevail over any technical rule. As between two parties if a deal is made with one party without serious detriment to the other then the Court would lean in favour of the weaker section of the society. (A. I. R. 1984 SC 1471 Sadhuram's Case)

3. "A Socialist" says Professor "is one who looks to society organised in the State for aid in bringing about a perfect distribution of economic goods and an elevation of humanity. The individualist regards each man to work out his own salvation, material and spiritual". The Government of our country is required to evince keen interest in the welfare of the people as a whole. While the rights of the individual are to be recognised they cannot be allowed to be exercised in such a way that the community suffers, meaning thereby it is the society whose interest is supreme. The expression "social and economic justice" involves the concept of "distributive justice" which cannotes the removal of economic inequalities and rectifying the justice resulting form dealings or transactions between unequals in the society. It comprehends more than lessening of inequalities by differential taxation, giving debt relief or regulation of contractual relations, it also means the restoration of properties to those who have been deprived of them by unconscionable bargains, it may also take the form of forced redistribution of wealth as means of achieving a fair decision of material resources among the members of the society (AIR 1985 SC 389 Lingappa vs. State of Maharashtra) Read with Article 39 A social justice would include legal justice, which means the system of administration of justice must provide a cheap, expeditious, and effective instrument for realisation of justice by all sections of the people irrespective of their social or economic position or their financial resources : AIR 1976 SC 1734 (Babu V Ragunathji). Free legal aid to indegents and poor (directions issued by the Supreme Court insuitable cases to array legal aid (1990) Supp. SCC 769– Bajiban Chouhan vs. MPSRTC)

4. The Constitution is intended to secure for the millions of our people justice, social, economic and political. Justice is concerned with the procedures and outcome and with consequences of actions and with their signfiicance. Social evils like untouchability, unapproachability, unseeability, caste system, communalism etc. are to be eradicated. Unless there is a heart in every citizen they cannot come to an end. There should be a mass movement to eradicate these prejudices. Law alone cannot achieve that result. All social justice measures taken at the international level and at the national level aim at increasing the happiness of the people wherever

they are Social Justice cannot be confined to the man made boundaries of a State. We the people of legal fraternity are working to achieve the social justice. Our legal profession is service oriented i. e. to dispense justice with an object to serve the society, Fraternity is a warm virtue, which means a sense of common brotherhood of all Indians. Fraternity is the reciprocal affection which inclines man to do unto others as he would like that others would do unto him. It is the principle which gives unity and solidarity to social life. It is a difficult thing to achieve, which can only be achieved by observing the rule of law and to work having in mind preamble of the Constitution.

5. Therefore, we on this day make a retrospection of ourselves and review our achievements. The times are changing fast and therefore law must respond and be respective to the felt need compulsion of the society that what would be equitable, fair and just and unless there is anything to contrary in the relevant statutes, Courts must take cognizance of the fact and act accordingly, that is known as judicial activism. In the process of adjudication by way of judicial review it cannot be curtailed by executive as any legisiative or executive act beyond the prescribed limits by the Constitution of India. To see that. the judiciary is one of the important pillars of the society erected by the rule of law which is designed to protect the value of human rights as law respond the human dignity above all therefore, it is always said that justice is virtue which transcends all barriers neither rules of procedure nor technicalities of law can stand in the way. See 1993 Supp (4) SCC 595-S. Nagraj and ors. vs. State of Karnataka. Hence, we have to ask ourselves are we discharging our duties and functions within the framework of the Constitution and assisting the establishment of a just social order. The parliament and Legislature enacting the various statutes to achieve the goal as shown in the preamble of the Constitution as lays our foundation of justice which are the basic requirements of just and social order, as the Constitution is the blue print of our future of social order.

6. Justice should be free and fair. Effort of the Courts should bo to promote justice and reach out injustice, whenever it is found Judiciary under our Constitution is conceived as an arm of social revolution upholding the dignity and equality. There should be easy access to all. Delay oriented procedure is to be avoided. Therefore, new device was evolved by public interest litigation and letter petitions. To achieve the speedy administration of justice, it is the Bench and Bar who by their cooperation play an important role in administration of justice. As our legal system requires complete co-operation of judges and Lawyers in the administra-

tion of justice success and the failure of the Court in dischargirg its function must be shared and borne by them collectively. The people of society must have faith in the Courts, therefore, it is our prime duty that the justice is administered speedily which can only be by the cooperation of the Members of the Bar. It shouid be the responsibility of each member of the fraternity to see that independence and impartiality of the judiciary is maintained. The freedom and independence of the legal profession is maintained as this profession is liberal and highly respected, therefore, self discipline is required to maintain independence and impartiality.

7. Here, I may refer to the observations of the Supreme Court in respect of our Indian Legal system in case of Byram Pestonji Gariwala vs. Union Bank of India (AIR 1991 SC 2234, paras 31 and 32):

> "The Indian Legal system is the product of history. It is rooted in our soil, nurtured and nourished by our culture, languages and traditions; fostered and sharpened by our genius and quest for social justice, reinforced by history and heritage; it is not a mere copy of the English common law; though inspired and strengthened, guided and enriched by concepts and precepts of justice, equality and good conscience which are indeed the hall marks of the common law. After the attainment of independence and the adoption of the Constitution of India, judicial administration and the constitution of the law Courts remained fundamentally unchanged. The concept, structure and organisation of Courts, the substantive and procedural laws, the adversarial system of trial and other proceedings and the function of judges and lawyers remained basically unaltered and rooted in the common law traditions in contra-distinction to those prevailing in the civil law or other systems of law."

People of our country have great faith in Indian Judicial system, even though the Courts are overburdened, but, inspite of all odds we should strive hard by harmonious jugal bandi of Bench and Bar to administer justive speedily within the frame work of the Constitution, as sentinel of people's rights, liberty and safety.

IMPORTANT JUDGMENTS OF SUPREME COURT AND HIGH COURT

I. What remedies are available to a defendant against wnom an exparte decree has been passed in a suit ?

In a recent Judgement in Narayan Das vs. Bhagwandas 1993 MPLJ 1005=1994 JLJ 110. The Hon'ble High Court of Madhya pradesh has held that when an exparte decree is passed, a defendant to get rid of said decree, can avail of either of 4 remedies :- he may pray for review, or he may apply for setting aside of the exparte decree under Order 9 Rule 13 C. P. C. on the ground of existance of sufficient cause of his non appearance or because of the non-service or defective service of summons; or he may file an appeal; or he may also institute a suit on limited ground of fraud. To get rid of exparte decree as obtained by fraud, if a suit is instituted, such a suit would be maintainable notwithstanding the fact that it has not been preceded by an application under Order 9 Rule 13 C. P. C. It has further been held that a fraudulent suppression in the matter of service of summons can afford a sufficient ground for setting aside an exparte decree and the jurisdiction of the Court to set aside a denied, on the ground of fraud cannot in such cases be denier, though it is to be exercised with great care and reserve. When there is a deliberate suppression of summons or notice issued to a person or a false report relating to service of summons or notice upon him is secured from the process server, and the court is thus led to pass an exparte decree or Order against such person without his acquiring knowledge of the suit or proceeding against him, the decree or order must be regarded hs vitiated by fraud.

1. Though a defendant may file an appeal against the exparte decree, or he may file an application under Order 9 Rule 13 C. P. C. before the Court which passed decree, but if he has filed an appeal he cannot file an application under Order 9 Rule 13 C. P. C., or if he had file an application under Order 9 Rule 13 C. P. C. he cannot file an appeal against the exparte decree. This is the law which has been laid down by Supreme Court in Rani Choudhury vs. Suraj Jit Choudoury, A. I. R. 1982 SC 1397. A Division Bench of M.P. High Court has in Sumera Vs. Madanlal A.I.R 1989, M.P. 224, followed the above decision of Supreme Court and has held that if defendant has already availed of remedy under Order 9 Rule 13 C P. C. appeal filed by him against the exparte decree subsequently was not maintainable.

2. Whether service of summons without a copy of plaint can be said to be a valid service, and whether on the basis of such service any valid exparte order or decree can be passed against the defendant ?

No. A Division Bench of M. P. High Court has in Chhutbai Vs. Madanlal 1989 MPLJ 705 held that whenever summons is issued to a defendant it must accompany a copy of the plaint or a concise statement. When the summons issued did not accompany a copy of plaint even though the summons indicated the name of the Court, the suit number and the next date of hearing as per form prescribed in the summons, it was not enough compliance with the provisions of Order 5 Rule 2 of the Civil Procedure Code. The word "shall" has been used in Order 5 Rule 2. If the summons is not accompanied by the copy of the plaint it cannot be said that there was due or valid service on the defendant and if there is no valid service the exparte decree passed against the defendant should be set aside.

The same view has been reiterated in Narayan Das vs. Bhagwandas 1993 MPLJ 1005.

3. Whether a party in a civil suit can be permitted to file the list of its witnesses at a subsequent stage after the period prescribed by Order 16 Rule 1 C.P.C., and also pray for issuing summons to the witnesses ?

Yes. The Court may on sufficient cause being shown by the party, permit the party to file the list of witnesses and also issue summons to the witnesses. The Supreme Court in Lalitha J. Rai vs. Aithappa Rai, AIR 1995 S C. 1984 has held that it is true that Legislature amended Order 16 Rule 1 of the C. P. C. and added Rule 1 (A) to see that undue delay should not be caused in trial of the suit by filing list of witness or the documents on a belated stage. Thereby it envisages that on or before the date fixed by the Court for settlement of issues and not later than 15 days after the date on which issues were settled the parties are to file a list of such witnesses whom they propose to call either to give evidence or to produce documents and they are required to obtain summons to such witness for their attendance in the Court. On their failure to do the same Rule 1 (A) says that they may without assistance of the Court bring witnesses to give evidence or to produce documents. In other words, if they fail to obtain the

summons through the court for attendance of the witnesses they are at liberty to have the witnesses brought without the assistance of the Court. When they seek the assistance of the Court they were enjoined to give reason as to why they have not filed an application within the time prescribed under Rule 1 of Order 16. The Supreme Court accepting the explanation for the belated submission of the list, directed the trial court to issue summons to the witnesses of the plaintiff.

