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मध्य प्रदेश उच्च न्यायालय, जबलपुर - 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

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JABALPUR - 482 007

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SUBJECT- INDEX

PART-IV
(IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS)

We are thankful to publishers of MPHT, MPJR, MPWN, MPLJ, AIR SCW, SCC and ANJ for using some of their material in this Journal.

- Editor

FROM THE PEN OF THE EDITOR

A. K. SAXENA
Director

The importance of Indian Judiciary is known to everyone in the world. It is because our judicial system is playing a vital role in dispensation of justice giving special emphasis on human rights and collection interest and fortunately we are an integral part of it. The District Judiciary is the foundation or base of our judicial system as most of the cases come before subordinate judiciary and out of these cases, most of the cases attain finality here only. It is not possible for every litigant to approach the superior Courts because economic condition does not permit so. It casts upon District Judiciary a very heavy responsibility to decide the cases as per legal and factual position.

Dispensation of justice is not an easy task. It expects all-round performance from a judicial officer. There are several qualifications of a good judge and most of them were highlighted in earlier issues of this Journal. I do not intend to repeat those qualifications in this editorial. What I want to stress here, is that there should be curiosity to know the latest developments of law through latest means. The laws are changing day by day and interpretations of various legal provisions are gaining new dimensions. In such a situation it is not humanly possible to keep every legal provision and every interpretation in our mind. Our mind cannot work as an encyclopaedia but it is also necessary to consider every legal situation of a case while passing the judgments and orders. Therefore, we have to find out some ways and means to cope up with this difficult situation, and to my mind the only way to keep ourselves abreast with all the legal provisions, is the computer and its softwares. No doubt, the computer and its software are not alternatives to a rich library, but availability of good library is always a problem before a judicial officer. So, the computer and softwares can play a good role as an additional aid to our library. We do not have trained Librarians and the work of up-dating of law books with every change may not always be possible. We also do not try to up-date the law books of Court library or our home library. With the result of not incorporating the changes in law books, we, most of the times fail to dwell upon the latest legal position in our judgments and orders. This causes unnecessary further litigation. The valuable time of higher Courts could be saved by stating the correct legal position in the judgments. The same also would avoid unnecessary further litigation.

The computers and softwares are new in respect of judicial system. The softwares are in a developing stage. It is not easy to become familiar with the

new system and at times it gives a feeling that we are unnecessarily wasting our time but it is not like so. Think about every developed infrastructure to which we feel homely at present. We were not ready to adopt them earlier but with passage of time and continuous use, they became indispensable necessities of our life. So should be the case with computers also.

We have entered into 21st century and three crucial years have rolled by but effective Court working on computers is yet to start in subordinate Courts. Our Hon'ble High Court is taking every step to provide computer facilities to District Judiciary but the whole exercise will go in vain if we do not take all the steps to implement the programme. Our Institute also felt this needed responsibility in this regard. We have started to impart training on computers and softwares during different training programmes. We have also published an article in continuation from April, 2003 issue to December 2003 of JOTI Jorunal on working of computers and softwares. This article has been written by the officers posted in the Institute with the help of Shri C.V. Sirpurkar, Additional Registrar (Judl.), High Court of Madhya Pradesh, Jabalpur. The Institute will always remain thankful to him for his assistance. This article is certainly helpful to judicial officers who want to start their Court working and judgment writing with the aid of computer and softwares. At present, it is very easy to find out different laws with the latest amendments on different sites through Internet. Some softwares also provide all the judgments of the Apex Court. The software enables us to find out the latest legal position is a comprehensive manner on any problem. If we take the help of these softwares in addition to our Court or home library, it would not be very difficult to place the correct legal position in our judgments and orders. This will not only curtail the time of higher Courts and litigating public but it will also give immense satisfaction to us which would be the reward of our services as judicial officers.

Rest in next issue.

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VALEDICTORY SESSION OF NEWLY APPOINTED CIVIL JUDGES CLASS II AT JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE, JABALPUR HELD ON JANUARY 9, 2004

From L to R : Hon'ble Shri Justice K. K. Lahoti, Hon'ble Shri Justice A. K. Shrivastava, Hon'ble Shri Justice S. S. Kemkar, Hon'ble Shri Justice S. K. Kulshrestha, Hon'ble The Chief Justice Shri Kumar Rajaratnam, Hon'ble Shri Justice Rajeev Gupta, Hon'ble Shri Justice Dipak Misra, Hon'ble Shri Justice S. P. Khare, Shri Ved Prakash (Addl. Director), Shri A. K. Saxena (Director).

PART - I

PRIORITY SECTOR LITIGATION

A.N.S. Shrivastava
Distt. & Sessions Judge
Jabalpur

The four main pillars or institutions of democratic setup in India are legislature, judiciary, executive and the enlightened citizens. India is said to have the most powerful and independent judiciary in the world. When all the institutions are crumbling, the judiciary is the only hope for people seeking justice. However, judicial system is receiving a lot of flak because of the delay in dispensation of justice. 'Justice delayed is justice denied' emphasizes the importance of a timely decision. The foremost reason for this delay is the dearth of judges in proportion to the number of cases that are pending. For every 10,00,000 people in America there are 15 judges: in Britain, it is 10 and in India it is a merely 5-7. The number of pending cases in India is over 2 crore 40 lac.

Increasing the number of judges is a structural reform, which is the responsibility of the Government. Nevertheless, what we judges can do is to decide the cases on priority. The criteria for priority should be such that the most needy gets justice first. The judge should use his discretion to decide the priority and his experience, inteligence, expertise in dispensing justice, free thinking, all play a key role. A few cases that should be kept on priority sector litigation are elucidated below :

1. The claim cases, where the principal earner of the family dies in some accident, should be decided as early as possible. This is because the family needs the money for maintenance and settlement. If the compensation is not paid immediately, the family may have to settle in pauperism causing permanent loss. For example, if there is a nubile daughter in the family, she may be forced to wed someone inferior because of the lack of money to pay for the marriage expenses, or a son may have to forego an attractive career option because of the dearth of money. Once the opportunity is lost no amount of compensation money can get it back.

2. Cases of compensation for wives, children and disabled people who are unable to maintain themselves on their own should also get priority based on the same reasoning.

3. The personal liberty of a citizen is his paramount constitutional and fundamental right. Therefore, the cases of bail applications should be immedicately decided.

4. Similarly the cases of 'under trials' must be taken up as expeditiously as possible. In case of conviction, the 'under trial' can get his period of incarcera-

tion, during investigation and trial, adjusted under section 428 of Code of Criminal Procedure. However, in the case of acquittal, this period cannot be compensated or adjusted for. This might be the golden period of the under trial which is lost behind the walls of a jail. This will cause irreparable loss to the person.

5. The cases of divorce, judicial separation and restitution of conjugal rights should also get instant attention of the Courts. Delay in disposal of such cases may ruin future of the family, especially the children of the litigants. Likewise the cases regarding the appointment of guardians of minors should be expedited. Undoubtedly, such cases should be of vital importance to the Courts.

6. Cases by which the proceedings of other cases are stayed or held should also be expedited so as not to hamper the proceedings of other Courts.

7. The cases of senior citizens, who come to the Courts with the hope of getting relief are not even decided during their lifetime. This is a pitiable condition for the judiciary. Such cases also come in the category of priority sector litigation.

Be it a judge, or an advocate or any other person of the judicial system, his existence is defined only when two people contest a case in the Court. Therefore, it is imperative for those in the judicial system to serve sincerely, honestly, dedicatedly the people who make it possible to uphold the majesty of law. The concept of priority sector litigation can serve as an effective tool in attaining the objective of the judicial system which is to give fair and timely justice to people.

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WHERE PARENTS SHOULD GO FOR CLAIMING MAINTENANCE

A.N.S. SHRIVASTAVA
Distt. & Sessions Judge
Jabalpur

As per section 126 (1) of the Code of Criminal Procedure, proceeding under section 125 may be taken against any person in any district-

(a) Where he is, or
(b) Where he or his wife resides, or
(c) Where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

Thus, the parents can initiate proceedings for maintenance under section 125 of the Code only in the district where their son or daughter resides. If they reside in a distant district it will be rather impossible for the pauper and old parents to apply for maintenance. The insertion of word "or either of his parents" between the words "he" and "is" occurring in section 126 (1) (a) of the Code can make the provisions fruitful for them.

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TAPE RECORDED CONVERSATION - ADMISSIBILITY, NATURE & VALUE.

VED PRAKASH
Addl. Director

The phenomenon of tendering tape recorded conversation before Law Courts as evidence, particularly in cases arising under the Prevention of Corruption Act, where such conversation is get recorded by sending the complainant with a recording device to the person demanding or offering bribe has almost become a common practice now. In civil cases also parties may rely upon tape records of relevant conversation to support their version. In such cases the Court has to face various questions regarding admissibility, nature and evidentiary value of such a tape-recorded conversation. The Indian Evidence Act, prior to its being amended by the Information Technology Act, 2000, mainly dealt with evidence, which was in oral or documentary form. Nothing was there to point out about the admissibility, nature and evidentiary value of a conversation or statement recorded in an electro-magnetic device. Being confronted with the questions of this nature and called upon to decide the same, the law Courts in India as well as in England devised and developed principles so that such evidence, though in its strict sense not included within the traditional concept of evidence, may be received in law Courts and acted upon.

The relationship between law and technology has not always been an easy one. However, the law has always yielded in favour of technology whenever it was found necessary. The concern of law Courts regarding utility and admissibility of tape recorded conversation, from time to time found its manifestation in various pronouncements. In *Hopes v. H.M. Advocate, 1960 Scots Law Times 264,* the Court while dealing with the question of admissibility of tape-recorded conversation observed as under :

> New techniques and new devices are the order of the day. I can't conceive, for example, of the evidence of a ship's captain as to what he observed being turned down as inadmissible because he had used a telescope, any more than the evidence of what an ordinary person sees with his eyes becomes incompetent because he was wearing spectacles. Of course, comments and criticisms can be made, and no doubt will be made, on the audibility or the intelligibility, or perhaps the interpretation, of the results of the use of a scientific method; but that is another matter and that is a matter of value, not of competency.

An authoritative and categorical exposition on this point is found in *Rex v. Maqsud , 1965 (2) All ER, 461* wherein the Court of Criminal Appeal observed that the time has come when this Court should state its views of the law on a matter which is likely to be increasingly raised as time passes. For many years now photographs have been admissible in evidence on proof that they are relevant to the issues involved in the case and that the print as seen represents situations that have been reproduced by means of mechanical and chemical devices. Evidence of things seen through telescopes or binoculars which otherwise could not

be picked up by the naked eye have been admitted, and now there are devices for picking up, transmitting and recording conversations. In principle no difference can be made between a tape recording and a photograph. The Court was of the view that it would be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices.

In India, the earliest case in which issue of admissibility of tape-recorded conversation came for consideration is *Rup Chand v. Mahabir Prasad, AIR 1956 Punjab 173.* The Court in this case though declined to treat tape-recorded conversation as writing within the meaning of Section 3 (65) of the General Clauses Act but allowed the same to be used under Section 155(3) of the Evidence Act as previous statement to shake the credit of witness. The Court held that there is no rule of evidence, which prevents a party, who is endeavouring to shake the credit of a witness by use of former inconsistent statement, from deposing that while he was engaged in conversation with the witness, a tape recorder was in operation, or from producing the said tape recorder in support of the assertion that a certain statement was made in his presence.

In *S. Partap Singh v. State of Punjab, AIR 1964 SC 72* a five Judges Bench of the Apex Court considered the issue and clearly propounded that tape recorded talks are admissible in evidence and simple fact that such type of evidence can be easily tampered with certainly could not be a ground to reject such evidence as inadmissible or refuse to consider it, because there are few documents and possibly no piece of evidence, which could not be tampered with. In this case, the tape record of a conversation was admitted in evidence to corroborate the evidence of witnesses who had stated that such a conversation has taken place.

The Apex Court *in Yusufalli Esmail Nagree v. State of Maharashtra, AIR 1968 SC 147* considered various aspects of the issue relating to admissibility of tape-recorded conversation. This was a case relating to an offence under Section 165-A of Indian Penal Code and at the instance of the Investigating Agency, the conversation between accused, who wanted to bribe, and complainant was tape-recorded . The prosecution wanted to use this tape-recorded conversation as evidence against accused and it was argued that the same is hit by Section 162 Cr.P.C. as well as Article 20 (3) of the Constitution. In this landmark decision, the Court emphatically laid down in unequivocal terms "that the process of tape recording offers an accurate method of storing and later reproducing sounds. The imprint on the magnetic tape is the direct effect of the relevant sounds. Like a photograph of a relevant incident, a contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under Section 7 of the Indian Evidence Act. The Apex Court after examining the entire issue in the light of various pronouncements laid down the following principles :

a) The contemporaneous dialogue, which was tape-recorded, formed part of res-gestae and is relevant and admissible under Section 8 of the Indian Evidence Act.

b) The contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under Section 7 of the Indian Evidence Act.

c) Such a statement was not in fact a statement made to police during investigation and, therefore, cannot be held to be inadmissible under Section 162 of the Criminal Procedure Code.

d) Such a recorded conversation though procured without the knowledge of the accused but the same is not elicited by duress, coercion or compulsion nor extracted in an oppressive manner or by force or against the wishes of the accused. Therefore, the protection of Article 20 (3) of the Constitution was not available.

e) One of the features of magnetic tape recording is the ability to erase and re-use the recording medium. Therefore, the evidence must be received with caution. The Court must be satisfied beyond reasonable doubt that the record has not been tampered with.

CONDITIONS OF ADMISSIBILITY :

The tape-recorded conversation can be erased with ease by subsequent recording and insertion could be superimposed. However, this factor would have a bearing on the weight to be attached to the evidence and not on its admissibility. Ultimately, if in a particular case, there is a well grounded suspicion not even say proof, that a tape recording has been tampered with that would be a good ground for the Court to discount wholly its evidentiary value. *(See : Pratap Singh v. State of Punjab and Haryana , AIR 1964 SC p.72),* In the case of *Ram Singh v. Col. Ram Singh, AIR 1986 SC 3* following conditions were pointed out by the Apex Court for admissibility of tape-recorded conversation :

(a) The voice of the speaker must be duly identified by the maker of the record or by others who recognize his voice. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.

(b) The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence direct or circumstantial.

(c) Every possibility of tampering with or erasure of a part of a tape recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.

(d) The statement must be relevant according to the rules of Evidence Act.

(e) The recorded cassette must be carefully sealed and kept in safe or official custody.

(f) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.

IDENTIFICATION OF VOICE :

As regards the identification of the taped voice, proper identification of such voice is a sine qua non for the use of such tape recording, therefore, the time and place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified. *[(See: Yusufalli Esmail Nagree (Supra)]*

TRANSCRIPT :

The importance of having a transcript of the tape-recorded conversation cannot be under estimated because the same ensures that the recording was not tampered subsequently. In the case of *Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdas Mehta, AIR 1975 SC 1788,* the Apex Court considered the value and use of such transcripts and expressed the view that transcripts could be used to show what the transcriber has found recorded there at the time of transcription and the evidence of the makers of the transcripts is certainly corroborative because it goes to confirm what the tape record contained. The Apex Court also made it clear that such transcripts can be used by a witness to refresh his memory under Section 159 of the Evidence Act and their contents can be brought on record by direct oral evidence in the manner prescribed by Section 160 of Evidence Act.

NATURE :

Tape-recorded conversation is nothing but information stored on a magnetic media. In the case of Roopchand (supra), though, Punjab High Court declined to treat tape recorded conversation as a writing within the meaning of Section 3 (65) of the General Clauses Act but this view could not survive for a long and the Apex Court in *Ziyauddin Burhanudding Bukhari (Supra)* clearly laid down that the tape recorded speeches were "documents as defined by Section 3 of the Evidence Act", which stood on no different footing than photographs.

After coming into force of the Information Technology Act, 2000, (w.e.f. 17.10.2000) the traditional concept of evidence stands totally reformed. Section 2 (r) of this Act is relevant in this respect which defines information in electronic form as information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device. Under Section 2 (t) 'electronic record' means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche. Section 92 of this Act read with Schedule (2) amends the definition of 'evidence' as contained in Section 3 of the Indian Evidence Act. The amended definition runs as under:

> "Evidence" :- "Evidence" means and includes -
>
> (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;
>
> such statements are called oral evidence;
>
> (2) all documents including electronic records produced for the inspection of the Court;
>
> such documents are called documentary evidence.

From the aforesaid provisions it becomes amply clear that the law, as it prevails today, takes care of information stored on magnetic or electronic device and treats it as documentary evidence within the meaning of Section 3 of the Indian Evidence Act.

UTILITY/EVIDENTIARY VALUE :

The next question regarding evidence of tape-recorded information, is about its utility and evidentiary value. In this respect, the following points require consideration:

a) Whether such evidence is primary or secondary?

b) Whether such evidence is direct or hearsay?

c) Whether such evidence is corroborative or substantive?

The point whether such evidence is primary and direct was dealt with by the Apex Court in *N.Sri Rama Reddy v. V.V. Giri, AIR 1971 SC 1162.* The Court held that like any document the tape record itself was primary and direct evidence admissible of what has been said and picked up by the receiver. This view was reiterated by the Apex Court in *R.K. Malkani v. State of Maharashtra, AIR 1973 SC 157.* In this case the Court ordained that when a Court permits a tape recording to be played over it is acting on real evidence if it treats the intonation of the words to be relevant and genuine. Referring to the proposition of law as laid down in *Rama Reddy's case (Supra)*, a three Judges Bench of the Apex Court in the case of *Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdas Mehta, AIR 1975 SC 1788* propounded that the use of tape recorded conversation was not confined to purposes of corroboration and contradiction only, but when duly proved by satisfactory evidence of what was found recorded and of absence of tampering, it could, subject to the provisions of the Evidence Act, be used as substantive evidence. Giving an example, the Court pointed out that when it was disputed or in issue whether a person's speech on a particular occasion, contained a particular statement there could be no more direct or better evidence of it than its tape record, assuming its authenticity to be duly established.

From the aforesaid it can well be gathered as a settled legal proposition that evidence of tape-recorded conversation being primary and direct one it can well be used to establish what was said by a person at a particular occasion.

CORROBORATION/CONTRADICTION:

Under Section 157 of the Evidence Act, a witness may be corroborated by his/her previous statement. Section 145 of the Act permits use of a previous statement for contradiction of a witness during cross-examination. Again Clause (1) of Section 146 provides that during cross-examination, questions may be put to a witness to test his veracity. Section 153 generally deals with exclusion of evidence to contradict answers to questions testing veracity. However, exception (2) of it permits a witness being contradicted if he has denied any fact which was put to him to impeach his impartiality. Section 155 (3) deals with impeaching the credit of a witness liable to be contradicted.

The Apex Court in *N. Sri Rama Reddy (Supra)* after considering the matter laid down that the evidence of a tape recorded conversation/statement apart from being used for corroboration is admissible for the purposes stated in Section 146 (1), Exception (2) to Section 153 and Section 155 (3) of the Evidence Act.

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DETERMINATION OF COURT FEES WHERE DISPUTE RELATES TO PART OF LAND

RAJEEV SHRIVASTAVA
O.S.D.

Assessment of Court Fees regarding the part of land of entire estate which is not assessed to land revenue, is an intricate matter. In this context we explore the various aspects of law relating to Court Fees Act, 1870.

When we deal with the case in which such land is disputed that can be assessed to land revenue or land revenue is payable in respect of such land, twenty times the land revenue so assessed is payable as court fees. In partition suits, court fees is payable according to one half of the value of the plaintiffs' share of the property or according to the full value of such share if on the date of presenting the plaint the plaintiff is out of possession of the property of which he claim to be a co-parcener or co-owner. That means in above mentioned situations, legal position is very clear and does not create any ambiguity.

Section 7 (v) of Court Fees Act says that- Computation of fees payable in certain land, houses and gardens-in suits for possession of land, houses and gardens, according to the value of the subject matter and such value shall be deemed to be where subject matter is land and

(a) Such land is assessed to land revenue or land revenue is payable in respect of such land- twenty times the land revenue so assessed or so payable.

(b) Such land forms a part of land which is assessed to land revenue or in respect of which land revenue is payable- twenty times of the land revenue proportionately worked out for such part of land;

(c) Such land is not assessed to land revenue- twenty times of the land revenue worked out at the rate of [(five rupees) per acre.]

Meaning thereby, Clause (v) of Section 7 of the Court Fees Act, provides that in suits for possession of land, houses and gardens, the Court Fees is payable according to the value of the subject matter. That clause further provides that where the subject matter is land, such value shall be deemed to be, where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or where the land forms part of such estate and is recorded as aforesaid (that is, recorded in Collectors' register as separately assessed with such revenue) and such revenue is settled, but not permanently twenty times the revenue so payable. Where the land forms part of an estate paying revenue to the Government, but is not a definite share of such estate and is not separately assessed as above mentioned, the market value of the land.

Under Section 7 (vi-a) of Court Fees Act in suits of partition-

(a) According to one half of the value of the Plaintiff's share of the property; and

(b) According to the full value of such share if on the date of presenting the plaint, the plaintiff is out of possession of the property and which he claims to be a co-parcener or co-owner, and is claimed to be a co-parcener or co-owner on such date is denied.

Meaning thereby, when plaintiff files a suit for partition, for the purpose of sub-clause (a) of clause (vi-a) of section 7, the plaintiff is in possession or not is irrelevant. In every suit for partition, whether plaintiff is in or out of possession or he has been ousted or not ousted from the enjoyment of all or any of the joint family property, the minimum that he must be called upon to pay Court-fee on one-half of the value of his share in the property.

The full ad valorem Court fee is payable, if two conditions are fulfilled under sub clause (b) of clause (vi-a) of section 7. These conditions are - (a) that the plaintiff's claim to be co-parcener or co-owner on the date of presenting the plaint should be denied, and (b) that the plaintiff must be found to be out of possession of the property he claims. He must then be called upon to pay Court-fee according to the full value of share claimed by him.

Under Section 7 (vi-a) of Court Fee Act the burden is on the defendant to allege and prove ouster before the date of suit. Neither want of possession nor adverse possession, nor mere denial of title is sufficient to constitute ouster because in the case of co-parceners the exclusion from possession has to be brought home to the knowledge of the person excluded.

In above mentioned situations, the assessment of Court fees is not a tough job, but when we assess Court fees, regarding part of land of entire estate, which cannot be assessed to land revenue, it becomes an intricate matter. Before going into the finer aspects of the issue, it is worthwhile to point out previous and present legal positions. Many amendments have been incorporated in the Court Fees Act from time to time. M.P. Act No. 4 of 1976 has omitted explanation of section 7 (vi-a). The omitted explanation ran as under :- "The value of the property for the purposes of this paragraph shall be the market value which is the case of immovable property, shall be deemed to be the value as computed in accordance with the paragraph (v)." Before this amendment, one could have assessed the value, regarding assessment of Court fees, according to the provision of section 7 (v) of Court Fees Act. Subsequent to this amendment a question arises that in amended situation, what will be the mode of assessment of Court fees, when such part of land is disputed ?

At this juncture it will be apposite to take note of the legal aspects relating to the applicability of the Act. The Act is not retrospective in its operation, meaning thereby, that it does not unsettle or alter any position which took place before 'the Act' came into force.

The Full Bench decision of Madhya Pradesh High Court, *Balu Devchand Kulmi & Others vs. Fundi Bai Amichand Kulmi, AIR 1972 MP 22* may be usefully referred in which it was held that :

(a) Court fees and suits valuations-Court Fees Act (1870), Section 7 (v) (d)-Valuation of part of estate-where a suit is filed for part of an estate and such part is not separately assessed to land revenue, the Court fees has to be paid on the basis of the market value. It is not permissible either to pay the Court fees on the basis of the land revenue for the entire estate in which the part claimed is included or to compute it by working out the proportion of the land revenue in respect of such part and pay Court fees on the proportionate multiple of the land revenue by working it out according to Section 7 (v) (d).

(b) Interpretation of statutes- The rule of construction that a taxing provision has to be construed strictly and in a manner most favourable to the citizen, has no application where the language of the statute is absolutely clear and unambiguous and does not yield to two interpretations.

(c) Interpretation of statutes-The interpretation by the Courts of statute in any particular manner should not render any part of the statute nugatory.

Prior to amendment of 1976, the legal position was not ambiguous, meaning thereby, if a suit is filed for part of land and such part of land was not independently assessed to land revenue, the Court fees will be paid on its market value. One can neither pay Court fees on the basis of land revenue of entire land in which the part claimed/disputed is included nor by computing it by working out the land revenue relating to such part of land.

In this context, under amended legal position, observations of M.P. High Court in Bhagwati vs. Chaman Rai that is reported in MPWN 1980 part II Note 22 may also be usefully referred. The observations of this citation are as follows:-

(1) Court Fees act, 1870- S. 7 (v) partition suit of agricultural land Court fee payable-Whether on market value of on 20 times of land revenue.

(2) Court Fee Act, 1870-S. 7 (vi-a) omission of explanation from the sub-section makes no difference Court fee still payable on 20 times of land revenue.

(3) Interpretation of Statutes-Rule of harmonious construction- intention of legislature to be seen, different interpretation leading conflict between two clauses to be avoided.

In this citation it has been held that Section 7 clause (vi-a) provides that in a suit for partition, without claiming separate possession, the suit has to be valued according to one half of the value of the plaintiff's share of the property. This is indicative the fact that Court fee payable on such a suit is less than the Court fee payable when a suit is instituted for partition and separate possession on the ground that the plaintiff is out of possession. The legislative intent it thus clear that when a plaintiff claims partition and separate possession on the ground that he is out possession, the claim is to be valued just like a suit for possession

simpliciter. In fact, when a co-owner files a suit for partition and separate possession, on the ground that he is out of possession, there is no difference between such a suit and a suit for possession based on title.

The amendment to the Court Fee Act (Act no. 4 of 1976) with effect from 1.3.1976 was introduced to clarify that even in cases where part of the land separately assessed to land revenue was claimed, Court fee payable on such claim will be proportionately worked out for such part of the land. This clarification had become necessary to get over some judgments which had laid down that where the claim was for the entire land separately assessed to land revenue, its market value will be deemed to be 20 times the land revenue but if it was called a part of land and that part was not separately assessed, the claim will have to be deemed to be 20 times the land revenue. But if it was for a part of land and that part was not separately assessed, the claim will have to be valued on the basis of actual market value. The intention was to provide relief to agriculturists and the owners of revenue paying lands.

It is also observed that a harmonious construction of paragraphs (v) and (vi) of Section 7 of Court Fees Act will show that the legislature intended that the market value of a land revenue paying land for both the clauses will be the same, that is, twenty times the land revenue as provided under Section (v). A different interpretation will create a conflict in these two clauses in as much as in a suit for possession simpliciter of land assessed to land revenue, the plaintiff will be required to pay twenty times the land revenue, while in a suit for partition and separate possession, when plaintiff is out of possession he will be required to pay Court fee on the actual market value. One cannot attribute such inconsistency to the legislative intent.

On the basis of above discussion we find that the relevant legal provisions as contained in Section 7 (v) and Section 7 (vi-a) of the Court Fee Act, 1870 are 'basically intended to beneficiate' the public. No apparent contradiction can be attributed to the above pronouncements because, the decision of 1972 is based on the then prevailing provisions of Section 7 (v), wherein there was nothing for determining valuation of a part of land assessed to land revenue.

In 1976 by M.P. State Amendment (Act No. 4 of 1976) it was made clear in Section 7 (v) that the value of land forming part of land which is assessed to land revenue shall be determined by proportionately working out the land revenue. The decision reported in 1980 is based on this amended legal position. Therefore, the same cannot be said to be against the Full Bench decision of the 1972 and the Court should interpret the law in the light of above mentioned principles laid down in citations.

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''तलाकशुदा मुस्लिम स्त्रियों एवम् मुस्लिम संतानों का भरण पोषण''

तजिन्दरसिंह अजमानी
ट्रेनी जज

प्रकृति :

मुस्लिम विधि में विवाह को संविदा के रूप में निरूपित किया गया है। ऐसी संविदा का अंत होने पर ऐसी मुस्लिम स्त्रियां जिन्हें उनके पति ने तलाक दे दिया है, अथवा जिन्होंने तलाक ले लिया है, के भरण पोषण संबंधी अधिकारों के संरक्षण के लिए संसद द्वारा मुस्लिम स्त्री (विवाह-विच्छेद पर अधिकारों का संरक्षण) अधिनियम 1986 पारित किया गया। जिसे राजपत्र में 19 मई 1986 को प्रकाशित किया गया। प्रस्तुत लेख में संक्षेप में ''अधिनियम'' उल्लेखित किया जा रहा है।

अधिनियम के महत्वपूर्ण प्रावधानों पर मंथन के पूर्व अधिनियम की प्रकृति पर विचार वांछनीय है :- जैसे कि अधिनियम का प्रभाव भूतलक्षी (Retrospective) है या नहीं। सामान्य अवधारणा यह है कि ऐसी प्रत्येक विधि, जब तक उसे, अभिव्यक्त रूप से भूतलक्षी घोषित न कर दिया गया हो, उसका प्रभाव भविष्यलक्षी होता है। उक्त सिद्धान्त के आलोक में अधिनियम के उपबंधों पर विचार करने के उपरांत प्रकट होता है कि अधिनियम के भूतलक्षी होने के संबंध में कोई अभिव्यक्त प्रतिपादना नहीं है। माननीय उच्च न्यायालय मध्यप्रदेश की पूर्व पीठ ने *Wali Mahammed Vs. Batulbai 2003 (2) MPLJ (513)* में अधिनियम की प्रकृति पर विचार किया गया है, जिसे उल्लेखित करना समीचीन है :-

> .... It will be thus, seen that Muslim-Women (Protection of Rights on Divorce) Act, 1986 is neither retrospective in operation nor it will have effect of nullifying the orders already made under Section 125 or 127 of Criminal Procedure Code ordering a muslim husband to pay maintenance to his divorced wife prior to the coming into force of the Act of 1986.

