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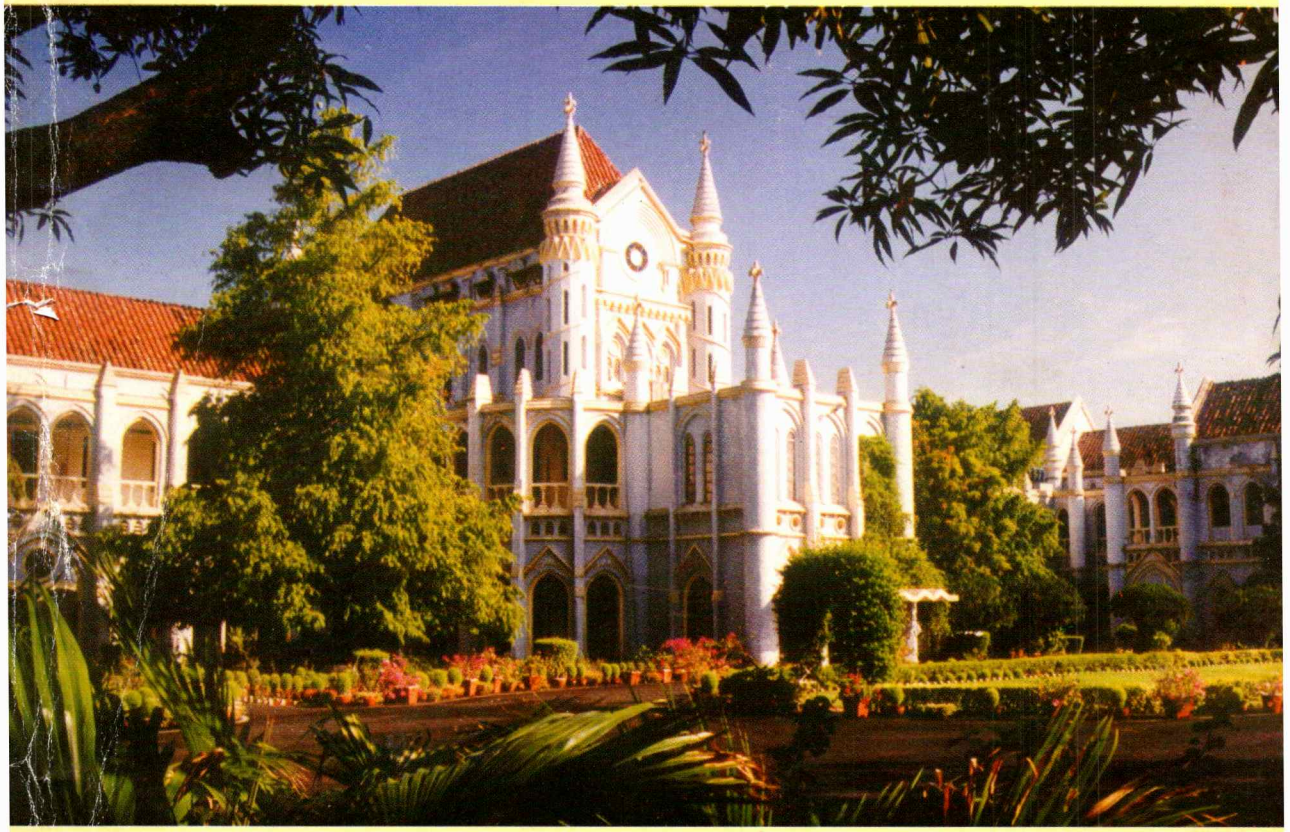

न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान

मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

TRAINING COMMITTEE

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH

JABALPUR - 482 007

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(CIRCULARS/NOTIFICATIONS)

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(IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS)

CHANGED/NEW TELEPHONE NUMBERS

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We are thankful to the publishers of SCC, MPLJ, MPHT, JLJ, MPWN, MPJR & RN for using some of their material in this Journal.

- Editor

FROM THE PEN OF THE EDITOR

VED PRAKASH
Director

With the current issue this Journal has entered into the 11th year of its publication. The Journal started its journey in a modest way in 1995 with its maiden issue published in the month of October, running into 32 pages only. During the past ten years the Journal has gradually developed and in its present form is well catering to the needs of the district judiciary at the gross-root level. The Journal by and large has acclaimed appreciation from all corners. This indeed puts on our shoulders an enhanced responsibility to ensure that the Journal continues to groom in such a way so that not only it retains its enormous utility among judicial officers but also becomes a front runner in the filed of publication of legal journals.

Present is the age of Information Technology. A Technology which has influenced each and every walk of human activity and to which Judiciary may not be an exception. The tremendous pressure of work on the law Courts obliges us to look into the techniques and methodologies which can help us in curing the justice dispensation system from the ills of ever increasing delays in justice delivery. The two magnificent tools which have by and large been recognized the world over as enormously effective in raising the qualitative and quantitative output are - Information Technology and Management Skills. The first one, to a large extent, depends upon the availability of funds to be provided by the Government, which by now is not very much in sight and we can simply wait and see. But then the mighty tool of management which has shaped the fortunes of various Institutions requires to be applied skillfully in the judiciary. The urgent need in this respect was well focused by Hon'ble the Chief Justice of India in his inaugural address delivered in the opening session of the Conference of the District Judges, Registrar Generals of High Courts and Principal Secretaries (Law) of various States held at National Judicial Academy on 18th December, 2004 in the following words:

> "We are on a turning point, when a justice delivery system cannot afford to survive merely because its members are just gentlemen and men of integrity. Over and above these qualities, the system shall have to be manned by such personnel who are equipped with managerial skills and use of modern technology."

The various aspects of management having a bearing on the system of administration of justice are - Court Management, Case Management, Docket Management, Self Management, Time Management and last but not the least

Stress Management. The two days conference at Bhopal virtually focused on all the aforesaid dimensions of management.

With the object that the message relating thereto may go down to the deeper stratas of system of judicial administration, the addresses, which were delivered in the Conference, including the Inaugural Address by Hon'ble the Chief Justice of India, which focuses on various facets of management, are being included in this issue. The systematic application of these methods is bound to generate magical results in this year of excellence for judiciary.

There has been some controversy about the availability of forum for cases relating to Juveniles because of non-constitution of Juvenile Boards. An article in this respect was earlier published in this Journal (October, 2003 Part I page 165). However, some mist still prevails, therefore, the issue is being again discussed in the light of the legal pronouncements. The question relating to the committal of cases arising under Special Acts, in particular SC/ST (Prevention of Atrocities) Act, 1989 is also being dealt with in this issue.

In the previous issue I raised the point regarding inadequate response to the bi-monthly training programme. Since then there has been some improvement in the sense that we are receiving more articles. The efforts in this direction are required to be strengthened so that the articles prepared in such discussion meetings may become more absorbing, interesting and helpful.

Part II of the Journal is replete with various important legal pronouncements of our own High Court as well as of the Apex Court which is definitely going to help the judicial officers posted in the remotest areas of the State where timely availability of the latest legal journals is still a problem. There has been an outstanding need regarding circulars relating to the procedure dealing with disposal of confiscated gold and silver. Some important circulars on the point are also being included in Part III. The latest changes introduced by State Amendment Acts No.14 & 15 of 2004 in the Code of Criminal Procedure and Indian Penal Code relating to provisions of maintenance (Section 125 Cr.P.C.) and offences relating to outraging the modesty of women (Section 354-A) do find place in Part IV.

To conclude with, I may assure that through this Journal the Institute will continue to strive hard to come true to the expectations of its esteemed readers. Our attempt will ever remain to cater to your needs so that the Journal continues to be of interest and utility at your end.

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Dated : 14-01-2005

Dear Judge,

As you may be aware, the Conference of District Judges was held at Bhopal on 18th and 19th of December, 2004 wherein the difficulties faced by District Judiciary were discussed. Further, during my interactions with Judicial Officers on various occasions, I learnt about their problems and difficulties. Broadly, the issues are :

(a) The heavy work-load with poor infrastructural facilities, in particular non-availability of Stenographers to Civil Judges Class II and several Civil Judges Class-I and absence of proper library.

(b) Anxiety and tension caused to Judicial Officers on account of false complaints by members of Bar and the litigants, in particular when the High Court takes cognizance thereof and seeks their comments.

(c) Inadequate units being assigned for different types of cases and difficulties in achieving the targets, in particular to those giving strict preference to old cases.

(d) Refusal of leave to Judicial Officers, except medical leave, thereby causing hardship and inconvenience.

(e) Absence of a forum to ventilate their grievances and consequential communication gap between High Court and the District Judiciary.

A. Let me assure you at the outset that the High Court is very concerned about the working conditions and facilities available to Judicial Officers. The High Court is taking all steps to improve the infrastructural facilities to the Judges (providing of Stenographers, type-writers, Xerox machines, library etc). It is committed to improve the welfare of the Judicial Officers and creation of a congenial, tension-free atmosphere for work.

The State Government has agreed to increase the number of Judges with corresponding staff. We are in constant touch with the Government to ensure that additional Judges are appointed and adequate facilities are provided at the earliest.

B. The position of a Judicial Officer is special and unique. Honesty, integrity, impartiality and hard work are the basic requirements of a Judge. To maintain integrity and transparency, all complaints have to be examined and processed, and where necessary, action be taken. In an adversorial system of dispute resolution, one of the litigating parties is bound to lose and consequently become unhappy and frustrated. The anger and frustration, on wrong advice, is given vent by making irresponsible and baseless allegations and complaints against the Judicial Officers. We are also aware that certain disgruntled elements in the Bar and in the office staff are also in the habit of giving false complaints. The High Court is not calling for comments in each and every complaint received. Most of the complaints on examination are closed, if they are anonymous. In a few cases, comments are called for, not to find fault with the Judicial Officer, but to close the matter once for all. You will however agree that there is a need to segregate the genuine complaints from false complaints and the process of such separation may sometime cause inconvenience and dismay to honest officers. But that cannot be avoided. Nor should the Judicial Officers feel bad or tense on that count. The High Court is fully supportive and will protect the Judicial Officers against false, malicious and baseless complaints.

C. Several Judicial Officers have mentioned that the present system of assigning units does not truly reflect the work done by them. Several suggestions are being considered for improving the method of assessment of performance. The units assigned to different types of cases are also under review. We have increased the units for Appeals. We are shortly introducing units for cases settled through the efforts of Judicial Officers. We have provided units for conducting disciplinary enquiries. It is true that fully contested Sessions case with dozens of witnesses and a short sessions trial with one or two hostile witnesses are presently on par. Similarly, original suits requiring lot of time (Partition suits etc.) and suits that can be disposed of within a short time (pronote suits etc.) are on par. Any practical and constructive suggestion from the judicial officers in this behalf is welcome.

D. The apprehension that the High Court has issued instructions that all kinds of leave except medical leave should be refused is incorrect. It is possible that to ensure the disposal of ten years old cases expeditiously within the prescribed time frame, the District Judges may discourage unnecessary leave. It is not uncommon for us to receive spate of leave applications in November and December to exhaust the casual leave.

E. You will appreciate that there is a need to show better disposals, both qualitatively and quantitatively in view of the huge pendency of cases and long pendency of cases. The need for speedy disposals, the need to provide effective access to justice, and the need to build up trust and confidence in Judiciary, need not be emphasised. Sacrifice of some freedom is necessary in a Judge.

But please remember that a good, honest and hard working Judge is appreciated and respected by the Bar and the public.

The year 2005 has been declared by the Hon'ble Chief Justice of India to be "The year of excellence" of Judiciary. I can do no better than to extract the meaning of 'Judicial excellence' from his Law Day speech delivered on 26.11.2004:-

> "Excellence consists of five I's. (i) Initiative – We shall not be satisfied with doing just what is our duty. Each one of us shall exert to do better than his contemporaries or predecessors going beyond the goal of duty and to be better than himself; (ii) Intelligence – None of us shall feel satisfied by mediocrity, i.e. by just being average; (iii) Industry – Each one of us shall exert to put his competence and capability to its maximum utilization; (iv) Integrity; (v) Inobtrusive personality, i.e. modesty and humility. Imbibed with initiative, intelligence, industry and integrity what has been achieved is just what is the basic requirement of the personality of a Judge. Such achievements should not be a reason for developing any egoistic attitude.
>
> Excellence in performance is ensured by relentless hard work, constant upgradation of knowledge, punctuality, courtesy and conscientiousness. Proper rest, relaxation and recreation help in judicial performance but a hectic social life and other distractions detract from the discharge of judicial duties. A judge need not be an ascetic or sanyasi but a certain degree of aloofness has to be observed by him to see that impartiality and objectivity are not only maintained but also seemingly observed."

Let us strive, by whole hearted commitment and co-operation, to make 2005, the year of Excellence of judiciary.

With best wishes for a happy and meaningful new year.

Yours sincerely

(R.V. RAVEENDRAN)

MANAGEMENT IN JUDICIARY AND THE QUEST FOR EXCELLENCE

(Text of the speech delivered by Hon'ble Shri Justice R.C. Lahoti, Chief Justice of India on the inauguration of Joint Session of Registrar Generals & District Judges of Madhya Pradesh At National Judicial Academy, Bhopal on December 18, 2004).

I am happy to be associated with a cream gathering of heads of the district judiciary from within the State of Madhya Pradesh and the principal court administrators of the High Courts of the country. The two groups have assembled for the purpose of undergoing a high-level training programme related to court management skills. While Office Management may be of special interest to Registrar Generals, Court and Case Management and Relationship with the Bar are the topics of greater interest for the District Judges. However, there are certain areas, the basic values wherein are of common interest to judicial officers and administrators. These are the areas such as Time Management and Self Management. The Judges and the administrators coming together for management learning is suggestive of one fundamental principle of management, that is, in an organization we may have different tasks assigned to different groups but as far as the evaluation of the institutional performance is concerned a high rating can only be achieved by a combined effort of the whole team. Individual efforts undoubtedly have their own significance but what matters the most in the institutional performance is the collective team effort.

GOALS AND MEANS:

We have entered the new millennium and the new century. At the threshold, the judiciary, and in particular the Indian judiciary, is posed with certain challenges. It will be prudent to assess, where do we stand and what do we face, before we embark upon equipping ourselves better and preparing ourselves for the future. Means can be better devised if the goals are known.

The Indian Constitution has assigned to the judiciary the role of being the custodian of the Constitution and watchdog of Indian Democracy. We cannot be oblivious of our responsibility and continue to play our traditional role when the demand of the time and the need of the hour is to wear new robes.

The tends of globalization have already set in. We cannot afford to assess our performance by traditional Indian standards only; we shall have to match international standards. The society is progressing, the values are changing and complexities of trade and commerce are posing hitherto unknown problems for resolution by the governance, which in its turn is contributing not only to complexity of litigation but also adding to the influx of disputes for resolution by courts.

The parting gift of the preceding century to the people generally has been the crisis of 3 Cs. There is crisis of character, crisis of credibility and crisis of competence. We Indians have always believed in 'Old is Gold' and are accustomed to drawing strength from our traditional values. The materialistic attitude

of the modern society and the urge for fining pleasure in enjoyment of wealth and resources, has contributed to diluting our faith in our own values and our own system.

Though the 21st century has posed new challenges, but the silver-lining is that these challenges are accompanied by the availability of the means of resolution as well. The advancements in the field of technology have broken all barriers. There are new means and scientifically developed methodologies available at hand to assist us in finding solutions and meet these challenges. The problems posed before us may be difficult, but are certainly not impossible to overcome. All that we need to do is to learn new principles, new methods, new technologies and assume new roles not only by learning but also by continuing to learn the wealth of knowledge and skills pouring in from all sides. A study of the problems faced by the judiciaries of other countries, whether developed or developing, shows that the problems are almost identical before all the judiciaries. The problems are not peculiar to us; what is peculiar to us is that we are not gearing up to adopt scientific and systematic methods to solve the problems, as the other countries are doing.

We must be prepared to innovate and also be inspired from our counterparts in other parts of the world and also in other business and professional activities within the country. Just as managers in business and industry approach the courts for sorting out their legal problems, we, as members of the Judiciary should not hesitate in approaching the management experts for solving our problems, which are peculiar to us. In the 21st century, a judge cannot afford to be just a gentleman of law sitting in ivory towers and hearing and deciding the cases and delivering justice according to the law. The new role of a Judge is also to be an efficient court administrator and successful court manager so as to come up to the expectations of the people, whom it is our duty to serve. In the new role, the administration of justice is not just a system of deciding cases through a hierarchy of courts. The emphasis has shifted to speedy justice through uncomplicated procedures, assisted by certain scientific principles and application of electronic technology in all areas where it can be applied. We are on a turning point, when a justice delivery system cannot afford to survive merely because its members are just gentlemen and men of integrity. Over and above these qualities, the system shall have to be manned by such personnel who are equipped with managerial skills and use of modern technology. We are all here to understand this concept and then to move in the direction, which this programme will enable you to proceed.

According to Mr. G. Narayana, a management expert, efficient management is captured in the maxim: 'follow the GOD and avoid the DOG'. Explaining further, he says GOD stands for Group/Organization/Direction. By Group, what he means is that whether a manager or workers, whether a leader or followers, they must all be able to develop a team spirit and work together for a common goal. The judge must be able to create a team consisting of all those who work under or along with him. The persons involved and the work on hand should both be organized. And then, there should be a direction or a goal in view,

which is to be achieved. "Group, Organization and Direction" translated into Hindi mean "Sangh/Vyavastha/Disha".

"GOD" can also be understood in a different sense. 'G' stands for goal. 'D' stands for destiny. You can have an ambitious goal but the destiny may not permit achieving the same. On the contrary, you may have a smaller goal but the destiny may shower results much beyond what you have targeted. This relationship between 'G' and 'D' depends on what meaning you assign to 'O'. 'O' may, for some, mean opportunities and, for some, obstructions. They are the skill, management and qualities and leadership which convert obstructions into opportunities and the lack of these qualities may reduce opportunities into obstructions.

"DOG" in the maxim, on the other hand, stands for "DisOrganized Group". Want of managerial skills and ignorance of modern methodologies in the leader results in disorganization with zero achievement for the group. Group remains a group on account of disorganization and does not convert into a team.

COURT AND CASE MANAGEMENT :

The concept of Court Management is to render the judicial system more productive. The principles of Court Management enable improving the efficiency. Irrespective of the rank of the Court in which the judge works, he must acquire certain skills and qualities which improve his competence and consequently the productivity of the system. Court Management would include identifying the purpose of courts and court system, qualities of leadership, planning the goals, allocation of funds, case flow management, modernization and rationalization of court system including introduction of information technology, training of employees and enhancing their skills, human resource management and Bench-Bar relationship.

Case Management has two aspects. One is institutional and the other is individual. As an institution, the Courts have to make an assessment of the case load which they can bear and then, having provided for availability of the requisite number of persons to bear the load, to distribute the work flow between judges fairly and equitably. Case Management, in its individual aspect, aims at retaining managerial control over the flow of an individual case in such a manner that the control is never lost and the flow never stops. In both the aspects of Case Management computers are of great help. They enable maintaining of statistics and information. The records can be digitalized into electronic files. The electronic diary enables keeping a record of hearing and its follow up.

Let me share some interesting and encouraging information with you. The Karnataka High Court under the leadership of Dr. Justice (Retd.) G.C.Bharukha has been able to develop a system whereby the High Court is interlinked with District Courts and Subordinate Courts. At the touch of the button, at 5 p.m. everyday the High Court has the information available with it as to how many judges were on leave, how many witnesses were examined, how many witnesses returned unexamined, how many judgments or orders were reserved,

how many were pronounced and how many cases were adjourned and to which dates. This is just an illustration. The system has enabled the High Court to exercise effective control over the working of subordinate judiciary. At the same time, the members of subordinate judiciary have become more alert, commenced pooling down all their efficiency components and concentrating on giving maximum quality output. Some other High Courts have also gone a long way in the direction of computerization.

Very recently, the Planning Commission has allocated a fund of Rs. 150 crores, for computerization of all the District Courts in the country. The Government of India has also sanctioned establishment of a Cell consisting of experts in judiciary, technology, administration and human resource management to plan introduction of IT in judiciary, suggest administrative reforms, make recommendations and also oversee their implementation once the recommendations have been accepted. The Committee would work directly under the supervision of the Chief Justice of India in close coordination with National Informatics Centre.

IT FACILITIES AVAILABLE IN SUPREME COURT

The Registry of the Supreme Court and National Informatics Centre have in close coordination developed the following programmes:

(i) Supreme Court's Filing Defects on Web

A list of Filing Defects consisting of 379 items has been standardized and is available on website by reference to each case filed in the Registry.

(ii) Digitisation of Old Records

Considering the space problem in the record room of the Supreme Court, NIC suggested to go in for digitization of all records stored in the record room go-downs, so as to make space available for the fresh records. This process enables the Supreme Court in preventing loss of records, saving storage space, to manage records easily, to find document quickly, to make the scanned documents available centrally on internet and to eliminate the need for file cabinets.

(iii) Supreme Court's Digital Display Boards on Internet

Court-wise progress of the cases, as they are being heard, is available on internet for the advantage of lawyers and litigants who need not necessarily reach the Court room for watching the progress of the case.

(iv) Automatic deletion/shifting of excess matters and proposing next listing date

This software module has been successfully implemented since July 2004 and excludes the possibility of manual manipulation.

(v) SUPNET

Entire information of interest for the employees of the Supreme Court including telephone directory is available on internet.

(vi) E-Kiosks

Two E-Kiosks are installed, one at the Filing Counter and the other at the Reception with touch screen facility providing information as to pending status of a case, the latest order delivered by the Court, Cause Lists, judgments, SC websites, filing defects and so on.

(vii) Interactive Voice Response System (IVRS)

Any litigant can access and ascertain the status of his case in the Supreme Court by dialing the telephone number : 24357276.

(viii) IT Facilities at the Museum

A brief information about the Supreme Court and its IT related information is shown on a large screen with projector attached to a computer system installed at the Museum of Supreme Court.

(ix) Cause List/daily orders on Web

Cause Lists and daily orders passed by the Supreme Court are available on internet.

The projects which are in pipeline and will be implemented shortly are:

(i) Attendance Recording System

A computer based attendance system will be installed to record and monitor the attendance of the employees of the Supreme Court.

(ii) Bar Coding based file tracing system

To trace files and assets a Bar code based system will be implemented in all sections and courtrooms.

(iii) Video Conferencing Facility

A video conferencing facility will be established in the Conference hall of the Supreme Court to enable the Hon'ble Judges to interact with the Hon'ble Judges of the High Courts, Ministries of Government, if required or any organization based outside India.

(iv) Electronic self operating Facilitation Counter

For providing easy information access to the litigant public, a facility consisting of a few computers, printers and internet will be established at the reception (to be constructed shortly). This will enable the users to access the required information on their own.

(v) Digitally Signed Certified Copies

Parallel to the signing of Daily Orders on hard copies, judges would sign digitally on electronic copies using Digital Signatures. The digitally signed orders would be made available on the court website. Litigants can download the electronic copies, with self-contained proof of authenticity of the document. Every judge will be provided with his/her Digital Signature.

When digitally signed orders are available on a server, the certified copy section simply accepts the application from the litigant, downloads the relevant order from the server, takes a print out, checks the authenticity and integrity of the document, when satisfied simply signs and serves to the litigant on the spot. As the digitally signed copies need not be cross checked with the original file, it can be served to the litigant on the spot without time delay. As a result :

- A large number of certified copies can be issued in a single day without keeping any application in pendency
- One person can handle the entire Certified Copy Branch.
- As there will be no delay in issuing the certified copy, the dealing clerk has to provide the copy on the spot.
- No chance for excuse.
- The litigant can even download an electronically certified copy from the net without contacting the court.

In the matter of improving the status of Court and Case Management, National Judicial Academy and State Judicial Academies can do a lot. I have high expectations from these academies. The National Judicial Academy under the leadership of Dr. N.R. Madhava Menon has already justified my expectations. Divinity is showering more results than goals. The National Judicial Academy is developing close relationship and inter-connectivity with the State Judicial Academies. I am confident that if these State Academies get active attention of the Chief Justices, the functioning of the judicial system would be revolutionized and the judges of tomorrow will be far better and, if I may say so, 'more competent and capable judges' or in one word 'more excellent judges'. The Indian judicial system will be more productive.