4. Can a Court Reader fix a date of hearing in any case on a date when the presiding judge is on leave ? Can the Judge proceed to dispose of a suit in any manner prescribed under Order 9 C. P. C. on a date which was in his absence fixed by the Reader of the Court ?

In R. R. Contractor and C. vs. Indra Narayana Mishra 1982 JLJ, Note 40 the Hon'ble High Court of M.P. has held that Reader of Court has no judicial authority to fix any case for hearing or evidence when the presiding Judge was on leave. In Sushila Bai vs. Ram Nihore 1991 MPLJ 329 it has been held that when the presiding Judge was on leave on 5-10-1987 and consequently the Reader adjourned the case to 20-10-87 the date of 5-10-87 could not be deemed to bo a date of hearing and the defendant was absent on that date and also on the next date fixed by Reader i. e. 20-10-87 of which defendant had no notice, the Court could not proceed exparte against the defendant on 20-10-87 and the exparte decree was liable to be set aside.

In Kranti Kumar Vs. Dr. J. B. Shrivastava 1978 (1) MPWN 443 it has been held that if the presiding Judge was absent on 23-12-1974 it was not the court functioning and the defendant was not obliged to appear before the Reader. He can remain absent in the hope that he shall be noticed again. There is no rule authorising the Reader to fix the date of hearing nor there is anything on record to show that the Judge had instructed the Reader to fix a particular date. The hearing contemplated was the hearing before the Court i. e. by the presiding Judge. The Reader was only a Ministerial Officer and could do no Judicial function.

A Division Bench of M. P. High Court has in Lakshmi Bai Vs. Kesharimal Jain 1994 JLJ 747 held that when the presiding Judge is on leave oc the date of appearance for which service has been effected on defendant snch date is not the date of hearing therefore the court cannot proceed exparte against the defendant; fresh notice should be issued to the defendant.

5. Whether denial of title of the landlord by the defendant in his written statement, which can be a ground of eviction under Section 12 (1) (c) of the M.P. Accomodation Control Act can be permitted to be withdrawn by amending written statement or whether even after amendment of written statement that ground of eviction shall be available to the plaintiff ?

In Bhagwati Prasad Vs. Ramesh Chand 1994, MPLJ 619 Hon'ble High Court of M. P. has held that in an eviction suit under the M. P. Accomodation Control Act where defendant denies the title of landlor in his written statement thereby giving rise to a fresh ground of eviction under Section 12 (1) (c) of the M. P. Accomodation Control Act, the defendant cannot be permitted to seek such amendment by which he wants to withdraw that denial of title. Even if such amendment is allowed it will not wipe out the cause of action which has accrued to the landlord on the basis of denial of such title.

Reliance was placed on Navalmal vs. Laxman Singh 1991 MPLJ 812 and Prabhakaran Nair vs. State of Tamil Nadu A. I. R. 1987, Supreme Court 2117, in which it was held that Court cannot devise relaxations and protections if they were not provided by the Legislature.

6. Whether before filing of written statement in any suit at the stage of issuance of injunction the question of maintainability of suit for want of jurisdiction can be gone into ?

In Naresh Saxena vs. President, Adarsh Nagarik Sahakari Bank, 1984 MPWN 44=1986 MPLJ Lhort Note 6 the defendant in answer to the plaintiff's application under Order 39 Rule 1 & 2 CPC, inter alia contended that the suit was not maintainable being barred by Section 82 of the M. P. Cooperative Societies Act and therefore, not only the injunction application but also the suit was liable to be dismissed. The trial court while dismissing the injunction application also dismissed the suit on the ground that the jurisdiction of civil court was barred by Section 82 of the Act. A Division Bench of Hon'ble High Court of M. P. held that the question of jurisdiction was to be considered predominently for the purpose of deciding the prima facie case of the plaintiff, on the matter of merits of the question of jurisdiction of the civil court, it could be decided only after the written statement of the defendant was filed as the procedure providedin the Code of Civil Procedure is that after the notice to the defendant of a suit the defendant has to file a written statement

and in that he is at liberty to raise the question of jurisdiction, which, if the court thinks necessary, may decide that question by framing a preliminary issue. In the instant case the trial court did not follow the prescribed procedure. The High Court therefore, set aside Order of dismissal of suit. The High Court therefore laid stress that at the stage of the disposal of Interlocutory application under Order 39 Rule 1, 2 CPC the question of jurisdiction should be considered only in relation to the prima facie case of the plaintiff.

Relying on the above mentioned judgment, another Division Bench of M. P. High Court ih Moolchand vs. N. K. Satsandgi 1992 JLJ 340 held that at the stage of issuance of injunction the question of maintainability of the suit for want of jurisdiction cannot be gone into on the basis of a simple application of the defendant. The question of jurisdiction can only be decided after filing of written statement and framing of issues. In this case also the jurisdiction of Civil Court was challenged on the basis of Section 82 of the M.P. Co-operative Societies Act 1961 and the trial court acceptins the contention of defendant ordered plaint to be returned to thc plaintiff for presentation before proper forum. The Hon'ble High Court held that on the matter of merits of the question of jurisdiction of the Civil Court it would be decided only after the written statement of the defendant was filed as the procedure provided in the Code of Civil Procedure is that after the notice to the defendant of a suit, the defendant had to file a written statement and in that he was at liberty to raise a question of jurisdiction which if the court thinks necessary and is required to do so by law it should decide that question by framing a priliminary issue.

The crux of above two Division Bench Judgements is that at the stage of deciding the application for temporary injunction under Order 39 Rule 1 and 2 CPC the court will consider the question of maintainability of suit on the ground of jurisdiction of the Court only in relation to the question of prima facie case and the decision of the question of maintainabiiliy of suit for want of jurisdiction should be left to be decided on merits after the filing of written statement by the defendant and frammng of issues.

In a very recent judgment in Vindhya Telelinks Ltd. vs. State Bank of India, 1995 MPLJ 575 another Division Bench of M. P. High Court has also held that before granting injunction, the Court is required to consider the existence of a prima facie case which also implies prima facie consideration of the jurisdiction of that court. There would not be a prima facie

case if the court considering has apparently no jurisdiction to entertain the suit. Every court must bear this aspect in mind and seek prima facie satisfaction that it has jurisdiction to entertain the suit before it proceeds to pass an order injuncting the defendant. If the court is of the opinion that the question of jurisdiction is prima facie question of law then certainly it can be decided as a preliminary issue. However, if the court is of the opinion that the question of jurisdiction of the court is a question depending on the facts or is a mixed question of law and fact then certainly it cannot be decided as a preliminary issue.

The Supreme Court also while considering the question of grant of injunction, has in Shivkumar Chadha vs. Municipal Corporation, Delhi (1993) 3 SCC 161=1993 (II) MPWN 73, held that before granting temporary injunction the court must be satisfied that a strong prima facie case has been made out by plaintiff including on the question of maintainability of the suit and the balance of the convinience is in his favour and the refusal of injunction would cause irreparable injury to him.

7. Under what circumstances interim injunction order under Order 39 Rule 3 CPC can be passed without notice to the defendant ?

The Supreme Court in Shiv Kumar Chadha vs. Municipal Corporation Delhi (1993) 3 SCC 161 has laid down that :-

"Whenever a court considers it necessary in the facts and circumstances of a particular case to pass an order of injunction without notice to the otherside, it must record the reasons for doing so and should take into consideration, while passing an order of injunction all relevant factors including as to how the object of granting injunction itself shall be defeated if an ex parte order is not passed but any such exparte order should be in force up to a particular date before which the plaintiff should be required to serve the notice on the defendant concerned.

"Power to grant injunction is an extraordinary power vested in the court to be exercised taking into consideration the facts and circumstances of a particular case. The court have to be more cautious when the said power is being exercised without notice or hearing the party who is to be affected by the order so passed. Such ex parte orders have far reaching effect and as such a condition has been imposed under proviso to Rule 3 of Order 39 CPC that court must record reasons before passing such order. This is imperative in nature and not optional. When the statute itself requires reasons to be recorded,

the court cannot ignore that requirement by saying that if reasons are recorded it may amount to expressing an opinion in favour of the plaintiff before hearing the defendant. Proviso to Rule 3 attracts the principle that if a statute requires a thing to be done in a particular manner it should be done in that manner or not at all. The requirement for recording the reasons for grant of ex parte injunction cannot be held to be a mere formality. This requirement is consistent with the principle that a party to a suit who is being restrained from exercising a right which such party claims to exercise either under a statute or under the common law must be informed why instead of following the requirement of Rule 3, the procedure prescribed under the proviso has been followed. The party who invokes the jurisdiction of the court for grant of an order of restraint against a party, without affording an opportunity to him of being heard, must satisfy the court about the gravity of the situation and court has to consider briefly these factors in the exparte order."

8. Whether any person can acquire title by adverse possession over Government land ? If so what should be the nature and period of possession ?

Section 27 of the Limitation Act 1963 says that at the determination of the perion limited by the Act to any person in instituting a suit for possession of any property, his right to such property shall be extinguished. It means that if a person foils to institute a suit for possession of his property within the time limit prescribed under the Limitation Act, his right to such property shall come to an end.

According to Article 65 of Limitation Act suits for possession of immovable property bassed on title should be brought within 12 years from the date when the possession of the defendant becomes adverse to the plaintiff. Article 112 says that limitation for any suit by or on behalf of the Central Government or any State Government shall be 30 years when the period of limitation would be taken to run under this act against a like suit by a private person. Articles 65 and 112 read together make it clear that for bringing a suit for possession of a immovable property based on title should be brought by a private person within 12 years from the date of dispossession and in the case of land belonging to the State Government such suit should be brought within 30 years from the date when the possession of the defendant becomes adverse.