अतः ऐसे प्रकरण जिनमें अधिनियम लागू होने के पूर्व दंड प्रक्रिया संहिता के प्रावधानों के तहत कार्यवाहियाँ की गई हैं इस अधिनियम के प्रभावशील हो जाने से अकृत या शून्य नहीं हो जाती।

विकल्प :

अधिनियम के प्रवृत्त होने के बाद भी यदि तलाकशुदा मुस्लिम स्त्री एवं उसका पूर्व पति आपस में सहमत हो जाते हैं तब वे दंड प्रक्रिया संहिता के प्रावधानों से शासित हो सकते हैं। इस संबंध में अधिनियम की धारा 5 प्रावधान करती है :-

> ''यदि धारा 3 की उपधारा (2) के अधीन आवेदन की प्रथम सुनवाई की तिथि को तलाकशुदा स्त्री एवम् उसका पूर्व पति संयुक्त अथवा पृथक शपथपत्र अथवा अन्य ऐसे प्रारूप में जैसा विहित हो, लिखित घोषणा के द्वारा घोषित करे कि वे दंड प्रक्रिया संहिता की धारा 125 से 128 के प्रावधानों से विनियमित होना चाहते हैं, एवं ऐसा शपथपत्र या घोषणा आवेदन की सुनवाई करने वाले न्यायालय में प्रस्तुत करे तो मजिस्ट्रेट तदनुसार निपटारा करेगा।''

उक्त प्रावधान में प्रथम सुनवाई की तिथि को स्पष्ट करते हुए उल्लेखित किया गया है कि प्रथम सुनवाई की तिथि से वह तिथि अभिप्रेत है जो आवेदन में प्रत्यर्थी की उपस्थिति के लिए सम्मन् में नियत की गई है।

तलाकशुदा स्त्री–मुस्लिम विधि अनुसार तलाक साबित करना

अधिनियम के माध्यम से संविधि की मंशा तलाकशुदा मुस्लिम स्त्री के अधिकारों के संरक्षण की रही है, संभवतः इसलिए प्रारंभ में ही अधिनियम में तलाकशुदा स्त्री को परिभाषित किया गया है।

> धारा 2 (क) :- "तलाकशुदा स्त्री से वह मुस्लिम स्त्री अभिप्रेत है जिसका विवाह मुस्लिम विधि के अनुसार हुआ है और जिसे मुस्लिम विधि के अनुसार उसके पति द्वारा तलाक दे दिया है, अथवा जिसने तलाक ले लिया है।"

यदि मुस्लिम स्त्री अपने भरण-पोषण के लिए अभिकथन करती है और बचाव में उसका पति 'तलाक' का आधार लेना चाहता है तब केवल इतना ही पर्याप्त नहीं है कि वह अपने लिखित कथन में व्यक्त करे कि उसने अपनी पत्नि को तलाक दे दिया है, परन्तु उसे यह साबित करना होगा कि उसने अपनी पत्नि को मुस्लिम विधि के प्रावधानों के अनुसार तलाक दिया है। उक्त आशय की अभिव्यक्ति खातून बी वि. मेहराजबी, 2000 (3) एम पी एल जे 449 में इस तरह की गई है :-

> "... Mere setting up of a plea in the written statement is not proof of divorce and the husband is required to prove that he has given divorce to his wife in accordance with Muslim Law".

तलाकशुदा स्त्री के प्रति उसके पूर्व पति का उत्तरदायित्व

अधिनियम की धारा-3 में उपबंधित है कि तत्समय प्रवृत्त किसी अन्य विधि में कोई बात होते हुए भी तलाकशुदा स्त्री-

(क) इद्दत की अवधि में अपने पूर्व पति से युक्तियुक्त एवम् उचित व्यवस्था तथा भरण पोषण की और उसे प्राप्त करने की हकदार होगी।

विचारणीय प्रश्न है, कि उद्दत की अवधि पूर्ण हो जाने के बाद तलाकशुदा पत्नी के पूर्व पति का दायित्व पूर्णतः समाप्त हो जाता है ? इस प्रश्न पर माननीय सर्वोच्च न्यायालय ने डेनियल लतीफ के मामले (2001) 7 एस सी सी 740 में विस्तार पूर्वक अभिनिश्चित किया है, जिसे उल्लेखित करना अत्यंत महत्वपूर्ण है।

1. A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3 (1) (a) of the Act.
2. Liability of Muslim husband to his divorced wife arising under section 3 (1) (a) of the Act to pay maintenance is not confined to the iddat period.

3. A divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided under section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death, according to Muslim law, from such divorced woman including her children and parents . If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

अवयस्क मुस्लिम संतानों का भरणपोषण– पिता का दायित्व

महत्वपूर्ण प्रश्न यह है कि अवयस्क मुस्लिम पुत्र तथा अविवाहित पुत्रियों के भरण पोषण के लिए दंड प्रक्रिया संहिता के प्रावधान आकृष्ट होते हैं या फिर अधिनियम (1986) में ही ऐसी संतानों के भरण-पोषण की सीमित व्यवस्था है ? सबसे पहले अधिनियम की धारा 3 (1) (ख) का उल्लेख आवश्यक है :-

> 3 (1) (ख) "जहाँ तलाक के पहले अथवा बाद में अपने बच्चों के भरण-पोषण वह स्वयं करती हो, तो बच्चों के जन्म की तारीख से दो साल की अवधि के लिए अपने पूर्व पति से युक्तियुक्त एवम् उचित व्यवस्था तथा भरण-पोषण प्राप्त करने की हकदार होगी।"

यहाँ ध्यान देने योग्य तथ्य है कि अधिनियम (1986) के प्रावधान तलाकशुदा मुस्लिम स्त्री के हितों के संरक्षण से प्रयत्क्षतः संबंधित है अतः एक मुस्लिम स्त्री एवं पुरुष से उत्पन्न हुई संतानों के भरण-पोषण से संबंधित हित, आश्रित हित न होकर स्वतंत्र हित रखते हैं, और ऐसी स्थिति में अधिनियम (1986) तथा दंड प्रक्रिया संहिता के भरणपोषण संबंधी प्रावधान (125-128) में किसी तरह का अतिव्यापन नहीं है और एक मुस्लिम पिता का दायित्व है कि वह पुत्र की व्यस्कता तथा पुत्री के विवाह होने तक उनके भरण पोषण की व्यवस्था करें। इस संबंध में माननीय सर्वोच्च न्यायालय ने नूर सबा ख़ातून वि. मोहम्मद क़ासिम, 1997 (3) क्राइम्स 106 (सु.को.) में व्यक्त किया है :-

"... Whereas the 1986 Act deals with the obligation of a Muslim husband vis-a-vis his divorced wife including the payment of maintenance to her for a period of two years of fosterage of maintaining the infant/infants, where they are in the custody of the mother, the obligation of a Muslim father to maintain the child is governed by section 125 Cr.P.C. and his obligation to maintain them is absolute till they attain majority or are able to maintain themselves, whichever date is earlier. In the case of female children this obligation extend till their marriage".

अंततः प्रस्तुत आलेख से निष्कर्ष निकलता है कि अधिनियम (1986) के प्रावधान भूतलक्षी प्रभाव नहीं रखते हैं। यदि तलाकशुदा स्त्री एवं उसका पूर्व पति परस्पर सहमत होते हैं तब भरण-पोषण संबंधी कार्यवाहियों में दंड प्रक्रिया संहिता की धारा (125-128) के प्रावधान आकृष्ट होते हैं। तलाकशुदा स्त्री के प्रति उसके पूर्व पति का सीमित दायित्व नहीं है। तलाक का अभिवचन ही पर्याप्त नहीं है वरन् तलाक मुस्लिम विधि के अनुसार साबित किया जाना भी आवश्यक है तथा अवयस्क संतानों के संबंध में अधिनियम (1986) तथा दंड प्रक्रिया संहिता के प्रावधानों में व्याप्त नहीं है, तथा मुस्लिम पिता अपने अवयस्क संतानों के भरण पोषण के दायित्वाधीन है।

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BI-MONTHLY TRAINING PROGRAMME

The following five topics were sent by this Institute for discussion in the bi-monthly training meeting of October 2003 to be held at district head quaters. The Institute has received articles on these topics from various districts. One article on each topic is being included in this issue of JOTI Journal :

1. What procedure should be adopted by the referring Magistrate and the C.J.M. while exercising Jurisdiction under Section 325 (1) and 325 (3) Criminal Procedure Code, 1973, respectively ?

   दण्ड प्रक्रिया संहिता, 1973 की धारा 325 (1) एवं 325 (3) के अन्तर्गत अधिकारिता के उपयोग में क्रमशः मजिस्ट्रेट एवं मुख्य न्यायिक मजिस्ट्रेट द्वारा अपनायी जाने वाली प्रक्रिया क्या होनी चाहिए ?

2. Whether on a conviction under Section 279 and 337 I.P.C. separate sentences be imposed under both the sections? Analyse in the light of provisions of Section 71 I.P.C.

   धारा 279 एवं 337 भा.दं.सं. के अन्तर्गत दोष सिद्धि की दशा में क्या उभय धाराओं में पृथक पृथक दंड अधिरोपित किया जाना चाहिए ? धारा 71 भा.दं.सं. के प्रावधानों के प्रकाश में विश्लेषण करें ?

3. What is the mode of reconstruction of record of pending or disposed of cases in civil and criminal matter?

   सिविल एवं आपराधिक मामलों में लंबित अथवा निराकृत रिकार्ड के पुनर्निर्माण की प्रक्रिया क्या है ?

4. What should be the extent of jurisdiction of Civil Court regarding grant of interim injunction in service matters of Government servants?

   शासकीय सेवकों के सेवा संबंधी मामलों में अन्तरिम व्यादेश प्रदान किये जाने के विषय में न्यायालय की अधिकारिता का विस्तार क्या होना चाहिए ?

5. Whether Civil Court has jurisdiction to grant relief of interim injunction under Section 9 of the Arbitration & Conciliation Act, 1996 in a case coming within the purview of M.P. Madhyastham Adhikaran Adhiniyam, 1983?

   क्या सिविल न्यायालय को माध्यस्थम एवं सुलह अधिनियम, 1996 की धारा 9 के अन्तर्गत उन मामलों में अस्थायी व्यादेश जारी करने की अधिकारिता है जो म.प्र. माध्यस्थम अधिकरण अधिनियम, 1983 की परिधि में आते हैं ?

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PROCEDURE TO BE FOLLOWED UNDER SECTION 325 OF THE CODE OF CRIMINAL PROCEDURE

JUDICIAL OFFICERS
District Jabalpur

All the sections referred to hereunder are from the Code of Criminal Procedure and for convenience, the Chief Judicial Magistrate is referred to as the C.J.M. All the emphasis are supplied by us.

The provisions of section 325 (1) are as follows :-

> "Whenever a Magistrate is of *opinion,* after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or, being a Magistrate of the second class, is of *opinion,* that the accused ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings, and forward the accused, to the Chief Judicial Magistrate to whom he is subordinate."

From a bare perusal of these provisions, it is clear that for submitting the proceedings and forwarding the accused, it is necessary that :-

1. The trial Magistrate must have heard the evidence of prosecution and the accused.
2. He must be of the opinion that the accused is guilty, and
3. He must be of the opinion that the accused ought to receive a punishment, different in kind from or more severe than that which he (Such Magistrate) is empowered to inflict.

OR

He being a Magistrate of a second class, is of the opinion that the accused ought to be required to execute a bond under section 106.

When all these 3 conditions are fulfilled then only, the trying Magistrate may record his opinion and submit his proceedings and forward the acused, that too, to the C.J.M. to whom he is subordinate. These provisions are not obligatory but discretionary. It is the trite law that the discretion must be exercised judicially.

Section 325 (3) reads as follows :-

> "The Chief Judicial Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case and may call for and take any further evidence, and shall pass such judgment, *sentence* or order in the case as he thinks fit, and as is according to law.

It is obvious from reading of sub-section (1) and (3), that the powers referred to in sub-section (3) can be exercised - (a) By a C.J.M. only (b) The proceedings must have been submitted to him under the provisions of section 325

(1), and (c) The Magistrate referring the proceedings must be subordinate to such C.J.M.

When all these three conditions exists, then it is in the discretion of such C.J.M. to examine and recall any witness who has already given evidence in the case and call for and take any further evidence. Therefore, it is not imperative on such C.J.M. to take further evidence in the case and he, in his discretion, can well act on the proceedings recorded by the referring Magistrate. Under the circumstances, the C.J.M. can pass sentence also. Thus, it is clear that this provision empowers a C.J.M. to pass a sentence, in given conditions, on the proceedings recorded by another Magistrate. It is relevant here to examine the bar created by section 461 (n). The relevant part of the section is as under :-

> If any Magistrate *not being empowered by law in this bahalf,* does any of the following things, namely :-
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> . . . . .
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> . . . . .
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> (n) passes a setence, under section 325, on proceedings recorded by another Magistrate;
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> . . . . .
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> . . . . .
>
> his proceedings shall be void.

If we concentrate on the emphasised portion of the section i.e. "not being empowered by law in this behalf", the only conclusion that can be drawn is that the proceedings enumerated in this section, including that of sub section (n), shall be void only when they are performed by a Magistrate, who has not been empowered by law in that behalf. It necessarily follows that if the Magistrate, doing any of the things, referred to in section 461, is empowered by law for doing that thing, the bar of section 461 will not apply.

We have already come to the conclusion that if the proceedings, under section 325 (1), have been submitted by trial Magistrate after observing all the formalities stated therein, the referee C.J.M. is empowered, under section 325 (3), even to pass sentence on the proceedings recorded by the referring Magistrate. Under these circumstances, the bar of section 461 (n) will not come in way of such C.J.M. from passing sentence on the proceedings recorded by other Magistrate. However, if the proceedings are not submitted by the trial Magistrate to the C.J.M., under section 325 (1), or the Magistrate submitting the proceedings is not subordinate to such C.J.M. or if the case is transferred from that C.J.M. to other Magistrate, then such C.J.M. or other Magistrate, as the case may be, will not be empowered to pass sentence under section 325 on the proceedings recorded by the referring Magistrate. And their doing so, shall be void under section 461 (n).

The action under section 325 can be taken only after hearing the evidence of the prosecution and accused i.e. after the conclusion of trial. Thus there may arise a confusion as to whether, before submitting the proceeding, the trial Magistrate should convict the accused or not?

Section 209 and 323 provide for committing the case, if it *appears* to the Magistrate that the offence is exclusively triable by Court of Sessions. For referring the case to another Magitrate, Section 322 of the Code requires that the evidence on record should *appear to warrant a presumption* that the trial Magistrate should not try the case. Under section 324, the case of a previous convict can be sent to the C.J.M. or be committed to the Court of Sessions when the trial Magistrate is *satisfied there is ground for presumption* that the accused has committed the offence. According to the provisions of section 360, a Magistrate of second class, *after convicting* the accused can submit the proceedings of the case to the Magistrate of the first class if he is of the *opinion* that the accused should be dealt with the provisions of Law of Probation.

Thus the legislature in its wisdom, has used different words and phrases for empowering the Magistrate to refer the case to another Court at different stages of the case and for different purposes. The words *'appears', 'satisfied', 'opinion', 'presumption', 'conviction'* or *'holding guilty'* have different imports and force. Judges or Magistrates can not sit over the legislature and they can not substitute their own words of different import or weight, for those, used by the legislature. For application of above provision of section 360, the Magistrate should first *convict* the accused and then should be of the *opinion* that the accused should be dealt with the provisions of Law of Probation. While for submitting the proceeding under section 325 (1) the word used in this behalf is *opinion* and not conviction. This means that the legislature has deliberately not required the Magistrate to *convict* the accused or to *hold him guilty* for referring his case under section 325 (1). The accused can be *convicted* or held guilty only when the offence against him has been proved beyond all reasonable doubt. But for forming a mere *opinion* that the accused is guilty a lighter approach is required.

Consequently, for submitting the proceeding under section 325 (1), as the law requires, the trial Magistrate is only to record his *opinion* that the accused is guilty but should refrain himself from *convicting* or *holding him guilty.*

This point can be viewed from another angle also. The C.J.M. is empowered by section 325 (3), to pass a judgment on the proceedings submitted to him under section 325 (1). Judgment includes both conviction and acquittal. Thus the C.J.M. can even acquit the acused forwarded to him under section 325 (1). If the referring Magistrate has convicted the accused then the judgment of his acquittal by C.J.M. will amount to allowing an appeal against conviction. But under section 374 (3) such appeal lies to Court of Sessions and not to the C.J.M. Further, if the referring Magistrate passes a judgment of conviction then the C.J.M. will be procluded from passing another judgment due to the bar of section 300. Therefore, also, for harmonious construction of these provisions, it is necessary that the Magistrate submitting the proceedings under section 325 (1), should refrain himself from convicting the accused.

However, if the referring Magistrate convicts the accused under section 325 (1), the conviction will be erroneous and it will be treated as surplusage or as a legal nullity and the C.J.M., to whom the proceedings have been submitted, can ignore it and proceed with the case.

As a result of the above discussion, the Magistrate, under section 325 (1) of Code, should refrain himself from convicting the accused but should only record his opinion that the accused is guilty.

If all the accused, in the opinion of the Magistrate are guilty, but the Magistrate considers that only one or some of them deserve more severe punishment then under section 325 (2), all the accused persons should be forwarded to the C.J.M. But if the Magistrate is of the opinion that one or some of them are guilty and others are not, the later are entitled to an order of acquittal and only former should be forwarded to C.J.M. *Sultan Muhammad Khan and others Vs. Emperor (A.I.R. 1926 Allahabad 176).* Under these circumstances, the accused who, in the opinion of the Magistrate, is not guilty of the offence should be acquitted by an order of acquittal and others be forwarded to the C.J.M.

To sum up the procedure for submitting the proceedings and forwarding the accused to the C.J.M., under section 325 shall be as follows :-

1. The trial Magistrtate shall hear the evidence of the prosecution and the accused.
2. He should record his opinion that the accused or the accused persons, as the case may be, is/are guilty.
3. He should further record his opinion that such accused persons or any of them, as the case may be, ought to recieve a punishment diferent in kind from, or more severe than that which he is empowered to inflict.

   OR

   If he is a Magistrate of second class, he should record his opinion that the accused or any one of them, as the case may be, ought to be required to execute a bond under section 106.
4. He should submit his proceedings of the case to the C.J.M. to whom he is subordinate.
5. He should forward the accused or accused persons, as the case may be, to such C.J.M.
6. Even if, he considers that one or more of such accused persons deserve treatment as stated in paragraph 3 above he should forward all the accused persons, who, in his oipinion, are guilty. If some of them, in his opinion, are not guilty, he should acquit them by an order of acquittal and forward only rest of the accused persons to the C.J.M.
7. The C.J.M. to whom such proceedings are submitted and such accused or accused persons is/are forwarded, may in his discretion examine the parties and recall, examine any witness who has already given evidence in case and may call for and take any further evidence.
8. Such C.J.M. shall pass judgment, (both of conviction or acquittal), pass any sentence or pass any order (e.g. committing the case to the Court of Sessions or to deal with the accused under the Law of Probation) and as is according to law.

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OFFENCES UNDER SECTIONS 279 & 337 IPC - CONVICTION & SENTENCE

JUDICIAL OFFICERS
District Chhatarpur

Offences under sections 279 and 337 IPC are two different offences arising out of one and the same criminal act of the accused. The provisions under Sections 279 and 337 of the Indian Penal Code, 1860 are as follows :

279. Rash driving or riding on a public way.- Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

337. Causing hurt by act endangering life or personal safety of others.- Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with inprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundered rupees, or with both.

Offence under section 279 IPC is rather more specific offence than that under section 337 IPC which has wider scope in its application. In the former, only the specific act of rash and negligent driving of a vehicle or riding on a public way endangering human life or even causing likelihood of hurt or injury to any other person, shall be punishable with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees or with both. In the later any sort of rash and negligent act endangering human life or the personal safety of others and causing hurt (simple) to any person shall make the offender liable to imprisonment of either description for a term which may extend to six months, or to fine which may extend to five hundred rupees or with both. As such the salient ingredient of endangering human life and personal safety of others by rash and negligent act, is of course, common to both the offences. If hurt is caused by that act, only section 337 IPC will be applicable.

If both the offences are committed in course of the same transaction they must be regarded as the outcome of the single composite criminal act. As such no one can be punished twice for the same act. It is one this principle of natural justice, the provisions of section 71 IPC have been incorporated which are as under:-

> **"71. Limit of punishment of offence made up of several offences-** Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the

punishment of more than one of such his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

In the above context it has been ruled long back by the Full Bench of our erstwhile Madhya Bharat High Court in *State V Gulam Meer, AIR 1956 MB 141* that an offence under section 279 IPC is distinct from offence under section 337 or 338 IPC and, therefore, a person convicted of an offence under section 337 or 338 IPC, can also be convicted of an offence under section 279 IPC. If, however, the two offences are committed in the same transaction, section 71 IPC will govern the assessment of punishment. In *Roopchand v. State of Chhattisgarh, 2001 (1) MPHT 22 (CG),* it is held by Hon'ble Chhattisgarh High Court that since the rash and negligent act under section 279 IPC provides foundation for conviction under sections 337 and 338 IPC, separate sentences could not be passed as act of negligent driving would merge in act covered under section 338 IPC.

In the case of *State of Karnataka v. Sharanappa Basnagouda Aregoudar, 2002 SCC (vi) 704* Hon'ble the Apex Court confirmed the conviction of the respondent accused under sections 279, 338 and 304-A IPC and sentence for offence under section 304-A IPC as imposed by the trial Court and affirmed by the appellate Court. As regards offences under sections 279, 337 and 338 IPC, no separate sentence was awarded, however, the trial court's direction, thereof, was also maintained. In this case question of awarding of sentence for the offences aforesaid had not been considered at all in the light of provisions of section 71 IPC. Hence, it remains still a point debatable whether separate sentences could be passed in a case involving offences under sections 337, 338 and 304-A IPC, though committed in the same transaction but related to various victims so as to form different parts of the same transaction.

Having considered the question of conviction and sentence for offences under sections 279 and 337 IPC, committed in the same course of transaction, within the purview of the above rulings of the Madhya Bharat and Chhattisgarh High Courts, it is amply clear that the offender, although, can be held guilty for both the offences but in view of the provisions of part III and IV of section 71 IPC, can only be awarded sentence under section 279 IPC which provides more severe punishment than section 337 IPC.

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सिविल एवं आपराधिक प्रकरणों के लम्बित/निराकृत अभिलेख के पुनर्निर्माण की प्रक्रिया

न्यायिक अधिकारीगण
जिला इन्दौर

सर्वप्रथम यहाँ यह स्पष्ट किया जाता है कि, मध्यप्रदेश व्यवहार न्यायालय नियम, 1961 मध्यप्रदेश नियम व आदेश आपराधिक, सिविल प्रक्रिया संहिता एवं दंड प्रक्रिया संहिता में न्यायिक अभिलेख के नष्ट होने या गुम हो जाने पर पुनर्निर्माण का कोई प्रावधान नहीं है। उक्त "सिविल नियम" के नियम 351 एवं "आपराधिक नियम" के नियम 499 में अभिलेख के गुम हो जाने पर जिला न्यायाधीश को प्रशासनिक स्तर पर कार्यवाही करने के संबंध सूचित करने विषयक नियम, विचारणीय प्रश्न अर्थात अभिलेख के पुनर्निर्माण की प्रक्रिया पर कोई प्रकाश नहीं डालते हैं।

साम्पतिक या आपराधिक प्रकरण के नष्ट होने या गुम होने की स्थिति में उनके पुनर्निर्माण के बाबत् उच्च न्यायालय मध्यप्रदेश, जबलपुर ने ज्ञापन क्रमांक 1251/तीन/16-15/95 जबलपुर दिनांक 1.3.1996 एवं ज्ञापन क्रमांक ए/489/तीन-16-8, 82 जबलपुर दिनांक 15 जनवरी 1985 द्वारा निर्देश जारी किए हैं। उक्त दोनों ही ज्ञापन निम्नानुसार हैं :-

No. A/489/III. 16-8/82, Jabalpur, dated 18th Jan. 85

To,

The District & Sessions Judge

Sub : Loss of judicial records.

It has come to the notice of Hon'ble the Chief Justice that there are frequent incidents relating to loss of judicial records in various courts and unnecessary references are made seeking orders for reconstruction of the lost records.

I am, therefore, directed to request you to take all necessary steps for preventing such incidents in future.

As regards reconstruction of lost records, I am to point out that every court has inherent powers to reconstruct the lost records by noticing the concerned parties.

Sd/-

18.1.1985
Dy. Registrar

No. 1251/III 16-15/95m, Jabalpur, dated 1.3.1996.

To,

The District & Sessions Judge

Sub: Loss of Judicial records.

It has come to the notice of Hon'ble the Chief Justice that there are frequent incidents relating to loss of judicial records in various courts and unnecessary references are made seeking orders for reconstruction of the lost records.

I am, to say in this regard that reconstruction of record is a judicial matter and every Court has inherent power to reconstruct its lost or damaged records after notice to the parties and no permission from this Court is required for the purpose.

Kindly bring this to the notice of all the Judges/Magistrates working under you and ensure that unnecessary correspondence is avoided in such matters.

Sd/-
Additional Registrar.

उपरोक्त दोनों ही परिपत्रों में माननीय उच्च न्यायालय ने यह स्पष्ट किया है कि, अभिलेख के नष्ट होने या गुम होने की स्थिति में उसके पुनर्निर्माण हेतु किसी अनुमति की आवश्यकता नहीं है, बल्कि अभिलेख के पुनर्निर्माण का कार्य संबंधित न्यायालय को ही अंतरभूत शक्तियों के अधीन करना होगा, ऐसे कार्य को न्यायिक विषय होना ही माना गया है।

जैसा कि, पूर्व में लिखा गया है सिविल प्रक्रिया संहिता व दंड प्रक्रिया संहिता आदि में अभिलेख के पुनर्निर्माण के संबंध में कोई स्पष्ट प्रावधान नहीं है, लेकिन इस विषय में मरक्कारूट्टी एवं अन्य विरुद्ध वीरनकुट्टी एवं अन्य, ए.आई.आर. 1923 मद्रास 647 के न्यायदृष्टांत में माननीय मद्रास उच्च न्यायालय की पूर्णपीठ ने व्याख्या करते हुए यह ठहराया है कि, अभिलेखों के पुनर्निर्माण का कार्य सिविल प्रक्रिया संहिता की धारा 151 के अंतर्गत अन्तरनिहित शक्तियों का उपयोग करते हुए किया जा सकता है। माननीय मद्रास उच्च न्यायालय ने यह सारभूत सिद्धान्त प्रतिपादित किया है कि, प्रत्येक न्यायालय को गुम या नष्ट हुए अभिलेख के पुनर्निर्माण हेतु अन्तरभूत शक्तियाँ प्राप्त हैं और ऐसी अन्तरभूत शक्तियाँ अपीलीय न्यायालय को भी प्राप्त हैं। अपीलीय न्यायालय न केवल अपने न्यायालय का बल्कि विचारण न्यायालय के गुम हुए या नष्ट हुए अभिलेख का भी पुनर्निर्माण कर सकता है। अभिलेख का पुनर्निर्माण करते समय, यहाँ यह संभव है कि, न्यायालय पुनः सुनवाई के बहुत निकट पहुँचे, लेकिन न्यायालय को हमेशा अपने न्यायिक मस्तिष्क का उपयोग करते हुए यह सुनिश्चित करना आवश्यक होगा कि, प्रकरण का नष्ट हुआ या गुम हुआ अभिलेख क्या था? ना कि, पक्षकारों के अधिकार क्या थे ?