I have declared the Year 2005 as "The Year of Excellence" in judiciary. I have ventured to make the declaration placing reliance on the mutual trust and confidence which you and I have in each other. If the Year 2005 has to be an "Year of Excellence" each one of us shall have to be first an excellent person and then an excellent judge or an excellent administrator, as the case may be. The secret of excellence is - There is nothing noble in being superior to some other man. To be noble is being superior to your previous self. Each one of us has to strive to improve oneself, to correct one's faults, to control one's habits and to make the best use of one's abilities. The greatest test of man's character is how he takes charge of his own life. Henry David Thoreau has said - "Every man is the builder of a temple called his body. We are all sculptors and painters, and our material is our own flesh and blood and bones. Any nobleness begins at once to refine a man's features, any meanness or sensuality to imbrute them".

Let us all come together to learn Court Management, Case Management and above all, management of ourselves so that collectively at the end of the next year we can claim that the Year 2005 was an year of excellence in judiciary.

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TIME MANAGEMENT

(Text of the Address delivered by Hon'ble Shri Justice Deepak Verma in the conference of District Judges at National Judicial Academy, Bhopal on December 18, 2004)

Time is a resource. It is not an exaggeration, if I say so, time is the most precious and important resource amongst all the things which go into accomplishing any task. We can do nothing, at all, if there is no time. I am sure all of us have heard from our rich friends that there is no dearth of money but there is no time to enjoy. When you hear "time is money" it is O.K. to take this adage but don't make the mistake that money would ever become time, which you allow to go by.

When we talk of managing time or time management in our lives we are essentially referring to management of life.

Time management is an art of organizing your life so that you are in control. For this, you do not need complicated equipments or a staff of dozens or six months break to learn how to save time and achieve more. All you need is willingness to try some of the ideas and the energy to start.

Time management is easy. All you have to do is rearrange the way you work and use the time you save effectively. That is all there is to it. All of us have few things that demand fix attendance from us, such as, work or prearranged leisure pursuits. But the rest of the time left thereafter is required to be arranged in such a way that every thing works well. Generally it is felt that there was not enough time for every thing we need or want to do. This leads to stress and chaos in our lives. Our work and home life suffer and we see time slipping away from us. The feeling we are left with, is one of frustration. Time management is answer to this. It will help you control time by deciding what you do with it and when you want to do it.

Priorities have to be worked out so that you are able to get more time for rest and recreation which is important for recharging your batteries that helps you cope with what life throws at you.

Time management involves recording, monitoring and improving how you use your time. Once you know, how your time is generally spent, you can make sensible decisions about how to use it better. But, however, well you plan your time, you will not make the best use of it, if, you indulge in time wasting activities. Thus you are required to eliminate unnecessary and inefficient task that shall enable you to have more time, whether at work, home or leisure.

Like most people you probably take a short-term view of your life. You want to get your work done and get home and have enough time to enjoy yourself. But, unless you take a longer view and know where you want your life to go, you cannot plan how you will get there. You probably live your life in a rush. You rush to get to work, the work piles up, you always seem to be dashing about and never seem to have time to do every thing.

Unproductive work consumes your most of the time. This can make you feel stressed, tired and depressed. But look at the successful people, you know how do they fit so much into their lives and still remain on top of things. They have clear idea of what they want and where they are going in life. They also have a clear idea about how they are going to achieve it. By having this clear vision of future, they become successful, busy and happy because they are controlling their time in order to achieve their aims in life.

Thus, you also need a clear idea about how you see your life in the future. Instead of responding to life by giving into the demands of others, reacting to crises or simply doing things out of habit, you can control your life. Only thing is, to do so you need to know what you really want. Aim to make your life, as much like your dreams as possible. Defining your goals and objectives in life, will help you to achieve your dreams, or, at least go a long way towards them.

First you have to decide which are the most important areas of your life that is your key areas. Look at the various roles you played. You have to ask a question to yourself "what is important to me"? A typical list might contain [i] family [ii] work [iii] leisure [iv] community [v] religion [vi] money and [vii] health. These are some of the major areas in which you may be required to fix your timings and priorities each of the work according to its importance. To get the best of your life, you need to imitate successful people and visualize how you want your life better. Start taking control by defining the key areas of your life and decide what you want to achieve in them. Write down your main goals and break these down into manageable objectives and achievable steps. Time-table these objectives and steps into your days.

Time should be so scheduled that it includes for every minute that you spent. Time is one thing which can neither be stored, nor can be collected somewhere to be used in future. Any time which has already been spent, may be for fruitful objective or for unproductive work, cannot be recalled for converting unproductive time into productive time.

All of us have same amount of time available at our disposal as others have i.e. 24 hours in a day. This time can neither be stretched to 26 hours, nor can it be reduced to less than 24 hours. One thing is clear that from the poorest to richest man; from humble to most powerful person all have equal amount of time available. But what you do with this time, makes the difference. And if we are desirous of bringing a qualitative change in what we do with our time we must understand its characteristics:-

[i] As I have already said it is equal for all.

[ii] Inelastic - we can neither reduce or increase it.

[iii] Highly perishable-Diminishes not by years, months and days, but by hours, minutes. The moments that pass away never return. The time which has gone never can be retrieved.

[iv] Yet there is great gift of God to all of us that time has a cyclic nature.

It comes to us each day as a new day from where we can begin afresh.

So whatever you have to plan, may be for today or may be for tomorrow, has to be planned in such a way, that every thing is capsuled within these 24 hours.

The best method to find out, if, lot of time is being wasted for some work which is not required to be done by you, is to have a time-table for one week. At the same time, you can also have different colour markers after you have prepared the time table, you can go on marking the unproductive, non-urgent and unimportant work in red colour and in case, red is dominating in that day's working, then, you will know as to how much time in a day you are really wasting. This is one of the methods through which you can save time and then put it to productive use.

Transition time or **'dead'** time, is the odd pieces of time between every thing you do.

One must form the habit of using transition time, e.g.

[i] Waiting at Doctor's clinic for your turn.

[ii] Journey to and fro work.

[iii] Between arrival and starting work.

[iv] Waiting for people to arrive.

[v] Waiting for appointments.

[vi] During breakfast or evenings at home.

The list is not exhaustive; it gives only some of the examples. There is yet another aspect of the matter where you can reduce unproductive time;

[i] Cut down on washing and dressing each morning.

[ii] Watch half an hour less T.V. every day.

[iii] Avoid unnecessary meetings.

[iv] Cut down on Coffee breaks.

[v] Decline long lunch invitations.

All kinds of short projects can be filled into transition time. You could do any of the following:-

[i] Make phone calls.

[ii] Write rough draft of letters.

[iii] Write office memos.

[iv] Catch up on reading.

[v] Make notes about your future plans.

[vi] Deal with staff problems.

[vii] Read/send e-mails.

[vii] Write notes for a speech

These are some of the ways; transition time can be put to a better use.

The secret of saying 'no' has its own advantages. Saying **'no'** is one of the best kept secrets of time management. If you are good to every one, then, they are going to take you for a ride.

By saying 'no' it will free you from non-essential tasks- all those things that you do to please other people but that are not essential for your own career or life. Saying **'no'** frees you to concentrate on things that are important to you.

You have every right to refuse to do something you don't want to do. You can be sure that most people will do so without a second thought. Think of the successful and most confident people you know. They are certainly not going to say yes to every thing and every one. Refusing to do something does not mean that you have to say so loudly and fiercely. While doing so, you can be still firm and polite. In the ultimate process you would realize that you have saved lot of time for yourself and your own work.

We all like to be polite but a misplaced sense of politeness can eat up if not your hours but at least your patience. Have you ever listened to a long one way conversation that proceed without a pause like a steady stream from a firehouse knowing all the while you are late for an appointment or something important is getting neglected.You can interrupt without being rude. Say something like 'excuse me, it is interesting but I really must go now'. You can add if you want to that some other day we can pick up this topic again. This is certainly better than listening him (sometimes her) impatiently, angrily and everlastingly.

I would also discuss yet another way of saving time. Using the phone can be very time wasting occupation. All the while you are using phone, you are not getting on with other work. People generally phone you for a chat, when you have urgent work for disposal. You should try to keep your own calls short. For this you have to note down the points you want to discuss. Otherwise, you tend to forget and would be required to call up again.

In time management, monitoring also plays an important role. It is easier to do a job ourselves as an individual but when the job requires efforts from others as well, there is a need to monitor the developments and progress of the project. Knowing that the job is not done when it is too late to do something about it, is as good as not monitoring it. The best way to monitor is to know the processes involved, measure the process in terms of time then establish a landmark to monitor.

The single most important ability to manage our responsibilities, as far as time is concerned, is our commitment. If we are committed to something our sub-conscious drives us to have an attitude to honour our words. If despite our sincere efforts, we fail to accomplish a project or a task in time, we should be looking at our skill set which goes into managing our affairs rightly and timely.

A feeling has always to be dispelled that there was no time to organize. At times it may be felt that when there was no time to complete the work, how we can undertake spending time on organizing and not actually working. Being organized is our mental process and a matter of habit we can develop with practice. When you are going for any meeting or conference, it is desirable to carry a small pad and pen and jot down the points which you may be required to answer or make queries.

A Judge's mind should never be free and should be put to use for as much time as, may be possible. In case, you are over-loaded, then, simultaneously you can do many things at the same time, but, other things must be done by some one else for you, on which you must monitor.

These are only few of the examples but you can practice time management techniques on your own, but, you would be more effective if you can get your staff to follow suit. These are many methods for teaching Time Management, but the best person to introduce into your work place is yourself. It should be implemented in a phased manner.

Now the question that arises for consideration is, how best time can be put to use by all of us in court functioning. Here, I would like to give some of the suggestions:-

1. The cases which are likely to involve short time for disposal, such as bail matters, routine interlocutory applications, recording compromise - where parties are present, should preferably be taken up immediately, and in the pre-lunch sitting. Cases likely to require lengthy hearing should preferably be taken up in the post-lunch sitting, after fixing the time in advance with the consent of advocates concerned. This would ensure their attendance at the time when the case is likely to be taken up and no time is likely to be wasted in waiting for any one.

2. When the case is being argued by the advocate, you can put your doubt or difficulties in accepting the proposition put forward by him. Never try to argue with the advocate in order to convince him that the proposition as put forward by him is wrong, that is no part of our duty. This would be an exercise in futility and is bound to result in avoidable wastage of time.

3. The counsel arguing before you is paid for and committed to a particular view point and also for not to be convinced with the contrary position. Someone has defined maturity as "being a right without feeling the necessity of convincing others that they are wrong". If by chance, and for reasons beyond control, the cases are adjourned and your Cause List collapsed, the spare time can be utilized in dictating pending judgments and orders. If there is no such pendency, the District Judges should utilize their time in taking surprise rounds of the precinct of the Court that would imbibe a sense of discipline and would develop a work culture in the subordi-

nate Judicial Officers as also the staff working in Accounts, Nazarat, Copying, Record room, Malkhana etc.. It is further desirable, you should frequently analyze the use of your time, that would help you in reaching optimum level of performance.

4. Your actions and behaviour must show that you disapprove of time wasting. Avoid gossips in chamber with colleagues of narration of your own experience before the advocates in Court room. That would protect your time from intrusions and would also develop work culture in people around you.

5. Never forget to thank those who are brief and to the point. For a conscientious advocate, a work of sincere and genuine judicial appreciation is far more precious and memorable, than a fat fee earned in case.

6. After all justice is truth in action. People are desirous to have justive rather than a charity. Just like a tree is judged by the fruit it bears, a Judge is judged by the kind of rulings he delivers.

7. A Judge's respectability does not depend upon his dress and high chair, but his integrity and sense of fairness.

8. An ethical lawyer is really an officer of the Court and he should always be treated with due dignity and honour.

9. I read an anecdote in the book written by Mr. Shiv Khera, an eminent educator, as to how he has described the judiciary. A sign board outside the lawyer's chamber reads as under:-

"Where there is a will, there is a way.

Where there is a way, there is a law.

Where there is a law, there is a rule.

Where there is a rule, there is a loophole.

Where there is a loophole, there is a lawyer, and I am here".

So this is how lawyer has been described by him.

Lastly, I would like to add that some how or the other, a feeling has been generated amongst some of us that lawyers and litigants are before us with a begging bowl. This may be correct, but, they are only begging for justice. Justice can be delivered to them with a smile on your face, with a frowning face or with anger. The net result would remain the same. But its effect even on a loosing party would differ. An attempt has to be made to deliver justice with a smiling face as the same shall have a soothing effect, even on a loosing party.

I hope you would adhere to this, which is not going to cause you anything extra.

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SELF-MANAGEMENT

(Text of the Address delivered by Hon'ble Shri Justice Dipak Misra in the conference of District Judges at National Judicial Academy, Bhopal on December 18, 2004)

Before one conceives the idea of self management one must know and acquaint himself about 'self'. The term 'self' here is not used either in the spiritual or metaphysical sense but in a rational, pragmatic and practical manner in its conceptual perception and connotative expanse. It engulfs and encapsules acquiring of knowledge about the pedestal on which one is seated, the information about the world which is necessitous and requisite for better functioning, the work orientational proclivity that meets the requirement of idea of serviceability of the institution and concretizes the faith of the collective in the system which is run by the presiding deities; garnering of wisdom to maintain self-composure, coolness, poise, dignity, patience, perseverance projecting the positive and progressive philosophy of the third pillar of the body polity and pyramid the energetic, resplendent and ebullient endowments to have keenness of ken and unsatiated appetite for work keeping in view the proverbial essence.

While discussing about the self one would like to remember the sensitized lines from 'Gitanjali' where Gurudev Rabindra Nath Tagore encapsuled the idea thus:-

> "The song that I came to sing remains unsung to this day.
>
> I have spent my days in stringing and unstringing my instrument.
>
> The time has come true, the words have not been rightly set; only there is the agony of Wishing in my heart.
>
> The blossom has not opened; only the wind is sighing by."

The purpose of reproducing the aforesaid lines is only to indicate that in the process of self-management one has to remind oneself time and again that life is an experiment and there is no end for effect, for in the end there is always a beginning.

Unsatiable desire to improve is the key to development the skill of self-management. Every judicial officer has to have the aptitude to learn the skills of self-management. He has to specify a clear cut goal to accomplish the same in a scientific method. It has been said that it is an erroneous notion that we fix higher target for us and not achieve the same and thereby lose our management skill, but, as an actuality we fix a low target and achieve the same. The achievement of low target makes one complacent which annihilates and destroys the capability to perform. It has been told in 'Mahabharat' that one should apply oneself, for action is better than inaction and one must do what must be done disregarding everything else.

A judge while training himself in the scheme of self-management must paint a positive graph about himself. He should be aware about the system in which he survives and should be able to tell others "Legal system is not a laboratory where small boys can play". The sincerity of projection and realization of obligation makes him a focused judge. Every moment he should remind himself that if the administration of justice is injured the collective would melt away like a boat wrecked on the sea. It is imperative on his part to be a part of the pro-

ceeding in every moment-active and concentrated. He should never treat himself as a silent spectator to the proceedings. He has the sacrosanct duty to see vexatious litigations are not entertained and such non-entertainment is possible if he has the adequate confidence, legal acumen, conception of leadership and bright strength of mind. Not for nothing it has been said that the brighter one is, the more he has to learn. It is because, as Roy L.Smith would like to put it – "Each morning puts a man on trial and each evening passes judgment". In the scheme of self-management a judge adheres to the concept of goal setting. To achieve the goal he must develop the perceptual shift but should not develop any kind of anxiety. He should not rush through the proceeding at the earliest point of time. nor should he expose a gloomy face as if the time has been arrested. He cannot afford to watch and watch alone. He should have the patience and endurance but simultaneously he should have the sense of time control so that things do not fall apart which the centre cannot hold. To get the judicial time organized a judge is required to have a positive and non-prejudicial mind set so that he can travel immediately to the crux and thrust of the matter and have control over the proceeding. The management on this score would be a step on the ladder of self-management.

The conceptual eventuality of the self-management inhere the constant alertness and circumspection of the presiding officer. He should not be garrulous but should not allow things to happen in an atmosphere of sphinx like silence. He should have the capability to generate a debate to put the controversy to rest but not to introduce a debate for the sake of debate. His questions are to be straight forward, pin pointing, clear and of such nature that they are not diverted or divorced from the main issue. In addition, the questions are to be such which are not misunderstood by the lawyer community or litigants.

While acquainting oneself with the process of self-management a judge has to abandon certain disagreeable qualities, namely, anger, impatience, wrath, ignorance and 'Adharma' in law. He must remain committed to perform the mission of life of judge as a 'Vrata' to be performed in conformity with the prescribed 'Nyaya'- the Rule of law.

The self-management in its hermeneutic sense would include the fundamental principle of leadership. A judge is a leader whether he wants it or not. He is a 'Mahajana' in the traditional sense of the term as he remains in the constant public gaze. He has the immense social accountability as his every action is perceived and scanned on the lens of social and legal morality. While making a cry that one is accountable to one's own conscience it should not be forgotten that the individual conscience should objectively co-relate to the public accountability in the sense the individual notion should be allowed to take a back seat to follow the rule of law in a condign canvass. In the sphere of self-management a judge has to develop an attitude to maintain cordial relationship with the Bar. The authority of the judge follows apart from his position from various facets. Francis Cowper while speaking about this aspect had stated so:

> "In the judge's relationship with the Bar and with the public, the traditional courtesies of address, the impersonal uniformity of the robes, the physical remoteness of the Bench help the judges to exercise authority without encouraging them to tyranny."

Adhering to the aforesaid idea makes him a leader a self-manager and a real 'Maharaja'.

A judge should always bear in mind that he has two ears and both alive. He is a judge by the very nature of his duties as well as the manner in which he performs them. While acquiring management skills in respect of one's oneself, a judge is required to train himself to conceive, grasp and understand quickly. The quick grasping does not necessarily mean to act quickly. He has to judge slowly, for a cool and composed judgment is much better than many a decision taken in a hurried state of mind. He must learn and digest and perform like silence of the stomach that functions in silence. To elaborate: the stomach of a body functions in silence and a judge who performs his duties in silence with permissible body language and allowable debate, indubitably puts a further progressive step in the ladder of self-management.

In the spectrum of self-management a judge is required to nurture institutional philosophy, guided patience, abandonment of the personal philosophy, use of temperate language, abdication of erratic behaviour and accentuate on courtesy with sincerity. Emphasis on intellectual objectivity and avoidance of unnecessary humour in the Court. He should imprint the motto in mind that fresh justice is the sweetest. In the improvement of self-management he has to graduate himself to realize the fundamental concept that a judge has to be just before he become generous.

Taking a decision is a difficult task. In day to day life one tends to avoid to take decisions but a judge has to apply his mind constantly to take decision. Promptitude in taking decision makes one an organized judge. Sooner the judge realizes that no court can make time stand still, better it is. Procrastination for aspiration of perfection or classicism is really an 'opium for underachievers'. The said attitude has no place in a well managed self.

While climbing the ladder of self-management it has to be remembered that a good character imbibes the faith of the people at large in the justice dispensation system. Long back it has been said that character is the tree, and reputation is the shadow, but unfortunately all of us think of shadow though tree is the real thing. Therefore, one has to go for the genus - the character- and not stick to the species alone, for shadow does not make one a complete personality.

While improving oneself it is imperative to avoid certain blocks. On the path of progress at any level one comes across certain impediments. A judge has to destroy or atleast marginalize cerain blocks so that self-management can be on the path of approximate perfection. The blocks can be categorized as emotional obstacle, sentimental remora, prejudicial stock, group bias, psychographical barricade, egocentric or perpendicular 'I'ism', complacence and functional constriction. A judge who gets encircled by 'I'ism' suffers from the judge's disease and that creates a tremendous block in the development of 'self'. Humility, attitude to learn, rational approach and a sense of dispassionate observation makes one better and self-managed judge.

The concept of self-management would not be complete unless reference is made to the facet of 'physical morality'. The aforesaid terminology came to be used by Herbert Spencer. One can have the idea of physical fitness but to real-

ize the idea of physical morality is something different. For a judge to work it is absolutely necessary to remain healthy. One may feel that he can afford to get up late as it is a personal habit, but the aforesaid idea or thinking violates the basic principle of physical morality. Any kind of bad habit, however moderate it is, does create a dent in the spectrum of physical morality. The attitude that one lives to eat but not eat to live is a degradation of the concept of physical morality. Sleeping late may not be otherwise unethical but irrefragably it runs counter to the basic feature of physical morality. One may stand up and say that he is allergic to do exercise and it may not be possible to find fault with him but the idea dashes violently against the wall of physical morality. Non-availing of timely treatment may be in the personal realm but it is a lien to physical morality. In the scheme of self-management, the physical morality has its own sacrosanctity and a judge who wants to manage himself in total propriety cannot ostracize physical morality.

Intellectual rejuvenation is an essential factor in the arena of self management. One has to remain up-to-date with the case laws as well to read certain other categories of books by which penetration into the principles of life and living are understood with utmost clarity. It is because life is not logic. One may understand the syllogistic parameters of logic but law which get the life spark ignited every moment requires one to realize that life kicks every moment. Many things give satisfaction but working in the sphere of adjudication or involved in the justice dispensation system puts sharpening of intellectual at the top. One should have obsession by intellectual propelling as it is the foundation stone of improvement. Stagnation mars intellectual cells and no judicial officer can afford to negate the satisfaction to himself on that score.

While speaking about the self-management involvement in action becomes a motto. Action is anti-depressant. In-action mars the psychological graph and makes one to pave the path of depression. If one understands the philosophy of 'Gita' in proper perspective, it lays emphasis on 'karma' which eventually ushers in 'kirti'.

Self-management does not mean obsession with self. In fact obsession with the self would be sometimes contra-indicative of self-management. Management of oneself, in a seemly manner, is to try to manage yourself so that one proceeds progressively on the path of elevation of judicial self and pedestranize one's inferior endowment of nature by making oneself different from others. It is to be always noted in the mind that a judicial officer has to be different than others. This realization provides him with the fundamental principle of self-management which ultimately accelerates to achieve the goal of institutional philosophy and management of institution in a condign manner.

Self-management can never be perfect or complete. It is an endeavour for perfection in continuum. The effort has to be magnified every day to convert the latent talent to kinetic propelling by adding the driving force, for effort is the strongest stimulus. One should chant the say of Henry David Thoreau "I know of no more encouraging fact than the unquestionable ability of man to elevate his life by a conscious endeavour", every morning. Because it is the only 'Mantra' for survival for the fittest. And the said 'Mantra' has to be chanted in the apple-pie order.

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COURT (BOARD) MANAGEMENT

(Text of the Address delivered by Hon'ble Shri Justice N.K. Jain Chairman, M.P. State Consumer Dispute Redressal Commission in the conference of District Judges at National Judicial Academy, Bhopal on December 18, 2004)

I am grateful to Hon'ble the Chief Justice for the honour of this invitation to address you, the senior members of the State Judiciary of which I may say with pride, I was also member for long 31 years. Indeed I am privileged to be with you and share my views on your role as the head of district judiciary.

I know it has been tough going for you all, ever since Hon'ble Mr. Justice Raveendran has taken over as Chief Justice. The entire judiciary seems to have been left literally gasping for breath just to keep pace with his Lordship's speed and expectations. I am afraid, it is because of-late our judges have become used to functioning at a low pace. I have however no manner of doubt that our Chief Justice is a well meaning person who only wants to develop work culture rather make you people to recognize your capacity for work and make best use of it. The other day while talking on phone his Lordship told me that he wants to revive old glory of the office of the District Judge in particular and that of the entire State Judiciary in general. I however, request Lord Chief Justice and his Hon'ble Colleagues in the High Court to ensure that fear psycho may not be created lest the entire exercise may prove to be counter productive.