A title to immovable property can be acquired by adverse possession against the Government in the same way as such title my be acquired against

a private person. But the person, claiming such title against the Government must prove that the adverse possesion has extended for a period of 30 years or more. Thus where the plaintiff sues the Government for declaration that he has acquired a title against the Government by adverse possession for the statutory period, he must prove that his possession has extended for a period of 30 years. Where a person seeks title by adverse possession against the Government the burden is on him to prove such possession for the full period of 30 years. Proof of adverse possession for a shorter period will not shift the onus to the Government to show that the possession had not continued for the full period of 30 years.

Article 112 of Limitation Act is equivalent to Article 149 of Limitation Act 1908 with the difference that under the new Act the period of limitation is 30 years and under the old Act the period of limitation was 60 years. In respect of Article 149 it has been laid dowa by Nagpur Higo Court in Provincial Government C P. and Berar vs. Govind Rao, A. I. R., 1949 Nagpur 403 that a person who relies on possessory title cannot succeed against Government unless he can show either that Government has parted with its title in some way to him or he has been holding the property adversely against the Government for a period of 60 years.

It has also been laid down that continuous and uninterrupted possession over a long period can give rise to a presumption that a person in possession is there with title even when the possession is there of the statutory period. This presumption may apply in a case between private individuals but it cannot apply to a case of the Government. In this case reliance was placed on A. I. R. 1944 Nagpur 399. Orissa High Court in State of Orissa vs. Pitambar Patro A. I. R. 1964 Orissa 233 relying on A. I. R. 1916 PC 21 held that in a suit against the State for declaration of title based on adverse possession the burden of proving his possession for the statutory period is on the plaintiff. Proof of mere long continued possession for any length of time, unless such possession clearly amounted to adverse possession for a peeiod of 30 years is not enough for establishing the hostile title of the plaintiff Further, proof of mere long and continued possession does not shift the onus to the State to establish that it had title and possession within 60 years (now 30 years) from the date of suit.

Regarding adverse possession Hon'ble High court of M. P. has in a very recent judgment in Kalyan Singh and Others vs. Jetthi Bai, 1995 MPLJ Short Note 35 hld that mere possession howsoever long cannot be

termed as adverse to prescribe title unless there is animus and hostility on the part of the person in possession which is made known to the real owner. Entry of the name in revenue papers is not an evidence of adverse possession. In another judgment in Chironjilal vs. Khatoon Bi, A. I. R. 1995, M. P. 238 the Hon'ble High Court has held that ordinary classical requirement of adverse possession is that it should be nec vi nec clam nec precaric, that is, a person who claims title by adverse possession must prove his possession adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. The case of P. Laxmi Reddy vs. L. Laxmi Reddy, A. I. R. 1957 SC 314 also lays down the same view. Mere possession howsoever long without any animus to hold the property as an owner does not make the possession adverse to the interest of the real owner and it does not create any title in any person in possession. The jurisprudential concept of possession is made up of two ingredients, (i) the corpus and (ii) the animus. Corpus means actual exclusive physical control over the property defining physical possession. The animus denotes the intention and exercise of right to possess the property as owner to the exclusion of others. These two ingredients put together go to constitute legal possession. (See Jayakishore vs. Ramnath, 1992 JLJ 92).

For declaring any person to be the title holder of any Government land on the basis of adverse possession for 30 years or more, it is necessary that he must prove that he was in possession of land as owner in denial of the title of the State. The clandestine possession over the Government land howsoever long it may be, cannot be termed to be adverse. The person in clandestine possession of Government land cannot be said to be in possession in denial of the title of the Government. If a person cultivates any Government land, or occupies such land acknowledging it to be Government land without claiming himself to be the owner, he cannot be declared to be the title holder of the same, howsoever long his possession might be.

9. Very often Judges while deciding injunction application have to express their views on certain points which touch the merits of the case specially in relation to the question of prima facie case, and while doing so they feel bound by that view even at a time of final decision of the suit on merits and some times dismiss the suit also if they don't find any prima facie case on merits in favour of the plaintiff. Question arises whether any view expressed on merits of the case at the stage of the disposal of injunction application is binding on courts at the stage of final adjudication of the case ?

The answer is No. The Hon'ble High Court of M.P. has in Bhagwandas vs Kanchan Kaur, 1972 MPLJ, Short Note 85 held that any observations made while deciding an application for temporary injunction are not binding on the court when deciding the suit on merits. The observations of the Appellate Court made in appeal at order are not binding on the trial court while deciding the suit on merits.

The Supreme Court also has in Shiv kumar Chadha vs. Municipal Corporation Delhi (1993) 3 SCC 161 (176) said that it need not be pointed out that any opinion expressed in connection with an interlocutory application has no bearing and shall not affect any party, at the stage of the final adjudication.

10. Whether it is obligatory for the defendant in an eviction suit under the M P. Accomodation Control Act to comply with the provisions of Section 13 (1) even though he denies the relationship of landlord and tenant with the plaintiff, and also whether it is necessary for the Court to first decide the existence of such relationship before directing the defendant to deposit rent u/s 13 (1) of the Act and before deciding the plaintiff's application u/s 13 (6) of the Act ?

A Division Bench of M P. High Court has in Inderlal vs. Mahngi Bai 1967 MPLJ 125=1967 JLJ 31 held that in a suit for eviction under the M P. Accomodation Control Act the defendant has to comply with the provisions of Section 13 (1) if he wants to take the advantage of the provisions of the Act, even if he does not admit the relationship of landlord and tenant between him and the plaintiff. It is not necessary for the Court to first decide the question of the existence of relationship of landlord and tenant before ordering the defendant to deposit the rent in accordance with Section 13 (1).

11. Whether affidavit may be taken as evidence in place of oral evidence in the Court ?

Order 18 Rule 4 of the Code of Civil procedure provides that the evidence of witnesses shall be taken orally in open court in the presence and under the personal direction and superintendance of the Judge. Thus the parole evidence of the witness should be taken in the court. But order

19 Rule 1 permits any court to order for sufficient reason that any particular facts may be proved by affidavit. The Supreme Court has in State of Jammu & Kashmir vs. Bakshi Gulam Mohammad, A. I. R. 1967 Supreme Court 122 (Page 132) said that Order 19 Rule 1 is intended as a sort of exception to the provisions contained in Order 18 Rule 4 C. P. C. In Khan Desh Spinning and Weaving Mills vs. R. G K. Singh A. I. R. 1960 SC 571, the Supreme Court said that ordinarily evidence has to be recorded viva voce in court as provided in order 18 Rule 4 C P. C. but that procedure may be dispensed with if the parties agree that affidavits should be substituted for the evidence so recorded.

A Division Bench of M. P. High Court in Mithai Lal vs. Inland Auto Finance 1967 MPLJ 776=1967 JLJ 864=A. I. R. 1968 M. P. 33 has said that witnesses must be examined in open court viva voce but exceptions are :-

(i) Where there is an agreement to take evidence by affidavit;

(ii) Where there is an order of the court to prove certain facts by affidavit; or

(iii) Where there is an order for examination by interrogatories before a commissioner.

The Supreme Court in a recent judgment in Muneer Ahmed vs. State of Rajasthan, A.I.R. 1989 Supreme Court 705 has said that in the case of a living person evidence in judicial proceedings must be tendered by calling the witness to the witness stand and cannot be substituted by an affidavit unless the law permits it or the court expressly allows it. In Sudha Devi vs. M.P. Narayanan, A.I.R. 1988 SC 1381 the Supreme Court has held that affidavits are not included in the definition of evidence in Section 3 of the Evidence Act and can be used as evidence only if for sufficient reason court passes an order under Order 19 Rule 1 or 2 of the Code of Civil Procedure.

So the law seems to be that normally the parole evidence should be adduced by examining the witness in court but an affidavit may be substituted for viva voce evidences if the law permits any fact to be proved by affidavit or where court orders any fact to be proved by affidavit or where the parties agree that any fact should be proved by affidavit.

12. Whether possession delivered in part performance of a contract of sale can become adverse to the vendor or whether a person in possession of an immovable property in part performance of a contract of sale can claim perfection of his title by adverse possession ?

No, a person who obtains possession of an immovable property in part performance of a contract of sale can only defend his possession under Section 53-A of T. P. Act but cannot perfect his title by adverse possession howsoever long his possession may be.

The Supreme Court in Achal Reddy vs. Ramakrishna Reddiar A. I. R. 1990, Supreme Court 553 has said that, "as in case of an agreement of sale the party who obtains possession acknowledges title of the vendor even though the agreement of sale may be invalid. It is an acknowledgement and recognition of the title of the vendor which excludes the theory of adverse possession. The well-settled Rule of Law is that if a person is in actual possession and has a right to possession under a title involving a due recognition of owner's title, his possession will not be regarded as adverse in law, even though he claims under another title having regard to the well recognised policy of law that possession is never considered adverse if it is referable to a lawful title. The purchaser who got into possession under an executory contract of sale in a permissible character cannot be heard to contend that his possession was adverse. In the conception of adverse possession there is an essential and basic difference between a case in which the other party is put in possession of property by an outright transfer both parties stipulating for a total divestiture of all the rights of transferor in the property, and in case in which there is a mere executory agreement of transfer both parties contemplating a deed of transfer to be executed at a later point of time. In the latter case the principle of estoppel applies estopping the transferee from contending that his possession, while the contract remained executory in stage, was in his own right and adversely against the transferor. Adverse possession implies that it commenced in wrong and is maintained against right. When the commencement and continuance of possession is legal and proper, referable to a contract, it cannot be adverse."

Yet in another case Thakur Kishan Singh Vs Aravind Kumar 1995 JLJ Pages 1 & 192 the Supreme Court has held that "a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner.

Mere possession for howsoever length of time does not result in converting the permissive possession into adverse possession."

A Single Bench Judgement of M. P. High Court in Ram Singh vs. Roop Singh 1989 MPLJ 681, holding that possession pursuant to agreement of sale is adverse from the date of agreement, cannot be said to be a good law in the light of above two judgments of Supreme Court.