माननीय मद्रास उच्च न्यायालय ने यह भी प्रतिपादित किया है कि, यह उस न्यायाधीश को ही, जिसके समक्ष अभिलेख के पुनर्निर्माण हेतु आवेदन किया गया है, सुनिश्चित करना होगा कि, अभिलेख का पुनर्निर्माण करते समय क्या प्रयास किया जाना आवश्यक है ? ऐसा करते समय वह शपथपत्रों, प्रतिशपथपत्रों, साक्षियों की सुनवाई और दस्तावेजात की प्रतिलिपियों की स्वीकृति आदि रीतियों, जिन्हें प्रकरण की परिस्थितियों को देखते हुए उचित समझे, को अपना सकता है। ऐसा करते समय न्यायाधीश द्वारा सर्वोत्तम साक्ष्य, जो उपलब्ध हो, प्राप्त की जायेगी।

अपीलीय मामले में न्यायालय किसी प्रकरण में उचित समझे तो अधिनस्थ न्यायालय से भी इस संबंध में जानकारी प्राप्त कर सकता है कि ऐसा गुम हुआ या नष्ट हो गया अभिलेख क्या था ? अपीलीय न्यायालय के मामले में कुछ में यह अधिक सुविधाजनक हो सकेगा कि, अधीनस्थ न्यायालय, जिसके द्वारा प्रकरण की सुनवाई की गई है और जहां ऐसा अभिलेख तैयार हुआ हो, उसका पुनर्निर्माण करे और इसके लिए अपीलीय न्यायालय ऐसे मामले में अधीनस्थ न्यायालय को साक्ष्य अभिलिखित करने और इस संबंध में निषकर्ष देने कि, ऐसा अभिलेख क्या था? निर्देश दे सकता है और ऐसा निष्कर्ष प्राप्त होने के उपरांत भी अपीलीय न्यायालय उसे स्वीकृत या निरस्त करने को स्वतंत्र है। यहां यह भी उल्लेखनीय है कि, अपीलीय न्यायालय में अधीनस्थ न्यायालय के समक्ष ऐसे मामले में क्या हुआ? इसकी संभवतः बेहतर साक्ष्य, अधीनस्थ न्यायालय, जिसके द्वारा मामले की सुनवाई करते हुए विनिश्चय किया गया, के निर्णय में मिल सकती है और यदि ऐसा निर्णय अस्तित्व में है तो वह अधिसंभाव्य रूप से किसी अन्य साक्ष्य की अपेक्षा बेहतर साक्ष्य हो सकती है।

माननीय मद्रास उच्च न्यायालय ने यह भी प्रतिपादित किया है कि अपीलीय मामले में यदि न्यायालय अपने संतोष अनुसार अभिलेख का पुनर्निर्माण करने में असमर्थ है तो ऐसी परिस्थिति में यह ध्यान रखना होगा कि, अपीलार्थी पर ही यह भार होगा, कि वह अपने अपील के आधारों को स्थापित करे, और इसी प्रकार प्रत्यर्थी पर यह भार होगा कि, वह ऐसी अपील के संबंध में प्रस्तुत अपनी प्रति आपत्तियों, यदि कोई हों, को स्थापित करे।

माननीय मद्रास उच्च न्यायालय की पूर्णपीठ के उपरोक्त न्याय दृष्टांत में प्रतिपादित सिद्धान्त को ही माननीय मध्य भारत उच्च न्यायालय द्वारा वामनराव विरुद्ध मजबूत सिंह, ए आई आर 1955 एन यू सी (मध्य भारत) नोट नंबर 3823 में मान्यता देते हुए यह निर्धारित किया गया है कि, ऐसी परिस्थिति में संबंधित न्यायालय/अपीलीय न्यायालय को ही ऐसे अभिलेख के पुनर्निर्माण के संबंध में अन्तरभूत शक्तियां प्राप्त हैं। अपीलीय मामले में यह अपीलार्थी का ही कर्तव्य है कि उसकी अपील की सुनवाई के लिए वह न्यायालय को संतुष्ट करें कि प्रकरण का अभिलेख क्या था, जिसमें वह असफल रहा है और यदि अपीलीय न्यायालय अपनी संतुष्टि योग्य ऐसे अभिलेख का पुनर्निर्माण करने में असमर्थ रहता है तो अपीलार्थी और प्रत्यार्थी पर यह भार रहता है कि वे क्रमशः अपनी अपील के आधार और प्रति आपत्तियां, यदि कोई हों तो, स्थापित करें।

इसी प्रकार माननीय इलाहाबाद उच्च न्यायालय द्वारा उत्तरप्रदेश रोड ट्रांसपोर्ट कार्पोरेशन बनाम श्रीमती गीतादेवी एवं अन्य, एआईआर 1983 इलाहाबाद पृष्ठ 124 में यह सिद्धान्त प्रतिपादित किया गया है कि, न्यायालय का सबसे महत्वपूर्ण कर्तव्य यही होता है कि, न्यायालय के किसी कार्य से किसी भी पक्षकार

का अहित न हो और उसे क्षति न पहुंचे। यदि किसी कारण से न्यायालय का अभिलेख गुम हो गया है या आग जैसी घटना में नष्ट हो गया है तो ऐसी स्थिति में न्यायालय का यह कर्तव्य होगा कि, वह अभिलेख का पुनर्निर्माण करे, जिससे संबंधित पक्षों के बीच न्याय किया जा सके। जहाँ विधायिका द्वारा स्पष्ट प्रावधान करके अंतरभूत शक्ति का उपयोग किया जाना वर्जित किया गया हो, केवल वहीं ऐसी शक्तियों का उपयोग नहीं किया जायेगा और इसके विपरीत यदि ऐसा विशिष्ट वर्जन नहीं है तो यही माना जायेगा कि, न्यायालय को इस संबंध में अंतरभूत शक्तियां प्राप्त हैं और इसे दृष्टिगत रखते हुए न्यायालय को न्यायिक अभिलेख के पुनर्निर्माण की कार्यवाही करनी चाहिये।

इस संदर्भ में न्याय दृष्टांत 1968 काश्मीर लॉ जनरल पृष्ठ 101 (ए.आई.आर. मेन्युअल पांचवा संस्करण 1989 पृष्ठ 335) में तो यहां तक निर्धारित किया गया है कि आग से नष्ट हो गये अभिलेख के पुनर्निर्माण के संबंध में यह न्यायालय का ही बंधनकारी कर्तव्य है कि, वह सभी अपवादों के रहते हुए भी स्वयं ही इसका पुनर्निर्माण करे, इसके लिए किसी की ओर से आवेदन प्रस्तुत किया जाना आवश्यक नहीं है।

इस प्रकार उपरोक्त न्याय दृष्टांतों के आधार पर यह स्थिति स्पष्ट हो जाती है कि न्यायालय को ही नष्ट हुए या गुम हुए प्रकरण के अभिलेख का पुनर्निर्माण अंतरनिहित शक्तियों के अधीन करना चाहिये। यहां यह भी उल्लेखनीय है कि, ऐसे पुनर्निर्माण की प्रक्रिया में उपलब्ध दस्तावेजात मूल प्रतियां नहीं होती हैं, लेकिन उन्हें भारतीय साक्ष्य अधिनियम की धारा 65 (सी) के प्रावधानों को देखते हुए ही द्वितीयक साक्ष्य में ग्राह्य करते हुए उसी अनुरूप उपयोग किया जा सकता है, यही विधिक स्थिति आपराधिक मामलों के लिए भी समान रूप से लागू होगी।

वर्तमान में परिप्रेक्ष्य में अभिलेख के पुनर्निर्माण में यदि न्यायाधीशों द्वारा पर्याप्त रुचि लेकर सजगता से अभिलेख के पुनर्निर्माण हेतु कार्य किया जायेगा तो अभिलेख के पुनर्निर्माण का कार्य हो सकना कठिन नहीं है , क्योंकि वर्तमान में साम्पतिक मामलों में दोनों ही पक्षों के द्वारा एक दूसरे को दस्तावेजों की प्रतिलिपियाँ दी जाती है तथा वाद पत्र व प्रतिवाद पत्र व अन्य आवेदन पत्रों की प्रतिलिपियां दोनों ही पक्षों के पास रहती है। इस तरह दोनों पक्षों से एक दूसरे द्वारा दी गई, प्रतिलिपियां प्राप्त कर अभिलेख के पुनर्निर्माण की कार्यवाही हो सकती है। इसी प्रकार पक्षकारों के उपस्थित साक्षियों के कथन, निर्णय की प्रतिलिपि आदि भी प्राप्त कर अभिलेख के पुनर्निर्माण की कार्यवाही पूर्ण की जा सकती है।

इसी तरह आपराधिक मामलों में भी अभियोग पत्र, जिसकी एक प्रतिलिपि अभियोजन के पास होती है तथा आरोपी को भी इसकी एक प्रति दी जाती है, उसके आधार पर अभिलेख का पुनर्निर्माण किया जा सकता है। दोनों पक्षों से अभिलेख के पुनर्निर्माण हेतु दस्तावेजों व मामले में हुई साक्ष्य को किस तरह प्राप्त करना है, इस बारे में न्यायाधीश को परिस्थितियों के अनुसार सजगता से व स्वविवेक से निर्णय लेते हुए कार्य करना होगा। उक्त कार्य पूर्ण करने के लिए यहां कोई निश्चित प्रक्रिया का वर्णन कर पाना कठिन ही होगा। कहने का आशय यह है कि, अभिलेख के पुनर्निर्माण की प्रक्रिया को किसी सीमा में नहीं बांधा जा सकता है यह न्याय़ाधीश की कार्यकुशलता एवं कार्यक्षमता पर ही निर्भर करेगा कि, वह नष्ट हुए या गुम हुए अभिलेख का किस तरह सही रूप में पुननिर्माण का कार्य पूर्ण करे।

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JURISDICTION OF CIVIL COURTS REGARDING GRANT OF INTERIM INJUNCTION IN SERVICE MATTERS OF THE GOVERNMENT SERVANTS

JUDICIAL OFFICERS
District Damoh

The subject in hand "What should be the extent of jurisdiction of Civil Courts regarding grant of interim injunction in service matters of the Government Servants?", though gives as ostensible impression of being a simple one which can be answered without any mind-boggling exercise, however, as soon as we start descending down to the root of the question, a motley panorama of ever changing scenario begins to unfold it-self.

Even if we leave the historical aspect of the matter lie in rest and take stock of the matter as it came to exist after coming in to force of the Code of Civil Procedure, 1908 we still find our hands full with intricate legal puzzles staring straight into our eyes with an arrogant challenge.

Section 9 of the C.P.C. can very well serve as a stepping stone to delve deep into our subject which provides that the Courts shall have jurisdiction to try all suits of Civil nature unless they are expressly or impliedly barred. Now, the question arise what does the expression 'Civil nature' means? In the Black's legal dictionary word 'Civil' is defined as 'relating to provide rights and remedies sought by Civil actions as contrasted by Criminal Proceeding" and the nature has been defined as "the fundamental qualities of a person or thing, indentity or essential character". It is thus a wider term than the expression "Civil Proceedings" and the above definitions were relied upon by the Hon'ble Supreme Court of India in S.L.A. Narayan Rao Vs. Ishwarlal Bhagwandas, A.I.R. 1965 S.C. 1818, and Arvind Kumar Singh Versus Nand Kisore Prasad, A.I.R. 1968 S.C. 1227 and on their strength the Apex Court, in Most Rev. P.M.A. Metropolitan Vs. Moren Mar Marthoma, A.I.R. 1995 S.C.2001 has emphasised that Sec. 9 of the C.P.C. casts an obligation upon Civil Courts to entertain a suit of Civil nature unless that suit is expressly or impliedly barred.

In the light of the above mentioned definitions and observations of the Apex Court there is hardly any doubt that cases arising out of the service matters of the government servants which are not offences, are of Civil nature and the Civil Courts are duty bound to entertain them excepting suits of which their cognizance is either expressly or impliedly barred and deal with them in accordance with law which includes the jurisdiction to grant interim injunction in fit cases.

Though our subject does not limit itself to any territorial confines but for all practical purposes we are concerned with provisions of law relevant to our subject matter as they stand in M.P. and on that count from there onward we shall deal with the subject matter with special reference to the State of M.P. In 1984, M.P. State amendment was introduced to Order 39 Rule 2 of the C.P.C. which came in to force on 14-8-84. The amendment provided that no injunction under Order 39 rule 2 of the C.P.C. can be granted in contravention of the provisions of

the above amendment and any such injunction if granted shall be void.

Before the exact nature and scope of the amendment could be ascertained by Judicial scrutiny and practice the Administrative Tribunals Act 1985 fell like avalanche sweeping out every shred of jurisdiction relating to cases arising out of service matters of Govt. Servants away from the Civil Courts and investing the Central and State administrative tribunal set up under the said Act with exclusive original jurisdiction in the matter. State of M.P. was no exception to that.

In Madhya Pradesh, State Administrative Tribunal (hereinafter called SAT) continued to exercise exclusive original jurisdiction in the cases arising out of service matters of the Government servants subject to the provisions of Sec. 2 of the Administrative Tribunals Act, 1985 up to 17.4.03. Now once again the position has been restored as it existed before setting-up of the SAT. Section 3 (1) of the M.P. Rajya Prashashnik Adhikaran (Lambit Evam Nirakrit Avedano Ka Antaran) Adhyadesh, 2003 says that "any plaint or other proceeding which was transfered by any Civil Court and is pending on the appointed day before the tribunal shall stand transferred to the same Civil Court from which it was transferred and in case such Court is not in existence then to the Court of competent jurisdiction in its place and such Court shall proceed to dispose of the same as it were plaint under the C.P.C.

As we have seen earlier Civil Courts have jurisdiction to entertain cases of civil nature arising out of the service matters of the government servants and in fit cases grant temporary injunctions subject to the provisions and settled principles of law regulating the grant of interim injunctions. Now the effect of the M.P. State amendment to Order 39 Rule 2 C.P.C. is to be ascertained. Provisions of the amendment relevant to our subject matter are as follows :-

Provided that no such injunction shall be granted-

(a) Where perpetual injunction cannot be granted in view of Sec. 38 and 41 of the Specific Relief Act, 1963, or

(b) to stay operation of an order for transfer, suspension, reduction in rank, compulsory retirement, dismissal, removal or otherwise termination of service of or taking charge from any person appointed to public service and post in connection with the affairs of the State, or

(c) to stay any disciplinary proceeding pending or intended or the effect of any adverse entry against any person appointed to public service and post, in connection with the affairs of the State.

And the expression 'any person appointed to Public service and post in connection with the affairs of the State', is a wider term which includes government servants the term mentioned in our subject.

Even a plain reading of the amendment reveals that the embargo placed by it, is of limited nature. On the one hand it covers only some of the service matters like transfer, suspension, reduction in rank, compulsory retirement, dismissal, removal or otherwise termination of service of taking charge from disciplinary proceedings and any adverse entry against a govt. servant leaving beyond its

perview many other like, remuneration allowances, pension, promotion, retirement benefits, confirmation and seniority etc., and on the other hand even in matters covered by clause (b) and (c) of the amendment the courts are barred from granting only those interim injunction which tends to stay the operation of the order or proceedings mentioned in those clauses of the amendment.

Like M.P. amendment, there is also U.P. amendment to the Order 39 rule 2 which is exactly the same as M.P. amendment as far as service matters of the government servants are concerned and Hon'ble Allahabad High Court has come down heavily upon the amendment. Dubbing it as improper, Hon'ble Court has observed :-

> "Order 39 Rule 2 as it applies to the State of U.P., is not proper as this amendment reflects on the faith and confidence of the subordinate courts by implication suggests that the subordinate judiciary is not to be trusted with power to consider the grant of injuction in certain subject and matters. Notwithstanding any thing contained in Order 39 Rule 2 as applicable in U.P. in a case of fraud and falsehood by a party to a litigation the Court has power inherent to protect itself and further stall the perpetuation of fraud. A.I.R. 1990 All. 188."

The views expressed by the Hon'ble Allahabad High Court are in confirmity with the long cherished tradition of Judiciary in India to look with disdain at the ever increasing tendency of the executive and legislature to curtail the jurisdiction of the Courts of law at the earliest possible opportunity. However, in absence of any such judicial pronouncement by the Hon'ble High Court of M.P. or the Hon'ble Supreme Court, on the M.P. amendment to Order 39 Rule 2 of the C.P.C. that amendment still holds ground in M.P. So, the legal position of our subject matter as it exists today in Madhya Pradesh is as follows :-

As the M.P. amendment to Order 39 Rule 2 of the C.P.C. still holds ground in M.P., Civil Courts are barred lock, stock and barred from issuing an interim injunction to stay the operation of an order of transfer, suspension, reduction in rank, compulsory retirement, dismissal or otherwise termination of service or taking charge from a govt. servant or to stay, any disciplinary proceeding pending or intended or the effect of any adverse entry against any govt. servant, and any such injuction if issued, shall be void.

But the Civil Courts do have jurisdiction to issue iterim injunctions in suits relating to the service matters other than those covered by clause (b) and clause (c) of the M.P. amendment to order 39 rule 2 of the C.P.C. like remuneration pension, promotion etc. and that jurisdiction also extends to grant temporary injunction in cases involving service matters even covered by Clause (b) and (c) of the M.P. Amendment Act if they do not tend to stay the operation of any order or a proceedings mentioned in Clause (b) and (c) of the said amendment subject only to the provisions of law like Sec. 80 of the C.P.C., Sections 38 and 41 of the Specific Relief Act, 1963 etc. and settled principles of law like touch stones of prima facie case, balance of convenience and irreparable injury etc., which have come to regulate the grant of interim injunctions in Civil suits in India.

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GRANT OF INTERIM INJUNCTION BY CIVIL COURT UNDER SECTION 9 OF THE ARBITRATION & CONCILIATION ACT, 1996 IN A CASE COMING WITHIN THE PURVIEW OF M.P. MADHYASTHAM ADHIKARAN ADHINIYAM, 1983

JUDICIAL OFFICERS
District Narsinghpur

The question before us for discussion is whether Civil Court has jurisdiction to grant relief of interim injunction under section 9 of Arbitration & Conciliation Act, 1996 in a case coming within the purview of M.P. Madhyastham Adhikaran Adhiniyam, 1983.

Two Acts are involved in this question, first one is Arbitration & Conciliation Act, 1996 and second one is M.P. Madhyastham Adhikaran Adhiniyam, 1983. First we have to discuss about Arbitrations & Conciliation Act, 1996. This Act has come into force from 25-1-1996. It seeks to provide for an effective mode of settlement of disputes between the parties. The object of this Act is to minimise the supervisory role of Courts in the arbitral process.

Section 7 of the said Act defines "arbitration agreement" as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not.

Section 9 of the Act provides as under :-

9. Interim measures etc. by Court.- A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court:-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings ; or

(ii) for an interim measure of protection in respect of any of the following matters, namely :-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement ;

(b) securing the amount in dispute in the arbitration ;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter or the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence ;

(d) interim injunction or the appointment of a receiver ;

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

Now the second part of our discussion is about the provisions of the M.P. Madhyastham Adhikaran Adhiniyam, 1983. This Act has come into force from 7th October, 1983 to provide for the establishment of a tribunal to arbitrate in **dispute** to which the State Government or a public undertaking owned or controlled by the state government is party and for matters incidental thereto or connected therewith.

Section 2(d) of the Adhiniyam difines **"dispute"**. It means any difference relating to any claim valued at Rs. 50,000/- or more, arising out of the execution or non-execution of a **works contract** or part thereof.

According to section 2 (i) of the Adhiniyam, **works contract** means an agreement for the execution of any work relating to construction, repairs or maintenance of any building or super structure, dam, weir, canal, reservior, tank, lake, road, well, bridge, culvert, factory, workshop or such other works of the state government or public undertakings as the state government may be notification, specify in this behalf, at any of its stages, entered into by the State Government or by an official for and on behalf of such public undertaking and includes an agreement for the supply of goods or material and all other matters relating to the execution of any of said works.

Section 7 of the Adhiniyam provides that either party to **works contract** irrespective of the fact whether the agreement contains an arbiration clause or not, refer a dispute to the Tribunal. Section 20 of the Adhiniyam futher provides that from the date of constitution of tribunal and notwithstanding any thing contained in Arbitration Act or any other law for the time being in force or in any agreement or usage to the contrary, no Civil Court shall have jurisdiction to entertain or decide any dispute of which cognizance can be taken by the Tribunal under this Act.

In the case of **Kamini Malhotra Vs. State of M.P. & others** which is reported in **2002 (3) M.P.L.J. 389,** Hon'ble High Court has held that where the dispute between the parties was referable to the Madhyastham Adhikaran the jurisdiction of Civil Court is barred as provided under Section 7 & 20 of the M.P. Madhyastham Adhikaran Adhiniyam, 1983. So, Civil Court has no right to decide the application under section 9 of the Arbitration & Conciliation Act.

So, it would, therefore, be clear that Civil Court has no Jurisdiction to grant relief of interim injuction under section 9 of the Arbitration & Conciliation Act, 1996 in a case coming within the purview of M.P. Madhyastham Adhikaran Adhiniyam, 1983.

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PART - II

NOTES ON IMPORTANT JUDGMENTS

1. CRIMINAL PROCEDURE CODE, 1973-Section 145
Proceedings under Section 145, initiation of- Matter concluded by a decree of Civil Court or involved in a pending Civil Suit- Course to be adopted.
Janki Prasad Patel Vs. Ramswaroop and another
Reported in 2003 (4) MPHT 1 (NOC)

Held :

In this context, it shall be apposite to refer the decision of this Court rendered in the case of *Bhoopat Singh and others Vs. Anrath singh and others, 1991 (1) MPJR 145,* wherein Mr. R.C. Lahoti, J., (as then he was) has laid down the law thus:-

"15. Keeping in view the law laid down by Their Lordships of the Supreme Court, the following principles emerge:-

(i) Where the question of title stands concluded by a decree of a Competent Civil Court, the proceedings under Section 145, Cr. PC are totally misconceived, and the remedy lies in initiating proceedings under Section 107/116, Cr.PC and binding over the erring party so as to respect the decree of the Civil Court;

(ii) When a civil litigation is pending either before the Original Court or before the Appellate Court and looking to the nature and scope of the litigation, the parties are in a position to approach the Civil Court for interim orders such as injunction order or appointment of a receiver for adequate protection of the property during the pendency of the dispute or if there be such an order already existing, again there is no justification for initiating parallel criminal proceedings under Section 145/146, Cr.PC. If apprehension as to breach of peace is persisting, the remedy lies in taking recourse to proceedings under Section 107/116 or Section 144, Cr.PC;

(iii) If the proceedings under Section 145, Cr.PC have stood concluded by a final order of the Executive Magistrate, merely because as unsuccessful party has later on chosen to approach the Civil Court, the pendency of civil proceedings can not be permitted to be utilised as a ground for setting at naught the concluded order of the Criminal Court; the order of Criminal Court Section 145/146, Cr.PC should be permitted to operate unless and until superseded by an order or a decree of Civil Court. The Civil Court has jurisdiction to give a finding different from that which the Magistrate had reached;

(iv) If the nature and scope of civil litigation in such as where the Civil Court can not grant an interim relief (such as where the question of title and possession relating to immovable property is only incidentally in question and the Civil Court would not have jurisdiction to grant an interim relief) or where the Civil Court having been approached has refused to grant an interim relief for adequate protection of the property during the pendency of the suit, the jurisdiction of the Magistrate to adjudicate upon the dispute before it under Section 145/146, Cr.PC shall not be taken away merely because of the pendency of any dispute between the parties before the Civil Court."

In the case of *Ram Sumer Puri Mahant Vs. State of U.P. and others, AIR 1985 SC 472,* it has been held that when the parties have approached the Civil Court parallel proceeding under Section 145, Cr.PC can not be proceeded.

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2. ADVERSE POSSESSION:
Adverse possession inter se co-owners- Law explained.
Nand Kishore Vs. Ramesh Chandra and another
Reported in 2003 (4) MPHT 114

Held :

There can be no adverse possession *inter se* real brother or *inter se* co-owners for the reason that unless the partition takes place, every co-owner is held to be in possession of other co-owner. In such circumstances, the element of hostility and/or animus is totally missing. It being a settled rule of law relating to adverse possession that mere long possession in itself does not ripe into a hostile one, nor it results in conferring of full ownership on the principle of adverse possession. It has application to the facts of the case.

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3. JUVENILE JUSTICE ACT, 1986-Section 32
Determination of age by competent authority u/s 32-Subject to appeal u/s 37 such determination is final.
Smt. Anjana Benerjee Vs. Aajad Kumar Ratna
Reported in 2003 (II) MPJR 376

Held :

Section 32 of the Act of 1986 contemplates full dress enquiry for deciding as to whether an accused on the date of offence, was a juvenile or not. Learned Magistrate made a detailed enquiry by affording opportunity to parties to adduce oral and documentary evidence and also giving them right of cross examination. Sub-section (2) of Section 32 of the Act of 1986 specifically provides that the age recorded by the competent authority for the purposes of the Act be deemed to be the true age of that person. Section 37 of the 'Act of 1986' makes provisions for the appeal against the order of competent authority, before the Court of Session. The period of limitation prescribed for such an appeal is thirty days.

Undisputedly, no appeal has been filed by either party under Section 37 of the Act of 1986, therefore, the age determined by the J.M.F.C., Maihar shall be deemed to be the true age of the respondent on the date of commission of offence.

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4. SERVICE LAW :
Termination order, whether punitive or not- Test to determine.
Ashok Kumar Vishwakarma Vs. State and others
Reported in 2003 (II) MPJR 379

Held :

Recently the Supreme Court has reviewed the entire case law on this point in *P.N. Verma Vs. Sanjay Gandhi P.G.I. of Medical Sciences, AIR 2002 SC 23* and it has been laid down : "one of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing the termination has been upheld.

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5. CRIMINAL PROCEDURE CODE, 1973-Section 228
Charge, framing of- Principles to be followed.
Hemraj and others Vs. State of M.P.
Reported in 2003 (II) MPJR 389

Held :

From the aforesaid pronouncement of law, the legal principle that emerges is that at the time of framing of charge though Court is required to exercise judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution but It is not necessitous to enter or probe into the pros and cons of the matter and to weigh or balance the evidence and probabilities. The evaluation of the material with niceties or scanning with the subtleties is not permissible. The Court is required to see from the facts whether accepted on the face value of the material the ingredients of the offences alleged are in existence.

In the case of *Imtiaz Ahmed Vs. State of Madhya Pradesh, 1997 (1) MPLJ 683,* Rajeev Gupta, J. after referring to the decision rendered in the case of State of *Maharashtra v. Som Nath Thapa, AIR 1996 SC 1744* in paragraph 6 expressed the view as under :

> "6. As the tendency of framing 'common charges', in a trial involving more than one accused, is on the increase, it is high time to check the above trend. An accused can be made to face trial on a particular charge/sheet/complaint against that accused and not on the material

available against his co-accused. It is, therefore, always incumbent on the trial Court, while considering the framing of charges against the accused persons in a trial, involving more than one accused, to evaluate the material, available against each and every accused, individually for ascertaining the culpability of each and every accused and then frame charge/charges against each and every accused accordingly."

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6. **GENERAL CLAUSES ACT, 1897-Section 6-A**
Effect of Repealing and Amending Act- It has no effect on the amendment made in parent Act.
Smt. Phoolmati Bai Vs. Mohd. Azad
Reported in 2003 (II) MPJR 394

Held :

The object of Repealing and Amending Acts is not to bring in any change in law but to remove enactments which have become unnecessary. Mostly, they expurgate amending Acts, because having imparted the amendment to the main Acts, those Acts have served their purpose and have no further reason for their existence. The repeal of an amending Act, therefore, has no repercussion on the parent Act which together with the amendments remains unaffected. The legal position is clear by reading Section 6-A of the General Clauses Act, 1897 and Section 4 of the Repealing and Amending Act, 2001 that the repealing of the amending Act does not affect the amendment made in Section 140 of the Motor Vehicles Act, 1988. This view of the effect of Repealing and Amending Acts is also concluded by a decision of the Supreme Court rendered in the case of *Jethanand Vs. State of Delhi, AIR 1960 SC 89.*

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7. **CRIMINAL PROCEDURE CODE, 1973-Section 401**
Revision at the instance of complainant- Held, maintainable.
K. Pandurangan Vs. S.S.R. Velusamy and another
Judgment dt. 18.9.2003 by the Supreme Court in Criminal Appeal No. 1682 of 1996, reported in 2003 AIR SCW 4712

Held :

So far as the first question as to the maintainability of the revision at the instance of the complainant is concerned, we think the said argument has only to be noted to be rejected. Under the provisions of Code of Criminal Procedure, 1973, the Court has suo motu power of revision, if that be so, the question of the same being invoked at the instance of an outsider would not make any difference because ultimately it is the power of revision which is already vested with the High Court statutorily that is being exercised by the High Court. Therefore, whether the same is done by itself or at the instance of a third party will not affect such power of the High Court. In this regard, we may note the following judg-

ment of this Court in the case of *Nadir Khan v. The State (Delhi Administration), (AIR 1976 SC 2205).*

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8. CIVIL PROCEDURE CODE, 1908- Section 92
Suit under Section 92, nature of- It is a representative suit- Held, decree in such suit binds entire body of interested persons.
Shiromani Gurdwara Parbandhak Committee Vs. Mahant Harnam Singh and others
Judgment dt. 16.9.2003 by the Supreme Court in Civil Appeal No. 3348 of 1993, reported in 2003 AIR SCW 4757

Held :

As observed by this Court in *R. Venugopala Naidu and others v. Venkatarayulu Naidu Charities and others (AIR 1990 SC 444)* a suit under Section 92, CPC is a suit of special nature for the protection of public rights in the public trust and charities. The suit is fundamentally on behalf of the entire body of persons who are interested in the trust. It is for the vindication of public rights. The beneficiaries of the trust, which may consist of public at large, may choose two or more persons amongst themselves, for the purpose of filing a suit under Section 92, CPC and the suit-title in that event would show only their names as plaintiffs. Can we say that the persons whose names are in the suit title are the only parties to the suit? The answer would be in the negative. The named plaintiffs being the representatives of the public at large which is interested in the trust, all such interested persons would be considered in the eyes of law to be parties to the suit. A suit under Section 92, CPC is thus a representative suit and as such binds not only the parties named in the suit-title but all those who share common interest and are interested in the trust. It is for that reason that Explanation VI to Section 11 of CPC constructively bars by re judicata the entire body of interested persons from re-agitating the matter directly and substantially in issue in an earlier suit under Section 92, CPC.

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9. TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1987- Section 15
Confessional statement of co-accused, value of- May be sole basis of conviction- Law explained.
Sukhwant Singh Vs. State through C.B.I.
Judgment dt. 23.9.2003 by the Supreme Court in Criminal Appeal No. 733 of 2003, reported in 2003 AIR SCW 4776

Held :

In our earlier judgment reported in *2003 (4) Scale 402,* we held thus :

(i) if the confessional statement is properly recorded, satisfying the mandatory provision of Section 15 of the TADA Act and the Rules made thereunder, and if the same is found by the Court as having been made voluntarily and truth-

ful then the said confession is sufficient to base a conviction on the maker of the confession.

(ii) Whether such confession requires corroboration or not, is a matter for the Court considering such confession on facts of each case.

(iii) In regard to the use of such confession as against a co-accused, it has to be held that as a matter of caution, a general corroboration should be sought for but in cases where the Court is satisfied that the probative value of such confession is such that it does not require corroboration then it may base a conviction on the basis of such confession of the co-accused without corroboration. But this is an exception to the general rule of requiring corroboration when such confession is to be used against a co-accused.

(iv) The nature of corroboration required both in regard to the use of confession against the maker as also in regard to the use of the same against a co-accused is of general nature, unless the Court comes to the conclusion that such corroboration should be on material facts also because of the facts of a particular case. The degree of corroboration so required is that which is necessary for a prudent man to believe in the existence of facts mentioned in the confessional statement.

(v) The requirement of sub-rule (5) of Rule 15 of the TADA Rules which contemplates a confessional statement being sent to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate who, in turn, will have to send the same to the Designated Court is not mandatory and is only directory. However, the Court considering the case of direct transmission of the confessional statement to the Designated Court should satisfy itself on facts of each case whether such direct transmission of the confessional statement in the facts of the case creates any doubt as to the genuineness of the said confessional statement.