People complain and many times rightly that our justice delivery system is too dilatory and our judiciary too secluded from social reality, besides being over protected by the law of contempt from being called to question for its possible acts of omissions and commissions. This is also apparent from the inordinate delay in disposal of civil cases and on criminal side dismally low rate of convictions, some time as low as to be in a single digit in a given period. This may lead to a dangerous situation. In the recent past a person accused of rape was lynched in court premise at Nagpur. At Bhopal also in the wake of rape with murder of a 6 years, old girl, people raised a slogan "Down with Human Rights, down with courts, hang the rapist." We all know, it is not possible and you cannot even fine an accused much less hang him except in accordance with due process of law. But if this due process of law takes unusually long time and the guilty is allowed to go free, the people are bound to lose faith in our system and the incidents like Nagpur would recur. There are talks of drastic changes in our judicial system but no concrete proposal is yet in sight. We the Judges have to administer law as it is. But we can certainly curtail delays by putting our own house in order which presently I regret to say, is far from satisfactory.

Coming straight to the subject of our discussion, friends our work in the court starts with our making a note in the Board diary evidencing that we have taken our seat at 11:00 A.M. The question however arises as to how many of

us are honest to ourselves in this regard. The responsibility of a District Judge is much more onerous. He has to ensure that his office starts functioning at 10:30 A.M. and all the courts commence the judicial work at 11:00 A.M. . I may look rather stupid when I refer here to Civil Court Rules generally forgotten now a days and which lay great emphasis on observance of punctuality and proper maintenance of judicial diary by every Judicial Officer. A District Judge or as a matter of that any Judicial Officer who does not reach office by 10:30 A.M. can not start his judicial work at 11:00 A.M. and a late comer District Judge can never provide the leadership expected of him to his team-mates. Friends, if we really transact judicial work from 11:00 A.M. to 2:00 P.M. and 2:30 P.M. to 4:00 P.M. in the court room not in chambers, the problem of mounting arrears can be taken care of to a great extent.

As I told the Management of Board Diary is a real task. While a Judge can hardly take-up one or two cases for recording evidence, a few cases for hearing arguments, his diary would show 50 to 60 cases fixed for that date to be dealt with mostly by court reader who only further burdens the diary of future dates. This also breeds corruption. In this regard I have a suggestion to make changes in the rules so as to introduce central registration system and preparation of cause list on High Court pattern. The judges should be relieved of this responsibility and only that number of cases should be listed for a day's hearing as may possibly be taken up by a judge on that date. The High Court may also think of appointing a Judicial Officer of the rank of Civil Judge Class-I as Registrar on full time basis at every District Headquarter and on part time basis on out-stations to take care of some preliminary stages of the cases such as completion of formalities of pleadings, service of summons, notices etc. He may also be entrusted with the responsibility of looking after the various office sections and may act as a link between the office and the District Judge. Of course this is for the High Court to examine the existing rules and make necessary changes. I feel that some such changes may help to a great extent in Court Management.

Under the existing system the Presiding Officer of a court may take recourse to block system while fixing cases for hearing. Normally, civil and criminal work should not be mixed up more particularly the cases fixed for recording of evidence and hearing final arguments. Fixing of both type of cases on one day makes civil work to suffer on the pretext that the criminal cases must get precedence while the reality is that a judge finds it more convenient to dispose a criminal matter as compared to a civil matter. Separate days in a week or month may be fixed for recording of evidence and hearing final arguments in criminal and civil matters. Similarly working hours of a day may also be suitably divided for different type of work to be taken up during that day. The pre-lunch hours should invariably be used for recording evidence. However, in case the parties, witnesses or lawyers are not available at 11:00 A.M. then this waiting period of half an hour or so may be used for disposing of miscellaneous matters, such as framing of

issues, charges and examination of accused, etc. Needless to say, the witnesses in attendance must be examined on that day and if necessary on the following day. The latter half of the day may be used for disposal of bail applications, final arguments and other miscellaneous matters. The interlocutory applications have to be dealt with promptly and firmly. You will agree that many a times interlocutory applications are used as a pretext to linger on a case. Many Judges grant time for filing reply to such applications and for arguments thereon. Several adjournments are granted on mere asking for this purpose. This is one of the biggest causes for delay in disposal of cases more particularly on civil side. Invariably such interlocutory applications should be dealt with on the same date of their filing and disposed of promptly. We can be very strict without being rude. A message should go to the members of the Bar that while reasonable accommodation shall be provided to them, they would not be allowed to linger on the cases and adjournments shall not be granted on mere asking. The recent amendments in CPC take care of these problems but when it comes to practice, it is for we Judges that the mandate of law as contained in these recent amendments is observed not only in words but in spirit too.

You as District Judges are required to guide your colleagues in the District. You have to find time for regular inspections of sub-ordinate courts. It may not be possible for a District Judge to do it single handedly. He may usefully involve his senior colleagues, the Additional District Judges to help him in the matter. In fact, this inspection process should not be an empty formality but a constant corrective process. I am told that recently at Indore, the District Judge has entrusted one or two courts of civil judges and judicial magistrates with one additional district judge who is required to interact with those junior judges constantly, to guide them and report to the District Judge about their work and conduct. I want to emphasis that this exercise of inspection should not be a fault finding process. Any inspection note or even a confidential report should be an objective assessment of the personality and performance of a sub-ordinate judge and the intention should be more to guide him rather than to condemn (for example).

Friends you are all senior members of State Judiciary and know your duties very well. In modern times, several new techniques have come into existence to help us in our court management. We should make best use of these facilities. However, I may add that while good infrastructure does help in transacting work effectively and smoothly but what really helps is the passion for work. In fact, you need to be workaholic. If we judges develop this rare quality in ourselves, the rest of the things will take care of themselves. These are the few thoughts which I wanted to share with you. Thank you all very much for giving me a patient hearing. I again thank Lordship Chief Justice for giving me this opportunity.

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THE PHILOSOPHY OF LOK ADALATS

JUSTICE DIPAK MISRA
Chairman, High Court
Training Committee

Organisation of Lok Adalats is one of the basic requirements of the legal Services Authorities Act, 1987 for the purpose of securing the operation of the legal system promoting justice on the foundation of equal opportunity. The statute recognizes two basic concepts in the idea of Lok Adalat, namely: Lok Adalat and permanent Lok Adalat. Statutory powers have been conferred on permanent Lok Adalat and guidelines have been provided for determining the disputes. The cardinal principles that have been engrafted are natural justice, objectivity, fair play and equity. In addition, other principles of justice are also required to serve as guiding factors. Permanent Lok Adalats are yet to be constituted in the State.

The concept of Lok Adalat is inhered in the fundamental human psychography. Some may think that it is part and parcel of human nature to fight with each other but the persons with better understanding of Social science would appreciate that the individuals at large would always prefer to remain away from cavil. By this it should not be understood that they do not intend to agitate their grievances or are not making an endeavour to fight for their rights for mitigating of their grievances. To stand up for fructification or realization of right is something different than to develop an attitude or proclivity to enter into a cavil at the drop of the hat. If this facet is understood in proper perspective, importance and significance of Lok Adalat would become vivid and luminescent. To elaborate; the people have the urge to settle their disputes if possible by way of amicable, amiable and dignified manner. But despite this deeply embedded temperament there is a barricade which they face which is quite basic to human nature. The singular and pertinent question that arises in the mind of every litigant before the Court is who is going to put the first step in the ladder of compromise or who is going to break the ice so that it can melt into pure and clear water? At this stage an example from science would be appropriate. The water filled in a container would appear to the normal eyes to be absolutely full and having no space in between but scientific theory has clearly laid down that there is vacant space in the water. Similarly in the psychographic propensity for amicable settlement of disputes and to put one step in abrogation of egocentric obstinacy there is space which is filled up by the Lok Adalats which function through conciliators.

The role of conciliators is sacrosanct. It is essential that they should have patience, perseverance, persuasive faculty, fairness of mind, sense of justice

and strong common sense determination, poise, coolness, calmness of mind and above all knowledge of law. The principles like striking of balance and understanding of vacillating situation of the adversaries are to be understood in a capsule formula so that the parties are made aware where they stand. The conciliators should have positive approach and conviction in the system of Lok Adalat. It is always to be borne in mind that anything that is done in the absence of conviction always yields haphazard results.

The Lok Adalats held at the District level should have a proper organized thinking. The participants in the Lok Adalats must have an institutional philosophy. It should not be done in a routine manner. The conciliators should adhere to the principle of serviceability of the institution. It is worth noting that in a democratic set up all should have attitude of serviceability. The nomenclature may be different but the purpose is the same. The word serviceability has to be understood in a condign expanse and not in the narrow sense of the term. The Judicial Officers who become conciliators should not have unit orientation but should have mental make up for doing justice by which the disputes between the two individuals or group of individuals or statutory bodies or a statutory body can be settled.

The Lok Adalats have to be held for the purpose of inspiring faith in the justice dispensation system. The endeavor has to be made to decide more matters which relate to domestic unhealthiness, fight between the siblings, matrimonial disputes and such other cases. Any negative approach should be ostracized. The benefit of Lok Adalat is manifold. The parties who settle their disputes in the Lok Adalat become friendly as a consequence of which a social balance is struck which subserve the cause of law in its conceptual eventuality. It adds more working hours to the judicial officers who devotedly and dedicatedly work for the same. Quite apart from the above it also reduces the pendency. Reduction of cases by proper determination of the controversy rejuvenates faith in the adjudicatory system, keeps it alive, for faith is life and life is faith in the justice dispensation system.

Judicial officers should never conceive the idea that as the Lok Adalat is to be held on a particular day they have to sit to complete the ritual. Once it is taken with a feeling of a ritual it losses its sacrosanctity. Every officer should feel that it is a spiritual act which he performs in a rational manner. He should welcome the challenge to decide the cases which require real deliberation than to give stamp of approval to cases which are totally trivial in nature. Let it not be understood that cases of minor nature are not be decided in Lok Adalat but what is meant by is that apart from that a dedicated attempt should be made to decide certain categories of cases by which more faith is placed in the process of settlement of cases in the Lok Adalat.

State of Madhya Pradesh has quite often being said to be a state where poverty reigns. To allow people to fight for year after year is not a salubrious principle to be respected. The poor and the needy should get speedy justice. It is also to be borne in mind that when illiteracy is quite high by making them realize through the system of Lok Adalat to put their controversies to end is not only beneficial to them in praesenti but to their future generation also. It is the duty of the present generation to see that posterity lives not on cavil but in peace. At this stage it is seemly to state that faith, in a better way is engrained in the justice dispensation system. When one is talking of impecuniosity it is not meant that people should not be encouraged to stand up for their rights. Fighting for their rights has a positive facet in democratic body polity. What has been said here is that the need of poor should be kept uppermost in the mind. Endeavour has to be made to bring up the balanced society though Lok Adalats.

It is time that the judicial officers must note that they are not to keep themselves in ivory tower and function. Gone are the days of yore where one could treat oneself as an alien and sit on the pulpit and give sermon. Lok Adalats are not to be regarded as anathema to the dignity of the judiciary. On the contrary it imbibes faith among the people in geometrical progression as a sequitor of which the dignity becomes more resplendent and divine. Mercurial or spacious pleas in this regard should be ostracized from the mind set of the judicial officers. The motto should be Serviceability of the institution which is paramount and we are the catalysts in such serviceability.

At this juncture it is my bounden duty to state that in the year 2005 so far there has been disposal of 182 cases at the High Court level. On a singular day more than 100 cases were disposed of. In the last year the disposal on a single day by the High Court Lok Adalat was the second highest in the entire country. The co-operation of the members of the Bar indubitably deserves appreciation. The expression of unihibited and unreserved appreciation for the members of the Bar who have devotedly extended their fullest cooperation is the imperative warrant. The same goes for the members of the District Bar Association, Jabalpur. It is worth noting here that due to their co-operation not only many cases could be disposed of but many matrimonial disputes were put to rest. It may not be out of place to state here that in the Lok Adalat held on 06.02.2005 in a claim relating to death the parties agreed to settle the case for a sum of Rs. 7 lac and on consent an award of Rs.7 lac was passed.

In the end it is worth remembering that our achievements is only a step on the ladder. We would refuse to embrace success as we are to constantly remind ourselves that there is no target for the real crusaders.

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JUVENILE JUSTICE - FORUM AVAILABLE *

VED PRAKASH
Director

Juvenile Justice (Care and Protection of Children) Act, 2000 (for short "the new Act"), Section 69 of which has the effect of repealing the Juvenile Justice Act, 1986 (for short "the old Act"), has come into force w.e.f. 01.04.2001. While under the old Act cases relating to juveniles were to be tried by Juvenile Court to be constituted by the State Government u/s 5 (1) of that Act, Section 4 of the new Act contemplates the creation of 'Juvenile Justice Board' to deal with the cases of juveniles. Section 4 of the new Act authorizes the State Government to constitute such Boards but by now the State Government has not constituted such Boards in the State of Madhya Pradesh.

As with the repeal of the old Act, the Juvenile Courts constituted under the old Act do not have the jurisdiction to deal with the cases of juveniles arising from 01.04.2001 and as the State Government has not constituted the Boards under the new Act, therefore, a serious legal problem has arisen in respect of the forum available to deal with such cases.

The problem has to be examined in the light of corresponding provisions of the old and the new Act. Here it is worthwhile to note that before coming into force of the old Act, State enactment in the shape of Madhya Pradesh Bal Adhiniyam, 1970 (for short the Act of 1970) was there in the field which stood repealed by virtue of Section 6 (3) of the old Act.

The Act of 1970 as well as its successor Act i.e. the old Act both contained a provision to deal with the situation where the forum contemplated under these Acts was not constituted. Section 6 (2) of the Act of 1970 provided that where no Juvenile Court has been constituted for any area, the powers conferred on such Court shall be exercised in that area by the Magistrate of the First Class. Similarly Section 7 (2) of the old Act provided that where no Juvenile Court has been constituted for any area, the powers of the Juvenile Court shall be exercised by the District Magistrate or the Sub-Divisional Magistrate or the Metropolitan Magistrate or the Magistrate of the First Class, as the case may be. Here it is noteworthy that such a provision is not there in the new Act which really compounds the problem.

The Act of 1970 as well as the old Act contained a provision in Sections 6 (3) and 7 (3), respectively, that powers conferred on the Juvenile Court by or under the Act may also be exercised by the High Court and the Court of Session when the proceeding comes before them in appeal, revision or otherwise. A similar provision is also there in Section 6 (2) of the new Act. If examined in

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* An article relating to this issue was published in the issue of JOTI, October 2003. Still there remains some controversy on this issue. Therefore, the matter is again being analysed in this article.

proper perspective , it can well be said that provisions contained in Section 6 (3) of the Act of 1970 or Section 7 (3) of the old Act were not meant to deal with the problem of availability of forum in the situation of non-constitution of the prescribed forum contemplated under the respective Acts. Had it been so, there would not have arisen the need of putting Section 6 (2) in the Act of 1970 or Section 7 (2) in the old Act. If we go by this analogy, it can well be inferred that Section 6 (2) of the new Act containing identical provisions may not to be applied for finding availability of alternative forum in case of non-constitution of the Juvenile Board.

Here it is pertinent to refer to the pronouncement of our own High Court in *Lala Pura Chamar v. State of M.P., 1984 MPLJ 420 = 1985 CrLJ 571* in which the phrase, ***"when the proceeding comes before them in appeal, revision or otherwise"*** occurring in Section 6 (3) of the Act of 1970 invited the attention of the Court and the Court observed that despite this provision the Sessions Court may not have any jurisdiction to try a case in the event of non-constitution of the Juvenile Court.

It appears from the article "Juvenile Justice : Victim of System" published in January, 2004 issue of monthly magazine "LAWS & FLAWS" (a publication by Law Publishers (India) Pvt. Ltd., Allahabad) that Allahabad High Court in the case of *Nazeem v. State of Uttar Pradesh, (1995) ACC 219* has interpreted the expression "otherwise" used in Section 7 (3) of the old Act to include within its fold proceedings in the form of trial, bail application or application u/s 482 of the Criminal Procedure Code. In my humble opinion the aforesaid view may not be applicable in our State because of the view expressed in the case of Lala Pura Chamar (Supra).

The problem can also be viewed in the light of the interpretative rule of *ejusdem generic.* The rule is applicable when the statute contains an enumeration of specific word; the subject of enumeration constitute a class or category; that class or category is not exhausted by the enumeration; the general terms follow the enumeration and there is no indication of a different legislative intent; (See- *Amar Chandra Chakraborty v. The Collector of Excise, Government of Tripura and others, (1972) 2 SCC 442).* The expression "otherwise" occurring in Section 6 (2) of the new Act has been used after the expressions "appeal" and "revision". The situation satisfies the conditions required for applicability of the aforesaid rule. Therefore, it follows that the expression "otherwise" is not intended to cover trial of the case but may include within its fold a proceeding by way of bail or a proceeding u/s 482 of the Criminal Procedure Code.

In the aforesaid background, ultimately the question remains as to which forum has jurisdictional competence to deal with the cases of juveniles which have arisen on or after 01.04.2001. In this connection provisions of Section 27 of the Criminal Procedure Code, 1973 may be usefully referred which are as under:

Jurisdiction in the case of Juveniles- Any Offence not punishable with death or imprisonment for life, committed by any person who at the date when he appears or is brought before the Court is under the age of sixteen years, may be tried by the Court of a Chief Judicial magistrate, or by any Court specially empowered under the Children Act, 1960 (60 of 1960) or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders.

Interpreting the aforesaid provisions, the Apex Court in *Raghbir v. State of Haryana, 1981 Cr.L.J. 1497* held that Section 27 of the Code is an enabling provision contemplating the trial of juveniles by Chief Judicial Magistrate or by any Court specially empowered under the Children Act, 1960.

From the provisions of Section 27 it is clear that if there is a special law and a machinery thereunder to deal with the cases of juveniles then their cases should be tried accordingly by that forum. But in absence of such a law or machinery the Chief Judicial Magistrate shall have jurisdiction in cases of juveniles relating to offences not punishable with death or imprisonment for life. However, in cases relating to offences punishable with death or imprisonment for life, only the Sessions Courts may have jurisdiction. While exercising such a jurisdiction u/s 27, the Court shall no doubt be required to observe and comply with the other provisions of the new Act, particularly, provisons contained in Sections 18 and 20.

Sometimes the case of *Abdul Mannan v. State of West Bengal, (1995) 4 Crimes 721,* which was a case under West Bengal Children Act, 1959 is put forth as a ground to assert that Sessions Court can exercise jurisdiction over all the cases of juveniles in the eventuality of non-constitution of the prescribed forum under a special law relating to juveniles. This assertion is quite misplaced and misleading for the simple reason that Section 5 of the Act of 1959 specifically provided for the jurisdiction of Sessions Judge in relation to cases of juveniles in a situation where a Juvenile Court was not established under the Act. Therefore, a view accordingly was taken by the Apex Court. Furthermore, in that case a provision like Section 6 (2) of the new Act was not dealt with or examined. In the background of the aforesaid analysis, it can well be said that Sessions Court is not clothed with unqualified jurisdiction to try the cases of juveniles in case of non-constitution of the Juvenile Board. However, it may try cases punishable with death or imprisonment for life. Rests of the cases are to be tried by the Chief Judicial Magistrate.

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COMMITTAL OF CASES RELATING TO OFFENCES UNDER SC/ST (PREVENTION OF ATROCITIES) ACT, 1989

VED PRAKASH
Director

With the pronouncement of the Apex Court in *Gangula Ashok and another vs. State of Andhra Pradesh, AIR 2000 SC 740* to the effect that the Court designated as Special Court under SC/ST (Prevention of Atrocities) Act, 1989 (for short 'the Act of 1989') is essentially a Court of Session and it cannot take cognizance of an offence unless the case is committed by the Magistrate in accordance with the provisions of the Code of Criminal Procedure; the legal position stands crystallized that all the cases arising under the Act either by way of charge-sheet or complaint should be filed before the Court of competent Magistrate and committed.

After this pronouncement there has been some divergence of opinion as to whether the case should be committed directly to the Special Court or it should be committed to the Sessions Court and then made over by Sessions Judge to the Special Court. Because of this divergence of opinion, while at some places the cases are being committed by the Magistrate directly to the Special Court; at other places the case is first committed to the Sessions Court and then it is made over by the Sessions Judge to the Special Court. Therefore, the legal position needs to be probed and examined to find out the procedure which should in this respect be followed.

The stream of view that the case should be committed to the Sessions Court and then made over by it to the Special Court appears to have emerged from certain observations made in *Bar Association, Jhabua v. State of Madhya Pradesh, 1995 (I) MPJR 102* (DB) in which the Court was called upon to interpret the expression "Court of Sessions" used in Section 9 of the Code of Criminal Procedure in the background of use of this expression in Section 14 of the Act of 1989 and Section 36-D of the N.D.P.S. Act, 1985.

The Court was of the view that the 'Court of Session' referred to in Section 14 of the 1989 Act comprehends Sessions Judge and Additional Sessions Judges, if any. However, Additional Sessions Judge has jurisdiction to try an offence under the 1989 Act only if it is made over to him or her by the Sessions Judge.

The aforesaid view implies that the 'Court of Session' referred to in Section 14 of the Act of 1989, which has the complexion of Special Court shall either be of the Sessions Judge or of the Additional Sessions Judge. But if it is one that of Additional Sessions Judge then it will have jurisdiction to try an offence only if the case has been made over to it by the Sessions Judge.

The aforesaid interpretation, apparently is not in consonance with the proposition of law laid down in the case of *Gangula Ashok* (Supra) to the effect that

Special Court contemplated in the Act of 1989 is a 'Court of Sessions' for all purposes in relation to offences arising under that Act and it can take cognizance of the case on the ***case being committed to it*** by the Magistrate.

Expression "Special Court" in relation to Act of 1989 has been defined in Section 2 (d) of the Act which provides that Special Court means a Court of Session specified as Special Court in Section 14. For the sake of convenience Section 14 is reproduced hereunder:

> "**14. SPECIAL COURT:** For the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the official Gazette, specify for each district a Court of Session to be a Special Court to try the offences under this Act."

A conjoint reading of Section 2 (d) and Section 14 of the Act in the light of the pronouncement of the Apex Court in *Gangula Ashok's case* (Supra) makes it abundantly clear that for the purpose of offences arising under the Act, the Court designated as Special Court is a Court of Session which has been created with the sole object of *speedy trial* of the case. It further flows from the above that though there is a Court of Session in each District but in relation to the offences arising under the Act, the Special Court also has the characteristic of a Sessions Court. This legal position has amply been highlighted by the Apex Court in the case of *Gangula Ashok* (Supra) and subsequent decisions (See- *Vidhyadharan v. State of Kerala, (2004) CrLJ 605* and *Moley and another v. State of Kerala, 2004 CrLJ 1818.*

Clearly enough it has been stressed by the Apex Court in all the aforesaid pronouncements that a Special Court can take cognizance of the offence when *the* ***'case is committed to it'*** by the Magistrate.

It is to be noted at this juncture that the Apex Court has no where observed in its various aforesaid pronouncements that the Special Court can take cognizance only when the case is committed to the Sessions Court and made over by it to the Special Court. The reason being, that the Special Court itself, for the limited purpose of the Act, is the Sessions Court, therefore, it may not at all be in conformity with the basic object of the creation of the Special Court i.e. speedy trial, that the case be committed first to the Sessions Court and then made over by it to the Special Court.

Again it is noteworthy that all the cases contemplated in Section 3 of the Act are not stricto sensu cases triable by the Court of Sessions. It is only for the purpose of speedy trial of the cases that Special Court having the complexion of Sessions Court has to try these cases. If that is the situation, then there may not be any logic in first committing the cases to the Sessions Court and then making it over to the Special Court, which is bound to cause in every case at least some sort of delay.

The issue relating to the procedure to be adopted for committing the cases arising under the Act has also been considered by a Division Bench of the Andhra Pradesh High Court *In Re : Referring Officer, Addl. District and Sessions Judge, Srikakulam and etc.,2000 CrLJ 3422.* In Andhra Pradesh the rules of the Criminal Courts provide for assigning separate numbers to cases which are to be committed and which are not to be committed. Dealing with multiple questions regarding procedural niceties, the Court observed that even if the case is wrongly registered as a calendar case, (case not requiring committal) it has to be committed to the Special Court. Clearly enough the stress is on committal to Special Court and not to the regular Sessions Court.