13. What should be the form of affidavit ?

Order 19 Rule 3 CPC provides that affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove. But if the affidavit is in support of interlocutory application then the affidavit may be in respect of such fact which is based on the belief of the deponent provided that the grounds of such belief are stated in the affidavit by deponent. Rules 20 to 28 of M P. Civil Court Rules 1961 and Chapter 3 of M.P. High Court Rules and Orders contain detailed and exhaustive provisions for the form and manner of verification of affidavits to be filed in any judicial proceeding before courts and High Court.

Rule 22 of M.P. Civil Court Rules 1961 and Rule 3 of Chapter 3 of M.P. High Court Rules and Orders lay down that every affidavit shall be drawn up in the first person and divided into paragraphs numbered consequtively and each paragraph should as nearly as may be shall be confined to distinct portion of the subject. Rule 26 of M.P. Civil Court Rules and Rule 7 of M.P. High Court Rules and Orders say that every affidavit should clearly express how much is a statement or declarant's knowledge and how much is statement made on his information of belief and must also state the sources or grounds of information or belief of sufficient particularity.

The Supreme Court in A.I.R. 1982 SC 65 has laid down that even where allegations in affidavit are stated to be correct to the best of the knowledge of the deponent the nature and source of knowledge must be disclosed. If the nature and source of knowledge is not disclosed the affidavit would not be an affidavit at all. M.P. High Court also has in Bala and Others vs. Gopal 1988 JLJ 304 held that any affidavit filed in support of interlocutory applications, the grounds of belief must be disclosed, so also the particular part of the affidavit which is according to deponent's personal knowledge and the averments which are believed to be

true by him disclosing the grounds of such belief. Verification of affidavit by merely saying, "that the averments contained in paragraphs 1 and 2 above are true to my knowledge and belief" is not a proper verification, and such an affidavit cannot be exhibited as evidence under Order 19 Rule 1 CPC.

Very often we come accross with affidavits which do not contain any specific deposition of distinct subjects in seperately numbered paragraphs as required by the rules framed by the Hon'ble High Court of M.P. ; the affidavits contain only a declaration that the contents of the interlocutory application are verified to be true to the knowledge and belief of the deponent. This is not at all proper form of affidavit and as such is liable to be ignored as has been held by the High Court and Supreme Court in decisions quoted above.

14. Whether in a criminal case composition of a compoundable offence can be permitted to be done after the judgment of conviction has been pronounced ?

No, it cannot be. Section 320 sub section (5) of the Code of Criminal Procedure says that where the accused has been convicted and an appeal is pending no composition for the offence shall be allowed without the leave of the court before which the appeal is to be heard. It means that after the judgment of conviction composition can be permitted by the appellate court only.

Sometimes it is submitted before the trial court that after convicting the accused the judgement is stopped for affording an opportunity to the accused of being heard on the point of sentence, and if at that stage any compromise petition is filed the trial court can allow composition because at that stage neither the judgment is complete nor any appeal is pending. This type of argument is fallacious. The judgment is practically complete when the order of conviction is passed; the order of sentence is only consequential order. Main order is the order of conviction. The Supreme Court in a very recent judgment in Rama Narang vs. Ramesh Narang (1995) 2 SCC 513 (at page 527) has very clearly said that appeal under section 374 Cr. P. C. is essentially against the order of conviction because the order of sentensc is merely consequential thereto; albeit even the order of sentence can be challenged if it is harsh and disproportionate to the established guilt.

The word "appeal is pending", should not be interpreted to mean only that appeal having been filed is prending for disposal. The word

"pending" also means "awaited" or "impending". So where the accused has been convicted and an appeal under Section 374 Cr. P. C. is awaited or is to be filed then composition can be allowed only by the appellate court and not by the trial court. The Keral High Court in 1993 Criminal Law Journnal 404 and the Supreme Court in 1990 Suppl. SCC 63 have said that no composition could be allowed after the pronouncement of judgment of conviction. The provisions of sub section (5) of Section 320 Cr. P. C. apply not only to offences compoundable under sub section (1) but also to offences compoundable with the permission of the court under sub section (2) of the Cr. P. C. as has been held by the Supreme Court in A. I. R. 1974 SC 1744.

15 Whether in a composite decree personally against the principal debtor and the guarantor and also against the mortgaged property, the decree holder has to proceed against the mortgaged property or the principal debtor first, and then proceed against the guarantor ?

No, the decree holder has got choice to recover the decreetal amount either from the principal debtor or from the guarantor or from the mortgaged property. It is not necessary that he should first exhaust his remedies against the principal debtor, then only he can proceed against the guarantor. This was the law so declared by Supreme Court in the light of the provisions of the Indian Contract Act as far back as in the year 1969 in Bank of Bihar Limited vs. Damodar Prasad, A. I. R. 1969 SC 297. But in the year 1987 in Union Bank of India vs. Manku Narayana A.I.R. 1987 SC 1078, the Supreme Court distinguishing its above mentioned earlier view held that where the decree in execution is a composite decree personally against the principal debtor and the guarantor and also against the mortgaged property and a portion of the decreed amount is covered by the mortgage, the decree holder Bank has to proceed against the mortgaged property first and then proceed against the guarantor. This view did not last long. A larger bench of the Supreme Court in State Bank of India vs. M/s. IndexPort Registered, A. I. R. 1992 SC 1740 overruled and held that if the composite decree is a decree which is both a personal decree as well as a mortgage decree without any limitation on its execution, the decree holder in principle cannot be forced to first exhaust the remedy by way of execution of the mortgage decree and told that only if the

amount recovered is insufficient he can be permitted to take recourse to the execution of the personal decree.

Where the money decree was against all the defendants including the guarantor, and a mortgage decree against one of the defendants who had mortgaged the shop with the plaintiff bank so far as the said shop was concerned and the decree did not put any fetter on the right of the decree holder to execute it against any party whether as a money decree on as a mortgage decree, the decree holder would be entitled to proceed against the guarantor first for the execution of the decree. Moreover, it is the right of the decree holder to proceed with it in a way he likes. Section 128 of the Indian Contract Act itself provides that "the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract." If on principle a guarantor could be sued without even suing the principal debtor there is no reason, even if the decretal amount is covered by the mortgage decree, to force the decree-holder to proceed against the mortgaged property first and then to proceed against the guarantor. In such a case, when the said decree had become final all pleas as to the rights which the guarantor had to be taken during the trial and not after the decree while execution is being levied.

16 Whether enhancement of pecuniary jurisdiction of Civil Judges Class-II and Class-I after the enforcement of M. P. Civil Courts (Amendment) Act, 1994 can affect the cases pending in courts on the date when the said Act came into force ? Whether pending cases which on the date of their institution were beyond the pecuniary jurisdiction of Civil Judges Class-II or Class-I can be made over to them for trial after the enforcement of the afore mentioned Amendment Act ?

By M. P. Civil Courts Amendment Act of 1994, Section 6 of the M. P. Civil Courts Act 1958 has been amended so as to increase the pecuniary jurisdiction of Civil Judges Class-II from 10,000 to Rs. 25,000 and that of Civil Judges Class-I from Rs 20,000 to Rs. 50,000. The Amendment Act does not contain any such provision that the pending cases shall stand transferred to the courts of Civil Judges Class-II and Class-I respectively in accordance with the amended provision. The law is well settled that whenever any amending law provides about a change in the forum that does not affect pending actions unless intention to the contrary is clearly shown. The Supreme Court in Manujendra Dutt vs. Purnendu Prasad Roy Chowdhury A.I.R. 1967 SC 1419 and Mohd. Idris vs. Sat Narayan A.I.R. 1966 SC 1499 has laid down the same law and has

reiterated to the same view in a recent judgement in C.I.T. vs. Dhadi Sahu 1994 Supp (1) SCC 257 and has said that a law which brings about a change in the forum does not affect pending actions unless intention to the contrary is clearly shown. One of the modes by which such an intention is shown is by making a provision for change-over of proceedings, from the court or the tribunal where they arepending to the Court or the tribunal which under the new law gets jurisdiction to try them. It is also true that no litigant has any vested right in the matter of procedural law but where the question is of change of forum it ceases to be a question of procedure only. The forum of appeal or proceddidgs is a vested right as opposed to pure procedure to be followed before a particular forum. The right becomes vested when the proceedings are initiated in the tribunal or the court of first instance and unless the legislature has by express words or by necessary implication clearly so indicated, that vested right will continue in spite of the change of jurisdiction of the different tribunals or forums.

17 Whether an illegitimate son can inherit the property of his parents ?

Marriage Laws (Amendment) Act 1976 provides legitimacy to children of a marriage hit by Section 11 of Hindu Marriage Act. By the said Amendment Act, Section 16 of the Hindu Marriage Act 1956 has been amended and it has been enacted that notwithstanding that a marriage is null and void under Section 11 any child of such marriage whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act 1976, whether or not a decree of nullity is granted or whether or not the marriage is held to be void the child will get right in the property of his parents. In Mahila Mathuro Bai vs. Ramvati 1990 MPLJ 475 and Neera Bai vs. Pusia Bai 1996 MPLJ 87, it has been held that the provision of Section 16 of the Hindu Marriage Act is for the benefit of children born out of void marriages and has to be applied in full so as to confer status with the interest in property of their parents. Law leans in favour of legitimacy and frowns upon bastardity. Section 16 of the Act removes the disability of right of such children so far as the property of their parents is concerned. But as held by Hon'ble High Court of M P. in Reshamlal vs. Balwant Singh 1994 MPLJ 446 an illegitimate son born of a relationship created otherwise than by marriage cannot be said to be legitimate child for the purposes of Section 16 and 8 of the Hindu Marriage Act. The benefit under Section 16 is available only when there is a marriage but is hit by Section 11.