3. In the present case we are aware of the fact that the appellant has not made any confessional statement nor there is any corroboration of the confessional statement of the co-accused implicating this appellant from any other independent source but then we have held in the above reported case that if confessional statement of a co-accused is acceptable to the Court even without corroboration then a confession of a co-accused can be the basis of conviction of another accused so implicated in that confession. Therefore the fact that the appellant herein has not confessed or the confessional statements made implicating him by A-1 and A-2 are not independently corroborated, will not be a ground to reject the evidence produced by the prosecution in the form of confessional statement of co-accused provided the confession relied against the appellant is acceptable to the Court.

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10. INDIAN SUCCESSION ACT, 1925-Sections 223, 236
Society registered under Societies Registration Act, 1860 not a juristic person-Grant of letter of Administration in favour of society not permissible.

Illachi Devi (Dead) through LRS and others Vs. Jain Society, Protection of Orphans India and others
Judgment dt. 26.9.2003 by the Supreme Court in Civil Appeal No. 8080 of 2003, reported in 2003 AIR SCW 4824

Held :

A society registered under the Societies Registration Act is not a body-corporate as is the case in respect of a company registered under the Companies Act. In that view of the matter, a Society registered under the Societies Registration Act is not a juristic person. The law for the purpose of grant of a probate or Letter of Administration recognises only a juristic person and not mere conglomeration of persons or a body which does not have any statutory recognition as a juristic person.

It is well known that there exists certain salient differences between a society registered under the Societies Registration Act, on the one hand, and a company corporate, on the other, principal amongst which is that a company is a juristic person by virtue of being a body corporate, whereas the society, even when it is registered, is not possessed of these characteristics. More, a society whether registered or unregistered, may not be prosecuted in Criminal Court, nor is it capable of ownership of any property or of suing or being sued in its own name.

Although admittedly, a registered society is endowed with an existence separate from that of its members for certain purposes, that is not to say that it is a legal person for the purposes of Sections 223 and 236 of the Act. Whereas a company can be regarded as having a complete legal personality, the same is not possible for a society, whose existence is closely connected, and even contingent, upon the persons who originally formed it. Inasmuch as a company enjoys an identity distinct from its original shareholders, whereas the society is indistinguishable, in some aspects, from its own members, that would qualify as a material distinction, which prevents societies from obtaining letters of administration.

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11. CRIMINAL TRIAL :
Identification of accused- Witness stating identification in torch light- Non-Mention of torch in FIR or in police statement is inconsequential - Identification, other factors.
State of U.P. Vs. Babu and others
Judgment dt. 24.9.2003 by the Supreme Court in Criminal Appeal No. 1683 of 1996, reported in 2003 AIR SCW 4841

Held :

This Court in *Shakti Patra and another v. State of West Bengal (AIR 1981 SC 1217)* held that where prosecution witness testified that he had identified the accused in the light of the torch held by him, the presence of torch would not be

said to be not proved on the ground that there was no mention of the torch in the FIR or in the statement of the witness before the police, when there was testimony of other witnesses that when they reached the spot they found the torch burning. To similar effect is the conclusion in *Aher Pitha Vajshi and others v. State of Gujarat (AIR 1983 SC 599).*

Apart from the mention about the torchlight, one important aspect which cannot be lost sight of and which is of relevance and great significance is that the accused persons are known to the witnesses. When the persons are known, identification is possible from the manner of speech, manner of walking and gesticulating and special features of a person like the physical attributes.

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12. TRANSFER OF PROPERTY ACT, 1882- Section 109
Transferee landlord's right to recover pre-transfer arrears of rent- Right accrues if there is assignment of such arrears.
Sheikh Noor Vs. Sheikh G.S. Ibrahim (Dead) through LRS
Judgment dt. 4.8.2003 by the Supreme Court in Civil Appeal NO. 5485 of 1993, reported in (2003) 7 SCC 321

Held :

The substantive part of Section 109 of the Transfer of Property Act read with the proviso necessarily indicates that the arrears of rent due is one of lessor's right as to the property transferred. Right to recover the arrears of rent vested with the original owner and on transfer of all his rights, the same vests in the transferee as per provisions of Section 109 of the "Transfer of Property Act. Proviso to Section 109 clearly indicates that if there is an assignment of rent due then the transferee landlord would be entitled to recover the same from the tenant as arrears of rent.

In view of the cases referred to above, in our opinion, the correct position of law is that a transferee is not entitled to recover the arrears as rent for the property on transfer unless the right to recover the arrears is also transferred. If right to recover the arrears is assigned, then the transferee landlord can recover those arrears as rent and if not paid, maintain a petition for eviction under the rent laws for those arrears as well. Since in this case we have found that there was an assignment of right to recover the arrears in favour of the respondent transferee he was entitled to recover the same as arrears of rent.

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13. CIVIL PROCEDURE CODE, 1908- O.8 R.6-A and O.8 R.10 (as it stood prior to 1-7-2002)
SPECIFIC RELIEF ACT, 1963-Section 6,9 and 34

(i) Counter-claim-Different modes of pleading/setting up counter-claim- Law explained.

(ii) Ex prate proceedings- Court should frame points for determination- Decision not to be influenced by irrelevant or inadmissible evidence.

(iii) Suit for declaration and possession based on possessory relief- Law explained.

Ramesh Chand Ardawatiya Vs. Anil Panjwani

Judgment dt. 5.5.2003 by the Supreme Court in Civil Appeal No. 7919 of 2001, reported in (2003) 7 SCC 350

Held :

Looking to the scheme of Order 8 as amended by Act 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter-claim in a civil suit. Firstly, the written statement filed under Rule I may itself contain a counter-claim which in the light of Rule I read with Rule 6-A would be a counter-claim against the claim of the plaintiff preferred in exercise of legal right conferred by Rule 6-A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the court in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading under Rule 9. In the latter two cases the counter-claim though referable to Rule 6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the court, either under Order 6 Rule 17 CPC if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the court under Order 8 Rule 9 CPC if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the court, the court would be justified in exercising its discretion not in favour of permitting a belated counter-claim The framers of the law never intended the pleading by way of counter-claim being utilized as an Instrument for forcing upon a reopening of the trial or pushing back the progress of proceeding. Generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced. But certainly a counter-claim is not entertainable when there is no written statement on record. There being no written statement filed in the suit, the counter-claim was obviously not set up in the written statement within the meaning of Rule 6-A. There is no question of such counter-claim being introduced by way of amendment; for there is no written statement available to include a counter-claim therein. Equally there would be no question of a counter-claim being raised by way of "subsequent pleading" as there is no "previous pleading" on record. In the present case, the defendant having failed to file any written statement and also having forfeited his right of filing the same the trial court was fully justified in not entertaining the counter-claim filed by the defendant-appellant. A

refusal on the part of the court to entertain a belated counter-claim may not prejudice the defendent because in spite of the counter-claim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counter-claim.

In *Mahendra Kumar case* counter-claim was sought to be brought on record after the filing of a written statement which was turned down by the trial court upon a misreading of Rule 6-A (1) that the counter-claim filed after the filing of the written statement was *ipso facto* not maintainable. This Court upset such erroneous view by clarifying the legal position, apparent on a bare reading of the relevant provision that the only requirement of Rule 6-A (1) was that the cause of action for the counterclaim should have arisen before the filing of the written statement and if that was so, the counter-claim was not simply excluded. In *Shanti Rani Das Dewanjee case* the brief order of this Court deals with the situation that the right to file a counter-claim does not come to an end by filing of the written statement once. None of the two decisions deals with a situation as before us and the question of law arising therefrom, namely, whether it is permissible to raise and plead a counter-claim though the defendant has not filed a written statement and has also lost his right to file the same. On the contrary, in both the cases cited by the learned Senior Counsel for the appellant, there was a written statement filed by the defendant available on record and the counter-claim was sought to be pleaded in addition to the defence taken in the written statement. It is difficult to conceive the defendant being conferred with a right to *attack* the plaintiff by way of a counter-claim in that very suit in which he has been held entitled not even to *defend* himself by filing a written statement and pleading a positive defence to defend himself against the relief sought for by the plaintiff.

Even if the suit proceeds ex parte and in the absence of a written statement, unless the applicability of Order 8 Rule 10 CPC is attracted and the court acts thereunder, the necessity of proof by the plaintiff of his case to the satisfaction of the court cannot be dispensed with. In the absence of denial of plaint averments the burden of proof on the plaintiff is not very heavy. A prima facie proof of the relevant facts constituting the cause of action would suffice and the court would grant the plaintiff such relief as to which he may in law be found entitled. In a case which has proceeded ex parte the court is not bound to frame issues under Order 14 and deliver the judgment on every issue as required by Order 20 Rule 5. Yet the trial court should scrutinize the available pleadings and documents, consider the evidence adduced, and would do well to frame the "points for determination" and proceed to construct the ex parte judgment dealing with the points at issue one by one. Merely because the defendant is absent the court shall not admit evidence the admissibility whereof is excluded by law nor permit its decision being influenced by irrelevant or inadmissible evidence.

A contract for sale does not confer title in immovable property. Section 54 of the Transfer of Property Act provides that a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms

settled between the parties; it does not of itself, create any interest in or charge on such immovable property. However still, if a person has entered into possession over immovable property under a contract for sale and is in peaceful and settled possession of the property with the consent of the person in whom the title vests, he is entitled to protect his possession against the whole world, excepting a person having a title better than what he or his vendor possesses. If he is in possession of the property in part-performance of contract for sale and the requirements of Section 53-A of the Transfer of Property Act are satisfied, he may protect his possession even against the true owner. (See *Shrimant Shamrao Suryavanshi v. Pralhad Bhairoba Suryavanshi, (2002) 3SCC 676*). Section 6 of the Specific Relief Act, 1963, provides for any person dispossessed without his consent of immovable property otherwise than in due course of law being entitled to claim and successfully sue for recovery of possession thereof, notwithstanding any other title that may be set up in such suit if the suit is brought before the expiry of six months from the date of dispossession except against the Government. Article 64 of the Limitation Act, 1963 contemplates a suit for possession of immovable property based on previous possession, and not on title, being brought within twelve years from the date of dispossession. Such a suit is known in law as a suit based on possessory title as distinguished from proprietary title. The law discourages people from taking the law into their own hands, howsoever good and sound their title may be. Possession is nine points in law and law respects peaceful and settled possession. Salmond states in *Jurisprudence* (12th Edn.)-

> "These two concepts of ownership and possession, therefore, may be used to distinguish between the *de facto* possessor of an object and *its due jure* owner, between the man who actually has it and the man who ought to have it. They serve also to contrast the position of one whose rights are ultimate, permanent and residual with that of one whose rights are only of a temporary nature. (p.59)
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> In English law possession is a good title of right against anyone who cannot show a better. A wrongful possessor has the rights of an owner with respect to all persons except earlier possessors and except the true owner himself. Many other legal systems, however, go much further than this, and treat possession as a provisional or temporary title even against the true owner himself. Even a wrongdoer, who is deprived of his possession, can recover it from any person whatever, simply on the ground of his possession. Even the true owner, who takes his own, may be forced in this way to restore it to the wrongdoer, and will not be permitted to set up his own superior title to it. He must first give up possession, and then proceed in due course of law for the recovery of the thing on the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover

his possession, until deprived of it by a judgment according to law. Legal remedies thus appointed for the protection of possession even against ownership are called *possessory,* while those available for the protection of ownership itself may be distinguished as *proprietary.* In the modern and medieval civil law the distinction is expressed by the contrasted terms *petitorium* (a proprietary suit) and *possessorium* (a possessory suit)." (p. 60)

The law in India is not different. In *Nair Service Society Ltd. v. K.C. Alexander* the Court held-

> "The uniform view of the courts is that if Section 9 of the Specific Relief Act is utilized the plaintiff need not prove title and the title of the defendant does not avail him. When, however, the period of 6 months has passed questions of title can be raised by the defendant and if he does so the plaintiff must establish a better title or fail. In other words, the right is only restricted to possession only in a suit under Section 9 of the Specific Relief Act but that does not bar a suit on prior possession within 12 years and title need not be proved unless the defendant can prove one. The present amended Articles 64 and 65 bring out this difference. Article 64 enables a suit within 12 years from dispossession, for possession of immovable property based on possession and not on title, when the plaintiff while in possession of the property has been dispossessed. Article 65 is for possession of immovable property or any interest therein based on title. The amendment is not remedial but declaratory of the law. (AIR p. 1173, para 14)

The Court further held: (AIR p. 1173, para 15)

> "When the facts disclose no title in either party, possession alone decides."

The submission that a suit on bare possession cannot be maintained after the expiry of 6 months was termed by the Court as "unsubstantial" and the plea that a trespasser has a right to plead *jus tertii* was branded as "equally unfounded" by this Court (vide AIR para 15). M. Hidayatuallh, J., as His Lordship then was, speaking for the Court quoted with approval the maxim *"Possessio contra omnes valet praeter eur cul lus sit possessionis* (he that hath possession hath right against all but him that hath the very right) AIR para 20). Taking stock of English decisions and having noted what appeared to be a little divergence in jurisprudential thoughts, His Lordship opined that the controversy must be taken to have been finally resolved by *Perry v. Clissold* wherein the principle was stated quite clearly as under :

> "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but, the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by

the provisions of the statute of limitation applicable to the case, his right is forever extinguished and the possessory owner acquires an absolute title." (AIR p. 1174, para 17)

The conclusion in that case was summed up by this Court by holding that the plaintiff who was peaceably in possession was entitled to remain in possession and only the State could evict him (in whom vested the ultimate title); the action of the defendant was a violent invasion of his possession and in the law as it stands in India the plaintiff could maintain a possessory suit under the provisions of the Specific Relief Act, in which title would be immaterial or a suit for possession within 12 years in which the question of title could be raised. Any view to the contrary, in the opinion of this Court, would be detrimental to the rule of law as the Court, borrowing from Erle, *J. in Burling v. Read* held that where none has title and both the parties are trespassers, the title must be outstanding in a third party and then the defendant will be placed in a position of dominance. He is only to evict the prior trespasser and sit pretty pleading that the title is in someone else.

> "Parties might imagine that they acquired some right by merely intruding upon land in the night, running up a hut and occupying it before morning."
>
> This will be subversive of the fundamental doctrine which has always been accepted and reaffirmed in *Perry.* The law does not countenance the doctrine of "findings keepings".
>
> So, the person in possession may not have title to the property yet if he has been inducted into possession by the rightful owner and is in peaceful and settled possession of such property he is entitled in law to protect the possession until dispossessed by due process of law by a person having a title better than what he has. A person in possession of the property cannot be forcibly dispossessed by another rank trespasser and even if the latter does so, the former may be entitled to restoration of possession, because the law respects peaceful possession and frowns upon the person wo takes the law in his own hands.

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14. CONTEMPT OF COURTS ACT, 1971- Section 2 (c), 12 and 14
Contempt proceedings- Withholding right of participation in proceedings to the contemner- Law stated.
In the matter of Anil Panjwani
Judgment dt. 5.5.2003 by the Supreme Court in Contempt Petition (C) No. 426 of 2002, reported in (2003) 7 SCC 375

Held :

To our mind, the rule as to denying hearing or withholding right of participation in the proceedings to the contemner may briefly be summed up and so stated.

It lies within the discretion of the court to tell the contemner charged with having committed contempt of court that he will not be heard and would not be allowed participation in the court proceedings unless the contempt is purged. This is a flexible rule of practice and not a rigid rule of law. The discretion shall be guided and governed by the facts and circumstances of a given case. Where the court may form an opinion that the contemner is persisting in his behaviour and initiation of proceedings in contempt has had no deterrent or reformatory effect on him and/or if the disobedience by the contemner is such that so long as it continues it impedes the course of justice and/or renders it impossible for the court to enforce its orders in respect of him, the court would be justified in withholding access to the court or participation in the proceedings from the contemner. On the other hand, the court may form an opinion that the contempt is not so gross as to invite an extreme step as above, or where the interests of justice would be better served by concluding the main proceedings instead of diverting to and giving pripority to hearing in contempt proceeding the court may proceed to hear both the matters simultaneously or independently of each other or in such order as it may deem proper.

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15. CRIMINAL PROCEDURE CODE, 1973- Section 133
Public nuisance, meaning of- Provision contained in Water (Prevention and Control of Pollution) Act, 1974 and Air (Prevention and Control of Pollution) Act, 1981 do not have effect of implied repeal of Section 133.
State of M.P. Vs. Kedia Leather & Liquor Ltd.
Judgment dt. 19.8.2003 by the Supreme Court in Criminal Appeal No. 151 of 1996, reported in (2003) 7 SCC 389

Held :

Section 133 of the Code appears in Chapter X of the Code which deals with maintenance of public order and tranquillity. It is a part of the heading "Public nuisance". The term "nuisance" as used in law is not a term capable of exact definition and it has been pointed out in *Halsbury's Laws of England* that :

> "even in the present day there is not entire agreement as to whether certain acts or omissions shall be classed as nuisances or whether they do not rather fall under other divisions of the law of tort."

In *Vasant Manga Nikumba v. Baburao Bhikanna Naidu* it was observed that nuisance is an inconvenience which materially interferes with the ordinary physical comfort of human existence. It is not capable of precise definition. To bring in application of Section 133 of the Code, there must be imminent, danger to the property and consequential nuisance to the public. The nuisance is the concomitant act resulting in danger to the life or property due to likely collapse etc. The object and purpose behind Section 133 of the Code is essentially to prevent public nuisance and involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately irreparable damage would be done to the

public. It applies to a condition of the nuisance at the time when the order is passed and it is not intended to apply to future likelihood or what may happen at some later point of time. It does not deal with all potential nuisance, and on the other hand applies when the nuisance is in existence. It has to be noted that sometimes there is confusion between Section 133 and Section 144 of the Code. While the latter is a more general provision the former is more specific. While the order under the former is conditional, the order under the latter is absolute. The proceedings are more in the nature of civil proceedings than criminal proceedings.

One significant factor to be noticed is that the person against whom action is taken is not an accused within the meaning of Section 133 of the Code. He can give evidence on his own behalf and may be examined on oath. Proceedings are not the proceedings in respect of offences. The Water Act and the Air Act are characteristically special statutes.

While, as noted above, the provisions of Section 133 of the Code are in the nature of preventive measures, the provisions contained in the two Acts are not only curative but also preventive and penal. The provisions appear to be mutually exclusive and the question of one replacing the other does not arise. Above being the position, the High Court was not justified in holding that there was any implied repeal of Section 133 of the Code.

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16. INDIAN PENAL CODE, 1860- Section 409
Criminal breach of trust by public servant- Ingredients of the offence - Law explained.
Kailash Kumar Sanwatia Vs. State of Bihar and another
Judgment dt. 2.9.2003 by the Supreme Court in Criminal Appeal No. 904 of 1996, reported in (2003) 7 SCC 399

Held :

Section 409 IPC deals with criminal breach of trust by a public servant, or by a banker, merchant or agent. In order to bring in application of the said provision, entrustment has to be proved. In order to sustain conviction under Section 409, two ingredients are to be proved. They are:

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

(2) the accused has committed criminal breach of trust.

What amounts to criminal breach of trust is provided in Section 405 IPC. Section 409 is in essence criminal breach of trust by a category of persons. The ingredients of the offence of criminal breach of trust are:

(1) Entrusting any person with property, or with any dominion over property.

(2) The person entrusted (a) dishonestly misappropriating or converting to

his own use that property; or (b) dishonestly using or disposing of that property or wilfully suffering any other person so as to do in violation-

(i) of any direction of law prescribing the mode in which such trust is to be discharged; or

(ii) of any legal contract made touching the discharge of trust.

The basic requirement to bring home the accusations under Section 405 are the requirements to prove conjointly (1) entrustment, and (2) whether the accused was actuated by the dishonest intention or not; misappropriated it or converted it to his own use to the detriment of the persons who entrusted it. As the question of intention is not a matter of direct proof, certain broad tests are envisaged which would generally afford useful guidance in deciding whether in a particular case the accused had mens rea for the crime.

Because of an intervening situation, the disappearance of the cash due to theft by somebody else, the bank drafts could not have been prepared and handed over to the appellant. Even if there is loss of money, the ingredients necessary to constitute criminal breach of trust are absent. If due to a fortuitous or intervening situation, a person to whom money is entrusted is incapacitated from carrying out the job, that will not bring in application of Section 405 IPC or Section 409 IPC, unless misappropriation, or conversion to personal use or disposal of property is established.

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17. CONSUMER PROTECTION ACT, 1986-Section 9, 10 (1-A) and 24-B Transfer of President of District Forum to another Forum-Power lies with State Government-Mode of such exercise of power stated. State of Rajasthan and others Vs. Anand Prakash Solanki Judgment dt. 25.8.2003 by the Supreme Court in Civil Appeal No. 6733 of 2003, reported in (2003) 7 SCC 403

Held :

The questions arising for decision in this appeal are : whether a President or a member of the District Forum, constituted under Section 10 of the Consumer Protection Act, 1986 (hereinafter "the Act" for short) can be transferred and, if so, which is the competent authority to transfer them?

It is true that there is no cadre as such of the Presidents and the members of the District Fora contemplated by the Act and this is the principal consideration which has prevailed with the High Court for holding that the President and members of District Fora are not liable to be transferred inasmuch as there is no single cadre of such persons in the State. We cannot subscribe to that view. The existence of one cadre is not essential and is not the *sine qua non* to make available the power of transfer. As District Fora, more than one, are constituted within the State, there is nothing wrong in the President or members of one District Forum being appointed by transfer to another District Forum, subject to the requirement of sub-section (1-A) of Section 10 being satisfied. Such appointment

by transfer shall be made by the State Government but only on the recommendation of the Committee consisting of the President of the State Commission and two Secretaries i.e. the Committee composed as per sub-section (1-A) of Section 10. Such appointment by transfer cannot be a frequent or routine feature. The power is there but is meant to be exercised sparingly and only in public interest or in such exigencies of administration as would satisfy the purpose of constituting the District Forum. The broader concept of "transfer" is a change of the place of employment within an organization. Transfer is an incidence of public service and the power to transfer is available to be exercised by the employer unless an express bar or restraint on the exercise of such power can be spelt out. The power, like all other administrative powers, has to be exercised bona fide.

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18. ARBITRATION ACT, 1940- Sections 13, 16, 30 and 33
Reasonable opportunity of hearing- Conditions required to be observed.
Sohan Lal Gupta (Dead) through LRS and others Vs. Asha Devi Gupta (Smt.) and others
Judgment dt. 1.9.2003 by the Supreme Court in Civil Appeal No. 2809 of 1979, reported in (2003) 7 SCC 492

Held :

For constituting a reasonable opportunity, the following conditions are required to be observed:

1. Each party must have notice that the hearing is to take place.

2. Each party must have a reasonable opportunity to be present at the hearing, together with his advisers and witnesses.

3. Each party must have the opportunity to be present throughout the hearing.

4. Each party must have a reasonable opportunity to present evidence and argument in support of his own case.

5. Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral argument.

6. The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument.

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19. N.D.P.S. ACT, 1985- Sections 20 (b), 35, 54 and 50

(i) Section 50, applicability of- It does not extend to search of vehicle, container, bag or premises.

(ii) Conscious possession of contraband articles- Words 'Conscious' and 'Possession', meaning of- Unless contrary proved, possession is presumed conscious one.

Madan Lal and another Vs. State of M.P.
Judgment dt. 19.8.2003 by the Supreme Court in Criminal Appeal No. 786 of 2002, reported in (2003) 7 SCC 465

Held :

(i) A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises. (See *Kalema Tumba v. State of Maharashtra, (1999) 8 SCC 257, State of Punjab v. Baldev Singh, (1999) 6 SCC 172* and *Gurbax Singh v. State of Haryana, (2001) 3 SCC 28.* The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in *Baldev Singh Case, (1999) 6 SCC 172.* Above being the position, the contention regarding non-compliance with Section 50 of the Act is also without any substance.

(ii) Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offences for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

It is highlighted that unless the possession was coupled with the requisite mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Supt.. & Remembrance of Legal Affairs, W.B. v. Anil Kumar Bhunja, (1979) 4 SCC 274* to work out a completely logical and precise definition of "possession" uninformally applicable to all situations in the context of all statutes.

The word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended.

As noted in *Gunwantlal v. State of M.P., (1972) 2 SCC 194* possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given holds it subject to that power or control.

The word "possession" means the legal right to possession (See *Heath v. Drown, (1972) 2 All ER 561).* In an interesting case it was observed that where a person keeps his firearm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See *Sullivan v. Earl of Caithness, (1976) 1 All ER 844)*

Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory rec-

ognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.

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20. MOTOR VEHICLES ACT, 1988-Section 168
Compensation- Determination of just and reasonable compensation- Law explained- Deprivation of income from agriculture- Normal rule not applicable.
State of Haryana and another Vs. Jasbir Kaur and others
Judgment dt. 5.8.2003 by the Supreme Court in Civil Appeal No. 5523 of 2003, reported in (2003) 7 SCC 484

Held :

It has to be kept in view that the Tribunal constituted under the Act as provided in Section 168 is required to make an award determining the amount of compensation which is to be in the real sense "damages" which in turn appears to it to be *"just and reasonable"*. It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. But at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim, Statutory provisions clearly indicate that the compensation must be *"just"* and it cannot be a bonanza; not a source of profit; but the same should not be a pittance. The courts and tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of *"just"* compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just" a wide discretion is vested in the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression *"just"* denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so it cannot be just. (See *Helen C. Rebello v. Maharashtra SRTC, (1999) 1 SCC 90.* The land possessed by the deceased still remains with the claimants as his legal heirs. There is, however, a possibility that the claimants may be required to engage persons to look after the agriculture. Therefore, the normal rule about the deprivation of income is not strictly applicable to cases where agricultural income is the source. Attendant circumstances have to be considered.

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21. ADVERSE POSSESSION :
Mere long possession without animus to possess adverse to the true owner- No title acquired by adverse possession.

Deva (Dead) through LRS Vs. Sajjan Kumar (Dead) through LRS. Judgment dt. 26.8.2003 by the Supreme Court in Civil Appeal No. 636 of 1997, reported in (2003) 7 SCC 481

Held :

In the above part of the deposition, the defendant admits that the dispute of encroachment concerning suit portion 70'x20' came to his knowledge only after filing of the suit. The defendant has described suit land 70'x20' to be part of his Survey No. 453. But all the courts have come to a concurrent finding that the suit land to the extent of 70'x20' is part of Survey No. 452 belonging to the plaintiff.

From the deposition of the defendant, it appears that he had encircled by a compound suit land 70'x20' by treating it to be a part of his adjoining Survey No. 453.

The deposition extracted above, in any case, negatives the defendant's case of having prescribed title by adverse possession from the year 1940. The *animus* to hold the land adversely to the title of the true owner can be said to have started only when the defendant derived knowledge that his possession over the suit land had been alleged to be an act of encroachment on the plaintiff's survey number.

The abovequoted admission contained in the defendant's deposition, does not make out a case in his favour of having acquired title by adverse possession. Mere long possession of the defendant for a period of more than 12 years without intention to possess the suit land adversely to the title of the plaintiff and to the latter's knowledge cannot result in acquisition of title by the defendant to the encroached suit land.

The plaintiff's suit is not merely based on his prior possession and subsequent dispossession but also on the basis of his title to Survey No. 452. The limitation for such is governed by Article 65 of the Limitation Act of 1963. The plaintiff's title over the encroached land could not get extinguished unless the defendant had prescribed title by remaining in adverse possession for a continuous period of 12 years.

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22. CONSTITUTION OF INDIA - Article 25 (1)

Conversion - Right to propagate religion does not include right to convert another.

Satya Ranjan Majhi and another Vs. State of Orissa and others Judgment dt. 25.8.2003 by the Supreme Court in SLP (C) No. (CC) No. 7122 of 2003, reported in (2003) 7 SCC 439

Held :

It may be noted that this Act has been held to be a valid piece of legislation by this Court in *Rev. Stainislaus v. State of M.P., (1977) 1 SCC 677* wherein it has been held as under: (SCC p. 682, para 20)

"19 [20]. We have no doubt that it is in this sense that the word 'propagate' has been used in Article 25 (1), for what the article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. It has to be remembered that Article 25 (1) guarantees 'freedom of conscience' to every citizen, and not merely to the followers of one particular religion, and that, in turn postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the 'freedom of conscience' guaranteed to all the citizens of the country alike."

Referring to Article 25 of the Constitution of India, it was observed that : (SCC p. 682, para 21)

"What is freedom for one, is freedom for the other, in equal measure, and there can therefore be no such thing as a fundamental right to convert any person to one's own religion."

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23. CRIMINAL TRIAL :

(i) Relative Witness- Relationship itself does not affect credibility- Law explained.

(ii) Falsus in uno, falsus in omnibus, principle of- Not a mandatory rule of law- The doctrine is dangerous in India.

(iii) Discrepancies- Effect of, on evidence.

(iv) Benefit of doubt, rule of- Law stated.

(v) Witness- Behaviour during incident- Not coming to rescue-Effect of.

Sucha Singh and another Vs. State of Punjab
Judgment dt. 31.7.2003 by the Supreme Court in Criminal Appeal No. 1014 of 2002, reported in (2003) 7 SCC 643

Held :

We shall first deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

In *Dalip Singh v. State of Punjab, AIR 1953 SC 364* it has been laid down as under : (AIR p. 366, para 26)

> "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usu-

ally means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be groverned by its own facts."

The above decision has since been followed in *Guli Chand v. State of Rajasthan, (1974) 3 SCC 698* in which *Vadivelu Thevar v. State of Madras, AIR 1957 SC 614* was also relied upon.

We may also observe that the ground that the witness being a close relative and consequently, being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in *Dalip Singh* case in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed : (AIR p. 366, para 25)

> "25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the fandation for such such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in- *'Rameshwar v. State of Rajasthan, AIR 1952 SC 54' (AIR at p. 59)*. We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel."

