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साधना से सिद्धि

माह जनवरी 1997 में संस्थानिक प्रशिक्षण के दो सत्र संपन्न हुए। प्रथम सत्र दिनांक 6 से 13 जनवरी तक चला तथा दूसरा सत्र 16 से 23 जनवरी तक चला। दोनों ही सत्रों में माननीय मुख्य न्यायधिपति महोदय श्रीमान ए. के. माथुर साहेब ने अपनी गरिमामयी उपस्थिति से सत्रों का शुभारम्भ किया। प्रथम सत्र में अपनी अभिव्यक्ति यह कहकर की कि समाज परिवर्तनशील है तथा समय के साथ पुरानी बातें समीचीन नहीं रहती हैं तथा किसी सीमा तक वे निरर्थक भी हो जाती हैं। सीखने की क्रिया तो सतत तथा अनन्त है। विधि का आधार अत्यन्त महत्व पा रहा है व तीव्र गति से अंतर्राष्ट्रीय स्तर में भी परिवर्तन हो रहा है। अतः न्यायिक अधिकारियों ने नई तकनीक विकसित करने हेतु सतत रूप से प्रयत्नशील होना चाहिये। उनकी यह अपेक्षा थी कि नई तकनीक का विकास तब ही संभव हो सकेगा जब न्यायिक अधिकारी स्वयं कार्य निराकरण के प्रति अत्यन्त गंभीर होंगे। सतत् कार्य करने से जब अनुभव में वृद्धि होगी तो स्वाभाविक रूप से तकनीक का विकास भी होगा। कार्य निराकरण के विषय पर माननीय मुख्य न्यायाधिपति श्रीमान माथुर महोदय अत्यन्त संवेदनशील थे व इसी भावना से ओतप्रोत होकर उन्होंने कहा कि कार्य निराकरण हेतु जो मापदंड दिये हैं उसका अर्थ केवल यह है कि न्यूनतम उतने प्रतिशत कार्य तो होना अनिवार्य है। उन्होंने इस भ्रम को दूर करने के लिए कहा कि न्यायिक अधिकारियों ने यह नही समझना है कि निर्धारित कार्य प्रतिशत से अधिक कार्य नहीं करना है विपरीत इसके उच्च न्यायालय की अपेक्षा है कि कार्य निष्पदान तो इस मापदंड से बहुत अधिक होना चाहिये निरीक्षण के समय इस बात को भी ध्यान रखा जाना है।

द्वितीय सत्र में भी श्रीमान माथुर साहेब ने प्रथम सत्र के अनुरूप यह अपेक्षा की कि न्यायिक अधिकारियों का कार्य ही इस प्रकार है कि उनके द्वारा कर्म के प्रति उपेक्षा न्यायिक अधिकारियों के प्रतिष्ठा को ठेस पहुंचाती है। न्यायिक अधिकारियों का कार्य व व्यवहार न्यायालय में व न्यायालय के बाहर हर कोई परखता रहता है। समाज का दृष्टिकोण न्यायाधीश के प्रति एकदम भिन्न होता है। समाज यह अपेक्षा करता है कि न्यायाधीश को उच्च कोटि का ज्ञाता होना चाहिये वैचारिक संतुलन बनाए रखना है तथा न्यायदान में लेशमात्र का भी असंतुलन नहीं होने देना है। न्यायाधीश के प्रति यह भी अपेक्षा थी कि वह दूसरों पर निर्भर न रहे अपितु प्रशासनिक व न्यायिक कार्य में स्वयं को सक्रिय रूप से भागीदार बने रहने दे व नियंत्रण रखे।

दोनो ही सत्रों के समापन अवसर पर माननीय प्रशासनिक न्यायाधिपति श्रीमान एस. के. दुबे महोदय ने अपनी गौरवपूर्ण उपस्थिति में संक्षिप्त लेकिन सारगर्भित विचारों को प्रस्तुत किया व कहा कि न्यायालय मंदिर के रूप में पवित्र स्थल है अतः वहां पर न्यायिक अधिकारियों का चिंतन, सोच विचार व आधार शुद्ध सात्विक हो व व्यवहार भी उसी अनुरूप हो। निष्कलंक व निष्प्रभावी छवि के होने की अनिवार्यता को व्यक्त करते हुए माननीय न्यायाधिपति महोदय श्रीमान दुबे महोदय के ये विचार थे कि न्यायाधीश का कार्य निष्पक्ष भाव से न्यायदान का कार्य है अतः बाह्य विचारों से प्रभावित हुए बिना अंतः चक्षुओं के माध्यम से देखें व विचारों को आंदोलित करें। दोनों सत्रों में विभिन्न अवसरों पर विद्वत न्यायाधीश सम्मिलित हुए थे जैसे माननीय न्याधिपतिगण श्रीमान डी. एम. धर्माधिकारी महोदय, श्रीमान आर. एस. गर्ग महोदय, श्रीमान व्ही. के. अग्रवाल महोदय तथा पूर्व मुख्य न्यायाधिपतिगण श्रीमान बी. सी. वर्मा महोदय एवं श्रीमान गुलाब गुप्ता महोदय।

विदुर नीति में एक श्लोक इस प्रकार है :

सुव्याहतानि धीराणं फलतः परिचिन्त्ययः।
अध्यवस्यति कार्येषु चिरं यशसि तिष्ठति।।

अर्थात जो व्यक्ति धीर–गंभीर विद्वान व्यक्तियों के अभिव्यक्त विद्वत्ता पूर्ण विचार–वचनों पर गंभीरतापूर्वक चिन्तन करता है व कार्यरूप में परिवर्तित व परिणित करता है वह अनंत काल तक यश का भागी बना रहता है।

न्यायपालिका के हम न्यायिक अधिकारियों का अहोभाग्य है कि हमें उच्च कोटि का मार्गदर्शन विभिन्न विद्वान, चिन्तक न्यायाधिपति महोदयों के माध्यम से मिल रहा है। उनके विचारों को व्यवहार में उतारना हमारा निष्ठापूर्ण कर्त्तव्य है। हमारा नैतिक–चारित्रिक व विधिक दायित्व भी है। अतः पूर्ण निष्ठा से लगन से कार्य करना है। न्यायदान दैविक कार्य है। सर्वशक्तिमान ईश्वर की सत्ता का यह एक महत्वपूर्ण अंश है वह हमें अहोभाव तथा अनुग्रह से प्राप्त हुआ है उसे हमें ईमानदारी से निष्पादित करना है। न्यायदान ईश्वरीय कार्य है तथा ईश्वर कभी बेईमान नहीं होता है (JUSTICE IS DIVINE AND GOD IS NEVER DISHONEST)

पुरुषोत्तम विष्णु नामजोशी

" INJUNCTION - GRANTING OR REFUSING "

Justice D.M. Dharmadhikari

The law relating to the issue of injunction in civil suits in India is contained in Section 94 (c) and Order 39, Rules 1 to 5 of the code of civil Procedure and Section 36 to 40 of the Specific Relief Act. The Court has also power to grant temporary or interim injunction under Section 41 (b) of the Arbitration Act, 1940 read with Paragraph 2 of the Second Schedule thereto.

The best guides in the matter of interference by way of injunction have been judicially stated to be the principles which determine the action of courts of equity in England. It is in fact on these principles that the relief given in the India Courts by way of injunction is founded and this relief is in substance the same as that granted by the Courts in England. But in India now the grant of injunction is regulated also by statute mentioned above. But the principles for granting injunction continue to be the same as were followed by the Court of equity in England. The leading case on the subject in India is of the Supreme Court in the case of ***H.M.K. Ansari and another V/s Union of India*** (A.I.R. 1984 SC 29).

The Supreme Court has also recognized inherent power of the Court to issue temporary injunction under Sec. 151 of the CPC when the case does not fall within the terms of Order 39 Rules 1 and 2 CPC. (See : A.I.R. 1962 SC 527 - ***Manoharlal V. Seth Hiralal***).

The three broad categories or forms of injunctions are - (1) temporary; (2) perpetual, and (3) mandatory. The word 'injunction' has a judicial meaning that it is a remedy by which a person is ordered to refrain from doing or to do a particular act or thing. In the former case it is of preventive or restrictive injunction and in the latter, a mandatory injunction.