18 Where the accused who first pleads not guilty to the charge but at a subsequent stage of trial wants to plead guilty and requests the court to decide the case on his admission of guilt, can the Court disposes of the case on such subsequent plea of guilty and convict the accused ?

In Ganeshmal Jashrai vs Government of Gujarat A. I. R. 1980 Supreme Court 264 = 1980 Criminal Law Journal 208 Supreme Court has said that, "when the appellant was called upon to make his plea before the commencement of the posecution evidence, he pleaded not guilty in respect of the offences charged against him and it was only after the prosecution evidence was closed and his examination under Section 313 of the Code of Criminal Procedure was completed that he admitted guilt presumably as a result of plea bargaining. The learned Judicial Magistrate was in the circumstances not entitled to take into account the admission of guilt made by the appellant in reaching his decision in regard to the conviction of the appellant. The learned Judicial Magistrate is true, did not base his order of conviction solely on the admission of guilt made by the appellant, but it is clear from his judgment that his conclusion was not unaffected by the admission of guilt on the part of the appellant. There can be no doubt that when there is admission of guilt made by the accused as a result of plea bargaining or otherwise, the evalution of the evidence by the Court is likely to become a little superficial and perfunctory and the Court may be disposed to refer to the evidence not critically with a view to assessing its credibility but mechanically as a matter of formality in support of the admission of guilt. The entire approach of the Court to the assessment of the evidence would be likely to be different when there is an admission of guilt by the accused. The entire approach of the Court to the assessment of the evidence would be likely to be different when there is an admission of guilt by the accused. Here it is obvious that the approach of the learned Judicial Magistrate was affected by the admission of guilt made by the appellant and in the circumstances, it would not be right to sustain the conviction of the appellant."

The case was remanded back to the Trial Court.

19. Whether a criminal case can be decided on plea bargaining or whether an accused can be convicted on his admission of guilt inspired by plea bargain ? Or whether an undertrial prisoner or any other accused can be convicted on the basis of his admission of guilt which he makes on the assurance given by the Court that if he pleads guilty he may be dealt with leniently ?

An admission of guilt made as a result of plea bargaining is unconstitutional and violative of Article 21 of the Constitution. In Thippe Swamy vs. State of Karnataka A. I. R. 1983 SC 747 the Supreme Court observed that "this is a case in which plea bargaining seems to have taken place because of the appellant pleading guilty to the charge, the learned Magistrate imposed upon him only sentence of fine of Rs. 1000/- even though the offence of which he was convicted was one under Section 304-A of the Penal Code.

"It is obvious that by reason of plea-bargaining, the appellant pleaded guilty and did not avail of the opportunity to defend himself against the charge, which is a course he would certainly not have followed if he had known that he would not be let off with a mere sentence of fine but would be sentenced to imprisonment. It would be clearly violative of Article 21 of the Constitution to induce or lead an accused to plead guilty under a promise or assurance that he would be let off lightly and then in appeal or revision, to enhance the sentence."

The conviction was set aside and the case was remanded back to the trial Court for fresh trial in accordance with law.

20 Can there be any fixed or rigid rule for appreciation of evidence ?

No there cannot be any hard and fast rule about the appreciation of evidence. The Supreme Court in Balbir Singh vs. State of Punjab, A. I. R. 1987 SC 1328 has held that no hard and fast rule can be laid down about appreciation of evidence. It is after all a question of fact and each case has to be decided on the facts as they stand in that particular case. Therefore, not much assistance could be sought from the decisions referred on the question of appreciation of evidence. The only rigid rule about the appreciation of evidence is that there is no rigid rule for appreciation of evidence.

21 Under what circumstances the provisions of Order 17 Rule 2 and Rule 3 respectively shall be applicable ?

The Supreme Court in Prakash Chander vs. Janki Manchanda A. I. R. 1987 SC 42 has held that if on a date fixed one of the parties to the suit remains absent and for that party no evidence has been adduced up to that date the court has no option but to proceed to dispose of the matter in accordance with Order 17 Rule 2 in any one of the modes prescribed under Order 9

of the Civil Procedure Code. After the amendment by Act Number 104 of 1976 to Order 17 Rules 2 and 3 in cases where a party is absent only course is as mentioned under Order 17 Rule 3 (b) to proceed under Rule 2. Similarly the language of Rule 2 as now stands also clearly lays down that if hny one of the parties fails to appar the court has to proceed to dispose of the suit in one of the modes direc ed under Order 9. The explanantion to Rule 2 gives a discretion to the Court to proceed under Rule 3 even if a party is absent but that discretion is limited only in cases wnere the party which is absent, has led some evidence or has examined substantial part of evidence.

A Full Bench of M. P. High Court consisting of 5 Hon'ble Judges in Rama Rao vs. Shanti Bai, 1977 MPLJ 364 = 1977 JLJ 147=A.I.R. 1977 M.P. 222 overruling an earlier full bench decision by 3 Hon'ble Judges in Shanti Bai vs. Chokhelal 1975, MPLJ 832 has held that whenever a question arises about the applicability of Rules 2 and 3 of Order 17 CPC it should be seen which of the rule applies. When there is a default of appearance of parties Rule 2 applies and when there is no default of appearance of all or any of the parties question of applying Rule 3 would arise provided the requirements laid down in Rule 3 are fulfilled. Rule 3 presupposes the presence of all the parties and then the failure of party at whose instance and for whose benefit the case was adjourned on the previous date to perform the act necessary for the further progress of the suit. If when a suit is called on for hearing the party's counsel appears and seeks adjournment but the adjournment is refused as he has no instructions it will be no appearance of the party and Rule 2 of Order 17 CPC would be attracted. If when a case is called on for hearing the counsel appears (without making any request for adiournment) merely to inform the court that he has no instructions, and therefore, would not appear, it will be no appearance of the party and Rule 2 of Order 17 CPC alone will be attracted.

In a very recent judgment in Bhoori Bai vs. Laxmi Bai 1995 MPLJ Shortnote 13 a Division Branch of M. P. High Court has held that necessary conditions for application of the provision of Order 17 Rule 3 CPC are :—

(i) Time must have been granted by the Court at the instance of the party; (ii) time must have been granted to the party either to produce evidence or to cause the attendance of the witnesses; (iii) default must have been committed by the party in performing the act for which time was granted and (iv) the party must be present or be deemed to be present.

"In the light of dictum laid down by the five Judges Bench in Rama Rao vs. Shati Bai, 1977 MPLJ 364, it is to be seen whether the councel appeared in the case on 23-1-1986 and whether his appearance can be taken to be an appearance on behalf of the party who was absent on that day. The order sheet showed that when the Court proceeded ex-parte the counsel appeared. There was nothing to indicate that the counsel participated or had taken any step in furtherance of the progress of the suit. It did not appear that the counsel appeared with instructions from the party to participate in the proceedings. The counsel appeared later in the Court after recording of the order-sheet by the Court and his presence was marked by the trial Court. It indicated that the counsel's appearance was not with the instructions to conduct the case. Appearance of the counsel in the Court cannot be held to be within the meaning of Order 17, Rule 3, Civil Procedure Code.

"As the party or their counsel were not present in the Court when the evidence of the defendant was closed on 23-1-1986, it shall be under Order 17, Rule 2, Civil Procedure Code and decree passed will be an ex-parte decree. The party aggrieved by an ex-parte decree has right to move an application under Order 9., Rule 13, Civil Procedure Code for setting aside ex-parte decree against him. Such application is maintainable and the Court is duty bound to decide it on merits."

* * *

"...the stength and effectiveness of the judicial system and its independence heavily depends upon the calibre of men and women who preside over the judiciary and it is most essential to have a healthy independent judiciary for having a healthy democracy because if the judicial system is crippled, democracy will also be crippled."

—S. Ratnavel Pandian, J. in S. C. Advocates-on-Record Assn. V. Union of India, (1993) 4 SCC 441, 568 para 203.

CIRCULARS

HIGH COURT OF MADHYA PRADESH JABALPUR

In supersession of all previous circulars prescribing standard of disposal of cases by Judges of Subordinate Judiciary, the following new standard of disposal is being prescribed. This standard shall be applicable w. e. f. 1-1-1996.

Criteria for the Assessment of work Done by District/Additional District and Sessions Judges.

(Assessment chart for each working day)

Below	3.5 Units	: Poor
Between	3.5 to 4.5 Units	: Average
Above	4.5 to 5.5 Units	: Good
Above	5.5 Units	: Very Good.

(**Note** : Assessment will be done monthly, quarterly and annually on the basis of actual working days of the period.)

Criminal

1. SESSIONS TRIAL

(a)	Murder, Culpable Homicides, Decoity	: 12 Units
(b)	Other I. P. C. Sessions Trials	: 8 Units
(c)	Under Explosive Substance Act.	: 3 Units
(d)	Discharge or remanded u/s 227 or 228 of Cr. P. C.	: 1 Unit

2. SPECIAL CASES

(a)	Under prevention of Corruption Act.	: 12 Units
(b)	Summary under Essential Commodities Act.	: 3 Units
(c)	C. B. I. Cases and T. A. D. A. Cases	: 15 Units
(d)	Other than I. P. C. Cases Triable by Court of Sessions, either as Sessions Court or as a Special Court.	: 6 Units

3. Criminal Appeals : 2 Units

4. Criminal Revisions : 1 Unit

5. Criminal M. J. C. : 1 Unit

6. Bail Petitions : 1/5 Unit. Subject to maximum of 20 Units per month

Civil

1. SUITS :

(a) Contested Cases — A Suits : 10 Units

B Suits : 7 Units

(b) Un-Contested Cases

[i] Ex-parte or Compromise after issues on the merits of the contraversy have been framed and some evidence on merits recorded. : 2 Units

[ii] Ex-parte decree where defendant does not at all appear to contest. : 1 Unit

2. Regular Civil Appeals : 3 Units

3. Misc. Appeals : 1 Unit

4. Cases under Land Acquisition Act, Public Trust Act, Arbitration Act, Hindu Marriage Act and Insolvancy cases (Contested) : 6 Units

5. Cases under Indian Succession Act (Contested) : 4 Units

6. Civil MJC and Execution (Contested) : 2 Units

7. Small Cause case. : 1 Unit

8. Interlocutory Applications under order 39 rule 1 and 2, Order 40 rule 1 of C. P. C., Section 24 of Hindu Marriage Act, Section 13 of M. P. Accommodation Control Act (Contested) : 1 Unit

9. Motor accident Claim cases.

(a) Individual cases : 4 Units

(b) Each connected cases : 1 Unit per connected case.