Again in *Masalti v. State of U.P., AIR 1965 SC 202,* this Court observed : (AIR pp. 209-10, para 14)

> "But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard-and-fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out the entire prosecution case. In essence, prayer is to apply the principle of *"falsus in uno falsus in omnibus"* (false in one thing, false in everything). This plea is clearly untenable. Even if a major portion of evidence is found to be deficient, in case residue is sufficient to prove the guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where chaff can be separated from grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove the guilt of other accused persons. Falsity of a particular material witness or a material particular would not ruin it from the beginning to the end. The maxim *"falsus in uno falsus in omnibus"* has no application in India and the witnesses cannot be branded as liars. The maxim *"falsus in uno falsus in omnibus"* has not received general acceptance nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". (See *Nisar Ali v. State of U.P., AIR 1957 SC 366).* Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted. *(See Gurcharan Singh v. State of Punjab, AIR 1956 SC 460)* The doctrine is a dangerous one, especially in India for if a whole body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. *(See Sohrab v. State of M.P., (1972) 3 SCC 751 and Ugar Ahir v. State of Bihar, AIR 1965 SC 277)* An attempt has to be made to, as noted above, in terms of the felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. *(See*

Zwinglee Ariel v. State of M.P., AIR 1954 SC 15 and *Balaka Singh v. State of Punjab, (1975) 4 SCC 511.* As observed by this Court in *State of Rajasthan v. Kalki, (1981) 2 SCC 752* normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in *Krishna Mochi v. State of Bihar, (2002) 6 SCC 81.*

Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice according to law. *(See : Gurbachan Singh v. Satpal Singh, (1990) 1 SCC 445)* The prosecution is not required to meet any and every hypothesis put forward by the accused. *(See State of U.P. v. Ashok Kumar Shrivastava, (1992) 2 SCC 86)* A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some inevitable flaws because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. *[See Inder Singh v. State (Delhi Admn.), (1978) 4 SCC 161]* Vague hunches cannot take the place of judicial evaluation.

> "A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties." [Per Viscount Simon in *Stirland v. Director of Public Prosecution, 1944 AC 315* quoted in *State of U.P. v. Anil Singh, 1988 Supp SCC 686 (SCC p. 692, para 17).*

Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth.

In matters such as this, it is appropriate to recall the observations of this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 (SCR pp. 492-93) : SCC p. 799, para 6)*

> "The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand special emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof be-

yond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt... The evil of acquitting a guilty person light-heartedly as a learned author (Glanville Williams in *'Proof of Guilt'*) has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishmtent of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless..... 'a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent....' "

The position was again illuminatingly highlighted in *State of U.P. v. Krishna Gopal, (1988) 4 SCC 302.* Similar view was also expressed in *Gangadhar Behera v. State of Orissa, (2002) 8 SCC 381.*

So far as inaction of PWs 9 and 10 in not coming to the rescue of the deceased is concerned, it has been noted by the trial court and the High Court that both of them were unarmed and bare-handed and the accused persons were armed with deadly weapons. How a person would react in a situation like this cannot be encompassed by any rigid formula. It would depend on many factors, like in the present case where witnesses are unarmed, but the assailants are armed with deadly weapons. In a given case instinct of self-preservation can be the dominant instinct. That being the position, their inaction in not coming to the rescue of the deceased cannot be a ground for discarding their evidence.

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24. INDIAN PENAL CODE, 1860- Section 80
Term 'accident' as used in Section 80- Meaning and connotation of.
Sukhdev Singh Vs. Delhi State (Govt. of NCT of Delhi)
Judgment dt. 1.9.2003 by the Supreme Court in Criminal Appeal No. 54 of 2003, reported in (2003) 7 SCC 441

Held :

Even otherwise, Section 80 IPC has no application to the fact of the case. The said provision reads as follows:

"80. Accident in doing a lawful act.- Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution."

The section exempts the doer of an innocent or lawful act in an innocent and lawful manner from any unforeseen result that may ensue from an accident or misfortune. If either of these elements is wanting, the act will not be excused on the ground of accident. An accident is not the same as an occurrence, but

something that happens out of the normal or ordinary course of things. An effect is said to be accidental when the act is not done with the intention of causing it, and its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it. The idea of something fortuitous and unexpected is involved in the word "accident". *(Per Lord Halsbury, L.C. in Hamilton Frasor & Co. v. Pandorf & Co., (1887) 12 AC 518)*

As was observed by this Court in *Atmendra v. State of Karnataka, (1998) 4 SCC 256* to claim the benefit of the provisions of Section 80, it has to be shown: (1) that the act in question was without any criminal intention or knowledge; (2) that the act was being done in a lawful manner and by lawful means; and (3) that the act was being done with proper care and caution. In the said case it was observed that the evidence established that the accused unintentionally fired the gun and, therefore, the question of applying Section 80 did not arise.

In *K.M. Nanavati v. State of Maharashtra, AIR 1962 SC 605* it was observed that Section 80 exempts the doer of an innocent or lawful act, in an innocent or lawful manner and proper care and caution from any unforeseen evil result that may ensue from an accident or misfortune. When an accused pleads an exception within the meaning of Section 80 there is a presumption against him and the burden to rebut the presumption lies on him.

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25. CONSTITUTION OF INDIA- Article 141
Rule of prospective overruling, applicability of- Law declared by the Supreme Court- Held, normally it applies with inception unless declared prospective.
M.A. Murthy Vs. State of Karnataka and others
Judgment dt. 2.9.2003 by the Supreme Court in Civil Appeal No. 6913 of 2003, reported in (2003) 7 SCC 517

Held :

Normally, the decision of this Court enunciating a principle of law is applicable to all cases irrespective of its stage of pendency because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception. The doctrine of prospective overruling which is a feature of American jurisprudence is an exception to the normal principle of law, was imported and applied for the first time in *L.C. Golak Nath v. State of Punjab, AIR 1967 SC 1643.* In *Managing Director, ECIL v. B. Karunakar, (1993) 4 SCC 727* the view was adopted. Prospective overruling is a part of the principles of constitutional canon of interpretation and can be resorted to by this Court while superseding the law declared by it earlier. It is a device innovated to avoid reopening of settled issues, to prevent multiplicity of proceedings, and to avoid uncertainty and avoidable litigation. In other words, actions taken contrary to the law declared prior to the date of declaration are validated in larger public interest. The law as declared applies to future cases. *(See Ashok Kumar Gupta v. State of U.P., (1997) 5 SCC*

201 and *Baburam v. C.C. Jacob, (1993) 3 SCC 362.)* It is for this Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling, unless it is so indicated in the particular decision. It is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling. The doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and enables an organic development of the law besides providing assurance to the individual as to the consequences of transactions forming part of the daily affairs.

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26. INTERPRETATION OF STATUTES :

Interpretation of Statutes - Statute must be construed as a workable instrument.

Balram Kumawat Vs. Union of India and others

Judgment dt. 27.8.2003 by the Supreme Court in Civil Appeal No. 7536 of 1997, reported in (2003) 7 SCC 628

Held :

A statute must be construed as a workable instrument. *Ut res magis valeat quam pereat* is a well-known principle of law. In *Tinsukhia Electric Supply Co. Ltd. v. State of Assam, (1989) 3 SCC 709* this Court stated the law thus : *(SCC p. 754, paras 118-120)*

> "118. The courts strongly lean against any construction which tends to reduce a statute to futility. The provision of a statute must be so construed as to make it effective and operative, on the principle *'ut res magis valeat quam pereat'*. It is, no doubt, true that if a statute is absolutely vague and its language wholly intractable and absolutely meaningless, the statute could be declared void for vagueness.This is not in judicial review by testing the law for arbitrariness or unreasonableness under Article 14; but what a court of construction dealing with the language of a statute, does in order to ascertain from, and accord to, the statute the meaning and purpose which the legislature intended for it. In *Manchester Ship Canal Co.v. Manchester Rececourse Co., (1900) 2 Ch 352 Farwell, J. Said : (pp. 360-61)*
>
> > 'Unless the words were so absolutely senseless that I could do nothing at all with them, I should be bound to find some meaning and not to declare them void for uncertainty.'
> >
> > 119. *In Fawcett Properties Ltd. v. Buckingham County Council, (1960) 3 Aller 503* Lord Denning approving the dictum of Farwell, J. said: (All er p. 516)
> >
> > 'But when a statute has some meaning, even though it is obscure, or several meanings, even though there is little to choose between them, the courts have to say what meaning the statute is to bear, rather than reject it as a nullity."

120. It is, therefore, the court's duty to make what it can of the statute, knowing that the statutes are meant to be operative and not inept and that nothing short of impossibility should allow a court to declare a statute unworkable. In *Whitney v. IRC, (2003) 7 SCC 589* Lord Dunedin said : (AC p. 52)

'A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable.' "

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27. EVIDENCE ACT, 1872- Section 68
Proof of execution of document- Plea of undue influence-Factors to be considered.
M. Rangasamy Vs. Rengammal and others
Judgment dt. 25.8.2003 by the Supreme Court in Civil Appeal No. 5199 of 1997, reported in (2003) 7 SCC 683

Held :

In *Subhas Chandra Das Mushib v. Ganga Prasad Das Mushib, AIR 1967 SC 878* this Court held that the Court trying the case of undue influence must consider two things to start with, namely: (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor? and (2) has the donee used that position to obtain an unfair advantage over the donor? Upon the determination of these two issues a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence lies upon the person who is in a position to dominate the will of the other. It was further said that merely because the parties were nearly related to each other or merely because the donor was old or of weak character, no presumption of undue influence can arise. Generally speaking, the relations of solicitor and client, trustee and cestui que trust, spiritual adviser and devotee, medical attendant and patient, parent and child are those in which such a presumption arises. The High Court presumed the undue influence merely on account of near relationship. The presumption made by the High Court on the basis of relationship was not warranted by law. The whole approach of the High Court was wrong and it cannot be sustained.

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28. CIVIL PROCEDURE CODE, 1908- Section 47
Powers of the executing Court in construction of terms of decree- Law explained.
Rajasthan Financial Corporation Vs. Man Industrial Corporations Ltd.
Judgment dt. 26.8.2003 by the Supeme Court in Civil Appeal No. 16814 of 1996, reported in (2003) 7 SCC 522

Held :

We have considered the rival submissions. There can be no dispute to the proposition that the executing court cannot go beyond the decree. There can be no dispute that the executing court must take the decree according to its tenor. Also as has been set out in *Greater Cochin Development Authority case, (1970) 1 SCC 670* when a decree is in terms of an award/document then the terms of that document have to be looked at. In this case the decree is in terms of the compromise deed. The decree does not provide that the compromise deed or any of its terms have been varied. To be remembered, that the decree is passed under Order 23 Rule 3 of the Civil Procedure Code. Under this provision normally the court passes the decree in terms of the compromise.

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29. CONSTITUTION OF INDIA- Article 14
N.D.P.S. (AMENDMENT) ACT, 2001- Section 41

(i) Article 14- Sweep and scope of - Law explained.

(ii) Proviso to Sub-section (1) of Section 41- Held, the proviso is ultra vires.

Ramesh Vs. State of Madhya Pradesh and another
Reported in 2003 (4) MPHT 78 (DB)

Held :

Article 14 of the Constitution does permit class legislation but such classification has to have the bedrock on intelligible differentia and must have the nexus with the object sought to be achieved. In this context it is profitable to refer to the decision rendered in the case of *Maneka Gandhi Vs. Union of India, AIR 1978 SC 597,* wherein the Apex Court has extensively dealt with the essential conception of Article 14 of the Constitution. The excerpt reads as under :-

> "..... What is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it can not be imprisoned within traditional and doctrinaire limits.
>
> ..... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Art. 14 like a brooding omnipresence."

In the case of *D.S. Nakra and others Vs. Union of India and others, AIR 1983 SC 130,* the Apex Court while dealing with the basic principle embedded under Article 14 of the Constitution expressed thus:-

"..... to pass the test of permissible classification, two conditions must be fulfilled, viz., (i) that the classification must be founded on an intelligible differentia which distinguishes persons of things that are grouped together from those that are left out of the group; and (ii) that the differentia must have a rational relation to the objects sought to be achieved by the statute in question. *(See : Ram Krishna Dalmia Vs. S.R. Tendolkar, 1959 SCR 279 at p. 296 : (AIR 1958 SCC 538 at p. 547).* The classification may be founded on differential basis according to objects sought to be achieved but what is implicit in it is that there ought to be nexus, i.e., casual connection between the basis of classification and object of the statute under consideration. It is equally well settled by the decisions of this Court that Art. 14 condemns discrimination not only be a substantive law but also by a law of procedure."

In this context we are reminded of the inimitable manner in which *Krishna Iyer, J., in the case of Re. Vs. Special Courts Bill, AIR 1979 SC 478 spoke:*

"The article has a pervasive processual potency and versatile quality, equalitarian in its soul and allergic to discriminatory diktats. Equality is the antithesis of arbitrariness and *ex cathedra ipse dixit* is the ally of demagogic authoritarianism. On knight-errants of 'executive excesses', if we may use current cliche, can fall in love with the Dame of despotism, legistative or administrative. If this Court gives in here it gives up the ghost. And so it is that I insist on the dynamics of limitation on fundamental freedoms as implying the rule of law. Be you ever so high, the law is above you."

The amendment has been brought to introduce the rationality in sentencing. It is settled in law that an appeal is continuation of the trial. It is not incorrect to say, unless the judgment of conviction has received finality the same should be made applicable to the convict as he still awaits the verdict. It may be different when the sentence is pronounced in appeal and the whole thing cannot be re-opened but to make a provision that the beneficial provision would not be applicable to the cases pending in appeal would not only be violative of Article 14 of the Constitution of India but also would run counter to the salutary principle meant for administration of criminal justice. As far as the present provision is concerned we perceive no rationale not to apply the amended provision to the cases pending in appeal. In our considered opinion the same invites the wrath of Article 14 of the Constitution and being defiant to the same is liable to be struck down and accordingly we strike down the same as *ultra vires.*

We have, already stated that the proviso to sub-section (1) of Section 41 of the Act, 2001 is *ultra vires* but we have struck it down by issue of writ of *certiorari.* As a consequence of such quashment the main provision, we would like to say requires to be interpreted. Sub-section (1) of Section 41 of the Amendment Act, 2001 postulates that all cases pending before the Courts or under investigation at the commencement of the Act shall be disposed of in accordance with

the provision of the Principal Act as amended by the said Act and any person found guilty of any offence punishable under the Principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offene. Applying the science of interpretation and taking recourse to the art of acceptation, we are inclined to interpret that the main provision shall apply to the appeals because the language employed in the provision is 'all cases pending before the Court'. When the word Court has been used there is no reason or justification to exclude the Appellate Court. We may reiterate that once the proviso has been struck down being unconstitutional, the main provision, *propio vigore,* would apply to appeals.

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30. MOTOR VEHICLES ACT, 1988- Section 166
Jeep driver dying in accident due to his negligent driving- Claim for damages against owner and Insurance Company under Motor Vehicles Act, not maintainable.
Shahjahan Begum and others Vs. Lakhan Pratap Singh and others Reported in 2003 (2) ANJ (M.P.) 194

Held :

The question for determination is how the accident has taken place and who is responsible for the same? First Information Report has been lodged by Bhagwant Singh (AW/2). He has stated that the Jeep was being driven rashly and negligently which caused the accident. It has been signed by him and exhibited by Shahjahan (AW/1), Bhagwant Singh (AW/2) has admitted lodging of First Information Report and making of statement. With this background, it is difficult to accept his statement that the accident occurred due to mechancial defect. Therefore, finding of negligence on the part of driver by Claims tribunal is sustainable and is upheld. Having come to the aforesaid conclusion, the claim petition is not maintainable. Claimants are entitled to approach the Commissioner for Workmen's Compensation, for compensation under Workmen's Compensation Act, 1923.

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31. SPECIFIC RELIEF ACT, 1963- Section 36
Wife has right to seek injunction restraining husband from remarrying during subsistence of marriage.
Shantilal Bhagatram Gurjar and others Vs. Geeta Bai Shantilal Gurjar Reported in 2003 (2) ANJ [M.P.] 209

Held :

I concur with the finding whereby the first appellate court has been pleased to grant injunction against the defendant-husband. *If the Plaintiff is held to be a legally married wife of the defendant then, she has every right to seek an injunction restraining her husband from breaking her marital ties except by due process of law. It is not in dispute that husband has not divorced the plaintiff, nor vice*

versa and hence, the relationship of husband and wife continues to remain inter se parties. In such a finding being present, the wife is entitled to claim such *prohibitory injunction,* against her husband. I thus, do not find any flaw in the impugned finding of the first appellate court when he proceeded to grant injunction against the defendant restraining from remarrying with any other lady during subsistence of marriage inter se parties.

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32. MOTOR VEHICLES ACT, 1988- Section 140 Compensation under no fault liability- Matters to be seen- Insurance Company cannot take any defence except non-insurance. The New India Assurance Co. Ltd. Vs. Hari Kishan and others Reported in 2003 (2) ANJ [M.P.] 211

Held :

For the disposal of the applications filed under Section 140 of the Act for grant of compensation under no fault liability, in case of *Shivaji Dayanu Patil vs. Vatschala Uttam More (1991 ACJ 777),* it has been held by the Supreme Court, in the light of the provisions of Section 92-A of the Motor Vehicles Act, that :

"Section 92-A is in the nature of a beneficial legislation enacted with a view to confer the benefit of expeditious payment of a limited amount by way of compensation to the victims of an accident arising out of the use of a motor vehicle on the basis of no fault liability. In the matter of interpretation of a beneficial legislation the approach of the Courts is to adopt a construction which advances the beneficent purpose underlying the enactment in preference to a construction which tends to defeat the purpose. The same approach has been adopted by this court while construing the provisions of the Act. *(See Motor owners Insurance Co. Ltd. vs. Jadavji Keshavji Modi, 1981 ACJ 507 (SC)* and *Skandia Insurance Co. Ltd. vs. Kokilaben Chandravadan, 1987 ACJ 411 (SC)* It has been further held that:

> "In our opinion, the word 'use' has a very wider connotation to cover the period when the vehicle is not moving and is stationary and the use of a vehicle having been rendered immobile on account of a breakdown or mechanical defect of accident."

The object underlying the said enactment of Section 92-A is to make available to the claimant compensation amount as expeditiously as possible and the said award is to be made before adjudication of the claim under Section 110-A of the Act. This would be apparent from the provisions of Section 92-B of the Act. Section 92-B Sub-clause (2) of the Act provides that claim for compensation under Section 92-A in respect of death of permanent disablement under Section 92-A and also in pursuance of any right on the principle of fault, the claim for compensation under Section 92-A shall be disposed of as aforesaid in the first place. The said object would be defeated if the Claims Tribunal is required to held a regular trial in the same manner as for abjudicating the claim petition under Section 110-A of the Act."

It was further held that :

"For awarding compensation under Section 92-A of the Act, the Claims Tribunal is required to satisfy itself in respect of the following matters :

(i) an accident has arisen out of the use of a motor vehicle;

(ii) the said accident has resulted in permanent disablement of the person who is making the claim for death of the person whose legal representative is making the claim;

(iii) the claim is made against the owner and the insurer of the motor vehicle involved in the accident".

In the case of *Gopal Lal vs. Tulsibai & others,* reported in *2001 (3) M.P.H.T. 234,* by order dated 20.3.01, I have already considered various decisions cited on behalf of the parties and by passing a detailed order has held that if the vehicle is insured the Insurance Company is liable to pay interim compensation under no fault liability, except in a case when the vehicle is not insured and Insurance Company cannot take any kind of defence. Therefore, now it is settled position under Law that under Section 140 of the Act at the stage of deciding application for interim compensation under no fault liability no defence is available to the Insurance Company either under Section 140 or Section 149 (2) of the Act or on the of violation of terms & conditions of police or on the ground that the driver was not having a valid driving licence. This objection too is also not available to the Insurance Company that the vehicle was not in motion or in running condition or it was standing. In fact, what is necessary for the Tribunal while deciding the application under Section 140 of the Act for grant of interim compensation under no fault liability whether death or permanent disablement has resulted, in an accident arising out of use of motor vehicle and the accident was reasonably proximate to the use of a motor vehicle. Therefore, if the motor vehicle is used in an accident then under no fault liability Insurance Company is liable and the Tribunal also cannot either reject the application or defer it for consideration after recording the evidence. It is the duty of the Tribunal to follow the mandate of law and to dispose of the application by a summary enquiry immediately after service of notice on the respondents.

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33. CRIMINAL PROCEDURE CODE, 1973- Section 397
Revisional jurisdiction of High Court and the Sessions Court- Option to choose forum is with the applicant- It cannot be insisted that party should first approach Sessions Court.
Issac Jaise Vs. Jasmit Singh Saluja
Reported in 2003 (2) ANJ [M.P.] 262

Held :

So far as preliminary objection raised by the counsel for the non-applicant No. 1 about maintainability of present petition is concerned, there is direct Division Bench decision of this Court in the case of *State of M.P. vs. Khizar Mohammad*

and Ors. (1996 MPLJ 1007). The Division Bench has held that provisions of Section 397 of the Criminal Procedure Code, 1973 confer concurrent revisional jurisdiction on the High Court and the Sessions Court and the option is with the party aggrieved to approach any one of the two Courts. The option contained in Section 397 (1) of the Criminal Procedure Code, 1973 is with the aggrieved party. It is apparent that the High Court cannot insist that the party should first approach the Sessions Court. The Division Bench has given this opinion on the reference made by a Single Judge of this Court because of two conflicting judgments passed by two Single Bench of this Court.

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34. PRACTICE & PROCEDURE :

No counter claim by defendant- No relief can be granted in defendant's favour.

Martalbai Vs. Madanlal and others

Reported in 2003 (2) ANJ [M.P.] 322

Held :

Learned counsel for the appellant submitted that there was no counter claim in the case nor the defendant has prayed in the written statement that the defendant no. I be handed over the possession of the land, such relief was not asked. The trial Court erred in granting such relief. The appellant has proved her possession over the land. In the circumstances, appellant is entitled for decree for permanent injunction against the respondent No.1 not to interfere with her possession till he evicts the appellant by taking recourse of law. He is pressing only this point and in support of this, learned counsel for the appellant relies on *Nair Service Society Ltd., vs. K.C. Alexander (AIR 1968 SC 1165).*

There is substance in the contention of appellant. The Court below has recorded finding that the Khusilal died prior to 1956 and appellant being the daughter of Khushilal will not get any right in the property but she is in possession of the land. Tnis finding has been recorded by the trial Court in para 11 of the judgment, but in para 13 the trial Court without any counter claim or asking relief directed that the defendant is entitled for possession from the plaintiff as she has no right over the land. This finding cannot be sustained under the law. The lower appellate court has only considered the factum of the title before it. Defendant has not filed any cross objection/suit claiming possession of the land. In these circumstances, the direction of the trial Court in favour of the defendant is wholly unwarranted, though defendant is free to take recourse of law for taking possession of the land. But without any counter claim or counter suit, the Court below erred in issuing such direction in favour of defendant no.1

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35. EVIDENCE ACT, 1872- Section 114

Service of notice under UPC- Presumption under Section 114 cannot be drawn- Registered notice returned with an endorsement "addressee not found"- There is no service of notice.

Suresh Vs. Manoj & State of M.P.
Reported in 2003 (2) ANJ [M.P.]- 343

Held :

So far as the service of notice under U.P.C. (Ex.P/6) is concerned, this cannot be construed as service because, no acknowledgement due is required to be sent and no presumption can be drawn under Section 114 of the Evidence Act as well as under Sec. 27 of the General Clauses Act. The burden is on the complainant/Non-applicant No.1 establish beyond reasonable doubt the compliance of mandatory Provision of Section 138 proviso (b) and (c) of the Act.

Clause (b) of the Proviso to Section 138 of the Act gives clear indication of giving notice "in the context is not the same as receipt of notice" Giving is the process of which receipt is the accomplishment. If the payee has despatched notice to the correct address of the drawer reasonably ahead of the expiry of the fifteen days, it can be regarded that he made the demand by giving notice within the statutory period. The language used in Section 138 (c) namely, "receipt of the said notice", unambiguously points to actual receipt of notice. Where the registered notice is returned with an endorsement "addresses not found", it cannot be stated that there could have been any sort of wilful evasion of such notice. In such a case, there is no service of notice and a complaint under Section 138 cannot be maintained" because on envelop (Ex. p/5,) alleged to containing notice is not showing correct address of the appellant/accused which is a condition precedent.

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36. SERVICE LAW :

"Last come first go", principle of- Principle not applicable when service is terminated on the assessment of work and suitability- Law explained.

D.S. Baghel Vs. Chairman, Governing Body, Hitkarini Science, Commerce and Arts Maha Vidyalaya, Garha, Jabalpur and others
Reported in 2003 (4) MPLJ 74

Held :

It is also argued on behalf of the petitioner that the rule of 'last come first go' has not been followed. That rule is not required to be followed where the removal is on the ground of unsuitability or unsatisfactory performance. The Supreme Court has held in *State of U.P. vs. K.K. Shukla, (1991) 1 SCC 691* that the principle of 'last come first go' is applicable to a case where on account of reduction of work or shrinkage of cadre retrenchment takes place and the services of employees are terminated on account of retrenchment. In the event of retrenchment the principle of 'last come first go' is applicable under which senior in service is retained while the junior's services are terminated. But this principle is not applicable to a case where the services of a temporary employee are terminated on the assessment of his work and suitability in accordance with terms and conditions of his service. If out of several temporary employees work-

ing in a department, a senior is found unsuitable on account of his work and conduct, it is open to the competent authority to terminate his services and retain the services of juniors who may be found suitable for the service. Such a procedure does not violate principle of equality, enshrined under Articles 14 and 16. If a junior employee is hard-working, efficient and honest, his services could not be terminated with a view to accommodate the senior employee even though he is found unsuitable for the service. If this principle is not accepted there would be discrimination and the order of termination of a junior employee would be unreasonable and discriminatory.

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37. COURT FEES ACT, 1870- Section 7 (iv) (c)
Suit for declaration with consequential relief of injunction- Ad valorem Court-fee payable.
Ram Prasad Agrawal and another Vs. Bhagwandas
Reported in 2003 (4) MPLJ 88

Held :

It is well settled that the question of Court-fee must be considered in the light of the allegations made in the plaint and its decision cannot be influenced either by the pleas in the written statement or by final decision of the suit on merits. This principle was laid down by the Supreme Court long back in *Sathappa vs. Ramanathan. AIR 1958 SC 245* and has been recently referred to by the Full Bench of this Court in *Subhash Chand vs. MPEB., 2000 (3) MPLJ 522.*

The present case is covered by section 7 (iv) (c) of the Court Fees Act. The plaintiff has claimed the relief of declaration and the consequential relief of injunction. Therefore, ad valorem Court-fee as per section 7 (iv) (c) is payable. The question is what should be the proper valuation. There is a decision of Division Bench of tis Court in *Badrilal vs. State of M.P., 1963 MPLJ 717= AIR 1964 MP 9* which must be followed. It has been held in this case that while the plaintiff is at liberty to value the relief claimed in suits governed by the various clauses of section 7 (iv) including those for a declaration with the consequential relief of injunction, he cannot be allowed to put an arbitrary value and if he does so and the Court considers that it is too low or unreasonable in that it bears no relation to the right litigated, it may require him to correct the valuation.

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38. MOTOR VEHICLES ACT, 1988- Sections 140 and 163-A
Section 140 and Section 163-A, operation of-Both the Sections are not retrospective.
Kanhaiyalal and another Vs. Sitabai and others
Reported in 2003 (4) MPLJ 89 (DB)

Held :

Full Bench of this Court had considered the scope of amendment in section 140 of the Motor Vehicles Act in the case of *Jivakhan vs. Shivcharandas and oth-*

ers reported in 1999 (1) MPLJ 5= 1999 (1) JLJ 129. The question was framed and referred to Full Bench :-

> Whether section 140 of the Motor Vehicles Act of 1988 is retrospective in operation for the reason section 144 thereof expressly says that- "the provisions of this chapter shall have effect notwithstanding anything contained in any other provision of this Act or of any other law for the time being in force?"

This Court after considering the relevant provisions of the Act held that section 140 of the Motor Vehicles Act is not retrospective and it is further held that the rights and liabilities between the parties arise on the happening of the accident and that would be the date for determining quantum of compensation fixed under the law existing therein. Similar view is taken by another Full Bench of this Court in the case of New India *Assurance Company Ltd. vs. Nafis Begum and others reported in 1991 MPLJ 700=1991 JLJ 490.*

Only question involved in the case is whether section 163-A has a retrospective operation or prospective operation.

Since the provision is a new provision, the effect of amendment in the Act is considered in a judgment of the Apex Court in the case of *K.S. Paripoornan vs. State of Kerala reported in AIR 1995 SC 1012.* While considering the amendment in Land Acquisition Act the Apex Court held :-

> "A statute dealing with substantive rights differs from a statute which relates to procedure or evidence or is declaratory in nature inasmuch as while a State dealing with substantive rights is prima facie prospective unless it is expressly or by necessary implication made to have retrospective effect, a statute concerned mainly with matters of procedure or evidence or which is declaratory in nature has to be construed as retrospective unless there is a clear indication that such was not the intention of the legislature. The state is regarded as retrospective if it operates on cases or facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character of consequences of transactions previously entered into or of other past conduct. By virtue of presumption against retrospective applicability of laws dealing with substantive rights transactions are neither invalidated by reason of their failure to comply with formal requirement subsequently imposed, nor open to attack under powers of avoidance subsequently conferred.

Thus, section 163-A of the Act as inserted by amending Act No. 54 of 1994 creates new right in favour of the claimant and it creates new liability on the owner and insurer. Therefore, the provision will be applicable to the cases where accident has occurred on the date of commencement of the Act or after the amendment. The provision will not be applicable to the accident which has occurred prior to the amendment. There is no legislative intent to apply the provision retrospectively.

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39. MOTOR VEHICLES ACT- Section 168
Accident claim cases- Appreciation of evidence- Proof beyond reasonable doubt not required.
Mohd. Nasir Vs. Angad Prasad and others
Reported in 2003 (4) MPLJ 95 (DB)

Held :

The Claims Tribunal has not analysed and appreciated the evidence in correct perspectives. It seems to be under erroneous belief that the case has to be proved beyond reasonable doubt, principle applicable in criminal trials forgetting that claim cases are to be proved and decided on preponderance of probabilities and strict rules of evidence are not applicable to trial of claim cases.