TEMPORARY -

Temporary injunction is merely provisional in its nature and does not confer a right. Its effect and object is merely to preserve the property in status quo until the hearing or further order to prevent future injury and leave matters as far as possible in status quo until the suit in all its bearings can be heard and determined. In temporary injunction, therefore, only such restraints will be interposed as may suffice to stop the mischief complained of and preserve the matters in status quo. In granting such injunctions, the courts in no manner anticipate the ultimate determination of the question of right involved. It merely recognises the power of the Court to intervene on a ground that sufficient cause has been made out to warrant a preservation of property or rights in issue in status quo until a hearing upon the merits without expressing and indeed without having the means of forming the opinion as to such rights. The Court, upon an application for temporary injunction will deal with the application upon the evidence before it and will confine itself strictly to the object sought and as far as possible abstain from pre-judging the question in the cause.

An injunction is in the form a relief granted in a suit in respect of actual or threatened infringment or invasion of some legal right, that is, some right recognised by and capable of being enforced by law. Where, under the circumstances of the case and upon the principles which govern the issue of injunctions, this form of relief is the appropriate remedy for such invasion or infringment.

In the first place, therefore, as interference by injunction is found le on the existence of a legal right, an applicant must be able to show that fair prima facie case in Support of the title which he asserts. When the is a serious question to be tried in the suit, it is generally termed as a 'prima facie case'. 'Prima facie case' means a case where there is bonafide contentions between the parties or a serious question to be tried. (Sec. 1978 M.P.L.J. 419 ***Shankarlal Vs. State of M.P.*** and A.I.R. 1981 SC 1426 - ***United Commercial Bank Vs. Bank of India***).

The second consideration for grant of injunction is that if a person seeks the aid of the Court on the ground of equity, interference of Court is necessary to protect him from 'irreparable' or at least serious injury before his legal right could be established at trial. It is in this sense that the words 'irreparable injury' have to be considered, because the term 'irreparable injury' does not mean that there must be no possibility of repairing the injury. All that is meant is that injury be a serious one or at least a material one and not adequately repairable by damages.

The third factor to be taken into account is the balance of convenience. An English Judge has rightly commented that the use of expression 'balance of convenience' is somewhat unfortunate. It should be 'balance of justice'. The Court in granting interim injunction should first see where there is a bonafide contention between the parties, on which side in the event of obtaining of successful result in the suit will be the balance of justice, if the injunction is so issued. The court shall, therefore exercise judicial discretion and take the account of substantial mischief done or threatened to the plaintiff and compare it with that which the injunction, if granted, would reflect upon the defendent. Since the relief is equitable, the Court may in its discretion refuse to grant the relief to the parties approaching who is found guilty of acquiescence or delay.

PERPETUAL :

A perpetual injunction can be granted only by the decree made at the hearing and upon the merits of the suit. As indicated by its name, a perpetual injunction has to operate permanently against the person proceeded against. It is regulated by the provisions of Specific Relief Act, Perpetual injunction can be granted in the following cases :

(a) Where the defendant is trustee of the property for the plaintiff
(b) Where there exists no standard for ascertaining the actual damages caused or likely to be caused by the invasion
(c) Where invasion is such that pecuniary compensation would not afford adequate relief

(d) Where it is probable that pecuniary compensation cannot be got for the invasion.

(e) Where the injunction is necessary to prevent multiplicity of judicial proceedings.

MANDATORY :

When order is made to compel the performance of a positive act, it is called 'mandatory injunction'. That power is expressly given under Specific Relief Act. A mandatory injunction may be either temporary or perpetual. A mandatory injunction is seldom granted before hearing though when the case is clear it can be granted on an interlocutory application.

The power to grant injunction is discretionary with the Court as in doing so the Court exercises its jurisdiction in equity, although to some extent regulated by law. No hard and fast rules, therefore, has been laid down even in the statute for exercise of power of injunction. This jurisdiction is manifestly indispensable. It ought to be exercised with extreme caution and applied in very clear cases. Generally speaking, the Court will consider amongst other things whether the doing or thing sought to be restrained will produce an injury to the person seeking the injunction, and would refuse it where such injunction is oppressive, not being equitable or contrary to the real justice of the case. It will not, therefore, be granted to a party guilty of acquiescence in the mischief sought to be restrained or in cases of gross laches or delay or to enforce covenance which are unreasonable or cases where equally efficacious reliefs can be obtained by any other usual mode of proceedings. Normally, an injunction is not to be granted for stay of execution of a decree. A Division Bench of the M.P. High Court in ***Surendra Singh Vs. Lal Sheoraj*** (A.I.R. 1975 MP 85) held that it is open to the court to provisionally satisfy that there is a fraud played in obtaining the previous decree to arrest execution of an earlier decree pending disposal of the subsequent suit. Similarly, in A.I.R. 1980 SC 193 (***S.B. Nooronah Vs. Premkumari***), following Halsbury's Laws of England, it has been held that a judgment obtained by fraud or collusion, even it seems a judgment, may be treated a nullity. The Court, therefore, gets jurisdiction to decide the question of fraud or collusion exercised in the former suit for obtaining a decree and issue an injunction restraining execution in appropriate cases.

The laws relevant on the subject are as under :-

1. Section 94 C.P.C. & Order 39 Rules 1 to 5 of C.P.C.
2. Sections 36 to 42 of Specific Reliefs Act, 1963
3. Section 35 of Indian Easements Act,
4. Sections 105 and 106 of Trade and Mercandise Marks Act, 1958
5. Sections 18 and 41 read with Second Schedule of Paragraph (3) of Arbitration Act.

MAINTENANCE OF MALKHANA, NAZARAT AND EMBEZZLEMENT OF PROPERTIES.

R.B.DIXIT,
District Judge (Vig.) Jabalpur.

1. Very few of the Judicial Officers realise the importance of Malkhana and Nazarat in working of judicial system. Lack of sufficient knowledge of these branches may land an officers-in-charge in trouble and spoil their carrier. On the other hand, if Malkhana and Nazarat is properly handled, it will boost working capacity of a Judicial Officer. Nazarat may be termed as a small secreteriate of court. It controls staff members and their behaviour towards courts and litigating parties. To be a successful Judicial Officer working of Nazarat and Malkhana is to be carefully learnt.

2. It is true that Judicial Officers are not account trained, nor they get enough time to devote for checking accounts and verify Malkhana properties. However if working knowledge of these sections is acquired, it will save a Judicial Officer from committing serious mistakes as officer-in-charge and they will be able to provide proper checks on its working. No Judicial Officer can properly control his staff if he takes such type of personal services or adopts pleasing tactics.

3. A broad principle of dealing accounts and organments is that a kind of practical faith on staff is necessary but one should be vigilant enough in this theory of make believe because blind faith leads to embezzlement of public money and properties. It is noticed that an accused of embezzlement is mostly well behaved and appears very innocent. He will cheat his master (officer-in-charge) by his hard working and outward sincerity. He will look like an honest serviceable colleague. The officer-in-charge therefore should not rely on such subordinate officials and check the accounts and properties themselves in time and surprise checking at frequent intervals.

4. From time to time High Court has issued circulars that in case of any loss of public money and properties the Judicial Officers (in-charge) will also be held equally responsible and liable for prosecution. In the Circumstances a Judicial Officer should not feel free when he is not directly incharge of Malkhana of Nazarat, because as a presiding officer of a court also he is required to sign and seal many account papers or valuable property. In case any lapse in signing or sealing such papers or property, the Judicial Officer may be caught in trouble at any subsequent time, even after his retirement. It is seen that instead of acquiring working knowledge of Malkhana and Nazarat, some Judicial Officers hesitate in signing day to day account papers, in order to save their skin, but it is all the more troublesome to them and subordinate staff. Delay in disposing off daily work causes public complaints against defaulting officers and one has to face checking

difficulties in case of piling of work and possibility of missing document and account links. Maintenance of daily accounts and daily checking are of paramount importance.

5. Rule 458 Rules and orders (Civil) provides that when any defalcation or loss of public money, stamps or other property of more than Rs. 200/- discovered in Nazarat or any other section of office, should be immediately reported to the Accountant General and the Government in the Finance Dept. through the High Court, even when such loss has been made good by the person responsible for it, when the matter has been fully investigated a further and complete report should be submitted showing the errors or neglect of rules by the officials or officers, concerned.

6. Under Rule 460 Rules & Orders (Civil) Nazarat is required to maintain a Register or properties passing into or through the Nazir under orders of a civil court. In this register articles of movable property only should be entered. The date and manner of disposal of property should be made in col. 9 of this register. Valuables in charge of Nazir should be delivered in presence of Judge or OIC. At the end of each quarter Nazir should prepare an abstract of the pending items and place the register before the officer-in-charge for scrutiny. The Nazir should also send regular reminders to the courts concerned for orders of disposal of the pending items and in cases of unnecessary delay bring it in notice of District Judge through officer-in-charge. Valuable articles should be verified at least once a quarter by the officer-in-charge and at inspection by the District Judge.