Here it is also noteworthy that the jurisdiction of the Sessions Court contemplated in Section 9 of the Code of Criminal Procedure is wider in the sense that when the case is received by it on committal, it may try the case itself or made over it to the Additional Sessions Judge. Needless to say that if a case under the Act of 1989 is committed by the Magistrate to the Sessions Court then neither it may try the case itself nor it may have the jurisdiction to make it over to any Court except the Special Court. This again underlines the futility of committing the case to the Sessions Court and then making over it to the Special Court by putting a stage of inevitable delay in every case.

In view of aforesaid discussion the only conclusion which can be drawn is that a case arising under the Act of 1989 need not be committed to the Court of Sessions but should be directly committed to the Special Court.

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You're the way you are
Because that's the way
You want to be. If you really
Wanted to be any different,
You would be in the process of
Changing right now.

- Fred Smith

BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent by this Institute for discussion in the bi-monthly district level meeting of October, 2004. The Institute has received articles from thirty districts. Article on topic no. 2 received from Chhatarpur district has been found worth publishing and therefore, is being published in this issue. The Institute is publishing its own articles on topics no. 1 & 4. Topics No. 3 and 5, in respect of which articles of requisite standards have not been received, shall be allotted to other group of districts in future.

1. Nature and extent of the liability of a carrier under Carriers Act, 1865 for loss of goods in transit ?
   परिवहन के दौरान परिवहन अधीन माल को कारित क्षति के लिये कैरियर्स अधिनियम, 1865 के अन्तर्गत परिवाहक के दायित्व की प्रकृति एवं स्वरूप क्या है ?

2. What is the procedure for trial of offences arising under the Indian Electricity Act, 2003?
   भारतीय विद्युत अधिनियम, 2003 के अन्तर्गत उद्भूत अपराधों के संबंध में विचरण प्रक्रिया क्या है?

3. Legal value that may be attached to special oath in a case after repeal of Indian Oaths Act, 1873?
   भारतीय शपथ अधिनियम, 1873 के निरसन के पश्चात् किसी मामले में ली गई विशेष शपथ का विधिक महत्व क्या है?

4. Whether the Court can impose sentence of imprisonment only where the offence is punishable with imprisonment and fine?
   क्या न्यायालय कारावसीय दण्ड तथा अर्थदण्ड से दण्डनीय अपराध के मामले में केवल कारावसीय दण्ड अधिरोपित कर सकता है ?

5. Whether conviction can be based on the basis of admission of guilt by accused subsequent to denial at the stage of framing of charge?
   क्या आरोप विरचना के समय दोष प्रत्याख्यान के पश्चात् अभियुक्त द्वारा अपराध के बारे में की गयी स्वीकारोक्ति के आधार पर दोषसिद्धि की जा सकती है ?

LIABILITY OF A CARRIER UNDER CARRIERS ACT, 1865

The liability of a carrier for the loss of or damage to the property delivered to him for being transported is governed by the Carriers Act, 1865 (for short 'the Act') which is a small enactment consisting of only eleven sections and one Schedule. The Act, as reflected from its preamble, has 2 fold objectives. Firstly, it enables the common carriers to limit their liability for loss of or damage to property delivered to them. Secondly, it declares their liability for loss/damage occasioned by the negligence or criminal acts of themselves, their servants or agents. Elaborating this point it was observed by the Apex Court in *M/s M.G. Brothers Lorry Service v. M/s Prasad Textiles, (1983) 3 SCC 61* that the Act was passed for both the purposes; to limit the liability of the carriers, as well as to declare the liability of the carriers.

Expression "common carrier" as defined in Section 2 denotes a person other than the Government engaged in the business of transporting property under multinodal transport document or transporting for hire property from place to place by land or inland navigation *for all persons indiscriminately* and includes within its fold any association or body of person whether incorporated or not. The expression *"for all persons indiscriminately"* used in the aforesaid description is noticeable because in absence of this condition a carrier will not come within the expression *"common carrier"* and consequently will not be governed by the provisions of the Act but shall be governed by the contract of transportation.

The Act is of particular significance because the rule of evidence incorporated in it regarding proof of liability for loss or damage caused to the goods is different from the rule as recognized either under law of contracts or under the law of torts. As a general rule there is no presumption that an act has been done negligently. On the contrary, it has to be presumed that ordinary care and caution was used. Again the general principle in case of tortuous liability is that the person pleading negligence must prove it. However, these two principles are not applicable in case of determination of liability of common carrier.

NATURE AND DETERMINATION OF PROPERTY :

Section 3 of the Act makes a distinction regarding the liability of the common carrier in respect of the property exceeding the value of Rs. 100/- which is included in the Schedule appended to the Act and the property not so included. A reading of the provisions of Section 3 of the Act clearly reveals that in case of the property included in the Schedule, the liability can be fastened only when the owner of the property or any person duly authorized in this behalf has expressly declared to the common carrier or his agent the value and description of the property and not otherwise. The schedule contains description of various properties including valuable metals, gems, jewellary, clothing and drugs. The provisions of Section 3 make it clear that if the property is not the one which is included in the schedule then in order to fasten liability upon common carrier

about loss of or damage to such property the owner is not required to declare the value and description thereof.

CONTRACT TO LIMIT THE LIABILITY :

Section 6 of the Act enables the common carrier to limit his liability for the loss of or damage to any property by a special contract signed by the owner of such property. The Section provides that the liability cannot be limited by the public notice, thereby making it clear enough that a special contract signed by the owner of the property is sine qua non for limiting the liability.

Again as explained by the Apex Court in *Nath Bros. Exim International Ltd. v. Best Roadways Ltd., (2000) 4 SCC 553,* the enabling provisions of Section 6 do not cloth the common carrier with the power to absolve himself altogether of his liability by special contract.

Section 8 is in the shape of an exception to the enabling provisions contained in Section 6 and whenever the loss of or damage to the property has arisen from the criminal act of the carrier or his agents or servants or it is caused due to negligence of the carrier, his agents or servants, the common carrier shall remain liable despite there being a contract absolving him of the liability. As a corollary to it, Section 9 of the Act further provides that in any suit for damages for loss of or damage to the property alleged to have been caused due to criminal act or negligence of the carrier, or his agents or servants, the plaintiff is not required to prove the criminal act or negligence, meaning thereby that it is for the common carrier to prove that the damage or loss was not caused due to negligence or criminal act of himself, his agents or servants.

The aforesaid rule incorporated conjointly in Sections 8 and 9 of the Act, as interpreted in various legal pronouncements, is of vide import. Examining the extent of liability of the common carrier, the Apex Court in *Nath Bros. (Supra)* expressed that the liability is absolute in terms, in the sense that the carrier has to deliver the goods safely, undamaged and without loss at the destination, indicated by the consignor. So long as the goods are in the custody of the carrier, it is the duty of the carrier to take due care as he would have taken of his own goods. The two well known exceptions to this rule as explained in this case are:-

firstly- loss or damage due to an act of God, and,

secondly- loss or damage due to an act of the enemy of the State

THE ACT OF GOD :

"The act of God" which may be a ground to avoid the liability is something which has happened due to non-intervention of human agency. Interpreting this phrase it was held in *P.K. Kalasami Nadar v. K. Ponnuswami Mudaliar, AIR 1962 Mad. 44* that the act of God will be an extraordinary occurrence due to natural causes which is not the result of any human intervention. Explaining this phrase it was laid down in *Kerala Transport Co. v. Kunnath Textiles, 1983 KLT 480* that an act of God does not take in any and every inevitable accident and that only

those acts which can be traced to natural causes as opposed to a human agency would be said to be an act of God. Where a fire broke out in a bonded warehouse where the goods were kept through transit, it was held not to be an act of God. (See - *Associated Traders & Engineers (P) Ltd. v. Delhi cloth and General Mills Ltd., ILR (1974) 1 Delhi. 790*).

LIABILITY OF COMMON CARRIER, BAILEE AND INSURER :

The liability of the common carrier is more onerous than that of bailee and almost similar to that of an insurer. The extent of liability of the bailee u/s 151 and 152 of the Indian Contract Act is to take proper care of the goods in the same manner as a person of ordinary prudence will take care of his own goods. Therefore, a bailee is not liable for any loss beyond his control. However, the liability of common carrier is on the higher side. In this connection the pronouncement of the Privy Council in *Irrwaddy Flotilla Co. Ltd. v. Bugwandass, (1891) 18 IA 121* is worth noticeable.

In real terms the liability of common carrier is that of an insurer but it is not dependent upon any contract, and no contract of insurance has to be made out between owner of the goods and the carrier (See - *River Steam Navigation Co. Ltd. v. Syam Sunder Tea Co. Ltd., AIR 1955 Ass. 65*). If a boat, ship or steamer sank on account of its having struck upon some snag and cargo was lost, that may be a mere peril of navigation and not an act of God, thus rendering the common carriers liable for the loss despite the fact that they were found to have acted with reasonable care and prudence. It goes to show beyond doubt that even exercise of reasonable care and prudence is not sufficient to absolve the common carrier of the liability.

The true scope of liability of the common carrier is found vividly explained by Madras High Court in the case of *Konda Rm. Eswara Iyer & sons v. Madras Bangalore Transport Co., AIR 1964 Mad.* as under :

> "The liability of a common carrier is not limited only to negligence. In the case of loss or damage he cannot plead that he has exercised all reasonable diligence and care. He must be liable in spite of taking all due care and precautions. As Chief Justice Hale observed in *Mors v. Slew (1672) I Vent 190, 239 Vent at p. 239* - ' And if a carrier be robbed by a hundred men, he is never the more excused.' Thus the general principle of the common law is, a common carrier is insurer of goods which he contracts to carry and he is liable for all loss of, or injury to those goods while they are in the course of transit unless such loss or injury is caused by the act of God or by the State enemies or is the consequence of inherent vice in the thing carried or is attributable to consignor's own fault."

No doubt the liability of common carrier is wide enough but it is not absolute. Apart from the two well known exceptions (act of God and Act of enemy of

State), two other exceptions which are by now well recognized and which have been referred in the case of *River Steam Navigation Co. Ltd.(Supra)* are as under :

(1) loss due to intrinsic vice or defect in the goods,

(2) loss due to perishable nature of goods.

NOTICE :

Section 10 of the Act provides that no suit shall be instituted against the common carrier unless notice in writing of the loss or injury has been given within 6 months of the time when the loss or injury first came to the knowledge of the plaintiff. Interpreting this provision it was held by the Supreme Court in *M/s M.G. Brothers Lorry Service v. M/s Prasad Textiles, (1983) 3 SCC 61* that any agreement providing for special period of limitation differently from the statutory period is void because it amounts to defeating the statutory provisions. Therefore, a notice can be given within 6 months from the time when loss/injury first came to the knowledge of the plaintiff despite a contract to the contrary.

ACTION BEFORE CONSUMER FORUM :

An action for damages regarding loss of or injury to the goods entrusted to the carrier may be initiated by way of "suit" after a notice to him u/s10 of the Act. As laid down by the Apex Court in *Patel Roadways Ltd. v. Birla Yamaha Ltd., (2000) 4 SCC 91* the expression "suit" as used in Section 10 is a term of wider signification including within its fold a proceeding initiated by way of a petition and therefore, a proceeding before Consumer Redressal Commission/ Forum comes within the expression "suit". In view of this an action for damages under the Act can well be initiated before the Consumer Commission/Forum by way of duly constituted petition under Consumer Protection Act, 1986.

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"Whatever path your feet may tread
Whatever be your quest
The only way to get ahead
Is striving for the best

'Tis not enough to wish to do
A day's toil fairly well;
If you would rise to glory you
Must hunger to excel".

- Edgar A. Guest

विद्युत अधिनियम, 2003 के अंतर्गत उद्‌भूत अपराधों के संबंध में विचारण प्रक्रिया

न्यायाधीशगण
जिला–छतरपुर

जैसा कि विदित है, विद्युत अधिनियम, 2003, जिसे आगे अधिनियम के नाम से संबोधित किया जा रहा है, दिनांक 10/06/03 से प्रभावशील हो चुका है। उक्त अधिनियम द्वारा भारतीय विद्युत अधिनियम, 1910 का निरसन किया गया है। अधिनियम के मुख्य प्रावधानों की ओर माह अप्रैल, 2004 के ज्योति जनरल (द्विमासिक पत्रिका) के पृष्ठ क्रमांक 53 पर प्रकाशित लेख में प्रकाश डाला जा चुका है इसलिये इस लेख में केवल विचारणीय प्रश्न पर ही विचार करते हुये विधिक स्थिति को स्पष्ट करने का प्रयास किया जा रहा है।

सर्वप्रथम यहां यह स्पष्ट करना आवश्यक है कि अधिनियम में धारा–135, 136, 137, 138 व 150 (2) में अपराध एवं उनके दंड का प्रावधान किया गया है जिसके अनुसार कारावास की दंडाज्ञा तीन वर्ष तक अथवा अर्थदंड या दोनों हो सकेंगे। पश्चात्‌वर्ती अपराध की स्थिति में पांच वर्ष तक के कारावास की दंडाज्ञा का प्रावधान किया गया है। अधिनियम की धारा 146 में कारावास तीन माह तक व अन्य अपराधों में केवल अर्थदंड ही निर्धारित किया गया है। अपराधों के दंड की स्थिति को इसलिये स्पष्ट किया जा रहा है कि जिससे उनके संज्ञेय या असंज्ञेय होने एवं उनके जमानतीय या अजमानतीय होने को स्पष्ट किया जा सके। अधिनियम में अपराधों के संज्ञेय या असंज्ञेय, जमानतीय या अजमानतीय होने के संबंध में कोई प्रावधान नहीं किया गया है। दंड प्रक्रिया संहिता की धारा–5 में यह प्रावधान किया गया है कि भारतीय दंड विधान के अलावा अन्य सभी विधि के अपराधों का अनुसंधान जांच व विचारण दंड प्रक्रिया संहिता के अधीन ही किया जावेगा, जब तक कि अन्य विधि में इस बाबत् कोई विशेष उपबंध नहीं किये गये हों, ऐसी स्थिति में दंड प्रक्रिया संहिता की अनुसूची–1 के द्वितीय भाग के अनुसार ही उपरोक्त स्थिति का निर्धारण किया जा सकेगा; जिसके अनुसार तीन वर्ष या उससे अधिक कारावास से दंडनीय अपराध को अजमानतीय व संज्ञेय होना कहा गया है। इस प्रकार यह निष्कर्ष निकलता है कि अधिनियम की धारा–135 लगायत–138 व धारा–150 (2) में वर्णित अपराध संज्ञेय व अजमानतीय अपराध हैं। इस स्थिति में शेष सभी अपराध असंज्ञेय व जमानतीय होना स्पष्ट होते हैं।

अधिनियम के अपराधों के विचारण की प्रक्रिया के प्रश्न पर विचार करने के लिये हमें तीन प्रश्नों पर विचार करना होगा:–

अ. उक्त अपराधों में रिमांड की प्रक्रिया क्या रहेगी?

ब. मामले में संज्ञान किस न्यायालय द्वारा लिया जायेगा?

स. विचारण की प्रक्रिया क्या होगी?

अधिनियम में रिमांड के संबंध में कोई प्रावधान नहीं है। जहां किसी विधि में रिमांड के संबंध में कोई प्रावधान न हो, उस स्थिति में रिमांड की कार्यवाही दं.प्र.सं. की धारा–167 के अधीन ही हो सकेगी। अधिनियम में इस संबंध में भी कोई प्रावधान नहीं है कि आपराधिक मामला किस न्यायालय में पेश किया

जावेगा। यहां यह भी स्पष्ट किया जाता है कि अधिनियम की धारा–154 (1) के अंतर्गत धारा 135–139 तक के अपराधों के विचारण के लिये विशेष न्यायालय गठित किये जाने का प्रावधान है तथा विशेष न्यायालय को ही अधिनियम के अपराधों के विचारण की अधिकारिता दी गई है। विशेष न्यायालय, सत्र न्यायालय ही हो सकेंगे, कहने का आशय यह है कि सत्र न्यायालय को ही विशेष न्यायालय नियुक्त किया जा सकेगा। म. प्र. शासन द्वारा माननीय उच्च न्यायालय की सहमति से विशेष न्यायालयों का गठन अधिनियम के उक्त अपराधों के विचारण के लिये किया जा चुका है।

अब विचार के लिये यह प्रश्न उत्पन्न होता है कि क्या विशेष न्यायालय अधिनियम के अपराधों के मामले के संबंध में धारा–190 दं.प्र.सं. के अधीन संज्ञान ले सकेंगे या फिर उन्हें न्यायिक दंडाधिकारी द्वारा उपार्पित कर विशेष न्यायालय को भेजा जावेगा। अधिनियम में इस संबंध में कोई प्रावधान नहीं है। अधिनियम में केवल विचारण के संबंध में ही प्रावधान किये गये हैं। जहां अधिनियम में विचारण के संबंध में कोई स्थिति स्पष्ट नहीं की गई है उस स्थिति में विशेष न्यायालय को सत्र न्यायालय होने के कारण दंड प्रक्रिया संहिता की धारा–193 के प्रावधानों के प्रकाश में आपराधिक मामलों में सीधे संज्ञान लेने का अधिकार नहीं रहेगा बल्कि न्यायिक दंडाधिकारी के न्यायालय से मामला उपार्पित किये जाने पर ही विशेष न्यायालय मामले में विचारण की कार्यवाही प्रारम्भ कर सकेंगे। इसके लिये *गांगुला अशोक वि. आंध्रप्रदेश राज्य, ए.आई.आर. 2000 एस.सी. 740* का न्याय दृष्टांत उल्लेखनीय है। उक्त न्याय दृष्टांत का मामला अनुसूचित जाति एवं जनजाति (अ. नि.) अधिनियम, 1989 के अपराधों से संबंधित है। इस अधिनियम में भी विचारण प्रारंभ होने के पूर्व की कार्यवाही के संबंध में कोई प्रावधान नहीं है। अनुसूचित जाति, जनजाति (अ. नि.) अधिनियम की स्थिति इस अधिनियम जैसी ही कही जा सकती है। ऐसी परिस्थितियों में माननीय उच्चतम न्यायालय के उपरोक्त न्याय दृष्टांत के आधार पर यह निष्कर्ष निकलता है कि विशेष न्यायालय को अधिनियम के अपराधों में संज्ञान लेने का सीधे अधिकार नहीं है तथा न्यायिक दंडाधिकारी के न्यायालय से मामला उपार्पित कर विशेष न्यायालय को भेजा जावेगा।

अधिनियम की धारा–151 में यह प्रावधान भी किया गया है कि अधिनियम के अपराधों के संबंध में परिवाद पत्र पर से ही कार्यवाही की जा सकेगी तथा समुचित सरकार, समुचित आयोग अथवा अन्य अधिकारी जिन्हें उनके द्वारा अधिकृत किया जावे अथवा मुख्य विद्युत निरीक्षक अथवा विद्युत निरीक्षक, अनुज्ञप्तिधारी कंपनी या विद्युत उत्पन्न करने वाली कंपनी को ही परिवाद पत्र पेश करने का अधिकार दिया गया है। उक्त प्रावधानों से यह स्पष्ट है कि धारा–151 में अधिकृत व्यक्तियों के अलावा अन्य किसी अधिकारी द्वारा परिवाद पत्र पेश नहीं किया जा सकेगा और न ही ऐसे किसी अधिकारी द्वारा प्रस्तुत किये गये परिवाद पत्र से न्यायालय द्वारा संज्ञान लिया जा सकेगा। परिवाद पत्र की परिभाषा अधिनियम में नहीं दी गई है। परिवाद पत्र की परिभाषा दंड प्रक्रिया संहिता की धारा–2 (डी) में दी गई है। उसके अनुसार परिवाद का आशय मौखिक या लिखित रूप में किसी अपराध के संबंध में न्यायिक दंडाधिकारी को की गई शिकायत से है जिस पर से अपराध के बाबत् किसी अपराधी के विरूद्ध कार्यवाही की जा सके। इस तरह यह स्पष्ट होता है कि अधिनियम के अपराधों के संबंध में पुलिस को दं.प्र.सं. की धारा–173 (2) के अंतर्गत पुलिस रिपोर्ट पेश करने का अधिकार नहीं है तथा न्यायालय पुलिस रिपोर्ट पर से मामले में संज्ञान भी नहीं ले सकेगा क्योंकि धारा–151 के अंतर्गत केवल परिवाद पत्र पर से ही न्यायालय को संज्ञान लेने का अधिकार दिया गया है।

परिवाद पत्र के आधार पर अधिनियम के अपराधों में लिये जाने वाले संज्ञान की स्थिति दं.प्र.सं. की धारा–195 में उल्लेखित प्रावधान जैसी ही है। उक्त प्रावधान में भी लोक न्याय के विरूद्ध अपराधों के लिये संज्ञान परिवाद पत्र पर से ही किये जा सकने का प्रावधान है। इस प्रकार यह निष्कर्ष निकलता है कि अधिनियम के अपराधों के संबंध में केवल परिवाद पत्र पर से ही न्यायालय द्वारा संज्ञान लिया जा सकेगा। इसके लिये *उ. प्र. राज्य वि. माता भिख, 1994 (4) एस. सी.सी. पृष्ठ–95 एवं अन्य व समरथ विरूद्ध म. प्र. राज्य, 1982 एम.पी.डब्ल्यू.एन. 492* के न्याय दृष्टांत उल्लेखनीय है।

अब विचार के लिये एक प्रश्न और उत्पन्न होता है कि जहां अधिनियम के पूर्व उल्लेखित अपराध धारा–135, 136, 137, 138 व 150 (2) संज्ञेय अपराध है तो फिर क्या उस स्थिति में पुलिस संज्ञेय अपराध होने के कारण उन मामलों में अनुसंधान कर अभियोग पत्र पेश कर सकेगी। इस संबंध में विधिक स्थिति यह स्पष्ट होती है कि उक्त अपराधों के संज्ञेय होने के कारण तथा अधिनियम में पुलिस के द्वारा अनुसंधान किये जाने के संबंध में कोई प्रतिबंध न होने की स्थिति में पुलिस उक्त अपराधों में अनुसंधान की कार्यवाही तो कर सकती है क्योंकि अधिनियम की धारा–151 में न्यायालय को अधिनियम के अपराधों मे परिवाद पत्र के सिवाय संज्ञान लेने से निंबंधित किया गया है लेकिन पुलिस या अन्य किसी को संज्ञान लेने से निंबंधित नहीं किया गया है। इसका आशय यह है कि पुलिस के द्वारा अधिनियम के अपराधों के मामलों में संज्ञान लिये जाने के संबंध में कोई प्रतिबंध होना नहीं कहा जा सकता है, लेकिन पुलिस अनुसंधान करने के बावजूद भी दं.प्र.सं. की धारा–173 (2) के अंतर्गत पुलिस रिपोर्ट पेश नहीं कर सकती है, अधिक से अधिक ऐसे मामलों में पुलिस को अपराध के अनुसंधान के बाद उस मामले को उस अधिकारी को ही सुपुर्द करना होगा जो परिवाद पत्र पेश करने के लिये अधिनियम की धारा–151 के अंतर्गत अधिकृत व सक्षम है। यह स्थिति भारतीय दंड विधान की धारा–188 के समान ही है। धारा–188 भा.द.वि. का अपराध म.प्र. राज्य के द्वारा संज्ञेय अधिनियमित किया गया है लेकिन इसके बावजूद भी धारा–188 के अपराध में पुलिस को अभियोग पत्र पेश करने का अधिकार नहीं है। इसके लिये *लोकनाथ मिश्रा विरूद्ध म.प्र. राज्य, 1964, एम.पी.एल.जे. 383,* का न्याय दृष्टांत उल्लेखनीय हैं।