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40. MOTOR VEHICLES ACT, 1988- Section 166
Accident claim cases- Strict rules of evidence not applicable.
Manful and another Vs. Mehmood and others
Reported in 2003 (4) MPLJ 174 (DB)

Held :

As has already been held by long catena of cases that in the case of motor accident strict rule of evidence is not applicable. It is to be established prima facie that accident had taken place with a motor vehicle and out of the use of said motor vehicle, either injury has been caused, or, it had resulted into death of a victim. If this much is established by the claimants, then, nothing more is required to be proved. The underlying purpose of this is, that innocent victims of road accidents should not suffer for want of strict proof of accident and drivers and owners do not go scot-free on account of this. If some doubt or obscurity is there, then, benefit should accrue to the victims.

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41. EXCISE ACT (M.P.), 1915 - Sections 34, 49 A and 59 A (ii)
Grant of bail in cases covered by Section 59 A (ii)- Considerations.
Reported in 2003 (II) MPWN 88

Held :

The bar created under section 59A (ii) of the Act against grant of bail for the offence punishable under section 49A and also under section 34 is that an opportunity to oppose the application for such release shall be provided to the Public Prosecutor and if such an application is opposed by the Public Prosecutor, unless the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail, the bail cannot be granted. Therefore, under section 59A (ii) of the Act while considering the bail application, the Court is required to consider the legislative mandate of the section and to provide an opportunity to the public prosecutor to oppose the application, obviously which should be just, fair and reasonable. Where the opposition by the public prosecutor is only for the

sake of opposition, this cannot be considered as just, fair or reasonable. The second condition is that there must be satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. So far as the second condition is concerned, the Court can consider the totality of the material collected in the case-diary for recording his satisfaction that the accused is not *prima facie* guilty of such offence and that he is not likely to commit any offence while on bail. In such cases while considering bail applications, in view of the bar of section 59A (ii) of the Act, the liberty of the citizens has got to be balanced with the interest of the society for which bar has been imposed.

While granting bail in cases where embargo has been created by section 59A (ii) of the Act, the Court may also consider the nature of offence; involvement of the accused in the commission of crime; recovery of any contraband material from him and its quantity; and that he is not a habitual offender or a previous convict and his release on bail will not prejudice the case of the prosecution; and that the investigation is over and charge-sheet has been filed. It has also to be kept in mind that the offence under Section 34(2) read with section 49A is triable by Magistrate First Class and the maximum punishment shall not be less than one year but may extend to three years and with fine which shall not be less than twenty five thousand rupees but may extend to one lac rupees under section 34 and under section 49A, sub-section (1) under clause (iii) when death of human being is caused, the imprisonment which shall not be less than two years but may extend to ten years and when any person is a previous convict under this section for a second or subsequent offence, he shall be punished to imprisonment for life or imprisonment which shall not be less than five years but extend to ten years. Therefore, the Act itself has provided two parameters for the first offence and also for the subsequent and second offence. When an offence is committed by a previous convict or accused is a habitual offender, the Court may consider his case separately and looking to the circumstances of the case Court may not release him on bail. But in a case of first offence, if the conditions and circumstances are satisfied, the Court may grant bail in appropriate cases after considering the embargo created by section 59A (ii) of the Act. In cases where it is the first offence of the applicant, while granting bail, the Court may provide further safeguard and take an specific undertaking that he/they will not commit any offence while on bail and if there is any breach in the undertaking the Court will consider the case for cancellation of their bail. This undertaking will also provide a safeguard not to commit any offence while on bail. The Courts are also empowered to impose other conditions as required under sections 437 and 439 CrPC.

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42. CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986- Sections 2 (ii), 3 and 14
To constitute offence under the Act, child should be below the age of 14 years- Law explained.

Raj Kumar Tiwari Vs. State of M.P.
Reported in 2003 (II) MPWN 89

Held :

The Apex Court in *M.C. Mehta v. State of Tamilnadu and others,* (1996) 6 SCC 756, has laid down that children aged about 14 years cannot be employed in any factory or mine or other hazardous work and they must be given education as mandated by Article 45 of the Constitution and interpreted in *Unni Krishnan J.P. v. State of Andhra Pradesh,* (1993) 1 SCC 645. It is the duty of the employer to comply with the provisions of Child Labour Prohibition and Regulation Act. Section 14 of the Act has provided for punishment upto one year, minimum being 3 months or fine up to Rs. 20,000/-, minimum being Rs. 10,000/- or with both to one who employees or permits any child to work in contravention of provisions of section 3. The Apex Court considered the mandate of the Articles 24, 39 (e), (f), 41, 45, 47 and held :

> "15. To accomplish the aforesaid task, we have first to note the constitutional mandate and call on the subject, which are contained in the following articles:
>
> *24. Prohibition of employment of children in factories, etc.-* No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.
>
> 39(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
>
> 39(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.
>
> *41. Right to work, to education and to public assistance in certain cases.-*
>
> The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of underserved want.
>
> *45. Provision for free and compulsory education for children.-*
>
> The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.
>
> *47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health.-*
>
> The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as

among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

16. Of the aforesaid provisions, the one finding place in Article 24 has been a fundamental right ever since 28.1.1950. Article 45 too has been raised to a high pedestal by *Unni Krishnan,* which was decided on 4.2.1993. Though other articles are part of directive principles, they are fundamental in the governance of our country and it is the duty of all the organs of the State to apply these principles. Judiciary, being also one of the three principal organs of the State has to keep the same in mind when called upon to decide matters of great public importance, Abolition of child labour is definitely a matter of great public concern and significance."

The Apex Court directed the survey to be made of child labour within six months from the date of the order. The Apex Court held that any violator is liable to pay compensation of Rs. 20,000/- for every child employed in contravention of the provisions of the Act. The Apex Court further held that Govt. must either provide job for an adult member of the family in lieu of the child belonging to that family who has been employed in the mine or other hazardous work or it must deposit Rs 5,000/- for each child. Welfare corpus of fund was also directed to be prepared where alternative employment is not made available. The parents/ guardians of the child would be entitled to be paid per month the income on the corpus of Rs. 20,000/- for each child. However, it was made imperative to send that child for education to avail the benefit corpus fund. The Apex Court also appointed the Inspectors to carry out the compliance under section 17 of the Act.

The submission raised that petitioner was not heard is not correct. Enquiry was also held. However, sine qua non is that a child should be below age of 14 years for applicability of the aforesaid directions. Child has been defined in Section 2 (ii) of the Child Labour (Prohibition and Regulation) Act, 1986, to be a person who has not completed his fourteenth year of age.

●

43. SERVICE LAW :

Employees of time limit scheme or project- Termination of employment due to abolition of posts/non-availability of funds- Right of employee to continue in service- Law explained.

Surendra Kumar Sharma Vs. Vikas Adhikari

Reported in 2003 (II) MPWN 95 (SC)

Held :

Recently, dealing with such scheme or project employees in *S.M. Nilajkar v. Telecom, District Manager JT 2003 (3) SC 436* this Court observed- "It is common knowledge that the Government as a welfare State floats several schemes and projects generating employment opportunities, though they are short-lived. The objective is to meet the need of the moment. The benefit of such schemes

and projects is that for the duration they exist, they provide employment and livelihood to such persons as would not have been able to secure the same but for such schemes or projects. If the workmen employed for fulfilling the need of such passing-phase- projects or schemes were to become a liability on the employer-State by too liberally interpreting the labour laws in favour of the workmen, then the same may well act as a disincentive to the State for floating such schemes and the State may opt to keep away from initiating such schemes and projects even in times of dire need, because it may feel that by opening the gates of welfare it would be letting-in onerous obligations entailed upon it by extended application of the labour laws."

A matter as to termination of employment caused by abolition of posts consequent upon the schemes having been abolished for non-availability of funds came up for the consideration of this *Court in Rajendra v. State of Rajasthan (1999) 2 SCC 317.* It was held that when posts temporarily created for fulfilling the needs of a particular project or scheme limited in its duration come to an end because the need for the project comes to an end either because the need was fulfilled or the project had to be abandoned wholly or partially for want of funds, the employer cannot by a *writ of mandamus* be directed to continue employing such employees as have been dislodged, because such a direction would amount to requisition for creation of posts though not required by the employer and funding such posts though the employer did not have funds available for the purpose.

In *Jaipal v. State of Haryana (1988) 3 SCC 354,* the employees of the project of adult and non-formal education, a temporary project which was time bound to last till 1990, were held not entitled for regularizing of their services.

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44. CRIMINAL PROCEDURE CODE, 1973-Section 125
Divorced wife's right to claim maintenance- The Right available under Section 125 CrPC.
Yashwant Shilpkar Vs. Samta Shilpkar
Reported in 2003 (II) MPWN 96

Held :

While not resisting the grant of maintenance to respondent-2 it is submitted on behalf of the petitioner that by mutual agreement marriage between the petitioner and respondent-1 stood annulled on 5.11.1997 in C.S. No. 23-A/97, therefore, she is not entitled for maintenance. But relying on *Bhagwandutt v. Kamladevi,* AIR 1975 SC 83, it is dictated by their Lordships of the Supreme Court in Savitri v. Govind, reported in 1986 CrLJ 48 that even if the earlier decree for restitution of conjugal rights is not complied with by the wife, a divorced wife has right to claim maintenance from the husband. By divorce the wife gets a new status as divorced wife and as such she is under no obligation to live under the roof of the husband. Thus, when a husband refuses to pay maintenance to the divorced wife, unable to maintain herself, she is entitled to claim maintenance u/s 125 CrPC.

●

45. MOTOR VEHICLES ACT, 1939- Section 110 B
Tortuous liability-Accident due to negligence of claimant/employee-Employer cannot be held vicariously liable for negligence of claimant/employee.
Tamil Nadu State Road Transport Corporation Vs. Natarajan
Reported in 2003 (II) MPWN 100 (SC)

Held :

From the facts of the case and nature of the claim stated above, we find absolutely no justification in law for the Division Bench of the Madras High Court in its impugned order imposing liability to the extent of 50% on the appellant/ Corporation. The Division Bench of the High Court completely over-looked that the claimant himself was driver of the Corporation bus and was found negligent to the extent of 50% for causing accident. In view of the above finding of contributory negligence on the part of the claimant as driver of the Corporation bus, the Corporation as an employer cannot be held to be vicariously liable for the negligence of the claimant himself.

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46. PREVENTION OF FOOD ADULTERATION RULES, 1955- R.7 (3)
Rule 7 (3) is directory-Non- compliance of per se does not vitiate conviction.
Deshraj Vs. State of M.P.
Reported in 2003 (II) MPWN 103

Held :

The first submission of learned counsel for the applicant is taken into consideration that on account of non-compliance of Rule 7 (3) of the Rules, the applicant is entitled for the acquittal, does not impress me. In the case of State of *M.P. v. Ganesh Prasad 2000 (1) JLJ 406,* this Court while dealing with the non-compliance of Rule 7 (3) of the Rules, held in para 6 and 7 as under :-

> "6. The second finding of the learned trial Magistrate that the accused/ respondents are not liable to be prosecuted and convicted for non-compliance of the provisions of section 7 (3) of the Act, is indeed unsustainable in law. The counsel for the accused/respondent No. 1 has rightly conceded that this finding and consequently acquittal of the accused/respondents on the basis of such finding was not proper.

The learned Magistrate has observed that by not sending the report of the Public Analyst within the stipulated period of 45 days, the prosecution has violated the provisions of section 7 (3) of the Act. It appears that the learned Magistrate by mistake quoted section 7 (3) of the Act. Indeed it should have been Rule 7 (3) of the Rules. The Supreme Court in *P.V. Usman v. Food Inspector Pelicheri Municipality* [1994 SCC (Criminal) 187] has held that the provisions prescribing period of 45 days under Rule 7 (3) are not mandatory and fatal unless accused establishes that prejudice was caused to him on account of such delay. The pro-

visions are directory and hence non-compliance thereof shall not vitiate the prosecution unless it takes away the right of the accused under section 13(2) of the Act. In view of the above pronouncement of the Apex Court, the finding of learned Magistrate that the trial has been vitiated for non-compliance of the provisions of Rule 7(3) of the Rules cannot be sustained".

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47. CRIMINAL PROCEDURE CODE, 1973- Section 401
Criminal revision under Section 401- Acquittal cannot be converted into conviction.
Govind Vs. State of M.P.
Reported in 2003 (II) MPWN 104

Held :

The learned trial Court committed no manifest illegality leading to mis-carriage of justice when it acquitted the appellant from the charge of having committed an offence punishable under section 302 of the IPC. In absence of any manifest illegality or perversity, it would not be open for this Court to convert the finding of acquittal into conviction at the instance of Nathuram specially when the State has not preferred any appeal against such finding of acquittal. The scope of criminal revision under section 401 is very limited and law in this regard is now well settled by catena of decisions of the Supreme Court. The latest decision on the subject by their Lordships of Supreme Court is in the matter of *Bindeshwari Prasad Singh alias B.P. Singh* and *others v. State of Bihar reported in AIR 2002 SC 2907.* In view of the settled position of law, the revision have been filed by Nathuram fails and is hereby dismissed.

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48. SERVICE LAW :
Principle of "equal pay for equal work"- Applicability of- Law explained.
State of Haryana Vs. Tilak Raj
Reported in 2003 (II) MPWN 135 (SC)

Held :

The principle of "equal pay for equal work" is not always easy to apply. There are inherent difficulties in comparing and evaluating the work done by different persons in different organisations, or even in the same organization. In *Federation of All India Customs and Central Excise Stenographers (Recognised) v. Union of India [(1988) 7 ATC 591]* this Court explained the principle of "equal pay for equal work" by holding that differentiation in pay scales among government servants holding the same posts and performing similar work on the basis of difference in the degree of responsibility, reliability and confidentiality would be a valid differentiation. The same amount of physical work may entail different quality of work, some more sensitive, some requiring more tact, some less- it varies from nature and culture of employment. It was further observed that judgment of administrative authorities concerning the responsibilities which attach

to the posts and the degree of reliability expected of an incumbent would be a value judgment of the authorities concerned which, if arrived at *bona fide*, reasonably and rationally, was not open to interference by the Court.

In *State of U.P. v. J.P. Chaurasia* [(1988) 8 ATC 929] it was pointed out that principle of "equal pay for equal work" has no mechanical application in every case of similar work. In *Harbans Lal v. State of H.P.* [(1989) 11 ATC 869] it was held that a mere nomenclature designating a person as a carpenter or a craftsman was not enough to come to a conclusion that he was doing the work as another carpenter in regular service. A comparison cannot be made with counterparts in other establishments with different managements or even in the establishments in different locations though owned by the same management. The quality of work which is produced may be different, even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of "equal pay for equal work" requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job requires may differ from job to job. It must be left to be evaluated and determined by an expert body. Same was the view expressed in Ghaziabad *Development Authority v. Vikram Chaudhary* [(1995) 31 ATC 129].

At this juncture, it would be proper to take note of what was stated in *Jasmer Singh case (supra)*. In paras 10 and 11, it was noted as under:

> "10. The respondents, therefore, in the present appeals who are employed on daily wages cannot be treated as on a per with persons in regular service of the State of Haryana holding similar posts. Daily-rated workers are not required to possess the qualifications prescribed for regular workers, nor do they have to fulfil the requirement relating to age at the time of recruitment. They are not selected in the manner in which regular employees are selected. In other words the requirements for selection are not as rigorous. There are also other provisions relating to regular service such as the liability of a member of the service to be transferred, and his being subject to the disciplinary jurisdiction of the authorities as prescribed, which the daily-rated workmen are not subjected to. They cannot, therefore, be equated with regular workmen for the purposes for their wages. Nor can they claim the minimum of the regular pay scale of the regularly employed.

In a recent case, this Court in *State of Orissa v. Balaram Sahu* [(2003) 1 SCC 250] speaking through one of us *(Doraiswamy Raju, J.)* expressed the view that the principles laid down in the well-considered decision of *Jasmer Singh* case (supra) indicated the correct position of law. It was noted that the entitlement of the workers concerned was to the extent of minimum wages prescribed for such workers, if it is more than what was being paid to them.

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49. MOTOR VEHICLES ACT, 1988- Section 149 (2) (a) (ii)
Accidental fire in vehicle due to mechanical defect- Driver not holding valid licence- Accident not due to negligence of driver- Insurer can't escape liability.
Jitendra Kumar Vs. Oriental Insurance Co. Ltd.
Reported in 2003 (II) MPWN 140

Held :

The question then is : can the Insurance Company repudiate a claim made by the owner of the vehicle which is duly insured with the Company, solely on the ground that the driver of the vehicle who had nothing to do with the accident did not hold a valid licence? The answer to this question, in our opinion, should be in the negative. Section 149 of the Motor Vehicles Act, 1988 on which reliance was placed by the State Commission, in our opinion, does not come to the aid of the Insurance Company in repudiating a claim where the driver of the vehicle had not contributed in any manner to the accident. Section 149 (2) (a) (ii) of the Motor Vehicles Act empowers the Insurance Company to repudiate a claim wherein the vehicle in question is damaged due to an accident to which driver of the vehicle who does not hold a valid driving licence is responsible in any manner. It does not empower the Insurance Company to repudiate a claim for damages which has occurred due to acts to which the driver has not, in any manner, contributed i.e. damages incurred due to reasons other than the act of the driver.

We notice that in the impugned order the National Commission has placed reliance on the judgment of this Court in the case of *New India Assurance Co.* [(2001) 4 SCC 342 : 2001 SCC (Cri) 701] which, in our opinion, has no bearing on this aspect of the case in hand. This Court in the said case held that the fake driving licence when renewed genuinely, does not acquire the validity of a genuine licence. There can be no dispute on this proposition of law. But then the judgment of this Court in the case of *New India Assurance Co.* [(2001) 4 SCC 342 : 2001 SCC (Cri) 701] does not go to the extent of laying down a law which empowers the Insurance Company to repudiate any and every claim of the insured (appellant) merely because he had engaged a driver who did not have a valid licence. In the instant case, it is the case of the parties that the fire in question which caused damage to the vehicle occurred due to mechanical failure and not due to any fault or act, or omission of the driver. Therefore, in our considered opinion the Insurance Company could not have repudiated the claim of the appellant.

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50. INDIAN PENAL CODE, 1860- Section 302
Death sentence- Murder of 21 persons itself cannot be the sole criteria for awarding capital punishment- Law explained.
Rampal Vs. State of U.P.
Reported in 2003 (II) MPWN 150

Held :

We have carefully considered the argument addressed on behalf of the parties. It is true the incident in question has prematurely terminated the life of 21 people but then number of death cannot be the sole criteria for awarding the maximum punishment of death. While in a given case death penalty may be the appropriate sentence even for a single murder, it would not necessarily mean that in every case of multiple murders death penalty has to be the normal punishment. Guidelines to be borne in mind while awarding death sentences have been considered and laid down by this Court in a number of cases but for the purpose of deciding this appeal it would suffice if we refer to a constitution bench judgment of this Court in the case of *Bachan Singh v. State of Punjab [1980 (2) SCC 684].* In the said case this Court after considering the constitutional validity of the provisions which empowers the Court to award death sentence laid down the following broad guidelines to be borne in mind by the Courts while considering the question of awarding a sentence in cases involving murder:

> "One thing however stands clear that for making the choice of punishment or for ascertaining the existence or absence of "Special reasons" in that context, the Court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because 'style is the man'. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments...
>
> As to the aggravating circumstances, preplanned, calculated cold-blooded murder has always been regarded as one of an aggravated kind: so also a murder "diabolically conceived and cruelly executed" and the test of Ediga Anamma: "The weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim".

In the said judgment this Court also laid down circumstances which could be considered as aggravating circumstances. These circumstances are as follows:-

(a) If the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the union or

of a member of any police force or of any public servant and was committed-

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under section 37 and section 129 of the said Code."

Similarly it also considered the following circumstances as mitigating circumstances :-

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the facts and circumstances of the case of accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

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51. INDIAN PENAL CODE, 1860 - Sections 107, 108 and 306
Abatement of suicide- Failure to repay loan or outstanding amount- Not an act amounting to abatement of suicide.
Ajay Patodia Vs. State of M.P.
Reported in 2003 (II) MPWN 153

Held :

This Court in the case of *Vedprakash Bhaiji v. State of M.P. 1995 Criminal*

law Journal 893 has held that the accused persons were intimated by the deceased that if they do not repay the loan advanced to them, then they will have to face with dire consequences and immediately thereafter he committed suicide. This Court has held that it could not be said that the accused persons provoked, incited, urged or encouraged the deceased to commit suicide. A person is said to "instigate" another to an act when he actively suggests or stimulates him to the act by any means of language, direct or, indirect for commission of the offence. In the present case, there is no averment to that effect. This Court in the case of *Sultan Singh and others v. State of Madhya Pradesh in Criminal Revision No. 441/2002* has also taken a similar view and held that the ingredients of abetment as defined in section 107 of IPC requires that knowledge and intention of the accused persons is necessary to hold the accused persons guilty of committing offence under section 306 IPC.

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52. CIVIL PROCEDURE CODE, 1908- O.18 Rr. 4, 5 and 13
Recording of evidence- In every case whether appealable or non- appealable examination-in-chief shall be on affidavit- Rule 5 not to be read as an exception to Rule 4.
Ameer Trading Corporation Ltd. Vs. Shapoortji Data Processing Ltd. Judgment dt. 18.11.03 passed by the Supreme Court in Civil Appeal No. 9130 of 2003, reported in 2003 AIR SCW 6340

Held :

Rule 5 refers to evidence which is required to be taken in cases where the appeal is allowed in contradistinction with the cases where appeal is not allowed as envisaged in Rule 13 of Order 18 of the Code of Civil Procedure. Rule 5, therefore, envisages a situation where the Court is required to take down an evidence in the manner laid down therein which would mean that where cross-examination or re-examination of the witness is to take place in the Court.

The examination of a witness would include evidence-in-chief, cross-examination or re-examination. Rule 4 of Order 18 speaks of examination-in-chief. The unamended rule provided for the manner in which 'evidence' is to be taken. Such examination-in-chief of a witness in every case shall be on affidavit.

The aforementioned provision has been made to curtail the time taken by the Court in examining a witness in chief, sub- Rule (2) of Rule 4 of Order 18 of Code of Civil Procedure provides for cross-examination and re-examination of a witness which shall be taken by the court or the Commissioner appointed by it.

We may notice that Rule 4 of Order 18 was amended with effect from 1-7-2002 specifically provided thereunder that the examination-in-chief in every

case shall be on affidavit. Rule 5 of Order 18 had been incorporated even prior to the said amendment.

Rule 4 of Order 18 does not make any distinction between an appealable and non-appealable cases so far mode of recording evidence is concerned. Such a difference is to be found only in rules 5 and 13 of Order 18 of the Code.

It, therefore, appears that whereas under the unamended rule, the entire evidence was required to be adduced in Court, now the examination in chief of a witness including the party to a suit is to be tendered on affidavit. The expressions "in every case" are significant. What, thus, remains, viz., cross-examination or re-examination in the appealable cases will have to be considered in the manner laid down in the Rules, subject to the other sub-rules of Rule 4.

Rule 5 of Order 18 speaks of the other formalities which are required to be complied with. In the cases, however, where an appeal is not allowed, the procedures laid down in Rule 5 are not required to be followed.

In a situation of this nature, the doctrine of suppression of mischief rule as adumbrated in *Heydon's case (3 Co. Rep. 7a, 76 ER 637) shall apply.* Such an amendment was made by the Parliament consciously and, thus, full effect thereto must be given.

The matter may be considered from another angle. Presence of a party during examination-in-chief is not imperative. If any objection is taken to any statement made in the affidavit, as for example, that a statement has been made beyond the pleadings, such an objection can always be taken before the Court in writing and in any event, the attention of the witness can always be drawn while cross examining him. The defendant would not be prejudiced in any manner whatsoever the examination-in-chief is taken on an affidavit and in the event, he desires to cross-examine the said witness he would be permitted to do so in the open Court. There may be cases where a party may not feel the necessity of cross-examining a witness, examined on behalf of the other side. The time of the Court would not be wasted in examining such witness in open Court.

Applying the aforementioned principles of interpretation of statute, we have no doubt in our mind that Order 18, Rules 4 and 5 are required to be harmoniously construed. Both the provisions are required to be given effect to and as Order 18, Rule 5 cannot be read as an exception to Order 18 Rule 4.

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PART - III

CIRCULARS / NOTIFICATIONS

Ministry of Finance and Company Affairs (Department of Revenue) Notification No. G.S.R. 217 (E) dated the 17th March, 2003. Published in the Gazette of India (Extraordinary) Part II Section 3(i) dated 17-3-2003 Page 2.

In exercise of the powers conferred by Section 9, read with Section 76 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government hereby makes the following rules further to amend the Narcotic Drugs and Psychotropic Substances Rules, 1985, namely :—

1. (1) These rules may be called the Narcotic Drugs and Psychotropic Substances (Amendment) Rules, 2003.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the Narcotic Drugs and Psychotropic Substances Rules, 1985 :-

(i) in Schedule I, under sub-heading II, "PSYCHOTROPIC SUBSTANCES", items 25 and 32 and the entries relating thereto shall be omitted;

(ii) in Schedle III, after item 3, the following items shall be inserted, namely :—

1	2	3	4
"4.	Nimetazepam		1, 3-Dihydro-1- methyl -7- nitro- 5- phenyl- 2H-1, 4-benzodin zepin 2-one.
5.	Temazepam		7-Choloro-1 3, dihydro-3- hydroxy-1 methyl-5- phenyl-2H-1, 4 benzodiazepin - 2- one"

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MINISTRY OF CONSUMER AFFAIRS, FOOD AND PUBLIC DISTRIBUTION

S.O. 270 (E), dated March 10, 2003.— In exercise of the powers conferred by sub-section (2) of Section 1 of the Consumer Protection (Amendment) Act, 2002 (62 of 2002) (2003-CCL-II-90), the Central Government hereby appoints the 15th day of March, 2003 as the date on which all the provisions of the said Act shall come into force.

(Published in the Gazette of India, Extraordinary, Part II, Section 3 (ii), No. 228 dated 10th March, 2003.)

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Ministry of Power Notification No. S.O. 669 (E) dated the 10th June, 2003. Published in the Gazette of India (Extraordinary) Part II Section 3 (ii) dated 10-6-2003 Page1.

In exercise of the powers conferred by sub-section (3) of Section 1 of the Electricity Act, 2003 (36 of 2003), the Central Government hereby appoints the 10th day of June, 2003, as the date on which the following provisions of the said Act shall come into force, namely :-

Sections 1 to 120 and Sections 122 to 185.

●

Ministry of Finance and Company Affairs (Department of Economic Affairs (Banking Division) Notification No. S.O. 140 (E) dated the 6th February 2003. Published in the Gazette of India (Extraordinary) Part II Section 31 dated 6-2-2003 Page 1.

In exercise of the powers conferred by sub-section (2) of Section 1 of the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 (55 of 2002), the Central Government hereby appoints the 6th day of February, 2003 as the date on which the provisions of the said Act shall come into force.

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उच्च न्यायालय, मध्यप्रदेश, जबलपुर

:: परिपत्र ::

क्र. ए/2817/तीन-18-65/91/जबलपुर, दिनांक 21 मार्च, 1991

प्रति,

जिला एवं सत्र न्यायाधीश,
राज्य के समस्त.

विषयः अधीनस्थ न्यायालयों के कर्मचारियों द्वारा सीधे माननीय मुख्य न्यायाधिपति अथवा रजिस्ट्रार अथवा शासन के उच्चाधिकारियों से सीधे पत्राचार करने बाबत्।

प्रायः ऐसा देखने में आ रहा है कि न्यायिक जिला स्थापनाओं पर कार्यरत् कर्मचारीगण अपनी सेवा संबंधी कठिनाइयों के समाधान के संबंध में माननीय मुख्य न्यायाधिपति, रजिस्ट्रार अथवा राज्य शासन से सीधे पत्राचार करते हैं जबकि उन्हें प्रथमतः संबंधित जिला न्यायाधीश, जिनके अधीन वे कार्यरत हैं, के समक्ष प्रस्तुत करना चाहिये। अधीनस्थ न्यायालयों के कर्मचारियों का यह कृत्य म.प्र. सिविल सर्विस (आचरण) नियम 1965 के नियम 21 के अंतर्गत कदाचार की परिधि में आता है।

(2) अतः निर्देशानुसार, आपको सूचित किया जाता है कि आपके अधीनस्थ कार्यरत कर्मचारी यदि भविष्य में अपनी सेवा संबंधी कठिनाइयों के संबंध में सीधे माननीय मुख्य न्यायाधिपति, रजिस्ट्रार अथवा राज्य शासन के उच्चाधिकारियों से सीधे पत्राचार करते हैं तो उनके विरुद्ध म.प्र. सिविल सेवा (आचरण) नियम 1965 के नियम 21 के अंतर्गत दंडात्मक कार्यवाही की जावेगी, ऐसा समस्त कर्मचारियों के मध्य परिचालित करें।

एडीशनल रजिस्ट्रार

HIGH COURT OF MADHYA PRADESH : JABALPUR.
MEMORANDUM

No. C/4978 / III-1-27-/75 (Guide line) Jabalpur, Dated 1 November, 200..

To,

The District & Sessions Judge.

Subject :- Regarding renewal of certificates of Oaths Commissioners.

***

It has been observed that the applications for renewal of Oath Commissioners are being mechanically forwarded by District & Sessions Judges for condonation of the delay. Rule 7 (2) of Commissioners of Oaths Rules, 1976, empowers District & Sessions Judges to condone the delay to the extent of 30 days. This apart, High Court of M.P. (Main Seat) in W.P. No. 6130/2001 Subhash Chandra Para Vs. High Court of M.P. and other vide judgment dated 12.12.2001 has specifically laid down that High Court has no power to condone the delay beyond 30 days. Thus, there is no propriety in forwarding the applications of Oath Commissioners to High Court which have been received after delay of 30 days.