7. Rule 461 & Orders (Civil) deals with Register of property passing into the hands of Nazir otherwise than under orders of a civil court. Articles of old furniture, stationary, boxes etc. which are deposited for sale are shown in this register. Register of General Cash Account is maintained under Rule 462 Rules and Order (Civil). All sums received in cash and disbursed by the Nazir should be accounted for in detail in this register. The register is divided into two parts-one credit of receipts and other is debit or repayment side. Except permanent advance and sums received for disbursement, which can be disbursed within a reasonable time all money in the hands of the Nazir Shall be credited day by day into the treasury. Except under extra ordinary circumstances, which should be noted in the remark column of classification register, the cash balance in the hand of Nazir at headquarter should not exceed Rs. 1000/- and at outlying station Rs 700/- respectively. The daily account shall be examined by the clerk of court or Dy. clerk of court or in absence by officer-in-charge and at outlying station by officer-in-charge. He shall compare all entries on the receipt side with the corresponding entries in the Book of Receipt, C.C.D. Register, Processes and Process Fees, Returned Diet Money etc. The Register shall be checked every month by officer-in-charge by counting cash balance and record a certificate to that effect.

8. Under Rules 463 & Orders (civil) all sums drawn from treasury on abstract contingent bills and all payments made out of the permanent advance are to be entered in contingent cash Account Register. In no case shall the Nazir make a payment from the permanent advance or from sums drawn on abstract contingent bills without the signature of the District Judge or clerk of court being affixed to the order of payment. At places where there is no clerk of court every order for payment should be signed by the officer-in-charge. The contingent cash amount shall be checked daily by the officer-in-charge with the vouchers for which payments have been made.

9. Every endeavour should be made to repay returned diet-money speedly. The judges should be particular to see that a notice for repayment of returned diet-money is displayed in every court as required by Rules 465 Rules and Order (Civil). At the beginning of each working day Reader should collect all the process on which diet money has been returned and should total up the sum repayable thereon. This amount is to be requisitioned from the Nazir and to be paid to the parties in the presence of the Judge. The transaction in respect of returned diet money should be completed by 12 noon. Such diet money as remains unpaid after close of the case should be sent to the party concerned by money order.

10. Civil Court Deposit (C.C.D.) is a head of account where defaulcations have occurred and therefore judges should be vigilant while dealing with this account. Rule 466 Rules and Order (Civil) should be thoroughly learnt. Regarding maintenance of C.C.D. account. All moneys received by sale of executions, deposit of rents, purchase of judicial stamps, copying fees etc. are accounted for in C.C.D. Register. When ever an application for repayment of C.C.D. money is presented, Nazir is required to report the C.C.D. number and amount of deposit on this application. After receiving the report a voucher for payment is prepared by the court and Nazir is authorised to draw the amount from treasury for payment to the party concerned, what the judges should see before signing the voucher for payment is whether the amount is really in deposit and/or if it is not already paid to the party? It is to be seen that in a particular case where money in C.C.D. is deposited through application, Nazir should endorse C.C.D. No. on this application and when an application for receiving payment is made and report of Nazir is called the original remittence List (R.L.) should be called from Nazir for comparing the entries, before signing the voucher of payment.

11. In process of C.C.D. amount a document known as Remittence List is very important. It is divided into two parts. In first part number of deposits with C.C.D. No. and amount is mentioned and in second part amount to be withdrawn with C.C.D. No. is to be entered. Below a balance between the two is to be stated. For example total amount to

be deposited on a particular day is Rs. 500/- and amount to be withdrawn is Rs. 400/- then balance of Rs. 100/- only is to be deposited in treasury, on which Treasury Officer will give his receipts, on the other hand if Rs. 400/- is to be deposited and Rs. 500/- is to be withdrawn the balance of Rs. 100/- only is to be paid by the treasury. Now the Officer-in-charge should see that the amounts of deposits are checked from duplicate receipt book and amount to be withdrawn for the payment vouchers of the courts. the Judge who signs a payment voucher should verify from the Remittence List that the amount is really deposited in treasury and its payment is out-standing.

12. If process registers, Register of process server's work done and Register showing the work done by Sale Amins are checked (see Rule 377 to 386, 468 and 469 Rules & Orders, Civil) regularly, the problem of not receiving processes by courts in time, can be easily solved. Although fine account is not maintained in Nazarat but the amount of fine is deposited in treasury through Nazir. Every Presiding Officer is personally responsible for fine amount and therefore they should see in beginning of the day that the fine amount realised on previous day was correctly deposited in treasury and fine registers are daily maintained (see Rule 577 to 583 and 590 Rules & Orders, Criminal).

13. High Court is very particular about payment of witnesses (Rule 440 to 444 Rules and Orders, Civil and Rule 588 to 569, 592 and 684 of the Rules and Orders, Criminal). The court Reader should assess the number of witnesses and amount to be paid to them in early hour of the working day and collect the amount from Nazir. The witnesses should not be left waiting for payment after they are discharged from evidence. The Reader should submit the payment vouchers to Nazir before 4 p.m. every day. The officer-in-charge should see that the statement of account with payment vouchers is submitted in time for the purpose of recoupment, otherwise Nazarat will be left with no money to pay for witnesses next time and judicial officers will come under heavy fire for non-payment to witnesses.

14. Deposit and payment in claim cases is also not concerned with Nazarat but the transaction under this head is carried through Nazir. The best way is to open an account of the party in a registered bank, whenever an order of payment is made. After deposit of claim amount in the bank the concerning party may be authorised to receive payment through cheque. If the amount is to be kept in fix deposit the receipt should be retained in court till its maturity for payment. No unnecessary delay in payment should be made and no pleader should be handed over authority of payment for any party.

15. Every presiding officer and officer-in-charge of Malkhana, now requires to be specially vigilant because it may spoil their carrier any time in their service life. Most of the officers so much fear in touching

Malkhana for disposal of properties, that they always avoid its work. This tendency is the root cause of miseries that are buried deep in the debris of malkhana properties. In most of the malkhanas old pending properties are not only piling up for disposal but also loosing their shape, size and marks of identification. After few years a huge amount of debris of such properties is made to puzzle the Judicial Officers who come for its disposal. The High Court has not yet framed any rules to coup up with this situation effectively and their is no effective checks on embezzlement of malkhana properties. The every Judicial Officer is given extra units of work for disposal of malkhana properties. Every Judicial Officer may be required to dispose of malkhana properties whose cases are decided by him before he hands over charge at a particular station.

16. Rule 422 to 433, 467 to 470 and 680 of Rules and Orders (Criminal) are to be strictly followed regarding disposal of properties. Judicial Officers are advised to develop following practices in keeping up malkhana upto date:-

(a) Quarterly verification of property should be regularly made.

(b) Valuable properties are to be tested, verified and sealed in presence of presiding Officer and the metal seal is always kept in personal custody of the presiding Officer.

(c) Property more than Rs. 500/- is considered as valuable property and should be immediately deposited in Treasury.

(d) Property memo containing receipt of Nazir and Treasury Officer (where necessary) should be checked and kept with the pending case file.

(e) Heavy property should be given on superdiname of any independent person.

(f) Property liable to be destroyed may be destroyed immediately and its sample only be retained, if not required for evidence.

(g) Property liable to be confiscated and likely to be decayed are to be sold immediately.

(h) Soon after disposal of a case and passing of period of appeal (if no instructions are received from appealat court) property memo is to be endorsed to Nazir with result of the case and manner in which property is to be disposed of.

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न्याय अपने पराये में अंतर नहीं करता है,
केवल सत्य की परख मात्र करता है।

DISCHARGE OF CONTRACT

P. V. Namjoshi

When the liability of the parties to perform a contract is extinguished the contract is said to be discharged. A contract may be discharged in any of the following manners :-

(1) By agreement and novation.

(2) By the performance of the contract.

(3) By impossibility of performance and frustration.

(4) By the breach of contract.

1. BY AGREEMENT AND NOVATION :-

Section 62 and Section 63 of the Contract Act deals with this clause. A party has a right to waive his right wholly or in part. Every person entitled to the performance can do so. Thus the promisee may either forego the whole of his claim or may accept a smaller amount in full satisfaction of a larger amount. Once the promisee has exercised an option then the original right is extinguished there by. But there is no discharge of contract when the promisee accepts the performance of the same "under protest". The promisee may accept the performance from a third party while agreeing to forego his claim in part. This will discharge the promisor from the liability. Novation means a new contract. Once a new contract is established, old contract need not be performed. Several examples to Section 62 makes it clear.