परिवाद पत्र से कार्यवाही न्यायिक दंडाधिकारी के समक्ष प्रारंभ किये जाने के संबंध में दं.प्र.सं. की धारा–200 लगायत–204 में प्रावधान किये गये हैं। दं.प्र.सं. की धारा–200 के अंतर्गत परिवादी और उसके साक्षियों के कथन लिये जाने का प्रावधान है लेकिन उसके परन्तुक में यह भी प्रावधान किया गया है जहां परिवाद पत्र लोक सेवक द्वारा पदीय कर्तव्य के निर्वहन में पेश किया जावे तो उस स्थिति में परिवादी का कथन लिये जाने की आवश्यकता नहीं रहेगी। उक्त प्रावधान के आधार पर यह कहा जा सकता है कि अधिनियम की धारा–151 में परिवाद पत्र पेश करने के लिये उल्लेखित अधिकारी यदि लोक सेवक है और उनके द्वारा अपने लोक कर्तव्य के निर्वहन में परिवाद पत्र पेश किया जाता है तो उस स्थिति में न्यायिक दंडाधिकारी के न्यायालय को परिवादी/लोकसेवक का कथन लेने की आवश्यकता नहीं रहेगी। लेकिन यहां विचार के लिये एक प्रश्न और उत्पन्न हो सकता है कि अधिनियम के कुछ अपराधों के विचारण की अधिकारिता विशेष न्यायालय को दी गई है तथा विशेष न्यायालय सत्र न्यायालय है तो फिर क्या ऐसी स्थिति में दं.प्र.सं. की धारा–202 के उस परन्तुक का पालन करना आवश्यक होगा जिसमें एकमात्र सत्र न्यायालय के विचारण की अधिकारिता के अपराध के मामलों में सभी साक्षियों के कथन आवश्यक रूप से लिये जाने का प्रावधान किया गया है। हमारे मत में उक्त परन्तुक के प्रावधान का अधिनियम के अपराधों के संबंध में प्रस्तुत परिवाद पत्र के मामलों में पालन किये जाने

की आवश्यकता नहीं है क्योंकि अधिनियम के अपराध एकाकी रूप में सत्र न्यायालय के द्वारा विचारणीय अपराध नहीं है। यद्यपि सत्र न्यायालय को विशेष न्यायालय अवश्य नियुक्त किये जाने का प्रावधान किया गया है तथा विशेष न्यायालय को सत्र न्यायालय की शक्तियां भी प्राप्त हैं लेकिन इसका यह आशय निकाला जाना उचित नहीं होगा कि अधिनियम के अपराध सत्र न्यायालय द्वारा विचारणीय अपराध हैं बल्कि अधिनियम के अपराधों में, जैसा कि पूर्व में लिखा गया है, कारावास की दंडाज्ञा अधिकतम तीन वर्ष और पश्चात्वर्ती अपराध की दशा में अधिकतम पांच वर्ष है साथ ही धारा–154 (3) के अंतर्गत संक्षिप्त प्रक्रिया भी प्रावधित की गई है। ऐसी स्थिति में अधिनियम के अपराधों को सत्र न्यायालय की एकाकी अधिकारिता का अपराध मानना उचित नहीं होगा।

धारा–202 दं.प्र.सं. के परन्तुक के उपबंध का उद्देश्य है यह है कि सत्र न्यायालय के द्वारा विचारणीय अपराध गंभीर अपराध होते हैं और उन अपराधों में यदि उपार्पण के पूर्व परिवादी पक्ष की संपूर्ण साक्ष्य नहीं ली जाती है तो उस स्थिति में आरोपी को अपनी प्रतिरक्षा करने में कठिनाई होना स्वाभाविक है तथा आरोपी को विचारण प्रारंभ होने तक यह ज्ञान नहीं हो सकेगा कि उसके विरूद्ध आने वाला साक्षी क्या कहने वाला है एवं यदि उपार्पण के पूर्व साक्षियों के कथन न्यायिक दंडाधिकारी के न्यायालय में अंकित नहीं किये जाते हैं तो उस स्थिति में विचारण के दौरान साक्षी एक नवीन कहानी भी तैयार कर सकते हैं तथा परिस्थितियों के अनुसार साक्षियों के कथनों को बदला जा सकता है इसलिये इस उद्देश्य को दृष्टिगत रखकर कि गंभीर अपराधों के मामलों में आरोपी अपना बचाव एवं प्रतिरक्षा अधिक प्रभावी एवं समुचित रूप से कर सके, समस्त साक्षियों की आवश्यक रूप से परीक्षा किये जाने का प्रावधान किया गया है; लेकिन ऐसी स्थिति अधिनियम के अपराधों के बाबत् नहीं कही जा सकती है। यहां यह उल्लेख किया जाना भी आवश्यक है कि जब भी लोक सेवक द्वारा परिवाद पत्र पेश किया जायेगा तो निश्चित ही वह अपने स्तर पर मामलों में साक्ष्य एकत्रित करने के उपरांत ही परिवाद पत्र पेश करेगा जिसके आधार पर न्यायिक दंडाधिकारी दंड प्रक्रिया संहिता की धारा –190 में अपराधी के विरूद्ध अपराध में संज्ञान लेंगे। इस तर्क के आधार पर यह कहना भी न्यायोचित होगा कि लोकसेवक द्वारा दायर परिवाद पत्र के मामलों में धारा–202 के परन्तुक का पालन किये जाने की आवश्यकता नहीं है।

परिवाद पत्र पर से संज्ञान लिये जाने के बाद दंड प्रक्रिया संहिता की धारा–204 के अधीन आरोपी को तलब किये जाने की कार्यवाही की जा सकेगी तथा आरोपी के उपस्थित होने के बाद उसे परिवाद पत्र व उसके साथ संलग्न दस्तावेजों की नकलें प्रदाय किये जाने के उपरांत उन अपराधों के विषय में जो अनन्यतः विशेष न्यायालय की विचारण अधिकारिता के हैं, मामले को विशेष न्यायालय को उपार्पित किया जावेगा। अधिनियम की धारा–154 के अंतर्गत विशेष न्यायालय दं.प्र.सं. की धारा –263 लगायत 265 के अनुसार संक्षिप्त प्रक्रिया के अधीन मामले का विचारण कर सकेगा। यहां यह भी स्पष्ट किया जाता है कि यदि विचारण न्यायालय किसी मामले में ऐसा समझता है कि संक्षिप्त प्रक्रिया के अधीन मामले का विचारण किया जाना न्यायोचित नहीं होगा तो उस स्थिति में न्यायालय संक्षिप्त प्रक्रिया द्वारा विचारण न करते हुये मामले के नियमित विचारण की प्रक्रिया के अधीन निराकृत कर सकेंगे। यहां यह अवगत कराया जाना भी आवश्यक होगा कि *ट्रांसमिशन कारपोरेशन आंध्रप्रदेश राज्य वि. च. प्रभाकर एवं अन्य, ए.आई.आर. 2004 एस.सी.डब्ल्यू 3223* के न्याय दृष्टांत में माननीय उच्चतम न्यायालय ने आंध्रप्रदेश राज्य द्वारा वर्ष 2000 में भारतीय विद्युत अधिनियम, 1940 में संशोधन द्वारा संक्षिप्त प्रक्रिया के जोड़े गये प्रावधानों को निर्णय के पद क्र. 17 में आरोपी के

प्रतिरक्षा में गंभीर रूप से प्रभावित होने के संबंध में मत व्यक्त किया है लेकिन उक्त निर्णय से वर्तमान भारतीय विद्युत अधिनियम में संक्षिप्त प्रक्रिया के संबंध में जो प्रावधान निर्मित किये गये हैं उनकी वैधानिकता पर कोई प्रभाव नहीं पड़ता है क्योंकि माननीय उच्चतम न्यायालय ने पूर्व उल्लेखित अनुसार जो मत व्यक्त किया था उन प्रावधानों के अन्तर्गत अपराध का दंड पांच वर्ष जिसमें न्यूनतम कारावासीय दण्ड तीन माह तक का व अर्थदंड 50 हजार रूपये तक जिसमें न्यूनतम अर्थदंड पांच हजार रूपये तक प्रावधित था, उक्त दंडाज्ञा को विचार में रखते हुये ही माननीय उच्चतम न्यायालय ने संक्षिप्त प्रक्रिया से आरोपी के गंभीर रूप से प्रभावित होने और सारवान रूप में क्षति हो सकने जैसा मत व्यक्त किया है लेकिन यहां इस अधिनियम में कारावास की दंडाज्ञा तीन वर्ष या अर्थदंड या दोनों जैसे प्रावधान हैं।

अधिनियम में धारा –172 (डी) में राज्य सरकार को अधिकार दिया गया है कि राज्य सरकार अधिनियम के प्रावधानों के प्रभाव को 6 माह के लिये स्थगित (Defer) कर सकती हैं म.प्र. राज्य शासन ने अधिनियम के प्रावधानों के प्रभाव को स्थगित करने के लिये अधिसूचना प्रकाशित की थी। उस अधिसूचना का प्रभाव दिनांक 9/12/03 को समाप्त हो चुका है तथा दिनांक 10/12/03 से अधिनियम म.प्र. राज्य में प्रभावशील हो चुका है। ऐसी स्थिति में अधिनियम के प्रभावशील होने के बाद से अधिनियम में प्रावधित अपराधों के विचारण की कार्यवाही भारतीय विद्युत अधिनियम, 2003 के प्रावधान के अधीन की जावेगी। जहां इस अधिनियम का प्रभावशील होना जिस अवधि में न पाया जाये उसे अवधि के अपराधों के लिये भारतीय विद्युत अधिनियम, 1910 के अंतर्गत ही अपराधों का विचारण किया जायेगा।

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Knowledge humbles the great man, astonishes the Common man, and puffs up the little man.

- Anon

Life without industry is guilt and industry without art is brutality.

- John Ruskin

'.... AND SHALL ALSO BE LIABLE TO FINE'- WHETHER IMPOSITION OF FINE DISCRETIONARY ?

Various offences under the Indian Penal Code punishable with different kinds of punishments may be classified as under :-

i. Offences punishable with fine only.

ii. Offences punishable with imprisonment.

iii. Offences punishable with imprisonment or fine or both.

iv. Offences punishable with imprisonment where accused "shall also be liable to fine".

v. Offences punishable with death or imprisonment for life where accused "shall also be liable to fine".

It is in respect of 4th and 5th categories that confusion has been there as to whether the expression ".... and shall also be liable to fine" tends to give the discretion to the Judge to impose sentence of imprisonment only or makes it mandatory to impose sentence of fine along with sentence of imprisonment. If only the words were as simple as "... shall be punishable with sentence of imprisonment as well as fine", there would have been no confusion and it would have clearly conveyed that sentence of fine along with sentence of imprisonment is imperative. But the use of expression ".....and shall also be liable to fine" has instilled a sense of confusion, as to its true import.

In a number of judgments, various High Courts have held that the expression bestows a discretion on the Judge *(See - Tetar Gope v. Ganauri Gope and others, AIR 1968 Pat. 287 and D.M. Thippaswamy v. Mysore Revenue Appellate Tribunal, Bangalore and others, AIR 1972 Mysore 50)*.

The Apex Court had an occasion to interpret the expression, ".... shall be liable to confiscation" as used in Section 63 (1) of Bengal Excise Act, 1909 in the case of *Superintendent and Remembrancer Legal Affairs to Govt. of West Bengal v. Abani Maity, AIR 1979 SC 1029.* Section 63 (1) of West Bengal Excise Act, 1909 is as follows:

> "63 (1). Whenever an offence has been committed which is punishable under this Act, the intoxicant, materials, still utensil implement and apparatus in respect of or by means of which such offence has been committed *shall be liable to confiscation."*

While interpreting the words ".... shall be liable to confiscation", the Apex Court embarked upon an exercise to appreciate the meaning of the expression "liable to" and after referring to various dictionary meanings of the word "liable", Apex Court concluded that the word "liable" does not convey a sense of absolute obligation or penalty but merely imports a possibility attracting such obligation or penalty.

The Apex Court further observed that even if this expression is used in conjunction with expression "....and shall also ...." it may not always be impera-

tive. It was however, held that although the word "liable" indicates a sense of discretion yet the statute is to be interpreted not merely from the lexicographer's angle and Court must give effect to the will and inbuilt policy of Legislature as discernible from the object and scheme of the enactment and the language employed therein. It was further stated that words in a statute often take their meaning from the context of the statute as a whole. The words therefore, ought not to be construed in isolation. The word "may" in the context of particular statute, may connote a Legislative "imperative". The Supreme Court quoted an excerpt from a foreign citation in which it was observed that "we should avoid a construction which would reduce the Legislation to futility". In this case, considering the scheme of the Bengal Excise Act as a whole, the Supreme Court was of the view that the intention of the Legislature is not only to raise revenue but also to control and restrict the import, export, etc. of intoxicants. Therefore, the words "... shall be liable to confiscation" if not given a strict meaning of imperative confiscation, the efficacy of the provisions as an instrument for combating the anti-social activities will be rendered ineffective.

Thus the words were held to be intending to have a compulsive force and even the word "may" as occurring in Section 64 (1) of the Act were held to convey the meaning of "must" by the Apex Court.

In *Govind Lal Chhaganlal Patel v. The Agricultural Market Produce Committee, Godhra & others, AIR 1976 SC 263* it has been held that the Court has to ascertain the real intention of the Legislation by carefully pointing to the whole scope of statute while considering the import of the word "shall".

The Supreme Court in *Zunjarrao Bhikaji Nagarkar v Union of India, (1999) 7 SCC 409* considered the matter relating to service law in which the appellant had challenged institution of departmental enquiry against him. The appellant was Collector of Central Excise and the charge against him was that he had favoured a company by not imposing mandatory penalty under Central Excise Rules. The appellant had argued that imposition of penalty was not mandatory and he cited an authority of Patna High Court [*Tetar Gope (supra)*] in which the High Court had taken the view that the expression "...shall also be liable to fine" in Section 325 I.P.C. does not mean that a sentence of fine is imperative under that Section. The Apex Court expressed that this view of the Patna High Court is not correct as it appears from the language of Section 325 IPC that sentence of both imprisonment and fine are imperative. In forming this opinion the Apex Court also took recourse to an authority - *Rajasthan Pharmaceutical Laboratory v. State of Karnataka, (1981) 1 SCC 645* in which it had been held that imprisonment and fine were both imperative when the expression "... shall also be liable to fine" was used under Section 34 of the Durgs and Cosmetics Act, 1914.

In *Palaniappa Gounder v. State of Tamil Nadu, AIR 1977 SC 1323,* a case relating to an offence u/s 302 IPC, the Supreme Court was however, of the view that in those cases in which sentence of death or sentence of life imprisonment has been imposed, it is not mandatory to impose fine and the expres-

sion "... and shall also be liable to fine" would mean that the discretion rests with the Court to impose or abstain from imposing fine looking to the circumstances of accused and the case. The Apex Court was of the view that in cases of extreme penalty i.e. of death or life imprisonment although the sentence of fine can legitimately be combined but legitimacy is not to be confused with propriety and the fact that the Court possess a certain power does not mean that it must always exercise it. In such cases sentence of fine is hardly calculated to serve any social purpose.

A study of both the above pronouncements of the Apex Court leads to the conclusion that the expression "... and shall also be liable to fine" as occurring in various Sections of Indian Penal Code provides for mandatory requirement of imposition of fine alongwith the sentence of imprisonment excepting the cases in which sentence of death or sentence of life imprisonment has been imposed.

It appears that the intention of the authors of *Indian Penal Code* in using the expression "..., and shall also be liable to fine" was two pronged. On the one hand a deterrent punishment was thought of in such category of offences which were relatively more serious and on the other hand it was considered proper to provide scope for compensating the wronged individual i.e the complainant. Section 357 of the Code of Criminal Procedure, as it stood prior to 1973 amendment, provided for compensation only out of amount of fine. If fine was not imposed, no compensation could be granted to the complainant.

It is only under the Code of 1973 that Section 357 (3) was incorporated in CrPC which enabled the Court to order payment of compensation to the aggrieved individual even when no fine was imposed. Inspite of this change, requirement of imposition of sentence of fine in cases in which sentence of death or life imprisonment is not imposed has to be considered as mandatory so that the deterrent effect of such stringent punishment may not fade away. This logic can be considered to be in consonance with the view expressed in *Zunjarrao Bhikaji Nagarkar's* case (supra). However, when the substantative sentence itself is as severe as sentence of death or sentence of life imprisonment then the deterrent aspect can be considered to have been taken care of without there being any requirement of fine (as expressed in *Palaniappa Gounder's* case (supra). Apart from this there is no utility of imposition of fine in such a case as in default of fine, a sentence would have to be imposed which would serve no purpose when the substantial sentence itself is of death or life imprisonment.

Due to aforesaid reasons as also in view of the pronouncements of the Apex Court in *Zunjarrao Bhikaji Nagarkar's case* (supra) and *Palaniappa Gounder's* case (supra) it can be concluded that the expression "...and shall also be liable to fine" signifies imperativeness of sentence of fine alongwith sentence of imprisonment in all the offences barring the offences in which sentence of death or life imprisonment has been imposed and in such cases Court shall have discretion to impose sentence of fine alongwith sentence of death or life imprisonment looking to the peculiar circumstances of the case.

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PART - II

NOTES ON IMPORTANT JUDGMENTS

1. **CIVIL PROCEDURE CODE, 1908 – O.22 & 9**
Order 22, applicability of – Limitation prescribed for substitution application under Order 22 not applicable to proceedings under Order 9.
Shikhar Chandra Jain (since dead) through L.Rs. Anil Kumar Jain and others v. State of M.P. and others
Reported in 2004 (4) MPHT 402

Held :

In *Sayeeda Begam and another Vs. Ashraf Hussain Anwar Hussain and others, 1980 MPLJ 46,* it has been held :-

> A proceeding on the death of a party can not proceed and those to whom the right to sue survives have to be impleaded, but the limitation to make an application for substitution in a suit for which there is express provision, will not govern a proceeding which is neither a suit nor an appeal. That being so provisions of Order XXII are not applicable to proceedings under Order IX, Civil Procedure Code for restoration of a suit dismissed in default.

Order XXII, CPC does not apply to proceedings under Order IX, CPC for restoration of suit dismissed in default. Consequently, the Court below erred in rejecting the application for substitution of L.Rs. of late Ram Kumar Agrawal in MJC No. 15/2000 on the ground of limitation.

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2. **MOTOR VEHICLES RULES, 1994 (M.P.) – Rule 97 (7)**
Tractor Trolley, use of – Rule 97 (7) permits use of tractor trolley for certain purposes other than agriculture including use for carrying persons at the time of marriage or other ceremonial occasions – Such use does not exonerate insurance company of its liability.
National Insurance Co. Ltd. v. Sarvanlal and others
Reported in 2004 (4) MPHT 404 (DB)

Held :

Then for the sake of argument, even it is opined that at the time of accident, the tractor was being used to transport a marriage party, for which it was not insured then, as per Clause 7 of Rule 97 of M.P. Motor Vehicles Rules, 1994, a tractor-trailer registered in the name other than Industrial Organisation, Municipal Institutions, Water Supply Institution and Non-agricultural Co-operative Societies for unladen weight up to 7300 Kgs. may be used for marriage purposes also. The relevant provision runs as under :-

> "(7) Notwithstanding anything contained in sub-rules (1) and (2) but subject to the provisions of sub-rule (5) such tractor-trailer other than

those registered in the name of Industrial Organisation, Municipal Institutions, Water Supply Institution and Non-agricultural Co-operative Societies, and the unladen weight of which does not exceed 7300 Kgs. may be used for the following purposes :-

(i) for carrying labours and the members of the family of agriculturist for the purpose of agriculture or any purpose connected with agriculture including sale and purchase of articles of agriculture.

(ii) for carrying persons at the time of Mela, Markets, Religious Functions, marriages and at other ceremonial occasions provided that the number of persons so carried shall not exceed 20 at a time.".

Relying on *Pushpadevi and others Vs. Kamal Singh and others*, 2001 (3) MPLJ 548, in Civil Revision No. 922/2002, *Madhu and another Vs. Munna and others,* disposed of by this Court on 10-9-2003, also, it is held that even if the deceased was travelling as a member of a marriage party in tractor trolley, which was being used otherwise then for agricultural purpose, for which it was insured, the insurer is liable to pay compensation to the claimant/sufferer on account of aforesaid Clause 7 of Rule 97 of Motor Vehicles Rules, 1994.

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3. LIMITATION ACT, 1963 – Section 5
Delay, condonation of – Expression "sufficient cause" as used in sections should receive liberal construction – Law explained.
Om Puri v. State of Madhya Pradesh
Reported in 2004 (4) MPHT 410

Held :

It is a well settled principle of law that rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. Furthermore, the primary function of a Court is to adjudicate the dispute between the parties and to advance substantial justice. The time limit fixed for approaching the Court in different situation is not because on the expiry of such time a bad cause would transform into a good cause. In this regard, I may also refer to a recent decision of the Supreme Court rendered in *Ramnath Sao Vs. Goberdhan Sao, AIR 2002 SC 1201,* in which it has been held that expression "sufficient cause" within the meaning of Section 5 of the Limitation Act or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of *bona fide* is imputable to party. Earlier also, in *Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji and others, AIR 1987 SC 1353,* it was held by the Supreme Court that ordinarily a litigant does not stand to benefit by lodging an appeal late and refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

The Supreme Court further held that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side can not claim to have vested right in injustice being done because of a non-deliberate delay. It was also observed by the Supreme Court that it must be grasped that judiciary is respected not on account of its power of legalise injustice on technical ground but because it is capable of removing injustice and is expected to do so.

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4. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (7) Ambit and scope of Section 12 (7) – Plaintiff not required to plead regarding requirements of Section 12 (7) – Plaintiff may satisfy Court about availability of plan, estimate and funds even at the stage of evidence- Law explained.
Shrimanth Seth Dharmendra Kumar v. Smt Uma Devi and others
Reported in 2004 (4) MPHT 412

Held :

If we analyse the scope and ambit of Section 12 (7) of the Act, it is perceivable that the intention of legislature is not that, on the date of the filing of the suit the plans, estimate and necessary funds should be available with the plaintiff or these conditions are pre-requisite conditions and plaintiff should possess these conditions when the suit is filed. In sub-section (7) to Section 12 the Court is required to satisfy that the plans, estimates and necessary funds are available with the landlord. The provisions of sub-section (7) can not be stretched to the extent that plans, estimates and the funds should be available to the plaintiff at the time of institution of the suit, nor this is the intention of Legislature. I may further add that the expression "necessary funds for the purpose are available with the landlord" used in sub-section (7) to Section 12 would not mean liquid money in hand. It would be sufficient if landlord demonstrates and proves that he is having potential capacity to raise funds for the purpose of carrying out the construction.

So far as the contention of learned Counsel for the appellant that there is no pleading in the plaint if regard to estimates for reconstruction of the suit accommodation, suffice it to say that if a suit for eviction is filed on the ground envisaged under clause (h) of sub-section (1) of Section 12 of the Act, the plaintiff is required to satisfy the Court under sub-section (7) of Section 12 that the plan and estimate of the proposed reconstruction have been prepared and the necessary funds, for that purpose, are available with the plaintiff, Merely the requirement of sub-section (7) of Section 12 has not been pleaded, the plaintiff can not be non-suited on this ground. What the plaintiff is required to show is that he is having the plans, estimate and necessary funds to carry out the construction and this can be shown by him even at the stage of evidence to satisfy the Court about the availability of plan, estimate and funds. The decree under Section 12 (1) (h) of the Act can not be denied on this ground. In this regard, I

may profitably rely the decision of this Court in the case of *Lal Singh Tomar Vs. Ramesh Chand and another, 1985 JLJ 304,* wherein in Para 12 has held that the provisions of Section 12 (7) of the Act are not required to be pleaded but there should be a satisfaction of the Court that plaintiff is having plans, estimate and necessary funds with him.