To avoid unnecessary correspondence in this respect, I am directed to bring to your notice the following instructions to be followed while dealing the applications of renewal of Oath Commissioners:-

1. That the office of the District & Sessions Judge should maintain a register of the Oath Commissioners as contemplated under Rule 6 of Commissioners of Oaths Rules, 1976.
2. That any application submitted by the Oath Commissioner after the delay of 30 days should not be mechanically forwarded to the Registry, instead it should be rejected at their own level in view of Rule 7 (2) of Commissioner of Oaths Rule 1976 and in view of the decision on W.P. No. 6130/2001 Subhash Chandra Para Vs. High Court of M.P. and other (the copy of the judgment in W.P. No. 6130/- 2001 has already been circulated to all District & Sessions Judges.) However, it will not debar the applicant from applying afresh for the post of Oath Commissioner against the available vacancy.
3. That District & Sessions Judges should check on the basis of the register maintained under Rule 6 of Commissioner of Oaths Rule, 1976 and ensure that no Oaths Commissioner of his District continues to function as Oath Commissioner after the expiry of period of certificate.

4. That District & Sessions Judges shall be answerable if any Oath Commissioner is found functioning after the expiry of the period of the certificate without applying for its renewal in due time.

5. That District & Sessions Judges should specifically mention in their letter whether they have condoned the delay under Rule 7 (2) of Commissioner of Oaths Rules, 1976 while forwarding the application to the High Court for renewal.

Additional Registrar

●

HIGH COURT OF MADHYA PRADESH

REGISTRAR GENERAL
JABALPUR

D.O.No. 758/Confdl./2003/
BF-1/2003

Dated 12 November, 2003.

Dear

It has been observed that some Judicial Officers are not punctual in attending the court and also in sitting on dias, thereby, causing dissatisfaction in the public and adversely affecting the judicial work.

Therefore, you are requested to remain punctual in attending the Court and also sitting on dias except on compelling reasons. Also ensure the same from your subordinates. Any deviation/lapse shall be treated as alleged misconduct.

With regards,

Yours sincerely,
(A.K. SELOT)

●

I'll tell you a big secret, mon cher.
Don't wait for the last judgement.
It takes place everyday.

-Albert Camus

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

Notification No. f-3-62-2002-XXVI-2 dated the 14th July 2003.-

In exercise of the powers conferred by the Section 68 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (No. 56 of 2000), the State Government of Madhya Pradesh is hereby pleased to make the following rules, nemaly:-

CHAPTER I

Preliminary

1. Short title and commencement.— (1) These rules may be called as the Madhya Pradesh Juvenile Justice (Care and Protection of Children) Rules, 2003.

These rules shall extent to the whole of the State of Madhya Pradesh.

(2) They shall come into force on the date of their publication in the "Madhya Pradesh Gazette".

2. Definitions :— In these rules, unless the context otherwise requires :—

(a) "Act" means the Juvenile Justice (Care and Protection of Children) Act, 2003;

(b) "Adoption" means taking into custody and responsibility permanently of child covered under Act and the child shall have all the rights and privileges of a natural born child;

(c) "Child with special needs" Child with special needs is a child for whom specialized services or interventions are necessary to facilitate proper care and rehabilitation;

(d) "Place of safety" means any place or institution (not being a police lock up or jail) the person in charge of which is willing to temporarily receive and take care of the child and which, in the opinion of the Competent Authority, may be a place of safety for the child;

(e) "Foster Care" means placement of a child with a nuclear family or group foster home;

(f) "Pre adoptive foster Care" means placement of a child in a family temporarily till the child can be rehabilitated in a permanent home;

(g) "Foster Child" means a child placed with a foster parent or foster family;

(h) "Foster Parent/s means the person/s who is not the parents of the child, but is willing to undertake the responsibility for care and maintenance of the child as his or her parents without necessarily legal rights of property etc.;

(i) "Extended family" means relatives of the child with whom he/she can be placed in foster care;

(j) "Group Foster Care" means care of a group of children in one family or a group foster home run by a Non-Government Organisation;

(k) "Social Workers" means social workers duly recognized and empanelled by the Competent Authority, who are professionals or specially trained to provide Social Work expertise in areas such as counselling, adoption, Community Service, foster care, sponsorship and any other such service;

(l) "Form" means the form annexed to these rules;

(m) "Institution" for the purpose of these rules, means an observation home or a special home or a children's home or a shelter home set up under section 8,9,34 and 37 of the Act;

(n) "Officer-in-Charge" means a person appointed for the control and management of institution certified or recognized as such under the Act;

(o) "Government" means the Government of Madhya Pradesh;

(p) "Secondary Victimization" means and refers to behaviours and attitudes of authorities and personnel in the child justice system towards children within the system, which further traumatizes victims;

(q) "Sexual abuse" occurs when any adult uses a child for sexual pleasure. Sexual abuse can be physical, verbal or emotional and includes:

  (i) Sexual tourching and fondling:

  (ii) Exposing Children to adult sexual activity or pornographic movies and photographs;

  (iii) Having children pose, undress or perform in a sexual fashion on film or in person;

  (iv) Rape or attempted rape;

  (v) Forcing, tricking, bribing, threatening or pressuring a child into sexual awareness or activity;

(t) "take responsibility" means being responsible for the physical, mental, emotional and over all health and safety of the child;

(u) CARA Guidelines: means the Guidelines issued by the Central Adoption Resource Agency from time to time to regulate matters relating to adoption of Indian children.

CHAPTER II

Juvenile in Conflict with law

3. Juvenile Justice Board.— (1) The Juvenile Justice Board shall consist of a Metropolitan magistrate or a Judicial Magistrate of the first class, as the

case may be, and two social workers of whom atleast one shall be a woman, forming a bench.

(2) Every such bench shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974).

(3) A Magistrate with special knowledge/training in child psychology or child welfare shall be appointed as a Principal Magistrate of the Juvenile Justice Board.

(4) In case the Principal Magistrate with such special knowledge and training is not available, then the State Government shall provide for such short-term training.

(5) The two social workers, of whom atleast one shall be woman, shall be appointed by the State Government.

4. Selection of the members of Juvenile Justice Board. — (1) The selection of the social workers members of the board shall be made by a selection committee consisting of the following persons namely :—

(a) District and Sessions Judge;

(b) District Collector;

(c) Commissioner of Police/District Superintendent of Police.

(2) There shall be penal of not more than five names identified from willing and competent persons in the district chosen by the committee.

(3) The Government shall appoint social worker members to the board, only from the persons recommended by the selection committee. No persons shall be eligible for appointment unless he recommended by the selection committee.

5. Qualifications of Social Worker.— (1) The social worker to be appointed as a member of the Board shall be a person, who

(a) has been actively engaged in planning, implementing and administering health, education or other welfare activities pertaining to child rights issues for atleast five years;

(b) a graduate from a recognised University;

(c) a teacher, a doctor, retired public servant or a professional who is involved in the work concerning juveniles; or

(d) a social worker who has been directly engaged in child welfare.

(2) No practising lawyer shall be appointed a chairman or member of the Board.

(3) The appointment of Member may be terminated by the State Government in accordance with the provisions of sub-section (5) of Section 4 of the Act.

(4) A member may at any time resign by giving, one month notice in writing to the State Government.

(5) A casual vacancy among the members may be filled by appointment of another members for the remaining period of tenure of the member in whose place the appointment is made.

6. Term of the Member of the Board.— The term of the Member of the Board shall be five years from the date of his appointment provided that a social worker member of the Board shall be eligible for appointment for a maximum of two terms one shall not be more than 65 years of age.

7. Time and Place of sitting of the Juvenile Justice Board.— (1) The Board shall hold its sitting in the premises of a Observation Home. The board shall meet on two working days of a week on Wednesday and Friday from 11.00 a.m. to 5.00 p.m.

(2) The final disposition of the enquiry shall be passed by atleast two members of whom one shall be the Principal Magistrate.

(3) In case of difference of opinion in the process of disposition or interim order if any to be made, the opinion of the Majority shall prevail, but, where there is no such majority, the opinion of the Principal Magistrate shall prevail. In such cases, the Principal Magistrate shall record in writing the circumstances that led to him to take the final decision.

8. Honorarium. — The social worker members of the Juvenile Justice Board shall be paid a Honorarium as the State Government may determine from time to time.

9. Procedure through which a child may be produced before the Board.— (1) Persons through whom a child alleged to be in conflict with law may be produced before the Board.

(a) The officers of the Special Juvenile Police Unit

(b) Any Police Officer

(c) The Child herself/himself

(d) Any recognized voluntary organization willing to take responsibility.

(2) Wherever possible, all such persons shall, except at the time or arrest, only were civil clothes and not a uniform unless specific circumstances require the said officer to wear a Police uniform in the interest of the child. However, they shall at all times have their identification card that shall be produced on demand.

(3) The concerned Police Officer shall perform the role of friend of the child. He/she shall perform all the specific roles and responsibilities required by Police with regard to children alleged to be in conflict with law. He/she shall work in close co-ordination with the Social Workers in the Special Juvenile Police Unit and perform only specialized roles expected by the police. All Police Officers are ultimately responsible for the care and protection of the children.

(4) The social workers at the Special Juvenile Police Unit shall be the case-worker in relation to the Children alleged to be in conflict with law and shall also perform on the role of friend of the child. He/she shall receive the child in a sensitive and friendly manner and enable him or her to feel at case during the entire process of First Contact and preliminary inquiry.

(5) As soon as a child in conflict with the law is apprehended by the Police, the Police shall place the child under the charge of the special juvenile police unit or the designated police officer. In case a recognized voluntary organization takes a child to the Juvenile Justice Board, the voluntary Organization shall also inform the concerned Police Station.

(6) The special juvenile police unit or any other producing agent shall produce the child before the Magistrate or a Member or the Board within 24 hours of his apprehension (excluding the time taken to bring the child from the Police Station/place of safety to the Board). In case of delay in production before the Magistrate/Board, the details of not doing so are recorded in the Police Dairy/ General Diary. Preliminary inquiries should be completed as soon as possible and care shall be taken not to cause any stress to the child for purposes of extracting information for this assessment or the initial reports.

(7) The child shall be informed promptly and directly of the charges against her/him in a language and manner that she/he understands so as to ensure full comprehension of the same.

(8) On arrest the child shall be given all possible assistance to enable her/ him to fulfil her/his right to call any person of her/his choice over the phone or otherwise.

(9) The child shall not be compelled to confess or give testimony. No form of torture or harassment shall be used in order to extract information from the child.

(10) On arrest, the child shall not be kept in the lock up of the police station or jail in order to conduct the preliminary inquiries. Instead, in the shortest possible time not exceeding eight hours, she/he shall be taken to a place of safety such as the Special Juvenile Police Unit or other such organization wherever such organization is present. When a child is kept in a place other than the special juvenile police unit, the officer in charge of the said place shall immediately inform the special juvenile Police unit of that jurisdiction and shall as far as possible work in co-ordination. All such places shall be child friendly places with an environment, services and facilities which respect the children as person and enable them to relax, play express their opinions, participate in decisions concerning them and have access to caring and responsible adults. The Police/recognized voluntary organization shall be responsible to ensure the safety of the children apprehended or kept under their charge.

(11) The child alleged to be in conflict with law shall be provided with nurturing care as well as other services deemed necessary at that time, such as immediate medical attention, basic needs, consoling, etc.

(12) The special juvenile police unit to which the child is brought, shall inform the concerned Probation Officer of such apprehension in Form IX to obtain information regarding the antecedents and family background of the child and other material circumstances likely to be useful for assistance to the Board for making the inquiry.

(13) The designated Child Welfare Officer or officers from the special juve-

nile police unit shall in the shortest possible time, inform the parents or legal guardian about arrest of the child in Form X. During any further questioning of the child, they shall ensure the presence of the parent or legal guardian. The concerned officer may also make a concerted attempt to identify someone as a "fit person" — preferably a social worker who knows and is willing to take responsibility of the child. The Officer along with the fit person shall consult the child and determine together, whether it is in her/his interest to inform the parent/legal guardian, taking into account the cases where the parents/legal guardians allegedly exploit or abuse children.

(14) The social worker of the special juvenile police unit or the Senior Social Worker in case of the recognized voluntary organization, shall as far as possible make a visit to the home of the child as well as to the place of the alleged crime and prepare a social investigation report narrating the circumstances of apprehension and offence committed, with the description on the possible reasons why the child has allegedly committed by the crime.

(15) The producing agent may make a report with recommendations to the Board. Such recommendations may include immediate release after admonition or reconciliation to be facilitated by the Child Welfare Officer at the special juvenile police unit itself. Whenever appropriate and possible, children alleged to have committed petty offences may be released from the special juvenile police unit itself, when one member or the bench of the Board accepts such recommendations within the maximum 24 hour period for preliminary inquiry. If the Board ratifies such a recommendation, the said child shall be released from the place of safety itself. If the Board decides not to take this recommendation into account, then the child may be transferred to the Observation Home and physically produced before the Board.

10. Procedure to be followed by a juvenile justice board in holding inquires.— (1) In every case in connection with a child, the Board shall obtain a birth certificate or medical opinion regarding his age and his physical and mental conditions.

(2) The Board shall satisfy itself either from the declaration of Police in writing or otherwise that the child was not kept in Police lock up or jail prior to the production of the child before the Board and that he/she was produced within 24 hours of taking charge. The Board shall also satisfy that the child has not been subjected to ill treatment or harassment either by the Police or by any other person from the time of taking charge. The Board shall also ensure that no girl was taken into charge by police between sunset and sunrise, provided if the circumstances warrant, that she was kept under the care of a woman in a place of safety or in an Observation Home.

(3) No juvenile or the child shall be handcuffed or featured under the provisions of the Act and the rules made thereunder.

(4) When the child is presented first time before the Board, the Board shall immediately determine whether the child can be released on bail. If the child can

be released on bail, then the court shall release the child either to a parent, guardian and fit person/institution or on personal bond by the child.

(5) When the child is presented before the Board, the Board shall communicate to the child in a child friendly manner in a home like environment, and in a manner that the child can understand the substance of the charge against him/her. The child shall be asked whether he/she committed the offence of which he or she is accused.

(6) If the child accepts that he/she committed the offence of which he or she is accused, then the Board records the acceptance and issue the appropriate order. If offence is not serious, the Board shall wherever possible issue a reprimand and release the child.

(7) When witnesses are produced for examination, the Board shall exercise the power conferred on it by Section 165 of the Indian Evidence Act, 1872, so as to question them as to bring out any point which may go in favour of the child.

(8) If the child does not accept the substance of the charge, then the Board shall proceed to hear the prosecution and take all evidence produced by the prosecution and also hear the accused and take all evidence as he/she produces in his/her defence.

(9) The Board may if it thinks fit on the application of the prosecution side or the child, issue a summons to any witness directing him to attend or to produce any document or thing.

(10) The Board shall address its inquiry with the question that why the child committed the offence and how best to redress the causative factors. In accordance with sub-section (2) of Section 10, the Board shall also order in Form I to a Probation Officer, or otherwise to conduct a social investigation, reporting on the character and antecedents of the child with a view to assessing the best possible mode for placement, such as, with the family, an institution or otherwise permissible under the Act.

(11) The order to be issued by the Board shall take into account —

(a) the views of the child

(b) the best interest of the child

(c) the fact that detention should be a last resort and for the shortest possible period of time. Only in the case of serious offences or chronic repeaters the Board shall order detention.

(12) The State Government shall recognize registered voluntary organizations to supervise and submit periodical reports and directed by the Board regarding the orders passed under clause (b) and (c) of sub-section (1) of Section 15 of the Act.

(13) When a child is placed under the care of a parent or a guardian and if the Juvenile Justice Board deems it expedient to place the child under the supervision of a probation officer, it shall issue a supervision order in Form II.

(14) The Competent Authority may, while making an order placing a juvenile under the care of a parent, guardian or fit person, as the case may be direct such parent, guardian or fit person to execute a bond with or without sureties in Form IV.

(15) Whenever the Juvenile Justice Board orders a child to be kept in an institution, it shall, forward to the Officer-in-Charge of such institution a copy of its order in Form III with particulars of the home and parents or guardian and previous record.

(16) All children shall be kept in such a home which is nearest to where he/she belongs, unless it is not in his/her interest to do so, such as in situations of conflict/disaster.

(17) The Officer-in-Charge of an institution certified as Special Home under sub-section (2) of Section 9 of the Act shall be informed in advance by the Board before any child is committed to it.

(18) The Officer-in-Charge of the said institution may on receipt of the information intimate in writing objections, if any, to the committal of the child and the objections shall be fully taken into consideration by the Board before the child is committed to the said institution.

(19) In case the board orders in Form VIII to the parent of the child or the child to pay a fine, the amount realized will be deposited in the Government Treasury.

(20) When a child is produced before an individual member of the Board, the order given by the member shall be ratified in the next meeting of the Board.

(21) The Board shall initiate action against any media for publishing any matters relating to children in need of care and protection, if such material leads to the identification of the child.

11. Procedure in respect of sections 23, 24, 25 and 26 of the Act. — The offences against the juvenile or child specified in sections 23, 24, 25 and 26 shall be either bailable or non bailable besides being cognizable under the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) and the provisions of bail or otherwise, shall apply on the police, the Board and the concerned accordingly.

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CHAPTER IV

Establishment of Institutions under the Act

21. Observation Home. — (1) The State Government may establish and maintain Observation Home either by itself or under an agreement with voluntary organization in every district or a group of districts as may be required or the temporary reception of any child alleged to be in conflict with law during the pendency of any inquiry regarding them under the Act.

(2) Separate institutions shall be maintained for boys and girls.

(3) Inmates of the institutions shall be classified and separated in accordance with their degree of offence and their age as follows—

Age group up to 12 years

Age group of 12 to 16 years

Age group of 16 to 18 years

(4) The State Government may also certify or recognise any institution as Observation Home for the purpose of this Act.

22. Objective of the Observation Home.— (1) Opportunities to pursue Education shall be offered through the provision of creative non-formal classes that to enable the child to sustain his/her interest in formal education especially if the child has attended such school.

(2) Special counselling sessions may be conducted by trained person to enable children alleged to be in conflict with law to deal with their feelings and fears about their situation and to offer them legal aid.

(3) In any case, children shall be offered opportunities to make constructive use of their time even during this short period of observation.

23. Management of Observation Home.— Management of Observation Home shall be maintained by an officer in charge specifically appointed to hold office as susperintendent of the institution, who is under the control and supervision of the Commissioner/Director of Social Welfare. The custody of children in conflict with law in the Observation Home shall be Judicial Custody.

24. Admission of a Child.— (1) Admission of child in the Observation Home shall be made round the clock and the Officer Incharge of Observation Home is bound to receive the child irrespective of the time.

(2) Admission of child in the Observation Home or a place of safety shall be made by the Juvenile Justice Board by issuing a placement order duly signed and seal affixed. No child other than a child in conflict with law shall be kept in an Observation Home.

(3) The Officer-in-Charge shall be authorised to detain in the Observation Home a child brought during the night till he is produced before the Juvenile Justice Board, the next day for obtaining an order.

(4) The Officer-in-Charge shall refuse admission of a child whose age, identification marks and offence for which he is charged etc. has not been mentioned specifically. Provided further admission can also be refused if the placement order is not signed duly or corrections not attested properly or brought without any seal affixed.

(5) The Superintendent/Officer-in-charge will be personally responsible to see that no child is admitted unauthorised. He will keep a proper check when a child is admitted at odd hours.

25. Special Homes. — (1) The State Government may establish and maintain Special Home either by itself or under an agreement with voluntary organi-

zation in every district or a group of districts as may be required for the reception, care, treatment and rehabilitation of children in conflict with law who have been directed to undergo institutional training for his activities against law.

(2) Separate institutions shall be maintained for boys and girls.

(3) Inmates of the institutions shall be classified and separated in accordance with their degree of offence and their age as follows.—

Age group of 12 years

Age group of 12 to 16 years

Age group of 16 to 18 years

(4) The State Government may also certify or recognise any institution as Special home for the purpose of this Act.

26. Objectives of Special Home.— The objectives of the Special Homes shall be —

(1) (a) to receive a juvenile in conflict with law who has been ordered by Juvenile Justice Board;

(b) to provide opportunities to receive emotional and psychological support;

(c) to facilitate the child to receive proper health care, education, vocational training behaviour modification programmes etc.;

(d) to ensure the child to be protected from secondary victimization and assist the child for development and growth;

(e) to prepare the child for reintegration within the community as a changed person;

(f) Special Programmes: Programmes may be to—

(i) Assist the child to accept rather than to avoid responsibility for his/her actions;

(ii) Help the child to focus on helping to resolve problems identified as contributing to their offending behaviour;

(iii) Assist the child to develop practical alternative ways of coping with stressors;

(iv) Involve, wherever possible, families of offenders to work on family issues likely to reduce offending;

(v) Remediating educational deficits in basic skills to raise social competence;

(vi) Help to develop market place work skills, which can lead to further training opportunities, qualifications and real jobs;

(vii) Assist the child in establishing and strengthening relationships with significant others who can then become mentors and role models;

(viii) Involve the child in empowering experiences of assessing their own needs and planning and monitoring their own case plans;

(ix) Help the child to develop skills and confidence to assert positive leadership and self-discipline;

(2) Efforts may be made to develop a Victim Offender Reconciliation Programme (Concept taken from Victim Offender Reconciliation Programme, www.vorp.com) with such experts involving interested and competent Non-Government Organizations. The objective of such programmes may be to offer avenues for communication, responsibility reconciliation and restitution;

(3) A programme for Group Counselling and other such services shall be evolved with the help of experts in the field;

(4) A Programme to offer and monitor meaningful and effective community service to children in conflict with law, who are ordered to undergo for the same, may be evolved with the help of competent and sensitive Non-Government Organizations/ experts. The Objective of such community service shall to be enable the child to move towards becoming an adjusted member of the community and it shall in no way further stigmatize the child or violate his rights.

27. Management of Special Home.— Management of Special Home shall be maintained by an Officer in charge specifically appointed to hold office as superintendent of the institution, who is under the control and supervision of the Commissioner/Director of Social Welfare.

28. Admission of Child.— (1) A child in conflict with law shall be admitted on a written placement order issued and duly signed by the Juvenile Justice Board for the purpose of receiving the institutional programme.

(2) No child shall be admitted or kept in the Special Home without any valid placement order issued by the Juvenile Justice Board or any other Competent Authority exercising the powers of the Juvenile Justice Board.

(3) No child shall be kept in the Special Home beyond the date upto which the child can be kept as per orders of Juvenile Justice Board.

(4) If a child is to be kept in Special Home beyond the date up to which the child was ordered to be kept in the institutions, the formal order of the Juvenile Justice Board shall be obtained in advance to complete the academic or vocational training till the closure of the academic year.

29. Children Homes.— (1) The State Government may establish and maintain Children Home either by itself or under an agreement with voluntary organization in every district or a group of districts as may be required for children in need of care and protection.

(2) Separate institutions shall be maintained for boys and girls.

(3) Inmates of the institutions shall be classified and separated in accordance with their age as follows.—

Age group up to 12 years

Age group of 12 to 16 years

Age group of 16 to 18 years

(4) The State Government may also certify or recognise any institution as Children Home for the purpose of this Act.

(5) Each Children Home should be a comprehensive child care centre.

30. Objectives of the Children Home.— The objectives of the Children Home shall be —

(a) to receive a child in need of care and protection;

(b) to facilitate the child to receive educational and vocational training behaviour modifications programmes for personal growth and developments;

(c) to ensure that the child develops positive attitude towards family and creates a linkage with the family.

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34. Disposition of Children from Reception Unit.— Children in the Reception Unit shall be discharged from the Reception Unit on the orders of the Child Welfare Committee. The child welfare committee may order that —

(a) the child shall be restored to the care of parents or relatives as per the orders of the Child Welfare Committee; or

(b) the child shall be shifted to the regular unit of the Children Home for further development activities of the child; or

(c) the child shall be transferred to a similar Children Home or a Shelter Home or a fit institution or under the care of fit person; or

(d) if a child belongs to some other State/District the child shall be transferred to the respective Child Welfare Committee for further enquiry and disposition.

35. Transfer/Escorts.— (1) The transfer of a child to any of the Children Homes or Shelter Homes in other State shall be made within a week of the orders of the Child Welfare Committee and the cases related to transfer to another State shall be completed within 30 days by arranging proper escorts.

(2) The transfer of children shall be given effect by a travel document issued by the Officer Incharge of the institution.

(3) Girl child shall be escorted by female staff accompanied by a male staff.

36. After Care Homes.— (1) After Care Homes may be set up to take care of children after they leave Special Homes and Children's Homes. These after care services shall be offered to all children/youth between the ages of 18-20

years in order to empower them and facilitate their smooth transition from institutional life into the community.

(2) Objective of these homes would be to enable such children to learn life skills, which will enable them to adapt to society. During their stay in these homes these children should be encouraged to move away from an institution based life to a normal one.

(3) Target groups shall include who have either left Special Homes or Children's Homes.

(4) The Key components of the model may include setting up of temporary homes for a group of youth, who can be encouraged to learned a trade and contribute towards the rent as well as the running of the home. There should also be provision for a peer counselor. The counselor may be in regular contact with these youths to discuss their rehabilitation plans and provide creative outlets for their energy, to tide over crisis periods in their life.

(5) The programmes under the scheme of after Care Programme shall include—

(a) facilitating employment generation for these youth. When a youth has saved a sufficient amount, she/he can be encouraged to stay in a place of his/her own and move out of the group home, or the youth must continue staying in the home. The youth who are learning a vocational trade could be given a stipend. This shall be stopped when the youth gets a job;

(b) Loans to these youth to set up entrepreneurial activities would also be arranged;

(c) Micro-credit and entrepreneurship training as well as income generation programmes should be offered;

(d) Girls especially shall be encouraged to take up further education and take admission in other Government Hostels. Though they may be financially and otherwise supported in case they opt to be married, such an option shall not be the only one offered to them as a reintegration strategy. When on discharge from the After Care Home, a youth who has absolutely no parent or guardian or mentor, youth shall be referred to appropriate recognized agencies or Non-Government Organizations for further training or apprenticeship or other such rehabilitative measure;

(e) A peer counselor whould also be available for youth at these homes. Since at this stage of life they can be lured into crime or drug dependence and such other habits or deviant behaviour, hence they need for a counselor;

(f) As far as possible, these after care homes shall be located within the community in areas that enable the youth to come in contact with a healthy social and community life. Each home would house

6-8 youths who could opt to stay together. One peer counselor can be in-charge of a cluster of 5 homes;

(g) Wherever possible, the State Government may make efforts to dovetail the After Care Home Programme with other State and Central Government Schemes that may enable the youth to take advantage of opportunities to secure a better future on his or her own.

37. Shelter Homes.— (1) For the children in urgent need of care and protection, such as destitutes, street children etc. the State Government support creation of the requisite number and not less than one Shelter Home through voluntary organizations. Local Authority Children with special needs from Children's Homes may also be referred to these Shelter Homes for special care, if such special care is available.

(2) The Shelter homes may be run in a manner, which facilitates following two stages of intervention during the period of initial contact with children,—

(a) **First contact.**— The first stage of intervention shall be made through initiating first contact intervention similar to street contact centers located on Railway Stations or other areas of high density of children at risk;

(b) **Transit care.**— The second stage shall be to facilitate a more settled setting for children in crisis who require transit care prior to long-term placement.

(3) **Infrastructure.**— The first contact centers of the Shelter Home shall have a fairly large physical space for reception of children along with attached bathing and toilet facilities. The Shelter Homes for transit care shall have the minimum facilities of boarding and lodging besides the provision for fulfillment of basic needs in terms of clothing. Both these centers of the Shelter Home shall be managed in such a way as to provide child centered community based reception centers for children.

(4) The Child Welfare Committees, Special Juvenile Police Units, Public Servants, Child Lines, Voluntary organizations, Social Workers and the children themselves may refer a child to such facilities.

(5) The legal requirements of investigation and disposal shall not apply in cases of children residing in the Shelter Home, except giving information to the committee and the police about the missing or homeless children besides initiating legal action in the interest of the child in terms of the Act or other child related laws.

(6) **Duration of stay in the Shelter Homes.**— The Staff of the Shelter Home shall make a case plan for each child and work with the child to try and find a suitable placement as soon as possible. No child shall ordinarily stay in the transit care Shelter Home for more than 3 to 6 months, in case of Government funding all children who have not been placed in such home shall be re-

ferred to other Non Government Organization for further follow up. A list of such Non Government Organization shall be maintained and effective liaison and networking initiated to facilitate such referrals.

(7) **Management.**— The Shelter Home shall be run by recognized or authorized voluntary organizations having a minimum of one year in dealing with children in especially difficult circumstances. The Shelter Home shall to the extent possible, be managed by taking into account the pricniples and standards outlined in the Rules listed in the Chapter VII on Institutional management, in accordance with the needs of the child.

38. Objectives of the Shelter Home.— (1) There shall be following objectives of the Shelter homes.—

(a) identify and receive children who are at risk and in need of urgent care and protection as well as those who specifically seek help in that jurisdiction;

(b) build up a friendly relationship with the child as to enable him/her to understand and share the reasons for his/her present situation as well as to participate in a decision regarding his/her placement;

(c) offer quick assessment services and referrals to detailed assessment and other services;

(d) offer service of counseling, recreation, medical attention, non-formal education and temporary, open and freely accessible 24 hour shelter;

(e) directly link up with competent authorities and institutions under the Act coming under that jurisdiction as well as network with the Child Help Line of the area and all other recognized fit persons, voluntary organizations and fit person willing to assist in the work of the Shelter Home.

(2) **Location.**— The Shelter Home shall preferably be located in areas of high density of children in difficult circumstances such as Railway Stations, market Stations, market places and other commercial areas.

(3) **Jurisdiction.**— The State Government shall encourage for setting up atleast one Shelter Home in every District.

(4) **Affiliation to the Jurisdictional Police Station.**— Every Shelter Home shall be affiliated to the Jurisdictional Police station and to the Child Help Line for any specific assistance.

(5) **Staffing pattern.**— The staffing pattern of the Shelter Home may be as under :-

(a) One ~~Se~~nior Social Worker who is qualified or has special trai~~nin~~g or experience in working with children in especially difficult circumstances;

(b) One Junior para professional with special training or experience in working with children in especially difficult circumstances;

(c) One helper;

(d) Two youth per counselors performing the role of friends of children.