Section 62 applies not only to the substitution of the complete contract but also to the variation or alteration of some of the promises only. Novation could be there even after the breach of the original contract. A person who is not a party to novation continues to be liable in respect of the original contract and is not discharged there from. In the case of Firm ***Gurunditta Vs. Firm Labhuram.*** AIR 1936 Lahore 476 it is held that in order to avail of the plea of noviation of contract there must be present substitution of another contract for original contract. A mere agreement of substituted one in future will not give raise to novation. See also ***Krishnajee Vs. Rakuram.*** AIR 1928 Nag. 289.

2. DISCHARGE BY PERFORMANCE :-

The contract can be discharged by performance. It is the duty of the contracting parties to discharge their obligation. The offer of performance is also considered to be performance of the contract. The offer of performance is also know as "tender". This word "tender" has nothing to do with the word "tender" used with reference to calling from parties, quotations or offers. Section 38 provides how to make an offer for performance of the contract if that offer is not accepted by the promisee the promisee becomes liable for the breach of the contract. If offer is refused by the promisee the promisor need not perform the contract.

3. DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE OR FRUSTRATION :-

Frustration means to make fruitless, to defeat. That is if the performance is defeated or the purpose becomes fruitless the contract need not be performed. In Hindi it means (NISHFAL). Section 56 of the Contract Act deals with this subject. If a contract is entered into (that is a valid agreement) but after the contract is made if it becomes impossible or for any reason or any event which the promisor could not prevent, becomes unlawful, the contract becomes void. Thus the contract becomes void when the act becomes impossible or unlawful.

Generally parties enter into a contract with this assumption that the performance of the same shall not render unlawful or impossible. Therefore when such a contract becomes impossible or unlawful the contract need not be performed and the parties to the contract are discharged from their respective obligations. Such a term is said to be frustration of the contract because the purpose which the parties had in mind get defeated or is fruitless, that is it become frustrated the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Contract Act. The test of impossibility is to see whether the performance is practically impossible within the stipulated time merely because the performance is more onerous and burdensome does not amount to impossibility. Again a mere commercial difficulty is not impossibility. If goods of certain specifications are agreed to be supplied non availability of the goods of those specifications would not attract the application of Section 56 so as to discharge the seller from the liability, and if he fails to perform the contract he will be liable to pay damages for the same. Abnormal increase in the prices of the product due to war conditions, if totally upset the very foundation upon which the parties raised their bargain, will be deemed to be impossibility. If a music hall which is to be given for a concert is destroyed by fire the contract gets frustrated and parties are discharged. When physical performance is possible but by such performance, due to some supervening event the main object for which the contract was made can no more be fulfilled. It amounts to frustration. For example if two seats were booked in a stadium for viewing Cricket match but the cricket match was cancelled because of non coming of the teams due to cancellation of travelling services due to heavy rains it was held that the contract was frustrated and the person who booked seats could not recover more than the amount paid for reservation. Section 56 of the Contract Act lays down a rule of positive law and doesn't leave the matter to be determined according to the intention of the parties. When performance, though physically possible is none the less impracticable, it amounts to frustration. The impossibility contemplated by the Section 56 of the Contract Act is not confined to something which is not humanly possible but the supervening events

should take away the basis of the contract and it should be of such a character that it strikes at the foot of the contract. Merely because there is likely to be delay in performance of the contract, does not amount to frustration.

4. DISCHARGE BY BREACH OF CONTRACT :-

Breach of contract by one party discharges the other from the performance of the contract which is to be discharged by the other person. This also entitles the other person to bring an action against the party making a breach to claim damages for the same.

The breach may be "anticipatory breach" or "actual breach" forthwith. Let us take the case of "actual breach" or "breach forthwith." That is the promisee has a right to rescind the contract immediately if the promisor commits breach of the contract, and he can forthwith bring an action for damages. He has a choice to treat the contract in existence if it is an anticipatory breach of contract. The anticipatory breach of contract (ABC) by a party does not automatically put an end on the contract and it depends on the way the option is exercised by the promisee. If a person by his own act or conduct make the performance impossible that entitles the other party to put an end to the contract. The right to treat the contract as repudiated and claiming damages for the same can be made immediately on anticipatory breach of contract without waiting for the actual date of performance to arrive. The refusal to perform or disablement from performing the contract must be actual larger than the mere suspicion about the same. The refusal must be such which affects a vital part of the contract and deprives the promisee from getting what he bargained for. In a case of anticipatory breach of contract by the promisor the promisee is free to treat the contract as still alive and subsisting and claim performance of the same, instead of treating it as repudiated. It is important to note that section 39 which relates to anticipatory breach applies only to executory contracts that is where the performance of the same has yet to be there if the date of performance has arrived and the breach of contract has already taken place. In such a case there is no contract which can be kept alive. Thus a distinction has to be drawn between failure to perform before the due date and on or after the due date. If a person supplies a part of goods after the due date, if the same are accepted by the buyer the conduct of the buyer in accepting the delayed delivery that too in short quantities signifies his acquiscence in the continuance of the contract, and the contract is treated as still alive. Thus in such cases the contract continues to subsist for the benefit of both the parties. In such a case the promisor may perform the contract instead of his earlier refusal to do so, and if because of some supervening event the performance becomes impossible the promisor would be discharged from the liability.

For details please refer Dr. R.K. Bangia on the Law of Contract and S.R. Act with Tenders.

JUDGES AND SOCIAL JUSTICE

ARVIND KUMAR AWASTHY
Member Secretary
MP Legal Aid Board, Bhopal

The high visibility, the prestige and the power which courts enjoy is the outcome of the distribution of the justice to the masses and due to crusade against the inefficient and corrupt politicians and bureaucrats. The court is the instrumentality to attract every individual member of the poorest classes to state administration and it has provided the historical nourishment to the confidence of the people in the efficacy of the judiciary in exposing the erring rulers. The Judges thrives on confidence of people and they can effectively and smoothly function to administer to justice when the required help is provided to the court by the people, advocates and the, bureaucracy.

It is the mandate of the Constitution and of the civilised society to maintain the independence and the dignity of the justice system. Article 50 of constitution of India is that the State shall take the step to separate the judiciary from the executive in the public service of the State. Article 121 of the Constitution has imposed the restriction on the discussion in Parliament with respect to the conduct to judges in discharge of their duties. It is in the larger interest of the democracy and our consumers of the justice that the concerted covert attempts by the corrupts to malign the judges and scuttle the power of the court should be effectively countered.

Unfortunately attempts are being made of bureaucratization of the courts by indiscriminately establishing the tribunals and then neglecting them. The Government either in Criminal or Civil cases make little efforts for the quick disposal of the cases. The appointment of the Government pleaders at district and Tehsil level is not on merits but political and their work is not monitored at all. All this results delay in disposal of cases. But the rulers squarely blame the Judges or the procedure for delay and arrears of the cases. This is a game-plan for bureaucratization and of politicalisation of the Judicial system. It is non-democratic and unconstitutional way to manipulate the Justice system which create lot of problem to the Judges while distributing the Justice to its poor consumers. When the court is embarking on the new technology of the administration of Justice i.e. Lok-Adalat etc. which is of easy accessibility to the institution of Justice for the neglected class, the Judges should not be subjected to such covert artifice by the rulers. The dictates of the constitutional democracy requires that the sustained efforts should be made to make the administration of Justice more responsive and effective. In civilized society it is the duty to the lawyers and law dispensers that they should jointly combat to make the Judicial system more independent, dignified and people oriented. Government is the potent and omnipotent teacher. It should help judges and the Justice system.

Rule of law is supreme. Liberty is obtained only by rule of law, which is as cement of society. Dr. Martin Luther King, Gandhi of America has said : " I believe in beauty and majesty of law, so much that when I think a law is wrong I am willing to go to Jail and stay there".

The future of constitutional democracy in India rest in catering the demand of 80% citizens living in villages. Social Justice to the villagers means assurance of a good life and the freedom from the clutches of conspiracy of the little rules and unsurplus business men. The Jurisprudence of remedies is their high priority and way to social Justice.

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THE CODE OF CRIMINAL PROCEDURE, 1973

MADHYA PRADESH :

Amended by M.P. Act. No. 29 of 1978. (w.e.f. 5.10. 1978)

In its application to the state of Madhya Pradesh in Section 357.