10. Election Petition : 6 Units

Other Work

1. Administrative Work (for D J. only)

   (a) If there are 20 or less courts in the District. : 15 Units per month.

   (b) If there are more than 20 courts in the District. : 20 Units per month.

2. Annual Inspection : 4 Units per Court

Remarks

1. If the Judge has been busy or has disposed off some substantial Judl. work due to which he could not dispose of sufficient number of cases he should mention the particulars and nature of those cases in the note appended to the Statement.

2. In the above chart except otherwise mentioned work done shall be counted only for contested cases.

3. Actual number of days spent by D. J. for sitting in Consumer Forum shall be excluded from working days.

Criteria for the Assessment of work Done by Civil Judges/Judicial Magistrates.

(Assessment chart for each working day)

4 Units and below	:	Poor
Above 4 Units to 5.5 Units	:	Average
Above 5.5 Units to 6 Units	:	Satisfactory
Above 6 Units to 6.5 Units	:	Good
Above 6.5 Units	:	Very Good

(Note : Assessment will be done monthly, quarterly and annualy on the basis of actual working days of the period.)

Criminal

1. Cases under I.P.C.

   (Contested) : 4 Units

   (Uncontested) : 1/2 Units

   (Compromise after some evidence) : 1 Units

2. Contested cases under P. F. A. Act : 4 Units

3. Cases under Arms Act and Railway property (Unlawful Possession) Act. (Contested) : 2 Units
(Uncontested) : 1/2 Unit

4. Cases under Indian Drugs Act, Incometax Act, Foreign Exchange Regulation Act, Central Excise and Salt Act and other Acts involving economic offences. : 3 Units

5. Cases under Excise Act, Gambling Act, Police Act and other Special Acts, if tried by the Magistrates without summary power. (Contested) : 1 Unit
(Uncontested) : 1/2 Unit

6. Criminal Private Complaints

(A) Under I. P. C.

(a) Dismissed in default after recording some evidence. : 1/4 Unit
(b) Dismissal u/s 203 of Cr. P. C. : 1/2 Unit
(c) Discharge of accused : 2 Units

(B) Under Dowry Prohibition Act or any other such Special Act.

(a) Dismissed in default after recording some evidence. : 1/4 Unit
(b) Dismissal u/s 203 of Cr. P. C. : 1/2 Unit
(c) Discharge of accused : 1 Unit

7. Under Section 125 Cr. P. C. (Contested) : 3 Units
(Uncontested) : 1/2 Unit

8. (i) Order u/s 319 (1) Cr. P. C. for. summoning any other person other than those challaned as accused when contested. : 1 Unit
(ii) Order u/s 451 Cr P. C. for custody and disposal of property in pending trial when contested. : 1/2 Unit
(iii) Order u/s 456 (i) Cr. P. C. for restoration of possession of immovable property made separately on application.
(Contested) : 1 Unit
(Uncontested) : 1/2 Unit

9. Summary cases	(Contested)	:	1/2 Unit
	(Uncontested)	:	1/10 Unit. Subject to ceiling of 15 units per month.

(Note : Ceiling under item 9 will not be applicable to Special Railway Magistrates & Motor Vehicle Magistrates.)

10. Bail Applications (For non-bailable offences only)	:	1/6 Unit. Subject to maximum of 15 units per month.
11. Miscellaneous		
Contested such as objection u/s 47 Cr. P. C./Special reference received from Appellate Courts.	:	2 Units

Note :

(i) A contested Criminal case would be one in which the accused pleads not guilty to charge and does not admit the truth of the allegations against him at any stage and which is disposed of on merits on the basis of evidence led therein.

(ii) The disposal of a criminal case remanded by the Appellate Court to the Magistrate with a direction to hear the accused on the question of sentence as envisaged in Section 248 (2) of the Cr. P. C. shall earn 1/2 Unit.

(iii) A Criminal case which is disposed of by a judgment recorded after the framing of charge/notice and recording of some (not all) evidence cited by the prosecution shall earn 4 units, where the court, after recording substantial evidence of the prosecution, is constrained to close the prosecution evidence merely on account of the failure of the prosecution to produce one or more formal witnesses.

(iv) A Criminal case disposed of on account of failure of the prosecution to produce any evidence after framing of charge/notice shall earn 1/2 units.

(v) Two units be earned per cases u/s 446 of Cr. P. C. decided ofter contest and recording of evidence but **no** unit be earned for uncontested cases u/s 446 or for cases u/s 350 of Cr. P. C.

(vi) A Criminal case disposed of on a plea of guilty by the accused to the charge/ notice framed against him without any evidence being recorded shall earn 1/2 Unit.

Civil Cases

1. CIVIL SUIT

(a) Contested	Class–A	:	8 Units
	Class–B	:	6 Units
(b) Exparte or compromise after issues on the merits of the contraversy have been framed and some evidence on merits recorded.		:	2 Units
(c) Dismissed in default or rejection and return of plaint after evidence.		:	1 Unit
(d) Dismissed in default before evidence and after settlement of issues.		:	1/2 Unit
(e) Ex-parte decree where defendant does not at all appear to contest.		:	1 Unit
(f) Compromise before recording any evidence		:	1/2 Unit

Notes :

(1) For purpose of assessing the disposal in terms of units in case of two or more contested codsolidated suits disposed of by a single judgment–Prescribed units for the main suit in which evidence is recorded and one each for every other suit, shall be earned.

(2) In the cases of a final decree

(i) Contested	:	3 Units
(ii) Dismissed in default after evidence	:	1 Unit
(iii) Dismissed in default before evidence	:	1/2 Unit
(iv) Compromise before recording any evidence	:	1/2 Unit
(v) Ex-parte final decree where defendant does not at all appear to contest before or after preliminary decree.	:	1/2 Unit
(vi) Compromise or ex-parte final decrec after issues on the merits of the contraversy have been framed after passing of the preliminary decre and some evidence on merits has been recorded.	:	1/2 Units

(3) Suit when dismissed in default, and application for restoration of sult is decided on concession **no** units be assigned and if it is disposed of on merit, one unit shall be given. :

(4) Small cause cases (Contested) : 2 Units
(Uncontested) : 1/2 Unit

(5) Execution (Contested) : 2 Units
(Uncontested) : 1/2 Unit

(6) Objection/Application under order 21 Rule 58 C.P.C. (Contested) : 2 Units

(7) Application under order 33 Rule 1 and order 47, Rule 1 C.P C. (Contested) : 1 Unit
(Uncontested) : 1/4 Unit

(8) Interlocutory application under order 38 Rule 5, Order 39 Rule 1 and 2, order 40 rule 1 and order 44 Rule 1 of C. P C. (Contested) : 1 Unit

(9) Application under order 39 Rule 2-A C.P.C.
(Contested) : 2 Units

(10) Guardians and wards Act (Contested) : 2 Units
(Uncontested) : 1/2 Unit

(11) Succession Certificate (Contested) : 3 Units
(Uncontested) : 1/2 Unit

(12) (a) Arbitration Applications (Contested) : 3 Units
(Uncontested) : 1/2 Unit

(b) Applications u/s 34 of the Arbitration Act-When Contested. : 1 Unit

Notes :

(i) A Civil Case in order to be considered a 'Contested Case' would be one in which any of the defendants appears and joins issues on the merits of the controversy resulting in the framing of issues, recording of evidence and a judgment on the merits of the case.

(ii) A Civil case disposed of without recording any evidence under order 17 Rule 3 of C. P. C. shall earn one unit.

(iii) No unit be awarded for any case dismissed in default or allowed to be withdrawn under order 23 Rule 1 of C. P. C. with liberty to file fresh suit on the same cause of action.

General Notes :

1. There can be contested disposal of cases only if there is substantial number of cases pending in a court. If the pendancy is light, this shall be taken into consideration in evaluating the poor contested disposal of the officer.

2. In cases of new Judl. Officers, their inabity to dispose of cases on account of inexperience and lack of judicial technique, shall be takens into consideration while assessing their work.

3. In the above chart, except otherwise mentioned work done shall be counted only for contested cases.

By Order of the HiGh Court
(S. S. Saraf)
Registrar Vigilance

HIGH COURT OF M. P. JABALPUR

MEMORANDUM

No. 7137/III.2 3/74 Dated the 18th May 1976

In exercise of the powers conferred under sub section (6) of Section 363 of the Code of Crl. Procedure, 1973 (Act II of 1974) the High Court makes the following rule for grant of copies.

RULES

"Save as otherwise provided by the Law for the time being in force copy of a Judgment or Order of a Criminal Court may be granted to any person who is not affected by a Judgment or Order, on payment, by such person, on the usual charges and subject to prescribed conditions, under Orders of the Presiding Officer or the Officer-in-charge of the Record Room as the case may be.

Provided that the copies required for official use or purpose, by officers of the Central or State Government should be delivered free of cost.

By Order of the High Court
(Sd/-D. B. SURYAVANSHI)
REGISTRAR

HIGH COURT OF MADHYA PRADESH, JABALPUR

MEMORANDUM

No. 7974/III-1-5/57 Dated, Jabalpur, the 7th June, 1974.

To,

The District & Sessions Judge,
(All in the State)

Subject : Grant of copies of depositions and judgments.