●

5. S.C. & S.T. (PREVENTION OF ATROCITIES) ACT, 1989 – Section 14 Private complaint for offences under Sections 3/4 of the Act of 1989 along with some other offences under I.P.C. – Complaint cannot be entertained directly by a Special Court.
Goden Prasad and another v. Manua and another
Reported in 2004 (4) MPHT 457

Held :

The stand of learned Counsel is based on decisions which are no more good in law. True, earlier Full Bench of this Court in the case of *Anand Swaroop v. Ramratan Jatav and others, 1996 JLJ 8 (FB)* has held that Special Court created under Section 14 of the Act can take cognizance without committal proceedings under Section 193, Cr.P.C. and private complaint can also be entertained by Special Court directly and overruled the Division Bench decision of *Meera Bai Vs. Bhujbal Singh, 1995 Cr.L.J. 2376,* wherein it was categorically held that Special Courts constituted under the Act has no jurisdiction to try offence unless the case being committed to it under Section 193, Cr.P.C. But, the decision of *Anand Swaroop* (supra), now can not be said to be a good law for the simple reason that the Apex Court in the case of *Gangula Ashok and another Vs. State of A.P., 2000 (2) M.P.H.T. 101 (SC) = (2000) 2 SCC 504,* has categorically held that "Special Court" constituted under the Act can not take cognizance directly as a Court of original jurisdiction without the case being committed to it by a Magistrate in view of Section 193, Cr.P.C. Their Lordships further held that Sections 4 and 5 of Cr.P.C. do not indicate any departure from this position. The Apex Court while holding so in Para 17 held that the view of Madhya Pradesh High Court is also the same and referred the decision of *Meera Bai's* case (supra).

In view of the decision of the Apex Court in the case of *Gangula Ashok* (supra) the argument of learned Counsel can not be accepted that under the Act private complaint is to be submitted directly to the Special Court constituted under Section 14 of the Act without following the procedure as envisaged under Section 193, Cr.PC.

●

6. STAMP ACT, 1899 – Section 35 and Article 23
Determination of question about stamp duty payable on a document-Relevant considerations to be kept in mind – Agreement of sale of immovable property with transfer of possession – Agreement liable to stamp duty as a conveyance.

Shiv Kumar Saxena and others v. Manishchand Sinha and another Reported in 2004 (4) MPHT 475 (DB)

Held :

The following cardinal principles laid down by Courts should always be kept in view, before considering any question relating to stamp duty :-

(i) Stamp duty is leviable on the instrument and not the transaction.

(ii) The substance of the transaction embodied in the instrument determines the stamp duty and not the form or title of the instrument.

(iii) In order to determine the nature of document and whether it is sufficiently stamped, the Court shall only look to the contents of the document as it stands and not any collateral circumstances which may be placed by way of evidence. In other words, for purposes of stamp duty, the intention of the parties is to be gathered only from the contents of the instrument and not any outside material. (But where the stamp duty depends on the market value, outside material can be considered in the manner provided in the relevant stamp law).

(iv) To find out the true character of an instrument for purpose of stamp duty, the document should be read as a whole and the dominant purpose of the instrument should be identified.

(v) The instrument must be stamped according to its tenor though it can not be given effect for some independent cause.

(vi) The Revenue can not contend that the object of the transaction was to achieve a purpose not disclosed in the document and, therefore, the document should be stamped as per such deemed, but undisclosed purpose. Similarly, the party liable to pay stamp duty can not contend that the purpose disclosed in the instrument is not the actual purpose and therefore, he is not liable to pay stamp duty on the apparent tenor of the instrument.

(vii) Once a document containing effective words of disposition is executed, it attracts stamp duty. The taxable event can not be postponed by contending that it was intended to come into effect on a future date, on the happening of a particular contingency.

Article 23 of Schedule 1-A of the Indian Stamp Act, 1899 (as amended in Madhya Pradesh) relates to conveyance. At the relevant point of time (April, 1991), Article 23 reads thus :-

> **Description :-** Convcyance not being a transfer charged or exempted under No. 62 irrespective of the market value of the property which is the subject matter of conveyance.
>
> **Explanation :-** For the purpose of this article, *where in the case of agreement to sell immovable property, the possession of any immovable property is transferred to the purchaser before execution or af-*

ter execution of such agreement without executing the conveyance in respect thereof, then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly : Provided further that where subsequently a conveyance is effected in pursuance of such agreement of sale, the stamp duty, if any, already paid and recovered on the agreement of sale which is deemed to be a conveyance shall be adjusted towards the total duty leviable on the conveyance, subject to a minimum of Rs. 10/-.

It is clear from the Explanation to Article 23 (which was inserted by M.P. Act No. 22 of 1990 with effect from 15-10-1990), that where possession of any immovable property is transferred to the purchaser under the agreement of sale, before the execution of the sale-deed, the agreement shall be liable to stamp duty as a conveyance.

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7. CIVIL PROCEDURE CODE, 1908 – Section 80
Notice under Section 80, requirement of – Notice should be addressed to the State Government through Secretary or the Collector – Notice addressed to Collector not a valid notice – Law explained.
State of Madhya Pradesh and another v. Jiwanlal Chikotiya and another
Reported in 2004 (4) MPHT 497 (DB)

Held :

When a suit is to be filed against the State Government or State then notice should be sent to the State Government through the Secretary or the Collector of the District. Section 80 specifically provides that notice must be addressed to the State Government through the Secretary to that Government or the Collector of the District. However, there is no provision for sending notice to the Collector or any other officer. Such notices can not be termed as notice under Section 80, CPC. Since the notice is not addressed properly and it has not been addressed to the State Government, there was no notice under Section 80 of the Code of Civil Procedure and in the absence of notice under Section 80, CPC also the suit was not maintainable.

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8. CIVIL PROCEDURE CODE, 1908 – O.38 R.5
Attachment before judgment, when to be resorted – Law explained.
Bindra Builders and Contractors Pvt. Ltd. v. Ranjan Pathak and others
Reported in 2004 (4) MPLJ 449

Held :

For passing a order under Order 38, Rule 5, Civil Procedure Code learned Court seized of the matter has to be satisfied on the basis of affidavit or otherwise that the defendants with a intention to obstruct or delay execution of the decree that may be passed against them, are disposing of whole or any of the

property or are about to remove whole or any of the property from the local limits of the jurisdiction of the Court. It is therefore, clear that the learned Court has to be satisfied with regard to the intention and object, for obstruction and removal of the property.

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9. HINDU MARRIAGE ACT, 1955 – Sections 13 & 29 (2)
Dissolution of marriage according to custom prevalent in the community – Such dissolution is legal – Law explained.
Harinarayan Khati v. Rekhabai
Reported in 2004 (4) MPLJ 455

Held :

In the Act of 1955, apart from section 13 regarding divorce between the spouses, there is another provision i.e. section 29 (sub-section 2) which reads as under :-

> 29(2). "Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu Marriage, whether solemnised before or after the commencement of this Act."

In view of section 29 Sub-section (2) of the Act, dissolution of marriage according to custom prevalent in Khati-community would be a valid dissolution between the applicant and the Non-applicant with their former spouses. Both the judgments relied upon by the learned counsel for the applicant i.e. *Smt. Yamunabai vs. Anantrao and another, 1988 MPLJ (SC) 223 and Khemchand vs. State of Gujarat , (2000) 3 SCC 753* are not helpful to the applicant in the facts and circumstances of the present case because in both the cases it was an admitted position that the spouses alive and there was no annulment of marriage by a decree of divorce or otherwise. In the judgment of *Khemchand Omprakash* (supra) the Supreme Court has held that :

> "The short question that arises for consideration in this appeal is whether the Respondent Jasumatiben, who claimed maintenance, being the wife of the applicant, can be allowed any maintenance on the admitted position that the applicant's first wife is alive and there has been no annulment of marriage by a decree of divorce or otherwise. During the subsistence of the first marriage, any second marriage is null and void, and therefore, the Courts below committed a mistake in granting maintenance in favour of Jasumati Ben, who claimed maintenance as the second wife of the applicant. We, therefore, set aside the grant of maintenance in favour of Jasumatiben alone. Needless to mention the children, namely Trupti and Vaishali will continue to get maintenance, as directed."

The abovementioned view of the Supreme Court i.e. "no annulment of marriage by a decree of divorce or otherwise" also positively establishes that

for annulment of marriage by a decree of divorce, there can be some other form or mode of annulment of marriage and that can be only under section 29(2) of the Act.

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10. MOTOR VEHICLES ACT, 1988 – Section 149 (2)
Driving licence found to be fake, effect of – Insurer liable unless proved that owner was aware of the fact of fakeness of driving licence.
Oriental Insurance Co. Ltd. v. Kamal
Reported in 2004 (4) MPLJ 469

Held :

Supreme Court in case of U*nited India Insurance Co. Ltd. vs. Lehru and others, (2003) 3 SCC 338* has held that where prior to hiring the driver, the owner satisfied himself that the driver had a licence and was driving competently, there would be no breach of section 149 (2) (a) (ii) and the insurer would not be absolved of liability. If ultimately the licence is found to be fake, the insurer would continue to be liable unless he proves that the owner was aware of the fact and had still permitted the driver to drive the vehicle. Even in such a case the insurer would remain liable to the third party but may recover the amount from the insured.

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11. CRIMINAL PROCEDURE CODE, 1973 – Sections 397 (1), 399 (1) & 401(1)
Sessions Court's power of revision, scope of – Sessions Court also has *suo motu* power of revision – Law explained.
Narayan Singh and others v. State of M.P.
Reported in 2004 (4) MPLJ 487

Held :

Section 399 of the New Code is providing Sessions Judge's power of revision. Under section 399 (1) of New Code, the Sessions Judge is empowered to exercise all or any of the powers which can be exercised by the High Court under Sub-section (1) of section 401 of New Code. Under section 399 (3), any order in revision passed by the Sessions Judge shall be final and no further proceedings by way of revision at the instance of such person shall be entertained by the High Court or any other Court. This provision clearly shows that the revisional power of the High Court and Sessions Court are concurrent. (See: *1997 Cri.L.J. 549, State of Madhya Pradesh vs. Khizar Mohammad and others*) Section 399 (1) also authorises the Sessions Judge to exercise all or any of the powers which may be exercised by the High Court under sub-section (1) of section 401 of the new Code. Under the Old Code, the Sessions Judge was not empowered to pass the order, if he found any illegality, irregularity or impropriety in any finding, sentence or order recorded or passed by the inferior Court. Now in the new Code, parallel powers are given to the Sessions Court as well as to the High Court and at the instance of the person only one revision is

maintainable. There is specific bar under section 399 (3) New Code, for filing second revision by same person. This difference between the old and new Code of Criminal Procedure clearly establishes that after calling for the record by the Sessions Court as per provision under section 397 of the New Code whether at the instance of the party/person or *suo motu* has to decide by invoking powers under section 399 read with section 401 of the New Code. In the New Code, there is no provision for referring the matter by the Sessions Judge to the High Court. This itself clearly establishes that when the Sessions Judge has *suo motu* power to call the record of the inferior Court, to see legality, regularity, propriety or correctness in any order or sentence passed by the inferior Court and if he finds any illegality, irregularity, impropriety or incorrectness in passing any order or sentence by the inferior Court, he can interfere with the said order.

This High Court, in the case of *2001 (4) MPLJ 384 = 2000 Cri.L.J. 2419, Gurmukh Das vs. State of Madhya Pradesh* has held that - 'Sessions Courts have *suo motu* power of revision. I am in full agreement with this view and this view is fortified by two reasons, firstly, in the New Code, the Sessions Judge and the High Court are having concurrent revisional jurisdiction and at the instance of such person/party only one revision is maintainable. He can either apply before the Sessions Court or before the High Court. Secondly, under section 397 of the New Code, High Court and Sessions Judges have been given equal *suo motu* powers as discussed above to call for the record of the inferior Court and if the Sessions Judge finds any illegality, irregularity or improprety in the said order and if the Sessions Judge has no power to interfere and correct the illegality, irregularity or impropriety or incorrectness in the said order or sentence, he has also no power to recommend the same to the High Court under the New Code under these circumstances, for correction. The exercise of powers under section 397(1) of the New Code would be redundant...,

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12. SERVICE LAW :
Seniority of ad hoc employee – Seniority has to be counted from the date of regularisation and not from the date of ad hoc appointment– Law explained.
Saroj Saxena v. State of M.P. and another
Reported in 2004 (4) MPLJ 492

Held

In the case of the *Direct Recruit Class II Engineering Officers' Association and others v. State of Maharashtra and others, AIR 1990 SC 1607*, Supreme Court after considering the various judgments on the point has laid down the law in para 44 of the aforesaid judgment and 44 (A) and (B) reads as under :-

"(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. *The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation*

in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted."

It is, therefore, clear from the aforesaid judgment that if the initial appointment is only on ad hoc basis and not in accordance with the rules, the said period cannot be taken into count for considering the seniority.

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13. INDIAN PENAL CODE, 1860 – Sections 302 & 304 Part I
Death due to single blow – No law that whenever death is caused by single blow the case would rest under Section 304 Part I of I.P.C.
Rakesh Kumar v. State of M.P.
Reported in 2004 (4) MPLJ 502 (DB)

Held :

In the case of *State of U.P. vs. Premi and others. (2003) 9 SCC 12*, the Supreme Court while dealing a case of single blow held that merely because there was a single blow, it is not possible to accept the contention that the accused had no intention to kill and, therefore, the conviction deserves to be altered to be one falling under section 304, Indian Penal Code. As we have already given our bestowed consideration that the Ballam was dealt with a great force and one can infer the gravity of the force that the blade of the Ballam was inserted in its entirety in the neck region of the deceased and it could not be taken out from the neck. Thus, merely there was a single blow which was inflicted on the neck region by itself is not enough to hold that appellant has not committed the offence under section 302, Indian Penal Code and it should be altered to 304 part I, Indian Penal Code. We may also profitably rely another decision of the Supreme Court in the same volume *Hari Prasad vs. State of U.P., (2003) 9 SCC 60* wherein there was single gun shot injury and the supreme Court was not impressed that merely there was a single gun shot injury, the case would not rest under section 302, Indian Penal Code and would come under the ambit and sweep of section 304 part I Indian Penal Code. It be seen that elements of *mens rea* and intention must accompany the culpable act or conduct of the accused. Mere intention is not punishable except when it is accompanied by an act or conduct or commission on the part of the accused. In the present case, the intention is coupled with the culpable act and conduct of the accused and, therefore, we are not impressed by the argument advanced by learned counsel that since a single blow was dealt, the case would rest under section 304, Part I, Indian Penal Code.

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14. TORT :

Tortuous liability regarding activity involving hazardous or risky exposure to human life, nature of – Liability is strict one and not dependent upon proof of negligence – Law explained.

Ramesh Singh Pawar v. M.P.E.B. and others

Reported in 2004 (2) JLJ 384

Held :

In the aforesaid case of Shail Kumari Supreme Court in para 8, 9 and 10 has observed as under :

> "8. Even assuming that all such measures have been adopted *a person undertaking an activity involving hazardous or risky exposure to human life, is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known, in laws, as "strict liability".* It differs from the liability which arises on account of the negligence or fault in this way i.e. the concept of negligence comprehends that the foreseeable harm could be avoided by taking reasonable precautions. If the defendant did all that which could be done for avoiding the harm he cannot be held liable when the action is based on any negligence attributed. But such consideration is not relevant in cases of strict liability where the defendant is held liable irrespective of whether he could have avoided the particular harm by taking precautions.
>
> 9. The doctrine of strict liability has its origin in English common law when it was propounded in the celebrated case of *Rylands v. Fletcher,* Blackburn, J., the author of the said rule had observed thus in the said decision : (All ER p. 7EF)
>
> "[T] he true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape."
>
> 10. There are seven exceptions formulated by means of case- law to the doctrine of strict liability. It is unnecessary to enumerate those exceptions barring one which is this : "Act of stranger i.e. if the escape was caused by the unforeseeable act of a stranger, the rule does not apply." (Vide p. 535, Winfield on Tort, 15th Edn.)"

Thereafter in para 11 and 12 Hon'ble Court has observed as under :

"11. The Rule of strict liability has been approved and followed in many subsequent decisions in England. A recent decision in recognition of the said doctrine is rendered by the *House of Lords in Cambridge Water Co. Ltd. v. Eastern Countries Leather ple.2* the said principle gained approved in India and decisions of the High Courts are a legion to that effect. A Constitution bench of this Court in *Charan Lal Sahu v. Union of India and a* Division Bench in *Gujarat SRTC v. Ramanbhai Prabhatbhai* had followed with approval the principle in *Rylands v. Fletcher.* By referring to the above two decisions a two-Judge Bench of this Court has reiterated the same principle in *Kaushnuma Begam v. New India Assurance Co. Ltd.*

12. In *M.C. Mehta v. Union of India* this Court has gone even beyond the rule of strict liability by holding that : [see p. 421, para 31]

Where an enterprise is engaged in a hazardous of inherently dangerous activity and harm is caused on anyone on account of the accident in the operation of such activity, the enterprise is strictly and absolutely liable to compensate those who are affected by the accident, such liability is not subject to any of the exceptions to the principle of strict liability under the rule in Rylands v. Fletcher."

(emphasis supplied)

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15. PREVENTION OF FOOD ADULTERATION RULES, 1955 – Rules 22 & 22-A
Nature and ambit of Rules 22 & 22-A – The Rules are not mandatory – Law explained.
Anil Kulkarni and another v. State of M.P. and others
Reported in 2004 (4) MPLJ 539

Held :

The first contention of learned counsel for the petitioners is that the complainant while taking the sample has opened the sealed bottle and thus he has violated the provisions of Rules 22 and 22-A of Prevention of Food Adulteration Rules, 1955 (the Rules, 1955 for short). According to learned counsel for the petitioners, the said rules are mandatory and any violation of the said rules will vitiate the entire prosecution case and therefore the criminal proceedings against the present petitioners be quashed. For this purpose, learned counsel for the petitioners has relied on the judgment of Allahabad High Court in case of *State of U.P. vs. Nanak Chand and another, 1974 FAC 413,* wherein the Allahabad High Court has held that where the food is should in a sealed container, the sealed containers as such must be sent to the Public Analyst for analysis of the contents of the containers, then there would be a clear violation of the mode prescribed for taking the sample for analysis and would result into acquittal. The another case relied upon by the learned counsel for the petitioners is in the case of *Saeed Ahmad vs. State of U.P., 1987 (2) FAC 163,* whereby the Allahabad

High Court has again held that violation of Rule 22-A of the Rules 1955 read with section 11-B of the Act, which provides that the food sold in sealed container should be sent to the Public Analyst without opening the seal and where the sample is not sent for analysis in the prescribed mode as required by Rule 22-A of the Rules, 1955, the person selling cannot be convicted on the basis of the analysis or the material which has been taken out of the sealed containers. The third case cited by learned counsel for the petitioners is in the case of *J.L. Jindal vs. State of Himachal Pradesh, 1989 (2) FAC 5.* In that case the High Court of Himachal Pradesh has taken the same view as taken by Allahabad High Court and held that the requirement of Rule 22-A is mandatory and the same should be taken in the sealed packed containers without opening it and should have sent the sealed containers to the Public Analyst. All these cases no doubt lay down that provisions of Rules 22 and 22-A of the Rules 1955 are mandatory and whenever the sample is taken of a food article, the same should be sent to the Public Analyst in the sealed container without opening the same. These judgments, therefore, no doubt support the case of present petitioners.

However, after perusing the aforesaid judgments, I find that the judgments of Hon'ble Supreme Court in case of *Municipal Corporation of Delhi vs. M/s Baboo Ram Shyam Sunder and others, (1982) 2 SCC 147* and in the case of *State of Kerala and others vs. Alasserry Mohammed and others, (1978) 2 SCC 386* have not been considered. In all these cases, the Hon'ble Apex Court had laid down that the provisions of Rules 22 and 22-A of the Rules 1955 are not mandatory and directory in nature. Therefore, in light of the aforesaid judgments, the present petitioners cannot be acquitted merely on the ground that the provisions of Rules 22 and 22-A of the Rules 1955 are not complied with. The Hon'ble Apex Court in case of *State of Punjab vs. Devinder Kumar and others, (1983) 2 SCC 384* has held that sample of food articles sold in sealed container can be taken after opening. The only requirement is that the quantity of the articles must be adequate for taking the sample. Thus, from these judgments of the Hon'ble Apex Court, it is clear that the provisions of Rules 22 and 22-A of the Rules 1955 are not mandatory and therefore the criminal proceedings against the present petitioners cannot be quashed only on that ground. Similar view is taken by this Court in case of *Prayelal vs. State, 1993 FAJ 215 (MP) and Ramdeo vs. State, 1993 FAJ 260* (MP). In view of these judgments, the proceedings against the present petitioners cannot be quashed only for noncompliance of Rules 22 and 22-A of the Rules, 1955.

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16. HINDU MARRIAGE ACT, 1955 – Sections 13, 13-B and 23
Application for grant of divorce by mutual consent in pending petition for divorce u/s 13 – Original petition pending for more than a year – Application for divorce by mutual consent can be entertained even prior to completion of six months from the date of its present tion.
Jyoti Jain v. Jinesh Jain
Reported in 2004 (4) MPLJ 542

Held :

It is not disputed that the applicant Smt. Jyoti Jain had filed a petition in the year 2001 under section 13 of the Hindu Marriage Act, 1955 hereinafter referred to as 'Act' against the non-applicant seeking decree of divorce on the grounds mentioned under section 13 of the 'Act'. The petition was filed in the Court of 9th Additional District Judge, Indore. Thereafter, vide order dated 27-8-2003 passed in M.C.C. No. 692/03 by this Court the petition was transferred from the Court of 9th Additional District Judge, Indore to the Family Court, Jabalpur and the same is pending.

During the pendency of the said petition which was filed in the year 2001 the parties moved a petition under section 13-B of the 'Act' seeking divorce by mutual consent. The Family Court, Jabalpur rejected the application holding that the application cannot be considered earlier than six months after date of its presentation, even though the petition for divorce presented under section 13 of the Act is pending since 2001.

Learned counsel for both the parties have relied on the judgment passed by this Court in *Deepak (Dr.) vs. Smt. Tanuja, 2003 (2) JLJ 121* in which this Court relying on the judgment of the Supreme Court and also of various High Courts has held that the trial Court as well as the appellate Court at any stage of the proceeding can grant a decree by mutual consent if the conditions laid down in section 13-B and section 23 of the Act of 1955 are fulfilled and can grant a decree for divorce in a case where the dispute is pending for more than a year and parties have been living separately for a period of more than one year and they have not been able to live together and have mutually agreed that the marriage should be dissolved and the consent has not been obtained by force, fraud and undue influence.

Admittedly the petition filed by the applicant under section 13 of the Act is pending since 2001. In view of this and the judgment passed by this Court supra, I am of the view that the Family Court had jurisdiction to decide the petition filed under section 13-B of the Act even prior to completion of six months from the date of its presentation.

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17. SERVICE LAW :

M.P. CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1966- RULE 19 (I)

Action by disciplinary authority against the employee after his conviction in a criminal case – Employee not entitled to any hearing – Contra view expressed in *Tikaram Windwar's case, 1978 MPLJ 57 and Dr. Sheetal Kumar Bandi's case, 2003 (2) MPLJ 485* expressly overruled.

Laxmi Narayan Hayaran v. State of M.P. and another

Reported in 2004 (4) MPLJ 555 (FB)

Held :

The decision in *Sheetal Kumar Bandi* (supra) is thus based on the following two premises :-

(a) A delinquent employee should be heard and his submissions should be taken into consideration before passing any order under Rule 19(i) of the State CCA Rules, even though the said rule does not provide for grant of such hearing or opportunity.

(b) Even if no hearing is necessary in regard to the penalty proposed, if the penalty imposed is excessive or disproportionate to the gravity of the charge or whimsical, it can be interfered with.

The learned Single Judge who heard this petition was of the view that the first premise in *Sheetal Kumar Bandi* (supra) ran counter to the decision of the Constitution Bench of the Supreme Court in *Union of India vs. Tulsiram Patel, AIR 1985 SC 1416* and therefore required reconsideration. An order of reference dated 6-5-2004 having been made in that behalf, the matter is placed before the Full Bench. The question that arises for our consideration is:-

> "Whether an order under Rule 19 (i) of the State CCA Rules should be preceded by a hearing or opportunity to the Government servant, to make submissions regarding quantum of penalty."

The portion of Rule 19 of the State CCA Rules which is relevant, reads thus :-

> "19. *Special procedure in certain cases.*- Notwithstanding anything contained in Rule 14 to Rule 18:-
>
> (i) Where any penalty is imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge; or
>
> (ii) Where the disciplinary authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these rules; or
>
> (iii) Where the Governor is satisfied that in the interest of the security of the State, it is not expedient to hold any inquiry in the manner provided in these rules,
>
> the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit".