(i) In sub-section (1) for the brackets, figure and words "(1) when a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the court may, when passing judgment, order the whole or any part of the fine recovered to be applied", the brackets, figure and words" (1) when a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, and where a person against whom an offence is committed belongs to Scheduled Castes or Scheduled Tribes as defined in clauses (24) and (25) and of Article 366 of the Constitution except when both the accused person and the person against whom an offence is committed belong either to such Castes or Tribes, the Court shall, when passing judgment, order the whole or any part of the fine recovered to be applied- "shall be substituted: and

(ii) for sub-section (3), the following sub-section shall be substituted, namely :-

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, and where a person against whom an offences is committed belongs to Scheduled Castes or Scheduled Tribes as defined in clauses (24) and (25) of Article 366 of the Constitution, the Court shall when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced. :

"provided that the Court may not order the accused person to pay by way of compensation any amount if both the accused person and the person against whom an offence is committed belong either to the Scheduled Castes or Scheduled Tribes."

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TIT-BITS

1. A.I.R. 1979 SUPREME COURT 1360 HUSSAINARA KHATOON VS. HOME SECRETARY SECTION 436, 437 OF THE C.P.C.:-

PERSONAL BOND

If court is satisfied after taking into account certain factors concerning the accused that the accused be released, then he may be released on personal bond. Even under the law as it stands today the courts must abandon the antiquated concept under which pretrial release is ordered only against bail with sureties. That concept is outdated and experience has shown that it has done more harm than good. The new insight into the subject of pretrial release which has been developed in socially advanced countries and particularly the United States should now inform the decisions of our Courts in regard to pretrial release. If the Court is satisfied, after taking into account, on the basis of information placed before it, that the accused has his roots in the community and is not likely to abscond it can safely release the accused on his personal bond. To determine whether the accused has his roots in the community which would deter him from fleeing, the Court should take into account the following factors concerning the accused :

1. the length of his residence in the community,
2. his employment status, history and his financial condition,
3. his family ties and relationships,
4. his reputation, character and monetary condition,
5. his prior criminal record including any record or prior release on recognizance or on bail,
6. the identity of responsible members of the community who would vouch for his reliability,
7. the nature of the offence charged and the apparent probability of conviction and the likely sentence in so far as these factors are relevant to the risk of non-appearance, and
8. any other factor indicating the ties of the accused to the community or bearing on the risk of wilful failure to appear.

It the court is satisfied on a consideration of the relevant factors that the accused has his ties in the community and there is no substantial risk of non-appearance, the accused may, as far as possible be released on his personal bond. But even while releasing the accused on personal bond it is necessary to caution the court that the amount of the bond which it fixes should not be based merely on the nature of the charge. The decision as regards the amount of the bond should be an individualised decision depending on the individual financial circumstances of the accused and the probability of his absconding. The amount of the bond should be

determined having regard to these relevant factors and should not be fixed mechanically according to a schedule keyed to the nature of the charge. The enquiry into the solvency of the accused can become a source of great harassment to him and often result in denial of bail and deprivation of liberty and should not, therefore be insisted upon as a condition of acceptance of the personal bond.

There is an urgent need for a clear provision enabling the release in appropriate cases, of an under trial prisoner on his bond without sureties and without any monetary obligation. Undeniably, the thousands of under trial prisoners lodged in Indian prisons today include many who are unable to secure their release before trial because of their inability to produce sufficient financial guarantee for their appearance. Where that is the only reasons for their continued incarceration, there may be good ground for complaining of invidious discrimination.

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2. AMOUNT OF SECURITY

Section 440-441 prescribes that the amount of every bond executed under this chapter shall be fixed with due regard to circumstances of the case and shall not be excessive. ***(Rajballam singh Vs. Emperor, AIR 1943 Pa9 375 at p. 376 : 45 Cr.LJ 340)***. The language of Section 441 makes it perfectly clear that what that section contemplates is the furnishing of a personal bond by the accused person and a bond by one or more sufficient sureties. The accused as well as the sureties have, therefore, to execute only bonds which are sufficient in the mind of the Magistrate for the amount which he might have fixed. If the Court admits a man to bail, it is of course at liberty to call for a report from the police as to the sufficiency of the bail, but the duty of deciding as to its sufficiency or otherwise is with the Court itself, and not with the Police. ***(Queen-Empress Vs. Gayatri Prosunno Ghosal, ILR 15 Cal 455 at p. 457).***

Section 445 provides for a concession to an accused person who is unable to produce sureties. That section also makes it clear that the Magistrate is not bound to accept cash, but may permit an accused person to deposit a sum of money in lieu of executing a personal bond and giving surety to some persons. That section, however, does not authorise a demand of cash by a Magistrate. ***(R.R. Chari Vs. Emperor, AIR 1948 All 238 at p. 239 ; Rajballam Singh Vs. Emperor, AIR 1943 Pat. 375 : 45 Cr LJ 340).***

Please refer to Section 440 and Section 117 [Proviso (B)] of the Cr.P.C. and for further studies kindly go through Chapter 15 and Chapter 35 of the Rules and Orders relating to bail and recognizance with special reference to verification of solvency of surities.

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3. COURT FEES -

Bail bonds Exempt from :-

Under Section 19, Clause XV of the Court Fees Act VI of 1870 , bail bonds in criminal cased, recognizances to prosecute of give evidence, and recognizances for personal appearance or otherwise are exempted form Court - Fees.

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4. INJURIES ON PERSON :-

Sardul Singh Vs. State of Punjab, 1993 Supp. (3) SCC 678 : 1993 SCC (CRI) 1092.

Where there are a number of injuries on the deceased and the witness have given some details about the manner in which they were inflicted, each witness cannot be expected to note the details in seriatim.

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5. INJUNCTION :-

A.I.R. 1996 SC 1946 SMT. RAJNIBAI VS. KAMALA DEVI.

Suit for declaration of title simplicitor. Question of injunction was raised. There was no dispute between the parties as to corporeal right to the property, but this fact will not disentitle plaintiff to an injunction. Court has inherent power also to protect rights of parties pending the suit. The plaintiff appellant was in possession of the property. There was an apprehension that there is a threat to his possession. His only remedy would be whether he will be entitled to declaration sought for? Plaintiff sought protection of possession. If he is otherwise entitled according to law, necessarily the Court has to consider whether protection to be given to him pending the suit. Merely because there is no dispute as regards the corporeal right to the property, it does not necessarily follow that he is not entitled to avail the remedy under Order 39, Rules 1 and 2 CPC. Even otherwise also, it is settled law that under Section 151 CPC, the Court has got inherent power to protect the rights of the parties pending the suit.

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6. ELECTRICITY PREVIOUS ARREARS :-

Liability of auction purchaser of property to pay arrears old electricity bills. ***(1995) 2 SCC 648 Isha Marbles Vs. Bihar State E.B. and others and 4 other cases.***

Supreme Court disposed of 5 cases in one judgment. The case relates to Section 24, 22 and other provisions of Indian Electricity Act 1910. The facts were the appellant purchased some premises under an auction made by Bihar State Financial Corporation. The Financial Corporation lend money to Messers Patel Industries, Daltongunj. Patel Industries could not pay off the debt. Therefore after suitable action the Financial Corporation

put the property to auction and the appellant purchased it. The previous owner did not pay some amount towards electricity charges to Electricity Board. Therefore after auction purchase the Electricity Board served a notice for payment of arrears which were due against Patel Industries. It was a fact that the Electricity Board did not take action for recovery of that sum though there was in existence an Act relating to public dues in Bihar. The Supreme Court in its judgment (Para 46) stated the indisputed facts out of which one is that the previous unit Patel Industries had the benefit of electric supply. The Electricity Board did not try to recover the amount and the arrears were due because of negligence of Electricity Board. The auction purchaser when purchased the property had no facility of electricity as it was already disconnected. The Supreme Court held that the auction purchaser has purchased the property when the Electricity Board had already disconnected the connection for supply of electricity and therefore he cannot held to be a consumer or occupier within the meaning of the provisions of law. The auction purchaser is a third party and he is not connected with the previous owner or occupier. The Supreme Court affirmed the judgment of Kerala High Court in ***Souriyar Luka Vs. Kerala, AIR 1959 Ker. 199***. The another appeal was that of ***Waxpol Industries Vs. Chairman*** in which the Supreme Court held that the auction purchaser was not a new entry as in that case the previous owner/ consumer (Messrs. Neo Chemicals) would be liable for the past arrears.

National Textile Corporation (M.P.) Ltd. Vs. M.P. Electricity Board, AIR 1980 MP 32 : MPLJ 233 : Bihar State Electricity Board Vs. Green Rubber Industries (1990) 1 SCC 731 : Ram Chandra Prasad Sharma Vs. State of Bihar, AIR 1967 SC 349 : (1996) 3 SCR 517, distinguished.