Consequent on the suggestions of some of the Bar Associations in the State for providing facilities for making application in advance for copies of depositions and judgments by taking out carbon copies, the Hon. the Chief Justice is pleased to order that when the Courts record a type-written deposition or deliver a type-written judgment or order and an application in advance has been made for supply of their copies, the Courts shall get carbon copies made of the depositions/judgments/orders and supply it immediately on payment of the prescribed fee chargeable for ordinary copies subject to the conditions prescribed in the Rules relating to Preparation and Delivery of copies.

(Sd/-M. M. JINSHIWALE)
Addl. REGISTRAR

HIGH COURT OF MADHYA PRADESH, JABALPUR

MEMORANDUM

No. A/536 / II-2-45/87 Jabalpur, dated the 20th January, 1988

To,

The District & Sessions Judge,
JABALPUR

Attention of the High Court has been drawn to reported increase in acid-throwing incidents in several parts of the State. In some such cases, whether intentional, negligent or otherwise, unwitting by-standers, passers-by, interveners or pacifiers also sustained injuries of varying degrees. The High Court desires that all Sessions Judges in this State should issue instructions to Chief Judicial Magistrates in their respective Sessions Divisions to :—

(a) inquire into, or as the case may be, try and decide all such cases of acid-throwing, with or without other associated offences, and put up before such Chief Judicial Magistrates on or after date of communication of this memorandum, and not permit Judicial Magistrates subordinate to them to so inquire into, or try and decide such cases;

(b) expedite inquiry into or trial and disposal of cases of aforesaid class, pending on date of communication of this memorandum or if such pending cases be on the files of Judicial Magistrate sub-ordinate to such Judicial Magistrates; to direct such Judicial Magistrates to inquire into, or, as the case may be, try and decide such cases expeditiously.

Needless to add, cases of the type described above if pending in Sessions Courts may also be taken up subject to other priorities, expeditiously.

Exceptions in (a) above may be made in clearest possible cases and for reasons to be recorded in writing by the Chief Judicial Magistrate concerned, under intimation to his Sessions Judge, who in turn shall satisfy himself that the reasons assigned for departure are satisfactory.

The instructions in this memorandum may be brought to the notice of all Judicial Magistrates working in Sessions Divisions concerned by the Sessions Judges.

(J. A. KHARE)
Registrar

HIGH COURT OF M. P. JABALPUR

No. Q/Cr. A. No. 126/77 Pending. Dated the___Feb 1981.

The District & Sessions Judge,
JABALPUR

Please find herewith below extract copy of order dated 16-1-81 passed by the High Court in Cr. A. No 126/77 for information and necessary action.
Kindly acknowlede receipt of the Order.

R. K. SETH
Additional Registrar

Extract copy of Court order dated 16-1-81 in Cr. A. No. 126/77 (Murlidhar s/o Baisakho and another Vs. State)

It is being observed in many cases that either the sureties are not traceable on the cryptic addresses given in their surety bonds or they are not found to be possessed of sufficient movable properties, commensurate with the amounts of their surety bonds. It clearly follows that the Lower Courts do not exercise proper care and deligence in verifying the bail bonds, before accepting the same. Some of the Courts discharge their duties in this regard only mechanically without applying their minds. Even care is not taken to ensure

that the addresses of the accused persons and their sureties in their respective bail bonds are proper and acourate. Greater care and caution is needed so that the process of law is not lightly thwarted.

HIGH COURT OF MADHYA PRADESH, JABALPUR

D. O. No. 1425 / III–2–3/74 Jabalpur, dated 19th July, 1995

Sub. : Trial of offences under Section 260 of the Code of Criminal Procedure by summary procedure.

Dear Shri

As directed, I am to invite your attention to section 260 of the Code of Criminal Procedure, 1973 and to request you to kindly impress upon all the Judicial Magistrates working under you to consider the desirability of deciding the cases covered by the said provision by summary procedure to the extent possible.

With regards,

Yours Sincerly,
(K. P. TIWARI)
Additional Registrar

HIGH COURT OF M. P. JABALPUR

D. O. No. 3285/III-2-3/74 (F.I.R.) Jabalpur Dated 4th Dec , 1995

Subject : Instructions to Magistrates regarding copy of F. I. R. sent to them by police.

Dear Shri

As dieected, I have to bring to your notice that Hon,ble the High Court has been pleased to pass the following Order on above mentioned subject :

"When a Police Officer delivers a copy of the F. I. R. in Court the same should be immediately placed be fore the Magistrate whether he is on the Banch or otherwise and the Magistrate should put his tnitial and the date on the copy and keep and preserve it and when the challan is filed, the copy of F. I, R. may be placed in the case Records."

I am, therefore, to requst you to kindly instruct all the Magistrate under you to follow the instructions strictly.

With regards,

Yours Sincerely,
(R. S. TRIPATHI)
Additional Registrar

HIGH COURT OF MADHYA PRADESH, JABALPUR

MEMORANDUM

No. C/2810 / III-2-9/40 Pt. II F. No. 4 Jabalpur, dated the 12th June, 1995

To,

The Secretary to Govt.,
Law & Legislative Affairs Deptt.
BHOPAL

Sub : Sending of original records alongwith notice to the District Magistrate in Criminal Cases.

I have been directed to inform you that henceforth Lower Court records shall not be sent to the District Magistrates alongwith the notice in-Criminal Cases. In this connection, copy of the Memo addressed to the Additional Registrar Benches at Indore and Gwalior, is enclosed for information.

Encl : As above.

(R. C. MISHRA)
Additional Registrar(J)

HIGH COURT OF M. P. JABALPUR

MEMORANDUM

No. C/2809 / III-2-9/40 Pt. II. F. No. 4 Jabalpur, dated 12th June, 1995

To,

The Additional Registrar,
High Court of M. P.,
Bench Indore/Gwalior,
INDORE/GWALIOR.

Sub. : Sending of original records alongwith notice to the District Magistrate in Criminal Cases.

Ref. : This Registry Memo No. 13037 dated 1-12-62 and Memo No. 5526 dated 27-6-1963

I am to inform you that the instructions contained in the Memo under reference stand withdrawn with the result that hence forth Lower Court records shall not be sent to the District Magistrate alongwith the notice in Criminal Cases.

(R. C. MISHRA)
Additional Registrar (J)

YOUR PROBLEMS AND THEIR SOLUTION

Questions sent by Shri Suresh Kumar Choubey, Civil Judge Class-II, Jabalpur

Q. 1 In a civil suit if a decree is passed in respect of a time barred claim, whether the judgement debtor can raise an objection that the decree is not executable because it is based on a time barred suit ?

Ans. Executing Court has of course the duty to decide all questions arising between the parties to the decree relating to execution, satisfaction and discharge of the decree. While deciding that question the executing court can refuse to execute a decree which is a nullity on the ground that it was passed despite inherent lack of jurisdiction. But the executing court while deciding such questions cannot judge the validity of the decree. Executing court cannot go behind the decree, it has to execute the decree as it is.

According to Section 3 Sub Section (1) of the Limitation Act every suit instituted after the period of limitation prescribed under the Act, shall be dismissed by the court although limitation has not been set up as a defence. But the court is not obliged to raise the issue of limitation suo motu. Limitation is a matter of procedure, it does not deprive a court of its jurisdiction to try the suit or other proceeding which has been instituted after the prescribed period of limitation. Hence the decision of a court decreeing or allowing a suit or other procseding which is barred by limitation, is not vitiated by want of jurisdiction. It has been held by Supreme Court in A. I. R. 1964, SC 907 that though Section 3 of Limitation Act is peremptory, a failure of court to desmiss a suit as barred by limitation does not make the decree a nullity. The court does not act without jurisdiction but it makes only an error of law. In A.I.R. 1960 SC 3888 the Supreme Court, and in A. I. R. 1965 M. P. 75 (F. B.) the M P. High Court held that an executing court cannot go behind the decree. The Supreme Court has further held in A. I. R. 1970 SC 1475 that an executing court has no powers to go behind the decree or to question its legality or corredthess.

Thus the decree passed by the court even in respect of a time barred claim will not be inexecutable though it may suffer from certain legal infirmities.

Q. 2 Whether a compromise petition supported by an affidavit and filed by the counsel for the complainant in respect of offences compoundable under the provisions of Section 320 Cr. P. C. can be accepted by the court ?

The Nagpur High Court has in Godfrey Meeus vs. Simon Dular A. I. R. 1950, Nagpur, 91 said that where a compromise petition in respect of offences under Sections 323 and 506. Penal Code, duly signed by both the parties and containing a statement that the complainant has compromised the case of his own free will is presented to Court by the accused but the Court wrongly rejects it on the ground that it should have come from the complainant it amounts to a composition of the offences which has the immediate effect of aoquittal of the accused. This necessarily deprives the Magistrate of his jurisdiction to try the case and the subsequent withdrawal from the composition by the complainant can neither affect the acquittal nor revive the jurisdiction of the Magistrate to proceed with the case. Reliance was placed on A. I. R. 1940, Nagpur 181.

Q. 3 Whether A. P. P. can be permitted to amend the challan ?

Ans. There is no question of amending the challan. The challan is not like a civil suit. In a civil suit the parties are bound by the allegations made by them in their pleadings but in a criminal case the prosecution is not bound by the allegations made in the challan. In this behalf R. K. Dalmia Vs. Delhi Administration A. I. R. 1962, SC 1821, Kesar Singh Vs. Sate of Punjab, A. I. R. 1974, SC 985 can be looked into. (A criminal case is not tied down to a particular version as a civil case is by the pleadings of the parties)

Q. 4 Whether a Magistrate can order futther investigation after the police has filed a report under Section 173 Cr. P. C. ?

Ans. Yes. Section 173 Sub Section (8) Cr. P. C. contains the provision that despite the forwarding of a police report to the Magistrate under Section 173 Sub Section (2), further investigation in respect of the same offence may be made and if upon such investigation the officer in charge of the police station obtains further evidence he shall forward it to the Magistrate. There are ample powers given to the Magistrate under Section 156 to order the police to investigate into any crime. Such directions can be given even after the filing of challan but a Division Bench of M. P. High Court has cautioned that such direction should be given on very strong grounds Kindly see Pannalal Vs. Dr. Veer Bhan, 1992 JLJ 327. In 1989 Cur. Cri. J. 49, M. P. High Court has held that where the police made perfunctory investigation Magistrate may order further investigation.