Rule 19 of the Central CCA Rules is on the same lines but for the significant and material addition of the following Proviso (made on 11-3-1987);

"Provided that the Government servant may be given an opportunity of making representation on the penalty proposed to be imposed before any order is made in a case under clause (i)"

Rule 19 of the State CCA Rules is similar to Rule 14 of Railway Rules considered in *Divisional Personnel officer, southern Railways vs. T.R. Challappan, AIR 1975 SC 2216* and unamended Rule 19 of Central CCA Rules considered in *Union of India v. Tulsiram Patel, AIR 1985 SC 1416* which did not provide for any opportunity of hearing in regard to the penalty to be imposed. In *Tulsiram Patel* (supra), the Supreme Court has categorically held that no opportunity need be given to the employee concerned, but the disciplinary authority, on consideration of the facts and circumstances (in the manner set out in *Challappan (supra) Tulsiram Patel* (supra) may impose the penalty. It was also clarified that if the penalty imposed was whimsical or disproportionately excessive, the same was open to correction in judicial review. The subsequent decision of the Supreme Court in *Union of India v. Sunil Kumar Sarkar, AIR 2001 SC 1092* dealt with the amended Rule 19 of the Central CCA Rules which provided for a hearing. Therefore, the principle laid down in *Sunil Kumar Sarkar* (supra) cannot be of any assistance in interpreting Rule 19 of the State CCA Rules in the absence of an amendment in the State CCA Rules corresponding to the amendment made in the Central CCA Rules. As the State CCA Rules stand today, the law applicable is as laid down in *Tulsiram Patel* (supra) and not as laid down in *Sunil Kumar Sarkar* (Supra).

We accordingly overrule the decisions of the Division Bench in *Tikaram windwar v. Registrar Co-operative Sections, 1978 MPLJ 57 and Sheetal Kumar Bandi* (supra), insofar as they hold that the delinquent employee should be given a notice giving an opportunity to put forth his views as to the penalty proposed to be imposed.

The second premise in the *Sheetal Kumar Bandi* (supra) that in exercise of the power of judicial review, the Court can examine whether there was consideration of the relevant facts and circumstances by the disciplinary authority in imposing the penalty and correct the penalty if it is excessive, is in consonance with the decisions of the Supreme Court in *Challappan, Shankar Dass, Tulsiram Patel and Sunil Kumar Sarkar* (supra). If the conviction is for any minor offence which does not involve any moral turpitude, a punishment of removal or dismissal from service will certainly be excessive. But where the conviction is on the ground of corruption, as in this case, there can be no two views that imposition of punishment by way of dismissal is just and proper and not excessive.

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18. SERVICE LAW :

(i) Exercise of discretion by Court while directing sympathetic consideration in case of employee's reinstatement – Sympathetic consideration cannot be beyond statutory rules and regulations – Law explained.

(ii) Precedent – Observation of Court out of sympathy, compassion or sentiment not a binding precedent – Law explained.

Jagdish Prasad Tripathi v. State of M.P.
Reported in 2004 (4) MPLJ 564 (FB)

Held :

When the rules require an authority to act in a particular manner, the Courts obviously cannot acting out of sympathy, direct the authority to act contrary to the Rules. The Courts have no doubt directed relaxation of age, but that is in rare cases and for valid reasons and for a period which can be supported legally and logically. For example, the Supreme Court, in *U.P. State Transport Corporation vs. U.P. Parivahan Karmachari Shikshak Berojgar Sangh, (1992) 2 SCC 1,* directed that the age limit should be relaxed by the period an apprentice has undergone training, that is, if the apprentice has undergone training for one year, the age relaxation should be for one year. Similarly in some cases of stop-gap or temporary emplyees, the courts have directed that the maximum age limit should be relaxed by a period corresponding to the period of this stop-gap or temporary employment, if they apply for regular recruitment. But the Court cannot, out of sympathy, direct relaxation of the maximum age, without limit and without any discernible logical basis.

The greater the power or discretion, the greater should be caution and restraint in exercising such power of discretion. The Courts cannot direct an authority to act sympathetically, where the matter is governed by statutory rules and regulations, merely because the Court feels that persons who has approached the Court should be shown sympathy. In service jurisprudence, every time preference in appointment is shown to someone of sympathy, the result will be to deny correspondingly, employment to a deserving candidate, who would have got the appointment by reason of fulfilling the eligibility and qualification criteria. The decision in *S.K. Nema* has opened the flood gates for persons who were employed for few days, decades ago, to approach the authorities and Courts requesting and asserting that they should be given employment by the State, irrespective of the fact that they are in the late 40s or 50s and irrespective of the fact that they are totally out of touch with teaching, and requiring the State to ignore the maximum age limit criterion, prescribed by the rules. But judicial process should not become an alternative mode of recruitment, de hors the rules vide *State of M.P. vs. Suresh Kumar Verma, (1996) 7 SCC 562.*

One more aspect is however required to be borne in mind. When a Court directs an authority to consider the matter sympathetically, it does not mean the rules and regulations governing the matter can be flouted or ignored. At best it could only mean that where two views are possible, a view that is favourable to the employee may be adopted, or where the matter is one of discretion, such discretion may be exercised in favour of the employee. In fact, the question of acting sympathetically would arise only where the matter is not governed by any specific rule or regulation and where the authority concerned is vested with discretion, and where any action based on sympathy would not prejudice any other person, but lead to a just result. Be that as it may. It is evident that the decision in *S.K. Nema* is erroneous and unseasonable.

Any observation made or relief given by a Court, out of sympathy, compassion, sentiments, and not based on any discernible principle of law or *de hors* the merits of the case cannot be a binding precedent. A judgment of a Court contains three parts : (i) finding of facts, (ii) statement of principle of law applicable to the legal problem raised on the facts, based on which the case is decided; and (iii) decision which is based on the finding of fact, applicable principles of law, and in some cases, discretion and the need to mould the relief in a particular manner. Out of the three parts, it is only the second part, that is *ratio decidendi* or statement of law applied and acted upon by the Court, that is a binding precedent. Neither the findings on facts nor the ultimate decision, that is, the relief given or the manner adopted to dispose of the case, is a precedent.

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19. TRANSFER OF PROPERTY ACT, 1882 – Section 106
Lease for manufacturing purpose, duration of – Parties can agree to create a tenancy for a period of less than a year – In such case six months notice not required to terminate tenancy – Law explained.
Inder Sain Bedi (Dead) by L.Rs. v. Chopra Electricals
Judgment dt. 27.08.2004 by the Supreme Court in Civil Appeal No. 6405 of 2002, reported in (2004) 7 SCC 277

Held :

According to the provisions of Section 106 of the Act a lease for manufacturing purpose is deemed to be a lease from year to year but the same is subject to a contract to the contrary between the parties. The landlord and the tenant can mutually agree to create a tenancy for manufacturing purpose for a period less than a year. Only in the absence of this kind of contract the lease for manufacturing purpose would be deemed to be a lease from year to year. The same can be created by a registered document in view of the provision of Section 105 of the Act. In the present case, admittedly, the lease was created for a period of 11 months only and it was provided in clause 15 that tenancy could be terminated by either of the parties by giving two months' notice. There was a contract to the contrary between the parties providing for termination of the lease between the parties by giving a notice of less than six months and as such it was not necessary for the appellant to terminate the tenancy by giving six months' notice. In view of the terms of the contract between the parties the tenancy could be terminated by giving two months' notice. In the present case, the lease in question was not from year to year or for a period exceeding one year. Since the lease was not from year to year there was no requirement of giving six months' notice. Manufacturing lease which is not from year to year does not require six months' notice for termination. It will fall in the second half of Section 106 requiring fifteen days' notice of termination.

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20. ARBITRATION ACT, 1940 – SECTION 37 (3)
Commencement of arbitration proceedings under Act of 1940 – Proceedings deemed to commence when notice requiring appointment of arbitrator is sent by one party to the other – Law explained.
Milkfood Ltd. v. GMC Ice Cream (P) Ltd.
Judgment dt. 05.04.2004 by the Supreme Court in Civil Appeal No. 9672 of 2003, reported in (2004) 7 SCC 288

Held :

Commencement of arbitration proceeding for the purpose of limitation or otherwise is of great significance. If a proceeding commences, the same becomes relevant for many purposes including that of limitation. When Parliament enacted the 1940 Act, it was not in its contemplation that 46 years later it would re-enact the same. The court, therefore, while taking recourse to the interpretative process must notice the scheme of the legislation concerned for the purpose of finding out the purport of the expression "commencement of arbitration proceeding". In terms of Section 37 of the 1940 Act, law of limitation will be applicable to arbitrators as it applies to proceedings in court. For the purpose of invoking the doctrine of lis pendens, Section 14 of the Limitation Act, 1963 and for other purposes presentation of plaint would be the date when a legal proceeding starts. So far as the arbitral proceeding is concerned, service of notice in terms of Chapter II of the 1940 Act shall set the ball in motion whereafter only the arbitration proceeding commences. Such commencement of arbitration proceeding although in terms of Section 37 of the Act is for the purpose of limitation but it in effect and substance will also be the purpose for determining as to whether the 1940 Act or the 1996 Act would apply. It is relevant to note that it is not mandatory to approach the court for appointment of an arbitrator in terms of sub-section (2) of Section 8 of the 1940 Act. If the other party thereto does not concur to the arbitrator already appointed or nominates his own arbitrator in a given case, it is legally permissible for the arbitrator so nominated by one party to proceed with the reference and make an award in accordance with law. However, in terms of sub-section (2) of Section 8 only a legal fiction has been created in terms whereof an arbitrator appointed by the Court shall be deemed to have been nominated by both the porties to the arbitration proceedings.

Section 85 of the 1996 Act repeals the 1940 Act. Sub-section (2) of Section 85 provides for a non obstinate clause. Clause (a) of the said sub-section provides for saving clause stating that the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before the said Act came into force. Thus, those arbitral proceedings which were commenced before coming into force of the 1996 Act are saved and the provisions of the 1996 Act would apply in relation to arbitral proceedings which commenced on or after the said Act came into force. Even for the said limited purpose, it is necessary to find out as to what is meant by commencement of arbitral proceedings for the purpose of the 1996 Act wherefor also necessity of reference to Section 21 would arise. The court is to interpret the repeal and savings clauses

in such a manner so as to give a pragmatic and purposive meaning thereto. It is one thing to say that commencement of arbitration proceedings is dependent upon the facts of commencement of arbitration proceedings is dependent upon the facts of each case as that would be subject to the agreement between the parties. It is also another thing to say that the expression "commencement of arbitration proceedings" must be understood having regard to the context in which the same is used; but it would be a totally different thing to say that the arbitration proceedings commence only for the purpose of limitation upon issuance of a notice and for no other purpose. The statute does not say so. Even the case-laws to not suggest the same. On the contrary, the decisions of this Court operating in the field beginning from *Shetty's Constructions, (1998) 5 SCC 599* are ad idem to the effect that Section 21 must be taken recourse to for the purpose of interpretation of Section 85 (2) (a) of the Act. There is no reason, even if two views are possible, to make a departure from the decisions of this Court as referred to hereinbefore.

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21. ARBITRATION ACT 1940 – Section 69

Arbitral proceedings at the instance of unregistered firm – Such proceedings not maintainable in view of Section 69 of the Indian Partnership Act – Law explained.

U.P. State Sugar Corporation Ltd. v. Jain Construction Co. and another

Judgment dt. 25.08.2004 by the Supreme Court in Civil Appeal No. 5479 of 2004, reported in (2004) 7 SCC 332

Held :

The question as to whether Respondent 1 firm is registered or not is essentially a question of fact. It is true that the arbitral proceedings would not be maintainable at the instance of an unregistered firm having regard to the mandatory provisions contained in Section 69 of the Indian Partnership Act, 1932. It has been so held in *Jagdish Chandra Gupta v. Kajaria Traders (India) Ltd., AIR 1964 SC 1882.* We may, however, notice that this Court in *Firm Ashok Traders, (2004) 3 SCC 155 despite following Jagdish Chandra Gupta* (supra) held that Section 69 of the Indian Partnership Act would have no bearing on the right of a party to an arbitration clause under Section 9 of the 1996 Act. As correctness or otherwise of the said decision is not in question before us, it is not necessary to say anything in this behalf but suffice it to point out that in the event it is found by the High Court that the learned Civil Judge was wrong in rejecting the application for amendment of the plaint and in fact the respondent firm was registered under the Indian Partnership Act, the question of throwing out the said suit on that ground would not arise. There cannot, however, be any doubt whatsoever that the firm must be registered at the time of institution of the suit and not later on. *(See Delhi Development Authority v. Kochhar Construction Work, (1998) 8 SCC 559.)*

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22. CIVIL PROCEDURE CODE, 1908 – Section 96 and O.41 R.11
Appeal, admission of – Admission of appeal is dependent upon the merits of the case – Admission on condition of deposit of some money not contemplated under Section 96.
Devi Theatre v. Vishwanath Raju
Judgment dt. 08.04.2004 by the Supreme Court in Civil Appeal No. 2582 of 2004, reported in (2004) 7 SCC 337

Held :

The learned counsel for the appellant submits that appeal lies from every decree passed by any court exercising original jurisdiction. The jurisdiction of the court in first appeal extends to examine the questions of facts as well as that of law. It is though true as pointed out by the learned counsel for the respsondent that under Order 41 Rule 11 CPC it would be open for the court to dismiss the appeal in limine at the time of admission but even examining the matter from that point of view we find that the court while considering the question of admission of appeal filed under Section 96 CPC, may admit the appeal if considered fit for full hearing having prima facie merit. Otherwise, if it finds that the appeal lacks merits, it may be dismissed at the initial stage itself. But admission of the appeal, subject to condition of deposit of some given amount, is not envisaged in the provision as contained under Section 96 read with Order 41 Rule 11 CPC. The deposit of the money would obviously have no connection with the merits of the case, which alone would be the basis for admitting or not admitting an appeal filed under Section 96 CPC. Further, imposition of condition that failure to deposit the amount, would result in dismissal of the appeal compounds the infirmity in the order of conditional admission.

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23. CIVIL PROCEDURE CODE, 1908- O.22 Rr. 4 and 11
Death of one of the defendants/respondents – Omission to bring legal representatives of the deceased on record, effect of on the suit or appeal – Law explained.
Shahazada Bi and others v. Halimabi (Since dead) by her LRs.
Judgment dt. 30.07.2004 by the Supreme Court in Civil Appeal No. 5507 of 1999, reported in (2004) 7 SCC 354

Held :

Order 22 Rule 4 CPC lays down that where within the time limited by law, no application is made to implead the legal representatives of a deceased defendant, the suit shall abate as against a deceased defendant. This rule does not provide that by the omission to implead the legal representative of a defendant, the suit will abate as a whole. What was the interest of the deceased defendant in the case, whether he represented the entire interest or only a specific part is a fact that would depend on the circumstances of each case. If the interests of the co-defendants are separate, as in case of co-owners, the suit will abate only as regards the particular interest of the deceased party.

(See *Masilamani Nadar v. Kuttiamma, 1960 Ker L.J. 936)* In the case *Sant Singh v. Gulab Singh, AIR 1928 Lah 573* it has been held that under Order 22 Rule 4 (3) read with Order 22 Rule 11 CPC where no application is made to implead the legal representative of the deceased respondent, the appeal shall abate as against the deceased respondent. That, so far as the statute is concerned, the appeal abates only qua the deceased respondent, but the question whether the partial abatement leads to an abatement of the appeal in its entirety depends upon general principles. If the case is of such a nature that the absence of the legal representative of the deceased respondent prevents the court from hearing the appeal as against the other respondents, then the appeal abates in toto. Otherwise, the abatement takes place only in respect of the interest of the respondent who has died. The test often adopted in such cases is whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the same suit with respect to the same subject-matter. The court cannot be called upon to make two inconsistent decrees about the same property, and in order to avoid conflicting decrees the court has no alternative but to dismiss the appeal as a whole. If, on the other hand, the success of the appeal would not lead to conflicting decrees, then there is no valid reason why the court should not hear the appeal and adjudicate upon the dispute between the parties. It was further held in the said judgment that a distinction must be made between the cases in which there is specification of shares or interests, and those in which there is no specification of interests. That in cases where there is a specification of share or interest, the appeal cannot abate as a whole. That in such cases, the appeal abates only in respect of the interest of the decrased respondent and not as a whole. To the same effect is the ratio of the judgment of this Court in the case of *Sardar Amarjit Singh Kalra v. Pramod Gupta, (2003) 3 SCC 272* in which it has been held that existence of a joint right as distinguished from tenancy-in-common alone is not the criterion but the joint character of the decree *dehors* relationship of the parties inter se and the frame of the appeal will take colour from the nature of the decree chalenged. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice. A careful reading of Order 22 CPC would support the view that the said provisions were devised to ensure continuation and culmination in an effective adjudication. It was further observed that the mere fact that a *khata* was a joint *khata* was not relevant for deciding the question of abatement under Order 22, as long as each of the appellants had their own independent, distinct and separate shares in the property. It was held that wherever the plaintiffs are found to have distinct, separate and independent rights of their own, joined together for the sake of convenience in a single suit, the decree passed by the court is to be viewed in substance as the combination of several decrees in favour of one or the other party and not as a joint decree. The question as to whether the decree is joint and inseverable or joint and severable has to be decided, for the purposes of abatement, with reference to the fact as to whether the decree passed in the

proceedings vis-a-vis the remaining parties would suffer the vice of inconsistent decrees or conflicting decrees. A decree can be said to be inconsistent or contradictory with another decree only when two decrees are incapable of enforcement and that enforcement of one would negate the enforcement of the other.

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24. LAND ACQUISITION ACT, 1894 – Sections 18 and 30
Scope and applicability of Section 30-A – Person debarred u/s 50 from filing a reference u/s 18 cannot initiate proceeding for apportionment u/s 30 – Law explained.
Meher Rusi Dalal v. Union of India and others
Judgment dt. 05.05.2004 by the Supreme Court in Civil Appeal No. 5422 of 1998, reported in (2004) 7 SCC 362

Held :

It is thus clear that persons who have notice of acquisition proceedings would have to apply for a reference under Section 18. To be noted that under Section 18 reference could be in respect of the measurement of the land and/or the amount of compensation and/or in respect of persons to whom it is payable and/or for apportionment of compensation amongst persons interested. Section 30 merely deals with apportionment of compensation when the amount of compensation has been settled. Thus, as set out in the abovementioned cases, Section 18 is to be invoked when a person claiming a pre-existing right has notice of the acquisition proceedings, whereas Section 30 comes into play only if a person had no notice of the acquisition proceedings or the rights came into existence after the acquisition proceedings. It is clear that the person who had notice of the acquisition proceedings and who, by virtue of Section 50, is debarred from filing a reference under Section 18 cannot be allowed to apply for a reference under Section 30. In this case, this Court has already held that the respondents were not entitled to apply for a reference under Section 18. This meant that they were not entitled to seek a reference not just in respect of the compensation but also for apportionment of the compensation. Once it has been held that they had no right to move under Section 18, there was no question of their being permited to move under Section 30. To permit a party, who cannot apply under Section 18, to apply under Section 30 would be to render Section 50 nugatory.

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25. SERVICE LAW :
Transfer – Transfer is an incident and condition of service – Unless mala fide or in violation of statutory provisions Court normally should not interfere with the transfer order – Law explained.
State of U.P. and another v. Siya Ram and another
Judgment dt. 05.08.2004 by the Supreme Court in Civil Appeal No. 5005 of 2004, reported in (2004) 7 SCC 405

Held :

No Government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place or place of his choice since transfer of a particular employee appointed to the class or category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. Unless an order of transfer is shown to be an outcome of mala fide exercise or stated to be in violation of staturoty provisions prohibiting any such transfer, the courts or the tribunals normally cannot interfere with such orders as a matter of routine, as though they were appellate authorities substituting their own decision for that of the employer/management, as against such orders passed in the interest of administrative exigencies of the service concerned. This position was highlighted by this Court in *National Hydroelectric Power Corp. Ltd. v. Shri Bhagwan, (2001) 8 SCC 574.*

The above position was recently highlighted in *Union of India v. Janardhan Debanath, (2004) 4 SCC 245.* It has to be noted that the High Court proceeded on the basis as if the transfer was connected with the departmental proceedings. There was not an iota of material to arrive at the conclusion. No mala fides could be attributed as the order was purely on administrative grounds and in public interest.

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26. CRIMINAL TRIAL :

Injury suffered by accused, explanation of – Non-mention of explanation in FIR not a ground to discard explanation given at the trial – Mechanical/ isolated approach not proper regarding effect of non-explanation of injuries – Factors to be considered – Law explained.
Dashrath Singh v. State of U.P.
Judgment dt. 13.08.2004 by the Supreme Court in Criminal Appeal No. 909 of 2001, reported in (2004) 7 SCC 408

Held :

We have given our anxious consideration to the aspect of non-explanation of injuries at the earliest opportunity by the prosecution party keeping in view the fact that some of the accused received fairly severe injuries. This aspect has also engaged the attention of the High Court. The High Court took note of the fact that the prosecution witnesses did explain that the injuries came to be inflicted on the accused with bamboos picked up by PW 2 and his brother in order to repel the further attack by the accused. The High Court observed that the mere fact that the FIR was silent regarding the injuries received by the accused is not a ground to discard the explanation given at the trial. There may be initial reluctance on the part of the informant to disclose that the prosecution party made a counter-attack causing injuries to some of the accused. The High Court was of the view that in the face of the clear and consistent evidence of independent and natural witnesses supported by the dying declaration, all of

which revealed that the accused party was the aggressor and initiated the attack on Pratap Singh in front of his house, the non-explanation of injuries at the earliest point of time cannot be put against the prosecution. Broadly speaking, the approach of the High Court seems to be correct and in conformity with the legal position clarified and explained by this Court in a series of decisions.

In *Bhaba Nanda Sarma v. State of Assam, (1977) 4 SCC 396* a three-Judge Bench of this Court made the following pertinent observations : (SCC pp. 399-400, para 2)

> "The prosecution is not obliged to explain the injuries on the person of an accused in all cases and in all circumstances. This is not the law. It all depends upon the facts and circumstances of each case whether the prosecution case becomes reasonably doubtful for its failure to explain the injuries on the accused. In the instant case the Sessions Judge was not justified in doubting the truth of the version given by the eyewitnesses – three of whom were wholly independent witnesses. Gopi Nath was surely present on the scene of the occurrence as he himself had received the injuries in the same transaction. The High Court has rightly believed the testimony of the eyewitnesses."

The law on the subject has been succinctly clarified by R.C. Lahoti, J. (as he then was) speaking for a three-Judge Bench in *Takhaji Hiraji v. Thakore Kubersing Chamansingh, (2001) 6 SCC 145.* After referring to the three-Judge Bench decisions of this Court, it was observed: (SCC pp. 154-55, paras 17-18)

> "17. ... the view taken consistently is that it cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved. Before non-explanation of the injuries on the persons of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions: (i) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question. Non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution. Where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood the mere fact that the injuries on the side of the accused persons are not explained by the prosecution cannot by itself be a sole basis to reject the testimony of the prosecution witnesses and consequently the whole of the prosecution case.

18. The High Court was therefore not right in overthrowing the entire prosecution case for non-explanation of the injuries sustained by the accused persons."

The injuries of serious nature received by the accused in the course of the same occurrence would indicate that there was a fight between both the parties. In such a situation, the question as to the genesis of the fight, that is to say, the events leading to the fight and which party initiated the first attack assumes great importance in reaching the ultimate decision. It is here that the need to explain the injuries of serious nature received by the accused in the course of same occurrence arises. When explanation is given, the correctness of the explanation is liable to be tested. If there is an omission to explain, it may lead to the inference that the prosecution has suppressed some of the relevant details concerning the incident. The Court has then to consider whether such omission casts a reasonable doubt on the entire prosecution story or it will have any effect on the other reliable evidence available having bearing on the origin of the incident. Ultimately, the factum of non-explanation of injuries is one circumstance which has to be kept in view while appreciating the evidence of prosecution witnesses. In case the prosecution version is sought to be proved by partisan or interested witnesses, the non-explanation of serious injuries may prima facia make a dent on the credibility of their evidence. So also where the defence version accords with probabilities to such an extent that it is difficult to predicate which version is true then, the factum of non-explanation of the injuries assumes greater importance. Much depends or the quality of the evidence adduced by the prosecution and it is from that angle, the weight to be attached to the aspect of non-explanation of the injuries should be considered. The decisions abovecited would make it clear that there cannot be a mechanical or isolated approach in examining the question whether the prosecution case is vitiated by reason of non-explanation of injuries. In other words, the non-explanation of injuries of the accused is one of the factors that could be taken into account in evaluating the prosecution evidence and the intrinsic worth of the defence version.