Sanjay Dhingra Vs. M.P. Electricity Board, 1990 MPLJ 48, referred to

Rama Krishna Choudhary Vs. Bihar State Electricity Board, CWJC No. 204 of 1984, impliedly approved.

Dani Mordhwaj Cold Storage (P) Ltd. Vs. Bihar State Electricity Board CWJC No. 6437 of 1992, impliedly overruled.

Also see AIR 1996 September issue page No. 129 of the General Section.

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7. RENT CONTROL AND EVICTION :-

(1996) 6 SCC 323

Sk. Sattar Sk. Mohd. Choudhari Vs, Gundappa Amabadas Bukate

After partition between co-owner landlords - Maintainability - where premises jointly owned by several persons, while a co-woner cannot alone maintain a suit for eviction of tenant inducted on behalf of all the co-owners, he can do so it pursuant to a partition by meets and bounds

effected amongst all the co-owners, the said premises falls to his share · Tenant can show that a partition was not bonafide and a sham · After partition a part of the demised premises, a shop, falling to the share of appellant - Information given to the tenant accordingly and there after suit for eviction filed by appellant -Tenant's contention that the shop having been let out on behalf of several owners, he could not be evicted at the instance of one of them as tenancy was indivisible accepted by High Court - During pendency of appeal before Supreme Court, the remaining portion of the shop purchased by the tenant from the person to whose share it had fallen -· Held, eviction suit maintainable - Transfer of property Act , 1882,Ss. 109 and 37 - Joint lessor - Eviction suit by after partition.

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8. EVIDENCE ACT - DYING DECLARATION :-

(1996) 8 SCC 217

State of Rajasthan Vs. Kishore

A. Evidence Act, 1872 - S. 32 - Dying declaration - Conviction solely on corroboration - If essential - Dying declaration if found to be true, coherent, consistent and free from any effort to induce the deceased to make a false statement then it is sufficient for recording conviction without looking for corroboration.

B. Evidence Act 1872 - S. 32 - Dying declaration - Reliability - Dying declaration of a married woman sustaining 80 percent burn injuries - Magistrate waiting for the doctor for 40 minutes but no body turned up - Hence dying declaration recorded in the absence of any doctor without taking a certificate of mental fitness - Answers given by the deceased showing that she was in a mentally fit condition - Deceased having been left unattended possibility of tutoring ruled out - Non - implication of other members of family present at the time of incident indicating that she was not interested in falsely implicating anyone except the real culprits Viz. , her husband and mother-in-law - Deceased being an illiterate lady difference of timing in the dying declaration and FIR not material - Non - Production of bed case sheet in the hospital of the deceased or absence of material showing nature of treatment given to the deceased before recording of the dying declaration does not create any doubt on the capacity of the deceased or on her mental condition at the time of giving the statement - Omission to attribute motive to the respondent (husband) not material since he acted at the instigation of his mother - in the circumstances of the case the dying declaration would by itself form the basis for conviction - However, it is corroborated by the FIR and statement recorded under Sec. 161 Cr PC.

C. Evidence Act, 1872 - S. 32 - Dying Declaration - Acquittal of co-accused, though named in dying declaration, does not render the dying declaration suspect or untrustworthy Mother-in-Law and hus

band of the deceased named in dying declaration - Mother-in- law acquitted by the trial court and no appeal against her acquittal filed by the State - Held, in the circumstances of the case, though the mother-in-law was wrongly acquitted, it did not cast any doubt on the veracity of the statement of the deceased under the dying declaration.

D. Evidence Act, 1872 - S. 32 - Bride burning - In view of attempt by the accused husband to destroy the evidence, absence of smell of kerosene in the hairs of the deceased sent for chemical examination does not render the dying declaration suspect or unbelievable.

E. Criminal Procedure Code, 1973 - Ss. 156 to 172 - investigation into bride burning case - Omission by the I.O. to send the burnt clothes and other incriminating material for chemical examination - Effect - Held, mere fact that the I.O. committed irregularity or illegality during the course of investigation would not cast doubt on the prosecution case Nor trustworthy and reliable evidence can be cast aside to record acquittal on that account.

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9. (1996) 9 SCC 18

State of M.P. Vs. Mohanlal and others

Evidence Act, 1872 - S. 32 - Dying declaration - weight to be attached to - Dying declaration can form the sole basis of conviction if it is found to be true and voluntary - Dying declaration made by the deceased when he was in a fit state of mind - Number of injuries found on the deceased and acid injury corroborating the dying declaration - Due to deteriating condition of the deceased omission to mention in the dying declaration that he was dragged and beaten outside the hut not fatal to the prosecution case that the place of assault was outside the hut and not inside the hut Held, in the circumstances of the case the High Court was not justified in discarding the dying declaration - Order of acquittal recorded by the High Court is unwarranted and liable to be set aside.

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10. CRIMINAL TRIAL BY RAO AND RAO, 3RD EDITION 1973 PAGE 103 TOPIC NO. 3 RELATING TO PARTIAL REJECTION AND PARTIAL ACCEPTANCE OF TESTIMONY. (GENERAL PRINCIPLES OF APPRECIATION OF EVIDENCE) :-

Where in a case the P. Ws. had gone out of their way to admit anything that they were asked in cross - examination and where the Court decided that examination-in-chief was true and statements in cross-examination false, it is proper to hold that Courts are entitled to come to such a conclusion. The argument that no conviction can be based upon the evidence-in-chief cannot be accepted. The Court may believe any witness or any part of any witness's evidence and disbelieve any other part and it cannot be said to be and axiom of law that a Court must reject examination-in-chief whenever cross-examination does not confirm it. ***Nooku Naidu In re. 1937 MCrC 227 = 1937 MWN 986 Cr 202.***

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11. SECTION 45 EVIDENCE ACT - EXPERTS EVIDENCE (1996) 7 SCC 471 DHARMA VS. NIRMAL SINGH

Evidence of autopsy surgeon - His findings relating to the nature of injuries and not as to how those injuries were caused should be accepted.

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12. (1996) 6 SCC 775

Common Cause Vs. Union of India and others

I. The time limit mentioned regarding the pendency of criminal cases in paras 2 (a) to 2 (f) of our judgment shall not apply to cases wherein such pendency of the criminal proceedings is wholly or partly attributable to the dilatory tactics adopted by the accused concerned or on account of any other action of the accused which results in prolonging the trial. In other words it should be shown that the criminal proceedings have remained pending for the requisite period mentioned in the aforesaid clauses of para 2 despite full cooperation by the accused concerned to get these proceedings disposed of and the delay in the disposal of these cases is not at all attributable to the accused concerned, nor is such delay caused on account of such accused getting stay of criminal proceedings from higher courts. Accused concerned are not entitled to earn any discharge or acquittal as per paras 2(a) to 2(f) of our judgment if it is demonstrated that the accused concerned seek to take advantage of their own wrong or any other action of their own resulting in protraction of trials against them.

II. The phrase "pendency of trials" as employed in paras 1 (a) to 1 (c) and the pharase "non-commencement of trial" as employed in paras 2 (b) to 2 (f) shall be construed as under :

(i) In cases of trials before the Sessions Court the trials shall be treated to have commenced when charges are framed under Section 228 of the Code of Criminal Procedure, 1973 in the cases concerned.

(ii) In case of trials of warrant cases by magistrates if the cases are instituted upon police reports the trials shall be treated to have commenced when charges are framed under Section 240 of the Code of Criminal Procedure, 1973 while in trials of warrant cases by magistrates when cases are instituted otherwise than on police report such trials shall be treated to have commenced when charges are framed against the accused concerned under Section 246 of the Code of Criminal Procedure, 1973.

(iii) In case of trials of summons cases by magistrates the trials would be considered to have commenced when the accused who appear or are brought before the magistrate are asked under Section 251 whether they plead guilty or have any defence to make.

III. In para 4 of our judgment in the list of offences to which directions contained in paras 1 and 2 shall not apply; the following additions shall be made :

(n) Matrimonial offences under Indian Penal Code including Section 498 -A or under any other law for the time being in force; (o) offences under the Negotiable Instruments Act including offences under Section 138 thereof: (p) offences relating to criminal misappropriation of property of the complainant as well as offences relating to criminal breach of trust under the Indian Penal Code or under any other law for the time being in force; (q) offences under Section 304-A the Indian Penal Code or any offence pertaining to rash and negligent acts which are made punishable under any other law for the time being in force; (r) offences affecting the public health, safety, convenience, decency and morals as listed in Chapter XIV of the Indian Penal Code or such offences under any other law for the time being in force.