Q 5 In a Criminal case under Section 427 I. P. C. instituted by a public servant

on behalf of his department the complainant wants to compound the offence with the accused but the complainant is not the senior officer of department. Whether such complainant can compound with the accused ?

Ans. According to Sectioh 320 Sub Section (1) the offence under Section 427 I. P. C. is compoundable without the intervention of the court. It does not require any permission from the court. According to Colume 3 of the table given below sub section (1) of Section 320 Cr. P. C. the person to whom the lose or damage is caused is the competent person to compound the offence under Section 427 I. P. C. A public servant who has initiated the proceedings is not the person to whom the loss or damage is caused. Therefore in such cases offence can be compounded only by a person duly authorised by the State Government. See 1954 Cr. L. J. 50.

Q. 6 In a warrant case, after the registration of the case the complainant either does not appear or does not produce evidence. What order can be passed in such cases ?

Ans. Before the framing of charge in a warrant case instituted on a private complaint if the complainant remains absent and the case is one in which the erovisions of Section 249 Cr. P. C. are attracted the Magistrate may dismiss the complaint. If the provisions of Section 249 Cr. P. C. are not attracted, the Magistrate may proceed under Section 245 Sub Section (2) Cr. P. C.

QUESTIONS SENT BY SHRI S. N. KHARE, ADDL. CHIEF JUDICIAL MAGISTRATE, VIDISHA (M. P.)

Q. 1 At page 50 of 'JOTI JOURNAL' Part II, Dec. 95 issue we have been informed that if an accused is in judicial custody and he is not produced before the court the court should not record the evidence of withesses, even if defence counsel requests for the same (relying on State of M. P. vs. Budhram 1995 MPLJ 906).

At Vidisha and also at most of the other stations it is a matter of practical experience that jail authorities are not producing the accused persons before the court at the time of hearing even for months together. When explanation in this regard is sought from jail authorities they take excuse "guards not provided", even when the matter is reported to police authorities the problem is not solved.

Kindly advise what course should be adopted by the judges in this circumstances so that witnesses are not returned unexamined and the case is disposed of expeditiously.

Ans. There is no page no. 50 in 'JOTI JOURNAL' Vol. I part II. The case State of M. P. vs. Budhram 1995 MPLJ 906 has been cited at page 5 The whole judgment has been published at page 12 under the instructions of Hon'ble High Court for the guidance of all the subordinate criminal courts of the State. A careful reading of the said judgment will make everything crystal clear and it does not require any special advice to be given by the Directorate of Training.

Q. 2 In a civil case for declaration of title and for injunction on summoning the defandant, he appears before the court and in writing admits the claim of the plaintiff, whether the court is bound to decree the suit ? Is there any reported decision on this point ?

Ans. In any civil suit where the defendant in his pleadings admits the claim of plaintiff the court is not bound to decree the suit either under the provisions of Order 12 Rule 6 or Order 15 Rule 1 of the Code of Civil Procedure. In both the provisions it is clearly mentioned that the court may pronounce judgment and not shall pronounce judgment. The Supreme Court in Razia Begum vs. Anwar Begum, A. I. R. 1958 SC 886 has laid down that in cases covered by Sections 42 and 43 of the Specific Relief Act 1877 (equivalent to Section 34 and 35 of Specific Relief Act 1963), the Court is not bound to grant the declaration prayed for, on a mere admission of the claim by the defendant if court has reasons to insist upon a clear proof apart from the admission.

Hon'ble High Court of M. P. also has in S. M. Shafai and Sons vs. Punjab National Bank 1984 MPLJ Short Note 22 held that the Court may pass a decree on the basis of admission contained either in written statement or elsewhere.

The Supreme Court in a very recent judgment given on 11-9-95 in Bhoop Singh vs. Ramsingh Major A.I R. 1996 SC 197 has held that a decree passed in view of written statement filed by defendant admitting claim of plaintiff to be correct is a judgment on admission under Order 12 Rule 6 of CPC and it will require registration under Section 17 (2) of the Registration Act, because the decree creates a right for the first time. The Supreme Court has also held that the exception engrafted in Clause (vi) of Section 17 (2) is meant to cover that decree or order of a Court, including a decree or order expressed to be made on a compromise, which declares the pre-existing right and does not by itself create new

right title or interest in praesenti in immovable property of the value of Rs 100/- or upwards. Any other view would find the mischief of avoidance of registration which requires payment of stamp duty, embedded in the decree or order. The Court should therefore examine in each case whether the parties have pre-existing right to the immovable property, or whether under the order or decree of the Court one party having right, title or interest therein agreed or suffered to extinguish the same and created right, title or interest in prasenti in immovable property of the value of Rs. 100/- or upwards in favour of other party for the first time, either by compromise or pretended consent. If latter be the position, the document is compulsorily registrable.

In view of this latest Supreme Court Judgment any decree passed in any civil suit regarding the declaration of title of the plaintiff over any immovable property on the basis of admission of the defendant, shall be compulsorily registrable under the provisions of Section 17 of the Registration Act and stamp duty shall be payable advoleram i. e. according to the value of the property.

A decree which is compulsorily registrable cannot be executed until it is registered or in other words it will remain ineffective till its registration and registration shall involve payment of stamp duty according to the value of the property and registration fees as fixed by the State Government.

Q. 3 The first remand of an accused is sought u/s 324 IPC the accused is bailed out. Afterwards, in the same case, producing case diary and sufficient material on record, the police authorities want "permission to rearrest the accused u/s 307 IPC from the court. Can the Court grant such permission? What is the proper course to be adopted ?

Ans. The Hon'ble High Court of M. P. has in Shiv Naryan vs. State of M. P. 1992 MPLJ 285 and Rambabu Sharma vs. State of M. P. 1990 (I) MPWN Note 79 held that the right of the police to rearrest on their own an accused, on the addition of more serious offence than the ones for which he was admitted to bail accrues only when the competent court cancelled the bail. Thus where the accused was released on bail by theMagistrate for a bailable offence punishable under Section 324 IPC, and subsequently the police converts the offence into one punishable under Section 307 IPC, police cannot rearrest the accused for the offence so converted unless and until the earlier bail order granted by Magistrate is cancelled by the competent court. The Magistrate cannot cancel the bail

granted by him under Section 436 Cr P. C. in respect of a bailable offence. There is no provision for the cancellation by a Magistrate of bail granted by him under Section 436 (1) Cr P. C. Under sub sectian (2) of Section 436 Cr. P. C. a Magistrate can refuse to release the accused again on bail when the accused had misused the bail by absenting himself from the court. A Magistrate has got power to cancel the bail oranted by him in respect of nonbailable offence as provided under Section 437 sub section (5) of Cr. P. C. Therefore, when a Magistrate grants bail to an accused for a bailable offence and the police wants to rearrest the accused for another offence then the police should approach the Sessions Court or the High Court under Section 439 sub section (2) Cı. P. C for the cancellation of bail. When the bail is cancelled only then the police can rearrest the accused: you kindly also read 1980 MPLJ 100 (D.B.)

Q 4 In a criminal case an accused has pleaded not guilty to the charge. Later on he wants to admit his guilt. Can he or she be allowed to do so ?

Ans. For answer to this question kindly read item number 18 of "Important Judgments of Supreme Court and High Court" published in this issue of 'JOTI JOURNAL' at page 22.

Questions Sent by SHRI CAMIL XALXO, VI Additional Judge to the Court of District Judge, Raipur

Q. In a case other than culpable homicide whether conviction of the accused may be made :-

(a) When the victim in his/her evidence in the court turns fully hostile but all the rest of the prosecution witnesses amply support the prosecution case.

(b) When the victim could not be examined in the Court either because of his death or that he or she could uot be traced but rest of all the prosecution witnesses amply supported the prosecution case.

Ans. You have formulated your question number (a) in a most general form without giving factual details of your problem. As mentioned at page 23 of this Part of the Journal against item number 20 there can be no hard and fast rule about appreciation of evidence. It is after all a question of fact and each case has to be decided on the facts as they stand in that particular case. Therefore not much assistance can be sought from the reported decisions of Supreme Court or High Court on the question of appreciation of evidence. There may be cases of rape where the prosecutrix may turn totally hostile though other withesses may speak that they

had seen the act of sexual intercourse. In such case if the prosecutrix is found to be a willing and consenting party then any amount of occular evidence will not be able to prove the charge under Section 376 IPC against the accused But there may be such cases of rape also where the lady may narrate the entire prosecution story except the identity of the accused. In that case the occular testimony of independent witness may be used as corroborrative piece of evidence and the testimony of the lady may also be used. In cases other than that of rape, a complainant may turn hostile partially but if there are other overwhelming testimonies of witnesses then they may be useful for proving the guilt of the accused.

There are cases and cases of Supreme Court and various High Courts throwing light on the value of evidence of hostile witnesses. It will suffice to quote few of them here which may be usefully read to help you solve the problem you are faced with :-

(1) Bhagwan Singh vs. State of Haryana, A. I. R. 1976 SC 202
(2) Sat Paul vs Delhi Administration, A. I. R. 1976 SC 294.
(3) Syad Akbar vs. State of Karnataka, A. I. R. 1979 SC 1848
(4) Khujji alias Surendra Tiwari vs. State of M. P., A. I. R. 1991, SC 1853.
(5) Dhananjoy Chatterjee vs. State of West Bengal (1994) 2 Supreme Court Cases 220.

Regarding your question (b) you can find its best solution by reading the Judgment of Supreme Court in Kishan Chand vs. State of Rajasthan, A. I. R. 1982 SC 1511.

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O. I. G. S.

To,

Shri

Mahesh Prakash,
Legal Adviser,
Dept. of Legal Affairs,
Min. of Law, Jus. & C.A.,
NEW DELHI.