(6) **Shelter Homes for Children with Special Needs : Such as Mentally Challenged Children.**— The State Government may run Children's Homes for mentally challenged children and children with multiple disabilities as per need. All Rules of Chapter VII of these Rules shall be applicable in these Homes.

39. Children Affected by Displacement, Disaster and Conflict.— Children affected by displacement, disaster and conflict shall be dealt with as children in need of care and protection under these Rules. However, certain additional principles and Rules to provide for special care shall be observed as stated below:—

(1) **Special Provisions for children affected by displacement, disaster and conflict.—**

(a) children shall to informed for their own situation as well as the details of their family if known, the progress in resettlement and any other issue that may be relevant to the child;

(b) there shall be no discrimination based on caste, language, ethnic origin, gender, or any other status by either staff or other children. Due consideration shall be given to the dynamics associated with conflict or other such situation;

(c) respect for cultural needs: Keeping in mind that the child may be from diverse cultural background every effort shall be made to be sensitive to the child's cultural and social needs. Such efforts may be to cook food familiar the child, identify persons who speak the language of the child to interact with the child and make the child comfortable and secure so as to reduce the stress of being in an alien environment. The child shall be allowed to follow his or her own religion, rituals and festivals;

(d) family and community-based re-integration shall be given priority. However, with due regard to the root cause and special circumstances of the case, exceptions may be made with reasons recorded in writing;

(e) the competent authorities shall respect and ensure respect for relevant rules of international humanitarian law applicable in situations of armed conflict.

(2) **Reporting.**— Only a trained social worker, child psychologist or child psychiatrist shall assess the situation of the child and prepare the report. Personnel shall make every effort to understand, report and respond to the Tourism Officer deep psychological impact on such children and shall strive to receive

and deal with the child sensitively. In preparation of the report and during all other procedures, every effort shall be made to avoid secondary victimization.

(3) **Procedure.—** Need Assessment of child shall be done by a child psychologist or trained social worker within four days of arrival of the child in the contact. All other procedures may be such as prescribed in chapter III of these Rules.

(4) **Non-institutional care.—** As far as possible, the child shall not be institutionalized in a State Institution but kept in a foster home under the foster care scheme, by foster parents who are specially oriented and trained to care for such children. The foster home shall serve as a home for interim care. During the child's stay in the interim home a basic standard of care that will meet with the child's physical, emotional, develoPmental and other needs shall be ensured.

(5) **Counseling and trauma care.—** Children who have been sexually abused, mentally disturbed or traumatized due to such disaster, conflict or displacement etc., or who have particular needs such as those arising from having a HIV positive status shall wherever possible be attended to by a child psychologist, a trained social worker or psychiatrist and given immediate medical attention and counseling. Regular counseling sessions with children (not less frequently than once a week) with trained personnel shall be facilitated.

(6) **Education.—** As far as possible, education that facilitates the continuation of the child's previous education, must be imparted to the child during stay in foster home or any other further long-term placement during the interim period. Such education may also be facilitated through non-formal methods.

(7) **Legal protection and assistance.—** Special care shall be taken to ensure that the legal rights of such children are respected and action taken under the relevant laws.

(8) **Family Tracing.—** For a child who has been found and who has not been admitted through voluntary procedures, the immediate task shall be to trace the family or the nearest known relative. This task shall be completed within the shortest appropriate period of time as under :—

(a) every effort must be made to trace the family/extended family an understand the history of the child, before placing the child in any long term care. Community based initiatives that are found to be sustainable and the interest of children may be identified and availed of after due consideration. If children are orpnaned and have no extended family then keeping in mind the principle of best interest of the child, alternative foster or adoptive families may be identified preferably from within the child community;

(b) When it has come to the notice of the competent authorities that there is a cause connected with the children, especially girls are being abused, exploited during such situations such children shall be identified and referred to recognized Non Government Organizations, civil society organizations fit persons or other state run

Institutions for long term care, and the adult offenders dealt with under the relevant laws. Special care shall be taken to prevent such children from being arbitrarily transferred or placed with persons who do not have the best interest of the child at heart such as those who arrange the marriage or such children for their supposed protection during such time of disturbance.

(9) **Follow up.**— Probation Officer or any other recognized voluntary organization or civil society organization that will follow up on the child must be identified. This organization must communicate within a month of resettlement about the well being of the child. The following issues shall be addressed at time of resettlement —

(a) Condition in home state and a report on the desirability of the continuing to stay in the home state considering the present condition of disaster, conflict or other such reasons for displacement;

(b) Situation of family or other persons who have been caring for the child prior to displacement;

(c) Care plan for re-integration and rehabilitation taking into account the feelings and opinion of the child about placement.

(10) **Sponsorship.**— If the family is unable to take care of the child for financial reasons, sponsorship support for the family shall be considered.

(11) Alternate arrangement if the child is not placed back to his/her home state, or placed in foster care or adoption, he or she may be referred to a Shellter Home for special care.

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CHAPTER V

Juvenile Police Unit

41. Special Juvenile Police Unit.— (1) The State Government shall create a minimum one Special Juvenile Police Unit at the district which shall operate as a Centre for Comprehensive First Contact Care for children under the Act.

(2) **Objective of the Special Juvenile Police Unit.**— The Objectives of the Special Juvenile Police Unit shall be as under.—

(a) to identify and receive children at the point of First contact, undertake outreach work in the jurisdiction to identify children at risk and conduct home visits of children;

(b) to build up a friendly relationship with the child so as to enable her/him to understand and share reasons for her/his present situation as well as to participate in a decision regarding proceedings concerning her/him;

(c) to conduct an individualized quick assessment and inquiry and offer counseling, medical attention, recreation services as well as referral to detailed assessment and other services;

(d) to provide Child Help Line and emergency outreach services through 1098;

(e) to network with the Child Help Line of the area and all other recognized fit persons/institutions and voluntary organizations willing to assist in the work of the SJPU as well as directly link up with competent authorities and institutions under the Act coming under that jurisdiction;

(f) to take on the role of the Child Friendly First Intervention Centres and perform the function of a Community Based Reception Unit of the Observation Home/Children's Home to receive, undertake preliminary inquiries, provide timely counseling and early intervention by operationalising the principle of diversion;

(g) to co-ordinate and upgrade the police treatment towards children;

(h) to operate a mobile Special Juvenile Police Unit which may be called upon by the concerned police station whenever a child is either apprehended or received under the Act;

(i) to function as a place of safety for children;

(j) any other tasks which the unit shall have to perform in the course of their ordinary duties in a child centered manner.

(3) **Location of Special Juvenile Police Unit.**— The Special Juvenile Police Unit shall not be located within the precincts of a Police Station, but it shall be located within the premises of a space being utilized by a recognized voluntary organization or a public educational institution or any such place. In addition mobile unit for the Special Juvenile Police Unit may be set up, which shall liaison with the respective jurisdictional Special Juvenile Police Unit.

(4) **Jurisdiction.**— (a) The Special Juvenile Police Unit shall have the jurisdiction on a number of Police Stations in a particular zone as identified as necessary by the SJPU for taking into account the density of children at risk in the area by the Special Juvenile Police Unit. Every District shall have a minimum of one Special Juvenile Police Unit;

(b) **Affiliation to the Jurisdictional Police Station.**— Every Special Juvenile Police Unit shall be affiliated to the nearest police station for documentation and for any specific assistance.

(5) **Staff of the Special Juvenile Police Unit.**— (a) A Child Welfare Officer shall be designated in term of Section 63 of the Act not below the rank of Inspector or sub-Inspector of Police;

(b) The Juvenile Police Unit at the district level shall function under the supervision of a Child Welfare Officer and two Voluntary Social Workers of whom one shall be a woman and another preferably child expert or having relevant experience;

(c) One Junior Social Worker who is qualified or experienced as a para professional with a minimum of one year experience in dealing directly with children in especially difficult circumstances. (One of these two Social Workers shall be a woman);

(d) A minimum of one Police constable who shall be a woman;

(e) One helper;

(f) Two youth counselors taking on the role of 'friends of Children' who come to the Special Juvenile Police Unit;

(g) One Police Officer;

(h) Clothing to be worn by persons designated to deal with children under the Act.— Wherever possible, all such persons shall, except at the time of arrest, only wear civil clothes and not a uniform unless specific circumstances require the said Officer to wear a Police uniform in the interest of the child. However, they shall at all time have on their person, an identification that shall be produced on demand.

(6) **Management.**— (a) Every Special Juvenile Police Unit may net work by a recognized voluntary organization having experience and training in directly working with children in especially difficult circumstances;

(b) All Special Juvenile Police Units shall report directly to the Commissioner/Superintendent of Police.

(7) **Procedure.**— (a) The staff of the Special Juvenile Police Unit shall receive the child who has been identified as needing the services provided under the Act according to the principles outlined in these Rules and proceed to conduct preliminary inquiries and offer services that the child may need at this point of initial contact;

(b) Special investigations and reports that are required to be undertaken by the Police shall be made in addition to which social investigation reports may also be made by the social workers of the Special Juvenile Police Unit. The social investigation report of the social worker attached to the Special Juvenile Police Unit may be considered;

(c) Every police station shall display the main features of Juvenile Justice Act on the board in the entrance of the police station.

(8) **Missing Children's Bureau.**— (a) The State Government shall set up a Missing Children's Bureau for documentation and publishing information relating to Missing Children. Computerized softwere shall be put in place to facilitate such a service. Attempts shall be made to network with all other similar facilities set up around the country so as to facilitate speedy scanning and transmission of information about such children around the country. This shall serve as a database of missing Children;

(b) The Missing Children's Bureau shall be linked up to the Child Help Line wherever available as well as to all major Police Stations in each District;

(c) All citizens found to be directly related to or otherwise authorised to access this information shall be allowed free access to this data base. Persons found to be abusing this database against the interests of children shall be investigated and the necessary action shall be taken.

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67. Procedure on the death of a Child. — On the occurrence of any case of death or suicide the following procedure shall be adopted :-

(a) If a child dies within 24 hours of his admission to the institution an inquest and postmortem examination shall be held ;

(b) Whenever a sudden or violent death or death from suicide or accident takes place, immediate information shall be given to the Officer-in-Charge and the Medical Officer. The Officer-in-Charge and the Medical Officer should examine and inspect the dead body. In case a child dies due to causes other than natural causes or if the cause of death is not known or if the death occurred due to suicide or violence or accident or whenever there is any doubt or complaint or question concerning the cause of death of any child, the Officer-in-Charge shall inform the Officer-in-Charge of the Police Station having jurisdiction. The Officer-in-Charge shall also immediately give intimation to nearest Magistrate empowered to hold inquests;

(c) Upon the death of a child during the period of stay in the institution, the nearest relative shall have the right to inspect the death certificate, see the body and determine the method of disposal of the body. In such circumstance, there shall be an independent inquiry by a subcommittee appointed by the Inspection Committee to inquire into the causes of death, the report or which shall be made accessible to the nearest relative. This inquiry should also be made when the death of a child occurs within six months from the date of his or her release from the institution and there is reason to believe that the death is related to the period of detention;

(d) The Medical Officer shall report to the Officer-in-Charge about the happening of the natural death of a child and see that the body is decently removed to the mortuary;

(e) In case of natural death or due to illness of child of an Observation Home or Special Home the Officer-in-Charge shall obtain a report of the Medical Officer stating the cause of death. A written intimation about the death shall be given immediately to the nearest Police Station, Juvenile Justice Board, National Human Rights Commission and the authority concerned;

(f) The parents or guardians of the deceased child shall be contacted and the Officer-in-Charge shall wait for 24 hours for the arrival of relatives. After the inquest is held, the body should be disposed of in accordance with the known religion of the Juvenile.

68. Procedure in the case of custodial rape or sexual abuse.— (1) In the event of custodial rape and/or sexual abuse, the action shall be taken as follows:-

(a) In case any resident or any other person has observed, knows or has reason to suspect that sexual abuse has occurred and makes a complaint to the Superintendent or through the grievance box or through Child Line or through any other means or it comes to the notice of the Medical Officer or other staff that one or more of the following general behaviour changes has been observed in a child, a report shall be made to the Juvenile Justice Board or the Child Welfare Committee for a special investigation into the possibility of sexual abuse. It shall be the responsibility of all functionaries to report such suspicions immediately. The report shall be based on observations of sudden onset of behaviour changes such as :-

(i) Copying adult sexual behaviour;

(ii) Persistent sexual play with other children, themselves, toys or pets;

(iii) A sudden increase in sexual knowledge, through language or behaviour, that is beyond what is normal for their age and circumstances;

(iv) Unexplained pain, swelling, bleeding or irritation of the mouth, genital or anal area; urinary infections; sexually transmitted diseases;

(v) Hints, indirect comments or statements about the abuse.

(2) The Juvenile Justice Board shall direct the Special Juvenile Police Unit in the local police station, wherever present to register case against the accused person under the relevant section of the IPC. The Special Juvenile Police Unit will conduct necessary investigations under the supervision of specialized agencies wherever possible. If a functionary of the institution is suspected to be involved the functionaries concerned shall be immediately suspended during pending further inquiry.

(3) If the person suspected of sexually abusing a child is himself or herself a child then the child shall be referred to a specialized institution or any other such agency, for consultation/counselling who shall prescribe the appropriate course of action.

(4) If the child reports sexual abuse/rape after leaving the institution to any person, the person shall bring the same to the notice of the Juvenile Justice Board or Child Welfare Committee who will then institute an inquiry.

(5) In the event of any other crime committed in respect of residents, the Juvenile Justice Board will take cognizance and arrange for necessary investigation to be carried out by Special Juvenile Police Unit under the supervision of specialized agencies wherever possible.

(6) Care shall be taken to ensure that the victimized child receives proper care and physical and psychological treatment and that due care is taken to avoid secondary victimization during the investigation.

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78. Adoption.— As the family is the best option to provide care and protection for children, adoption shall be the first alternative for rehabilitation and social reintegration of children who are orphaned, abandoned, neglected and abused.

(1) Adoption Agencies.—

(a) The State Government shall recognise children's home or State run Government homes for orphans as adoption agencies both for scrutiny and placement of such children within the country ;

(b) The process of scrutiny and placement of children on adoption shall be done by probation officer;

(c) Any Government run hospitals or private nursing homes etc. which find an infant as abandoned within the premises shall report to recognised adoption agency;

(d) The agency which receive a child or an infant should report to the nearest police station and also the Child Welfare Committee at the earliest within six hours. Police on receipt of such reports shall make an entry in register and an intimation shall be sent to the Juvenile Police Unit for appropriate enquiry. The Police should file a status report to Child Welfare Committee within a week;

(e) Any child who is eligible for adoption and residing in an unrecognised home shall for the purpose of adoption be transferred to a recognised home.

(2) **Procedure in the case of abandoned children.**— (a) An abandoned child can be given in a adoption only when the committee declares such a child to be legally free from adoption an order to that effect is signed by atleast two members of the committee of which one shall be a Chairperson.

(b) Before declaring the child as abandoned and certifying him as legally free for adoption, the committee shall institute a process of enquiry, which shall include —

(i) A thorough enquiry shall be conducted by the Probation Officer or case worker or Special Juvenile Police Unit as the case may be, shall be conducted and a report in Form XVI containing finding submitted within a maximum period of 1 month;

(ii) Declaration by the placement agency, stating that there has been no claimant for the child even after making notification in atleast one leading news papers, television and radio announcement and after waiting for a period of one month the time which shall run concurrently to the inquiry to be conducted and report submitted under clause (a);

(iii) The Committee shall make a release order declaring the child legally free for adoption within the period of six weeks from the date of application in the case of children below the age of two years and three months in the case of children above two years. Provided that no child above seven years who can understand and express his opinion shall be placed in adoption without his consent.

(3) Procedure in the case of surrender of child.— The following procedure shall be adopted in the case of surrendered child who has parents or guardian. Any parent who voluntarily surrenders his/her right over the child/children in various circumstances the following guideline shall be adopted by the agency concerned :-

(a) The Social Worker of the concerned agency shall counsel the parents explaining the consequences of adoption and explore the possibility of parents retaining the child;

(b) If the surrender is inevitable to deed of surrender document shall be executed in a non judicial stamp paper in the presence of Child Welfare Committee;

(c) Such a surrendered deed shall explain the reason for surrender and other relevant information of the child. It shall be written in the regional language. The document shall contain the information that parent has a right to revoke the surrendered deed within two months from the date of execution of the said deed;

(d) If both the parents are living, both of them should execute the deed;

(e) If a surrender deed is executed by any one of the parent, in such case the person who executes deed should declare the present position of the second parent. In case of the death of any one parent, the death certificate shall be produced. In such circumstances the report of the Probation Officers shall be called by the Child Welfare Committee and the procedure relating to the abandoned children shall be followed.

(4) Role of licensed or recognised Government and non Government agencies for adoption—

(a) In the case of an abandoned child the recognized agency shall within 48 hours report to the Committee alongwith the copy of the report file with the Police Station in whose jurisdiction the child was found abandoned;

(b) The adoption agencies may initiate the process of clearance at the earliest, in the case of abandoned children for the purpose within a period of two months and for placing application before the committee for declaring the child legally free for adoption;

(c) In case of a child surrendered by his biological parent or parents by executing a document of surrender, the adoption agency shall make an application directly to the board for giving the child in adoption;

(d) The adoption agencies shall wait for completion of reconsideration time of two months given to the parent or parents;

(e) Serious efforts shall be made for counseling the parents so as to persuade them to retain the child and if the parents are still unwilling to retain then such children shall be kept initially in foster care or arranged for their sponsorship;

(f) In the case of a surrendered or abandoned child who is legally free for adoption the licensed agency shall have the discretion to place the child in pre-adoption foster care under intimation to the board, within one week of its placement pending the final order.

(5) Role of children homes/State run orphanages as placement agencies.— The recognised children home and State run orphanages recognised by the State Government as placement agencies, shall perform the following duties and responsibilities :—

(a) Receiving of applications, screening and identification of prospective adoptive parents;

(b) Conduct a home study report of the prospective adoptive parents upon identification;

(c) Matching a child with the prospective adoptive parents and place the child on temporary Foster Care for a maximum period of six months;

(d) Regular follow-up during Foster Care period and report preparations;

(e) Process the adoption procedure in the Child Welfare Committee and Juvenile Justice Board;

(f) Co-ordination with voluntary co-ordinating agency;

(g) Maintenance of records relating to adoption;

(h) Profile of children;

(i) Follow-up for at least three years after adoption.

(6) Guidelines for the preparation of home study report.— The following shall be the criteria for the preparation of home study report,—

(a) Social status and family background;

(b) Description of homes;

(c) Standard of living as it appears in the home;

(d) Current relationship between husband and wife;

(e) Current relationship between the parents and children (if any children);

(f) Development of already adopted children (if any);

(g) Current relationship between the couple and the members of each others family;

(h) Employment status of the couple;

(i) Health details such as clinical tests, health conditions, past illness, etc.;

(j) Economic status of the couple;

(k) Accommodation for the child;

(l) Schooling facilities;

(m) Amenities in the home;

(n) Reason for wanting to adopt a child;

(o) Attitude of grand parents and relatives towards adoption;

(p) Anticipated plans for the adoptive child;

(q) Legal status of the prospective parents.

(7) Follow-up.— The follow-up of child placed within the country will be as follows:—

(a) If any replacement (foster care) is effected there should be a regular monitoring and evaluation of the foster care. A professionally trained social worker should visit the family regularly;

(b) The follow up format should be completed and forwarded by the recognised placement agency to voluntary coordinating agency and the director/commissioner social welfare once in six months;

(c) The agency should see that legal adoption is effected at the earliest thereby safeguarding the interest of the child;

(d) Even after legal adoption the agency should keep in touch with the family for a period of three years;

(e) Post adoptive counselling should be provided by the agency to the adoptive parents.

(8) Records.— The following records and registers shall be maintained by every recognised Children's Home and State run Orphanages:—

(a) Admission register;

(b) A separate file on each child in the prescribed format giving full details/history. Relevant legal documents of every adoption and child's background/history should be maintained atleast for a period of 18 years for future reference;

(c) Register of prospective adoptive parents with details.

(9) Disruption proceedings.—

(a) Adopted children or Adoptive Parents or Probation Officers or Social Workers of accredited Children's Homes shall have the right to make complaints or initiate disruption processes by writing to the Child Welfare Committee/Juvenile Justice Board;

(b) After the Child Welfare Committee has consented to the disruption, the child shall be returned to the Children's Home from where he or

she was taken. A report of the circumstances under which this decision was taken and the efforts made to sort out any problems shall be recorded and submitted to the Child Welfare Committee, the Department of Social Welfare and the Voluntary Co-ordinating Agency;

(c) The child may be removed and placed in an alternate home/transit home whenever there is serious mal-djustment, after obtaining the consent of the Child Welfare Committee;

(d) Upon disruption of a placement the Committee shall recommend alternate placement of the child with adequate provisions for counseling and care.

(10) Juvenile Justice Board in Adoption.— Children who has been dealt with under the various provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 shall be placed in adoption. The Juvenile Justice Board is the Competent Authority to place such children in adoption. In addition to the guideline issued by the Government, the guideline on adoption issued by the Central Adoption Resource Agency and the Supreme Court judgment issued from time to time shall apply:—

(a) In the case of surrendered child it shall be the duty of the Juvenile Justice Board to ascertain from the parents about the authenticity of the declaration given by the biological parents. While doing so the parents can be informed that their declaration can be used against them as witness;

(b) The Board shall ensure that the child is placed on adoption within the country and licensed agency alone can approach the Juvenile Justice Board for adoption;

(c) The list of approved agencies should be kept in every Juvenile Justice Board.

(11) Juvenile Justice Board and Adoption Procedure.— The Juvenile Justice Board shall ensure the following process for declaring adoption of a children :—

(i) The licensed agency shall furnish the following documents with their application for Adoption order :-

(a) License certificate issued by the Government,

(b) Registration Certificate,

(c) Surrender deed, if any,

(d) Abandonment certificate issued by the Child Welfare Committee (if any),

(e) Authorisation letter from the authorised signatory of the agency, authorising the social worker to file the application before the Juvenile Justice Board,

(f) Child study report and medical report,

(g) Home study report about the prospective parents done by a social worker voluntary co-ordinating agency or any other licensed adoption agency,

(h) Income certificate of the prospective adoptive parents,

(i) Property certificate of the prospective adoptive parents,

(j) Job certificate of the prospective adoptive parents,

(k) Health certificate of the prospective adoptive parents,

(l) Marriage certificate or evidence of marriage of the prospective adoptive parents,

(m) three referral letters from the respectable people of the society,

(n) A letter of consent for adoption,

(o) Photos of the child and the adoptive parents duly attested by competent person;

(ii) The prospective adoptive parents alongwith the placement agency shall file a joint petition before the Juvenile Justice Board with all the relevant documents. In case of single parent the person shall alone file a petition;

(iii) The concerned institution or agency which offer the child for adoption shall be the co-respondent;

(iv) On admission of an application from a recognised agency for adoption the board shall call for independent enquiry by recognised scrutinizing agency and the scrutiny report shall be submitted within a period of two weeks;

(v) The Board shall undertake a process of enquiry which will include interviewing the prospective parents, verifying the documents and the report of the serutinizing agency. If the board is satisfied that the placement is in the best interest of the child, it will pass a final order giving permanent custody to the adoptive parent/parents. An order of adoption shall be signed by the Principal Magistrate besides atleast any one of the two members of the board;

(vi) The Board shall fix the date of birth on the report of the medical experts. The Juvenile Justice Board shall direct the appropriate authority to issue a birth certificate incorporating the date of birth, date of adoption and the names of adoptive parents.

(vii) As far as possible the time taken for passing an adoption order shall not exceed 3 months of the date of filing. The order shall also include provision for a periodic follow up report either by the Probation Officer/ Case Worker or adoption agency to ensure the well beings of the child. The period of such follow up shall be not less than 3 years and such

other period as the Juvenile Justice Board any direct. The follow up shall be made once in 6 months.

(12) Child Welfare Committee and Adoption Procedure.— The Child Welfare Committee shall ensure the following process for declaring a child who is legally free for adoption :—

(A) The licensed or approved agency should furnish the following documents with petition in duplicate for declaring a child who is legally free for adoption :—

(a) Photograph of the child be affixed on both the petitions,

(b) Fit Institution Certificate Copy,

(c) Licence Certificate issued by the Government,

(d) Discharge Summary and Hospital Records in case the child was abandoned in the hospital,

(e) Any orders of the Government authorising the Institution to take custody of the children who are abandoned in hospitals or public places,

(f) A copy of the temporary custody order,

(g) Registration Certificate,

(h) Surrender Deed (if any),

(i) Authorisation letter from the authorised signatory of the agency authorising Social Worker to file the petitions before the Child Welfare Committee,

(j) Publication of the photograph and other details of the child,

(k) Photos of the child being taken at the time of admission and the recent photo of the child with a declaration that both photos to the same child,

(l) Copy of the report sent to the nearest Police Station together with acknowledgment received from the Police Station,

(m) Health status of the child with probable age,

(n) Descriptive marks of the child duly certified,

(o) Declaration by the Agency that it has furnished all the information available with them and they are bonafide to the best of their knowledge;

(B) If the Application from the agency shall be rejected if any of the documents is missing and agency has to file a fresh petition subsequently;

(C) If the application is filed along with the relevant documents as specified in clause (a) to (o) above the application shall be admitted by the Committee. On admission of an application the committee shall call for a report of Probation Officer;

(D) The Child Welfare Committee shall determine the date birth in the interest of the child based on the report of the medical expert;

(E) As far as possible the time taken for passing an order shall not exceed 6 weeks in respect of a child who is below 2 years of age and in respect of child above 2 years of age, within 3 months from the date of filing;

(F) The Child Welfare Committee shall ensure that no child is kept unauthorisedly in any of the organization which is not recognized under the provisions of the Act, either as a fit institution or as Children's Home or as licensed agency for adoption.

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88. State Advisory Board.— (1) The State Government shall constitute an Advisory Board as required under Section 62 of the Act, consisting of the following :

Minister Social Welfare	Chairman
Secretary Social Welfare	Member
Secretary Education	Member
Secretary Health	Member
Secretary Home	Member
Secretary Law/Judicial	Member
Secretary Labour & Employment	Member
Secretary Cottage & Small Scale Industries	Member
Secretary Technical Education	Member
Secretary Industries	Member
Secretary Finance	Member
Director General Police	Member
A representative of UNICEF	Member
An Industrialist	Member
A Journalist	Member
A representative of Press Council	Member
Two Social Workers/representatives of Voluntary Organisations	Member
Commissioner/Director Social Welfare	Member, Secretary

(2) The advisory Board may advise to the State Government on the following matters namely :—

(a) development of Juvenile Justice Services through various official and Community based Welfare agencies.

(b) the ways and means of mobilising human and material resources to ensure social justice to the juveniles of both categories.

(c) the development of facilities for educational vocational training and rehabilitation for various categories of juveniles coming within the purview of the Juvenile Justice System.

(d) the co-ordination between various sectors of child development in dealing with the problems of Juveniles processed through the law.

(3) The non official members of the Advisory Board shall be nominated by the State Government on the recommendation of the Director/Commissioner Social Welfare Department. The non official members shall hold office for a term of 3 years from the date of nomination and shall be eligible for re-nomination. The non official member may be terminated by the State Government after giving reasonable opportunity. Any casual vacancy among non official members shall be filled by the appointment of another non official who shall hold office so long as the person in whose place is appointed would have held it if the vacancy had not occurred. The procedure for the meetings of the Advisory Board shall be laid down by the State Government.

89. District Advisory Board.— (1) The State Government shall constitute a District Advisory Board which shall also perform the role of inspecting the programme and activities for the effective implementation of the Act.

The District Advisory Board shall consist of the following :

1.	Collector	Chairperson
2.	Superintendent of Police	Member
3.	Representative of Zila Panchayat	Member
4.	Chief Medical Officer	Member
5.	Deputy Director Education	Member
6.	Secretary Red Cross	Member
7.	Chairperson Rotary/Lions club	Member
8.	Two Social Workers	Member
9.	Two members of Neighbourhood Committee	Member
10.	Businessman	Member
11.	Two Donor	Member
12.	Deputy Director Panchayat & Social Welfare	Member, Secretary
13.	Susperintendent of concerning Home	Member

(2) Objective.— The District Advisory Board shall review the activities relating to the Administration of Juvenile Justice in the District on the following lines:

(a) Review the administration and activities of institutions established under the provisions of the Act.

(b) Inspect the institutions established under the provisions of the Act and report to the Director/Commissioner of Social Welfare Department.

(c) Propose suitable programmes for the up-gradation & development of the homes.

(d) Review the probation work in the district & propose suitable suggestions for effective implementation.

(e) To give support to the programme for the rehabilitation of inmates in the society.

(f) To generate financial support to the inmates for their entire development and rehabilitation.

(g) To create linkages between various agencies working in the field of social welfare for coordination and cooperation. To bring the inmates in the main stream of the society.

(h) To review the minimum standards ensured in the institutions set up under the Act.

(i) To review the non institutional services like Probation, Foster care, Adoption, Sponsorship Programmes etc.

(j) To review the inter coordination between the various departments, community based programmes etc. and suggest the suitable remedial measures for effective functioning.

(k) To propose necessary suggestions to improve the quality of institutional and non institutional services effectively.

(3) Nomination of non official members:

(a) Nomination of the non official members of District Advisory Board shall be made by the concerning Collector of the district.

(b) The tenure of the Non Official members shall be for a period of 3 years. The non official member may be terminated by the Collector after giving reasonable opportunity.

(4) Meetings.— The District Advisory Board shall meet once in 3 months.

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93. Repeal and Saving.— The Madhya Pradesh Juvenile Justice Rules, 1988 shall stand repealed immediately after the commencement of these Rules:

Provided that any action taken, order, made under the provisions of the Rules so repealed shall be deemed to have been taken or made under the corresponding provisions of the Rules.

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Note : The other provisions of the Rules are not being published here due to lack of space. The said Rules may be perused for other provisions.