It is further directed that in criminal cases pertaining to offences mentioned under the above additional categories (n) to (r) wherein accused are already discharged or acquitted pursuant to our judgment dated 1-5-1996 and they are liable to be proceeded against for such offences pursuant ot the present order and are not entitled to be discharged or acquitted as aforesaid, the criminal court concerned shall suo motu or on application by the aggrieved parties concerned shall issue within three months of the receipt of this clarificatory order at their end, summons or warrants, as the case may be, to such discharged or acquitted accused and shall restore the criminal cases against them for being proceeded further in accordance with law.

It is however made clear that in trials regarding other offences which are covered by the time-limit specified in our earlier order dated 1-5-1996 wherein the accused concernedare already acquitted or discharged pursuant to the said order, such acquitted or discharged accused shall not be liable to be recalled for facing such trials pursuant to the present clarificatory order which qua such offences will be treated to be purely prospective and no such cases which are already closed shall be reopened purauant ot the present order.

13. M. GOVINDA RAJU VS. SPECIAL LAND, ADDITIONAL LAND ACQUISITION OFFICER AND ANOTHER. (1996) 5 SSC 547.

This case relates to Section 54 of Land Acquisition Act and Order 41 C.P.C.

Court fees of additional valuation - Principle governing :-

The appellants valued their appeals at Rs. 75,000/- per acre but paid court fee at Rs. 60,000/- acre. Subsequently the appellants preferred to pay Court fee on Rs. 75,000/- per acre. The Supreme Court held that higher amount was stated in the memo of appeal but court fee was paid on a lesser amount. Therefore the appellants cannot be allowed to pay the

deficit court fee at a later stage for higher compensation. The party cannot be permitted to pay the deficit court fee at a later stage on the difference of the amount claimed in the appeal it would be unhealthy practice and it will not be conducive to encourage too practice to keep on changing the valuation and then to pay deficit court fee there on for higher compensation.

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14. MOHAMMAD KHALIL VS. KHAMRUDDIN (1996) 5 SCC 625 (REFERENCE ORDER 41RULE 17 C.P.C.) :-

Dismissal of appeal in case of absence of one of the appellants :-

When the appeal was posted for hearing, it is but the duty of the counsel to appear. Appellants' duty is to see that his counsel was ready. The appellant had changed his counsel. When the counsel was not present the court is not incubent to adjourn the case. Out of 4 appellants 3 appellants retained the old counsel but 4th appellant changed his Advocate who did not appear on the date of hearing. The Court heard the appeal and dismissed the appeal. On merits also the Supreme Court found that the dismissal of the appeal was on proper grounds.

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15. MUTATION ENTRIES : EFFECT ON TITLE :-

DURGA DAS VS. COLLECTOR (1996) 5 SCC 618.

Mutation entries do not confer any title to the property. This is only an entry for collection of the land revenue from the person in possession. The title to the properly should be on the basis of the title they acquired to the land and not by mutation entries.

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16. 1 M. P. S. C. 454 = 1942 N. J. J. 449

Thunnudeo Raghvi Vs. Baldeo Raghvi

Cross-examination of witness is 'acting' and 'pleading'. In specific cases, and expert, under special power of attorney, can be allowed to be employed for the cross-examination of an expert in the same line of business on the other side.

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17. A. I. R. 1990 M.P. 326

National Airport Vs. Vijaydatt

Public Premises (Evection of Unauthorised Occupants) Act (40 of 1971), Ss. 2 (g), 5.

Civil P.C. (5 of 1908), O. 39, Rr. 1 and 2 - Tender of contractor for

running Airport restaurant accepted - contractor provided full opportunity for running catering business - Authorities cannot be restrained from initiating proceedings for eviction under Act after expiry of term of licence.

Moreover, relief of temporary injunction is an equitable one and is in the domain of the Court's judicial discretion. Therefore, even where the three well known concurrent conditions (prima facie case, balance of convenience and irreparable injury) requisite for grant of the relief exist, the Court, on the facts and in the circumstances of the case, in exercising its discretion judicially may still refuse the relief as where there has been delay and the party applying for the relief has not come with clean hands.

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18. 1981 CCLJ NOTE NO. 102

Gopal Vs. Gordhanlal (O. 33 R. C.P.C.)

The trial court held that the appellant failed to prove that he was not possessed of means to pay the court fee and dismissed the application. Aggrieved by the order passed by the trial Court the plaintiff has preferred this appeal.

The High Court held that the Trial court has rejected the prayer of the plaintiff mainly on the ground that apart from these five shops there are five other shops in which the plaintiff also has his share and that the plaintiff has also a share in another house. However, it is not the case of respondents that the plaintiff is in possession of any **realisable assets.** The other shops and the house are in possession of the plaintiff's father. Apart from the house and the other shops it is not shown that the plaintiff is possessed of any other means to pay the court fee. The house and the shops cannot be held to be **realisable assets.** Appeal allowed.

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19. DR. SHIPRA VS. SHANTI LAL KHOIWAL, (1996) 5 SCC 181

MEANING OF WORD "TRUE COPY" EXPLAINED

The question arises as to the meaning of the expression "true copy" In ***Sarkar on Evidence*** (14th Edn.1993) it is stated at p.2183 under "Appendix A" that :

"[A]n affidavit is a statement in writing on oath or affirmation before a person having authority to administer an oath or affirmation. The affidavit should be in statutory Form 25 prescribed under Rule 94-A. It should be supplied along with the election petition which contains allegations of corrupt practices as grounds for assailing the validity of the election of a returned candidate."

In ***Black's Law Dictionary*** (6th Edn.) 'copy' is defined at p. 336 to mean:

"[A].transcript, double imitation, or reproduction of an original writing, painting, instrument, or the like.

Under best evidence rule, a copy may not be introduced until original is accounted for."

At p. 1508, the word 'true' has been defined as :

"[C]onformable to fact; correct, exact; actual; genuine; honest. In one sense, that only is 'true' which is conformable to the actual state of things."

The expression "true copy" is defined to mean :

(A) true copy does not mean an absolutely exact copy but means that the copy shall be so true that anybody can understand it."

In ***webster's Comprehensive Dictionary*** (International Edn.) "true copy" is defined as :

"(A)n exact, verbatim transcript of any document, report etc.; especially, one certified as correctly a qualified authority.'

In ***Stroud's Judicial Dictionary*** (5th Edn.) (vol.5) "true copy" is defined at p. 2694 thus:

A "true copy" does not mean an absolutely exact copy but it means that the copy shall be so true nobody can by any possibility misunderstand it ... The test whether the copy is a "true" one is whether any variation from the original is calculated to mislead to mislead an ordinary person."

It would thus be clear that a true copy is transcript identical to or substitute to the original but not absolutely exact copy. But nobody can by any possibility, misunderstand it to be not a true copy. It is seen that the test, as stated earlier, is whether any variation from the original is calculated to mislead an ordinary person. When a petitioner is enjoined to file an election petition accompanied by an affidavit duly sworn by the applicant duly verifying diverse allegations of corrupt practices imputed to the returned candidate and attested by the prescribed authority it would be obvious that the statute intended that it shall be performed in the same manner as prescribed in Form 25 read with Rule 94-A of the Rules. The attestation of the affidavit by the prescribed authority, therefore, is an integral part of the election petition. The question, therefore is whetger copy of the affidavit supplied to the respondent without the attestation portion contained in it (though contained in the original affidavit) can be considered to be a "true copy"?

Please also refer to ***Mithilesh Kumar Pandey Vs. Baidya Nath Yadav (1984) 2 SCC1.***

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EACH ONE OF US CANNOT DO GREAT THINGS, -
BUT SURELY, EACH ONE OF US CAN DO SMALL THINGS GREATLY.

Sections 146 and 147 read with Section 64-B B Insurance Act.

1996 JLJ 494 Prakash Vs. Amrit Lal

Applicant met with an accident on 22.4.1991 at 5.30 p.m. The vehicle was not insured at that time. It was insured on the same date at 9 p.m. The owner had knowledge about the accident. But he did not disclose the fact in the declaration form of the Insurance Company. The claim was dismissed by the Tribunal. In appeal the contention of the Insurance Company was not accepted on the ground that certificate of Insurance issued to the insured (bus owner) does not contain any time of the commencement of the Insurance but simply indicates the date as 22.4.1991 as effective date of the commencement of insurance. (Reference to case New India Insurance Company Limited Vs. Ram Dayal and others 1990 (2) M.P. Weekly Note 90 (S.C.)

The second contention which was rejected by the High Court was fraudulent suppression of the material fact. The High Court held that so far as the position in regard to 'third party' is concerned the vehicle stands insured on the date when the accident took place. High Court found that the Insurance Company has not proved that the bus owner had fraudulently suppressed the fact as it was for the Insurance Company to prove that the policy is procured by means of fraudulent misrepresentation as to matters material to the risk. The Insurance Company could not satisfy on various points such as :-

(a) Why request for insurance was accepted at 9.00 P.M. on 22.4.1991 when previous policy ended as back as on 15.3.91?

(b) Why premium was accepted at odd hours as contended like 9.00 P.M.?

(c) Why the vehicle was not got examined to find out whether any accident had been caused by the vehicle?

(d) Why alleged time was not mentioned in the policy when there is a clear column in that behalf in the policy paper?

(e) Why permission in term of Section 170 (b) of the Act was not sought from the Tribunal to contest the claim on all grounds when owner and driver has failed to contest the same?

CASES REFERRED :-

1990 (2) M.P.W.N. 90 S.C., A.I.R. 1962 S.C. 814, 1962 J.L.J. 1128 and 1995 A.C.J. 26.

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DUTY DOES THINGS WELL,
BUT LOVE DOES THEM BEAUTIFULLY.

CIRCULARS & NOTIFICATIONS :-

No. I/16012/25/95-IS (D. III)

GOVERNMENT OF INDIA

MINISTRY OF HOME AFFAIRS

New Delhi - 110 001.

Dated 19th June 1996.

SUB : Procedure regarding service of warrants summons and other legal processes on members of Parliament.

1. I am directed to say that instances have been brought to the notice of this Ministry where copies of the summons issued by Magistrates requiring the attendance of the Members of Parliament in courts in certain cases, have been forwarded to the Speaker of Lok Sabha or the Chairman of the Rajya Sabha Secretariate or to the Lok Sabha/Rajya Sabha Secretariate for effecting service on the Members concerned. In this regard, attention is invited to article 105 (3) of the Constitution of India which provides that in respect of matters other than those covered by clause 2 of article 105, the powers, privileges and immunities of each House of Parliament, and the members and committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined shall be those of that House and of its members and committees immediately before the coming into force of section 15 of the Constitution (Forty-fourth Amendment) Act, 1978. One of the privileges is that no service of summons can be effected upon the Members when they are within the precincts of the Parliament. If necessary, the permission of Speaker, Lok Sabha is required to be obtained for the service of a summon or a legal process within the precincts of the House on any Person whether a Member of Lok Shabha or a stranger vide Rule 233 of Rules for procedure & Conduct of Business in Lok Sabha Seventh Edition, 1989 (herein after briefly referred to LSR). Similarly, in the case of a Member of the Rajya Sabha, permission of the Chairman of the Rajya Sabha will have to be obtained with simultaneous intimation to the speaker, Lok Sabha.

2. In view of the above position, the appropriate procedure would be for the warrants/summons/legal processes to be served direct on the members concerned outside the precincts of the Parliament i.e. at their residence or at some other place. Precincts of the House means and includes the Chamber, the Lobbies, the Galleries and such other places as the Speaker may from time specify vide the definition in LSR. In an exceptional case, if at all it becomes necessary to seek the Speaker/Chairman's permission to serve warrants, summons and other legal processes, Civil or Criminal, within the precincts of the House, the Speaker/Chairman should be addressed through the Ministry of Home Affairs and the authority issuing the legal process

should send alongwith it a brief statement containing a well- reasoned request setting out the grounds why it has become necessary to serve the process within the precincts of the House.

3. It may be pointed out that the same procedure should be followed for effecting service of summons upon Members of the state Legislature, who enjoy the same privileged under article 194 (3) of the Constitution of India.

4. It is requested that the above procedures may be brought to the notice of all courts, civil and criminal, in the state in order to ensure that service of warrants/summons/legal processes on Members of Parliament/Members of State Legislature is affected in accordance with the above procedure.

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मध्यप्रदेश राजपत्र, दिनांक 13 दिसम्बर 1996

भाग 4 (ग)

अंतिम नियम (पृष्ठ 423)

HIGH COURT OF MADHYA PRADESH JABALPUR

Jabalpur, dated the 20th November 1996

No. C-6010-II-15-28-41 - In exercise of the powers conferred by sub-section (10) of Section 11 of the Arbitration and Conciliation Act, 1996 (here in after referred to as the Act) the Chief Justice of the High Court of Madhya Pradesh hereby makes the following Scheme :-

1. SHORT TITLE. -

This Scheme may be called the Scheme for appointment of Arbitrators by the Chief Justice of Madhya Pradesh High Court, 1996.

2. SUBMISSION OF REQUEST -

The request under section (4) or sub - section (5) or sub - section (6) of Section 11 of the Act shall be made in writing, signed and verified and accompanied by :-

(a) the original arbitration agreement or a duly certified copy thereof:

(b) the names and address of the parties to the arbitration agreement;

(c) the names and addresses of the arbitrators, if any already appointed;

(d) the name and address of the person or institution, if any to whom or which any function has been entrusted by the parties to the arbitration agreement under the appointment procedure agreed upon by them;

(e) the qualifications required, if any, of the arbitrators by the agreement of the parites;

(f) a brief written statement describing the general nature of the dispute and the points at issue;

(g) the relief of remedy sought; and

(h) an affidavit, supported by the relevant documents to the effect that the condition to be satisfied under sub-section (4) or sub-section (5) or sub-section (6) of Section 11 of the Act, as the case may be, before making the request has been satisfied and how it has been so satisfied.

3. AUTHORITY TO DEAL WITH THE REQUEST -

(1) For the purpose of dealing with the request made under paragraph 2 the Chief Justice hereby designates the District Judge/Addl. Judge to the Court of District Judge, where the value of the subject matter does not exceed 25 lakhs rupees;

(2) The request involving the subject matter exceeding 25 lakh rupees shall be dealt with by the chief Justice himself or he may designate any judge of the High Court for this purpose by a general or special order.

(3) The requests falling under sub-para (1) shall be placesd before the District Judge for appropriate allotment and the requests falling under sub-para(2) shall be placed before the Chief Justice or his designate.

4. REQUESTS AND COMMUNICATIONS TO BE SENT TO ADDL. REGISTRAR (JUDICIAL) -

(1) All requests under this Scheme and communications relating there to, which are addressed to the Chief Justice, shall be presented to the Addl. Registrar (Judicial) of the High Court, who shall maintain a seperate Register of such requests and communications.

(2) The Addl. Registrar (Judicial) shall examine the memo of request and submit his report to the Chief Justice or to his designate, as the case may be, as to whether the request has been made in accordance with a paragraph 2 and payment of Court fee in accordance with paragraph 10.

5. SEEKING FURTHER INFORMATION : -

The Chief Justice or his designate may seek such further information or clarification or documents from the party making the request under this Scheme as he may deem fit and the party making the request shall file as many copies of the written information or clarification or copies of documents as may be required.

6. REJECTION OF : -

Where the request made by any party is not in accordance with the provisions of this scheme the Chief Justice or his designate may reject the same.

7. NOTICE TO AFFECTED PERSONS : -

Where the request is not rejected under paragraph 6 the Chief Justice or his designate shall direct that a notice of the application be given to all the parties to the arbitration agreement and to such other person or persons likely to be affected by such request to show cause within the time specified in the notice as to why the appointment of the arbitrator(s) or the measures proposed to be taken should not be made or taken and such notice shall be accompanied by copies of all documents referred to in paragraph 2 or, the information or clarification or copies of documents, if any, sought under paragraph 5, as the case may be.

8. INTIMATION OF ACTION TAKEN ON REQUEST. -

The appointment made or measures taken by the Chief Justice or his designate shall be communicated in writing to :-

(a) the parties to the arbitration agreement;

(b) the arbitrator, if any, already appointed by the parties to arbitration agreement;

(c) the person or the institution referred to in paragraph 2 (d); and

(d) the arbitrator appointed in pursuance of the request.

9. DELIVERY & RECEIPT OF WRITTEN COMMUNICATION :-

The provisions of Sub-sections (1) and (2) of Section 3 of the Act shall, so far as may be, apply to all written communications received or sent under this Scheme.

10. COSTS FOR PROCESSING REQUESTS. -

A request under paragraph 3 (1) shall be accompanied by court fee stamps of Rs. 500/- and under paragraph 3 (2) by Rs. 1000/-.

11. INTERPRETATIONS.-

If any question arises with reference to the interpretation of any of the provisions of this Scheme, the question shall be referred to the Chief Justice whose decision shall be final.

12. POWER TO AMEND THE SCHEME. -

The Chief Justice may from time to time amend by way of addition or variation any provision of this Scheme.

By order of Hon'ble Chief Justice
K. P. TIWARI, Addl. Registrar.