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27. PRECEDENTS :

Precedents – Mere similarity of facts in two cases not to be used to determine a conclusion of fact in another case.

Rudrappa Ramappa Jainpur and others v. State of Karnataka

Judgment dt. 02.08.2004 by the Supreme Court in Criminal Appeal No. 1026 of 2003, reported in (2004) 7 SCC 422

Held :

Learned counsel for the appellants drew our attention to paragraph 9 of the judgment in *Shivalingappa Kallayanappa v. State of Karnataka, 1994 Supp. (3) SCC 235* where in similar circumstances this Court found the appellants guilty of the offence under Sections 326/149 IPC and only two of the accused

who had caused injuries resulting in the death of the deceased were held liable for their individual acts and punished under Section 302 IPC. That was also a case where some of the appellants, though armed with axes, did not use the sharp side but only gave one or two blows on the head with the butt ends. Some of the accused, who were armed with stick dealt blows only on the legs and/or on the hands which were not serious. In these circumstances this Court came to the conclusion that the common object of the unlawful assembly could not be said to be to cause murders and at any rate it could not be said that all the accused shared the same object and that they had knowledge that the two deceased persons would be killed and with that knowledge they continued to be the members of the unlawful assembly. It was observed that whether there existed a common object of the unlawful assembly to commit murder depended upon various factors.

It is true that when such a question arises for consideration by the court, no judgment can be cited as a precedent, howsoever similar the the facts may be. As was observed by this Court in *Pandurang v. State of Hyderabad, AIR 1955 SC 216* each case must rest on its own facts and the mere similarity of the facts in one case connot be used to determine a conclusion of fact in another.

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28. ADVERSE POSSESSION :

Acquisition of title by adverse possession over land belonging to member of a Scheduled Tribe – Transfer of which prohibited under the law – Title cannot be acquired – Law explained.

Lincai Gamango and others v. Dayanidhi and others

Judgment dt. 31.05.2004 by the Supreme Court in Civil Appeal No. 868 of 1998, reported in (2004) 7 SCC 437

Held :

Coming first to the second point, we find that there is a decision of this Court directly on this point. It is in *Amrendra Pratap Singh v. Tej Bahadur Prajapati, (2004) 10 SCC 65.* The matter related to transfer of land falling in tribal area belonging to the Seheduled Tribes. The matter was governed by Regulations 2, 3, and 7-D of the Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes) Regulations, 1956 viz. the same Regulations which govern this case also. The question involved was also regarding acquistion of right adverse possession. Considering the matter in detail, in the light of the provisions of the aforesaid Regulations, this Court found that one of the questions which falls for consideration was "whether right by adverse possession can be acquired by a non-aboriginal on the property belonging to a member of an aboriginal tribe". (SCC p. 76, para 14 of the judgment) In contest with the above question posed, this Court observed in para 23 of the judgment as follows : (SCC p. 80)

"The right in the property ought to be one which is alienable and is capable of being acquired by the competitor. Adverse possession operates on an alienable right stands alienated by operation of law, for it was capable of being alienated voluntarily and is sought to be recognised by the doctrine of adverse possession as having been alienated involuntarily, by default and inaction on the part of the rightful claimant....."

This Court then noticed two decisions – one that of the Privy Council in *Madhavrao Waman Saundalgekar v. Raghunath Venkatesh Deshpande , AIR 1923 PC 205 and Karimullakhan v. Bhanupratapsingh, AIR 1949 Nag 265* holding that title by adverse possession on inam lands, watan lands and debutter was incapable of acquisition since alienation of such land was prohibited in the interest of the State.

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29. RAILWAY PROPERTY (UNLAWFUL POSSESSION) ACT, 1966 – Sections 3 and 8

Offence u/s 3 of the Act, nature of – Offence is non-bailable – Arresting officer has option to release on bail in a given situation – Law explained.

Union of India and another v. State of Assam

Judgment dt. 10.09.2004 by the Supreme Court in Criminal Appeal No. 608 of 1999, reported in (2004) 7 SCC 474

Held :

The controversy revolves around the provisions contained in Section 8 of the Act and the same reads as under :

"8. *Inquiry how to be made against arrested persons.* - (1) When any person is arrested by an officer of the force for an offence punishable under this Act or is forwarded to him under Section 7, he shall proceed to inquire into the charge against such person.

(2) For this purpose the officer of the force may exercise the same powers and shall be subject to the same provisions as the officer in charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898), when investigating a cognizable case :

Provided that-

(a) if the officer of the force is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate :

(b) if it appears to the officer of the force that there is not sufficient evidence or reasonable ground of suspicion against

the accused person, he shall release the accused person on his executing a bond, with or without sureties as the officer of the force may direct, to appear, if and when so required before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior."

A bailable offence is defined under Section 2(d) of the Criminal Procedure Code, 1973 (in short "the Code"). A bare reading of the proviso to sub-section (2) of Section 8 makes the position clear that three situations are envisaged. Two of the three situations are relatable to clause (a) of the proviso. If the officer of the force is of the opinion that there is sufficient evidence or reasonable ground of suspicion against the accused persons he shall: (a) either admit him to bail to appear before a Magistrate having jurisdiction in the case, or (b) forward him in custody to such Magistrate.

Learned Single Judge appears to have taken the view that the direction that can be given by the officer having jurisdiction of the case is as a corollary of the accused's right to get bail. The interpretation is clearly erroneous. It has been observed that the discretion to decide whether it is bailable or not cannot be left to the discretion of the officer. The view overlooks the clear language of the proviso and the jurisdiction to exercise the discretion is statutorily provided. The exercise of such discretion is also controlled by the prescription regarding forming of opinion as regards sufficiency of material or otherwise.

The controversy can be looked at from another angle. In Schedule 1 of the Code, offences are classified. Part I deals with offences under the Indian Penal Code and Part II deals with "classification of offences against other laws". Undisputedly, the present case is covered by Part II. While classifying offences on the basis of punishments prescribed for offences punishable with imprisonment for 3 years and upwards but not more than 7 years, it is provided that the offences shall be cognizable and non-bailable. However, an exception has been made by Section 5 of the Act, making the offence non-cognizable. Except that exception, Schedule 1 of the Code applies. Under Section 3 of the Act for the first offence the imprisonment may extend up to five years and for subsequent offences also similar term is fixed. Only for special and adequate reasons to be recorded the minimum can be one year and two years respectively.

There are two options given to the officer to form opinion i.e. whether there is sufficient evidence or reasonable ground of suspicion against the accused persons. It nowhere deals with the right of the accused to get bail. The third category is contemplated by clause (b) of the proviso. It inter alia, provides that when it appears to the officer that there is no sufficient evidence or reasonable suspicion, he shall release the accused person on his executing a bond with or without surety as the officer of the force may direct to appear if and when so required before the Magistrate having jurisdiction and shall make a full report of all the particulars of the case to his superior officer. This category deals with a case where there is absence of sufficient evidence or reasonable

ground of suspicion. In such case the officer concerned has the power to release the accused person on his executing bonds. Therefore, the High Court was not justified in holding that all the offences under the Act are bailable. Such view is contrary to the provisions contained in Section 8 of the Act.

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30. CIVIL PROCEDURE CODE, 1908- O.39 R. 1
Interim mandatory injunction, grant of – Such injunction can be granted only in exceptional case.
Metro Marins and another v. Bonus Watch Co. (P) Ltd. and others
Judgment dt. 10.09.2004 by the Supreme Court in Civil Appeal No. 5901 of 2004, reported in (2004) 7 SCC 478

Held :

As noticed by this Court, in the case of *Dorab Cawasji Warden v. Coomi Sarab Warden, (1990) 2 SCC 117* it has held that an interim mandatory injunction can be granted only in exceptional cases coming within the exceptions noticed in the said judgment. In our opinion, the case of the respondent herein does not come under any one of those exceptions and even on facts it is not such a case which calls for the issuance of an interim mandatory injunction directing the possession being handed over to the respondent. As observed by the learned Single Judge the issue whether the plaintiff is entitled to possession is yet to be decided in the trial court and granting of any interim order directing handing over of possession would only mean decreeing the suit even before trial. Once the possession of the appellant either directly or through his agent (caretaker) is admitted then the fact that the appellant is not using the said property for commercial purpose or not using the same for any beneficial purpose or the appellant has to pay huge amount by way of damages in the event of he losing the case or the fact that the litigation between the parties is a luxury litigation are all facts which are irrelevant for changing the status quo in regard to possession during the pendency of the suit.

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31. CRIMINAL TRIAL :
Non-examination of I.O., effect of – Unless prejudicial to the accused, not fatal to the prosecution case – Law explained.
State of Karnataka v. Bhaskar Kushali Kotharkar and others
Judgment dt. 19.08.2004 by the Supreme Court in Criminal Appeal No. 498 of 1998, reported in (2004) 7 SCC 487

Held :

In the instant case, the Sessions Judge issued summons to these two witnesses but these police officers did not turn up for giving evidence and the Sessions Judge closed the prosecution case as one of the accused had been in prison as an undertrial for a fairly long period. The counsel for Respondents 1 to 4 though contended that they were seriously prejudiced by the non-examination of the investigating officer, this plea could not be substantiated by cogent

facts and circumstances. It is true that as a part of fair trial the investigating officer should be examined in the trial cases especially when a serious sessions trial was being held against the accused. If any of the prosecution witnesses give any evidence contrary to their previous statement recorded under Section 161 CrPC or if there is any omission of certain material particulars, the previous statement of these witnesses could be proved only by examining the investigating officer who must have recorded the statement of these witnesses under Section 161 CrPC. In the present case, no such serious contradiction is pointed out in respect of the evidence of the important eyewitnesses PW 1, PW2 and PW 10. So also the non-examination of the Head Constable who recorded F1 statement is not of serious consequence as PW1 was examined to prove the fact that she had given the statement before the police. The learned Single Judge was not justified in reversing the order of the Sessions Court by holding that the non-examination of the investigating officer and the constable who recorded the F1 statement had caused prejudice to the accused.

In *Behari Prasad v. State of Bihar, (1996) 2 SCC 317* this Court held that non-examination of the investigating officer is not fatal to the prosecution case especially when no prejudice was likely to be suffered by the accused. In *Bahadur Naik v. State of Bihar, (2000) 9 SCC 153* the Court held that when no material contradictions have been brought out, then non-examination of the investigating officer as a witness for the prosecution was of no consequence and under such circumstances no prejudice had been caused to the accused by such non-examination.

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32. CRIMINAL PROCEDURE CODE, 1973 – Section 313
Examination of accused, methodology of – Such examination is not an empty formality but part of a fair trial – Practice of putting the entire evidence in one or two questions deprecated.
Naval Kishore Singh v. State of Bihar
Judgment dt. 04.08.2004 by the Supreme Court in Criminal Appeal No. 1331 of 2003, reported in (2004) 7 SCC 502

Held :

Our attention was drawn to the statement taken from the present appellant. Only three questions were put to the appellant. The first question was whether he heard the statement of the witnesses and the second question was that the evidence given by the witnesses showed that he committed the murder of the deceased and whether he had to say anything in defence. The questioning of the accused under Section 313 CrPC was done in the most unsatisfactory manner. Under Section 313 CrPC the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of evidence, which had been produced by the prosecution, should have been put to the accused in the form of questions and he should have been given opportunity to give his explanation. No such oppor-

tunity was given to the accused in the instant case. We deprecate the practice of putting the entire evidence against the accused put together in a single question and giving an opportunity to explain the same, as the accused may not be in a position to give a rational and intelligent explanation. The trial Judge should have kept in mind the importance of giving an opportunity to the accused to explain the adverse circumstances in the evidence and the Section 313 examination shall not be carried out as an empty formality. It is only after the entire evidence is unfurled the accused would be in a position to articulate his defence and to give explanation to the circumstances appearing in evidence against him. Such an opportunity being given to the accused is part of a fair trial and if it is done in a slipshod manner, it may result in imperfect appreciation of evidence. In various decisions of this Court, the importance of questioning the accused under Section 313 CrPC was given due emphasis, e.g. *Rama Shankar Singh v. State of W.B., AIR 1962 SC 1239, Bhalinder Singh v. State of Punjab, (1994) 1 SCC 726, State of Maharashtra v. Sukhdev Singh, (1992) 3 SCC 700 and Lallu Manjhi v. State of Jharkhana, (2003) 2 SCC 401.*

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33. SPECIFIC RELIEF ACT, 1963- Section 6

Expression "dispossess" as used in Section 6, meaning and connotation of - Dispossession wil include a case where symbolical possession obtained in due process of law is sought to be set at naught - Law explained.

Sudhir Jaggi and another v. Sunil Akash Sinha Choudhury and others Judgment dt. 11.08.2004 by the Supreme Court in Civil Appeal No. 6408 of 2002, reported in (2004) 7 SCC 515

Held :

In the case of *Kumar Kalyan Prasad v. Kulanand Vaidik, AIR 1985 Pat 374* while discussing the scope of Section 6 of the Specific Relief Act, 1963, it has been held : (AIR pp. 375-76, para 9)

> "9. In the first instance, a mere reference to the plain language of the provision aforesaid would indicate that the word 'dispossessed' has not been used in the narrowly constricted sense of the actual physical possession of immovable property. Indeed, it talks somewhat widely of dispossession of immovable property otherwise than in due course of law without the person's consent. If the legislature intended to narrowly limit the word 'dispossessed' there could have been no difficulty by specifying in terms the actuality of physical possession as its necessary and vital ingredient. The word employed is the ordinary word 'dispossess'. Plainly enough it would include within its sweep actual physical dispossession also but this is no warrant for holding that it necessarily excludes the violation of other forms of possession including a symbolical possession duly delivered by law and contumaciously violated by an aggresive trespasser. On princi-

ple I am not inclined to construe the word 'dispossessed' in Section 6 in any hypertechnical sense and to push it into the procrustean bed of actual physical possession only. Indeed the intent of the legislature in Section 6 to provide early and expeditious relief against the violation of possessory right, irrespective of of title, would be equally, if not more, relevant where symbolical possession deliverd by due process of law is sought to be set at naught forthwith."

To the same effect is the judgment of the Calcutta High Court in the case of *Raj Krishna Parui v. Muktaram Das, (1910) 12 Cal LJ 605* in which while interpreting Section 9 of the Specific Relief Act, 1877 (Section 6 of the present Act, 1963) it has been held :

> "In a suit commenced under Section 6 of the Specific Relief Act, the sole point for determination will be, whether the plaintiffs were in possession of the disputed property within six months previous to the institution of the suit and whether they had been deprived of such possession by the defendant otherwise than in due course of law. It is immaterial, if the plaintiffs were in possession, that such possession was without title. What the plaintiff has to prove is possession of the disputed property and not mere isolated acts of trespass over that property.
>
> In order to entitle the plaintiff to succeed on the ground of possession, he must prove, firstly, that he exercised acts which amounted to acts of dominion; the nature of these acts of dominion varies with the nature of the property; secondly, that the act of dominion was exclusive. If the occupation by the plaintiff, as indicated by those acts, has been peaceable and uninterrupted and has extended over a sufficient length of time, the inference may properly be drawn that the plaintiff was in possession."

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34. CRIMINAL PROCEDURE CODE, 1973- Section 439
Bail, grant of – Factors to be taken into consideration – Though detailed examination/elaborate documentation not advisable, yet reasons to arrive at the finding must be given – Law explained.
Chaman Lal v. State of U.P. and another
Judgment dt. 16.08.2004 by the Supreme Court in Criminal Appeal No. 896 of 2004, reported in (2004) 7 SCC 525

Held :

Though detailed examination of the evidence and elaborate documentation of the merits of the case is to be avoided by the Court while passing orders on bail applications, yet a court dealing with the bail application should be satisfied as to whether there is a prima facie case, but exhaustive exploration of

the merits of the case is not necessary. The court dealing with the application for bail is required to exercise its discretion in a judicious manner and not as a matter of course.

There is a need to indicate in the order, reasons for prima facie concluding why bail was being granted, particularly where an accused was charged of having committed a serious offence. It is necessary for the courts dealing with application for bail to consider among other circumstances, the following factors also before granting bail, they are:

1. The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.
2. Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.
3. Prima facie satisfaction of the court in support of the charge.

Any order dehors of such reasons suffers from non-application of mind as was noted by this Court in, *Ram Govind Upadhyay v. Sudarshan Singh, (2002) 3 SCC 598, Puran v. Rambilas, (2001) 6 SCC 338 and in Kalyan Chandra Sarkar v. Rajesh Ranjan, (2004) 7 SCC 528.*

Though a conclusive finding in regard to the points urged by the parties is not expected of the Court considering the bail application, yet giving reasons is different from discussing merits or demerits. As noted above, at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merits of the case is no to be undertaken. But that does not mean that while granting bail some reasons for prima facie concluding why bail was being granted is not required to be indicated.

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35. CRIMINAL PROCEDURE CODE, 1973 – Sections 437 & 439
Bail – Subsequent application, consideration of – Court is also required to consider the grounds on which earlier applications were rejected.
Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav and another
Judgment dt. 12.03.2004 by the Supreme Court in Criminal Appeal No. 324 of 2004, reported in (2004) 7 SCC 528

Held :

In regard to cases where earlier bail applications have been rejected there is a further onus on the court to consider the subsequent application for grant of bail by noticing the grounds on which earlier bail applications have been rejected and after such consideration if the court is of the opinion that bail has to be granted then the said court will have to give specific reasons why in spite of such earlier rejection the subsequent application for bail should be granted. (See *Ram Govind Upadhyay, (2002) 3 SCC 598.*)

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36. LIMITATION ACT, 1963 – Articles 64 & 65

Applicability of Articles 64 & 65 – Article 64 applicable to suits for possession or dispossession or discontinuance of possession – Article 65 is a residuary article applicable to suits not otherwise provide for – Law explained.

Ramiah v. N. Narayana Reddy (Dead) by L.Rs.

Judgment dt. 10.08.2004 by the Supreme Court in Civil Appeal No. 5864 of 1999, reported in (2004) 7 SCC 541

Held :

Article 64 of the Limitation Act, 1963 (Article 142 of the Limitation Act, 1908) is restricted to suits for possession on dispossession or discontinuance of possession. In order to bring a suit within the purview of that article, it must be shown that the suit is in terms as well as in substance based on the allegation of the plaintiff having been in possession and having subsequently lost the possession either by dispossession or by discontinuance. Article 65 of the Limitation Act, 1963 (Article 144 of the Limitation Act, 1908), on the other hand, is a residuary article applying to suits for possession not otherwise provided for. Suits based on the plaintiff's title in which there is no allegation of prior possession and subsequent dispossession alone can fall within Article 65. The question whether the article of limitation applicable to a particular suit is Article 64 or Article 65, has to be decided by reference to pleadings.

In the case of *Ram Surat Singh v. Badri Narain Singh, AIR 1927 All 799 (2)* it has been held that if the suit is for possession by a plaintiff who says that while he was in possession of the property he was dispossessed, then he must show possession within 12 years under Article 142 (now Article 64) of the Limitation Act. To the same effect is the ratio of the judgment in the case of *Mohd. Mahmud v. Mohd. Afaq, AIR 1934 Oudh 21.* In *Commentary on the Limitation Act* by Sanjiva Row (9th Edn., Vol. 2, p. 549) it has been stated that the question as to which of the two articles would apply to a particular case should be decided by reference to pleadings, though the plaintiff cannot be allowed by skilful pleading to avoid the inconvenient article.

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37. LEGAL SERVICES AUTHORITIES ACT, 1987– Section 20

Cognizance of cases by Lok Adalats – Expressions "compromise" and "settlement" as used in Section 20, meaning and connotation of – Compromise/settlement is always a bilateral act – Case not involving compromise/settlement cannot be disposed of by Lok Adalat – Law explained.

State of Punjab and others v. Phulan Rani and another

Judgment dt. 03.08.2004 by the Supreme Court in Civil Appeal No. 4718 of 2004, reported in (2004) 7 SCC 555

Held :

The matters which can be taken up by the Lok Adalat for disposal are enumerated in Section 20 of the Act which reads as follows :

"20. *Cognizance of cases by Lok Adalats.*- (1) Where in any case referred to in clause (i) of sub-section (5) of Section 19,

(i) (a) the parties there of agree; or

(b) one of the parties thereof makes an application to the court, for referring the case to the Lok Adalat for settlement and if such court is prima facie satisfied that there are chances of such settlement; or

(ii) the court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat, the court shall refer the case to the Lok Adalat;

Provided that no case shall be referred to the Lok Adalat under sub-clause (b) of clause (i) or clause (ii) by such court except after giving a reasonable apportunity of being heard to the parties.

(2) Notwithstanding anything contained in any other law for the time being in force, the Authority or Committee organising the Lok Adalat under sub-section (1) of Section 19 may, on receipt of an application from any one of the parties to any matter referred to in clause (ii) of sub-section (5) of Section 19 that such matter needs to be determined by a Lok Adalat, refer such matter to the Lok Adalat, for determination :

Provided that no matter shall be referred to the Lok Adalat except after giving a reasonable opportunity of being heard to the other party.

(3) Where any case is referred to a Lok Adalat under sub-section (1) of where a reference has been made to it under sub-section (2), the Lok Adalat shall proceed to dispose of the case or matter and arrive at a compromise or settlement between the parties.

(4) Every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice, equity, fair play and other legal principles.

(5) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, the record of the case shall be returned by it to the court, from which the reference has been received under sub-section (1) for disposal in accordance with law.

(6)Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, in a matter referred to in sub-section (2), that Lok Adalat shall advise the parties to seek remedy in a court.

(7) Where the record of the case is returned under sub-section (5) to the court, such court shall proceed to deal with such case from the stage which was reached before such reference under sub-section (1)."

The specific language used in sub-section (3) of Section 20 makes it clear that the Lok Adalat can dispose of a matter by way of a compromise or settlement between the parties. Two crucial terms in sub-sections (3) and (5) of Section 20 are "compromise" and "settlement". The former expression means settlement of differences by mutual concessions. It is an agreement reached by adjustment of conflicting or opposing claims by reciprocal modification of demands. As per Termes de la Ley, "compromise is a mutual promise of two or more parties that are at controversy". As per Bouvier it is "an agreement between two or more persons, who, to avoid a law suit, amicably settle their differences, on such terms as they can agree upon". The word "compromise" implies some element to accommodation on each side. It is not apt to describe total surrender. (See *N.F.U. Development Trust Ltd., Re, (1973) 1 All ER 135 (Ch D.)* A compromise is always bilaterial and means mutual adjustment. "Settlement" is termination of legal proceedings by mutual consent. The case at hand did not involve compromise or settlement and could not have been disposed of by the Lok Adalat. If no compromise or settlement is or could be arrived at, no order can be passed by the Lok Adalat.

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38. CRIMINAL PROCEDURE CODE, 1973 – Sections 438 & 439
Bail and anticipatory bail, distinction between- Section 439 comes into operation only when a person is "in custody"– Expression "custody" as used in Section 439, meaning of- Observation made in K.L. Verma's case [(1998) 9 SCC 348] regarding extension of time to move the higher Court even after the time limit stipulated in anticipatory bail orders over, held, per incuriam.
Nirmal Jeet Kaur v. State of M.P. and another
Judgment dt. 01.09.2004 by the Supreme Court in Criminal Appeal No. 978 of 2004, reported in (2004) 7 SCC 558

Held :

Sections 438 and 439 operate in different fields. Section 439 of the Code reads as follows :

"439. (1) a High Court or Court of Session may direct-

(a) that any person accused of an offence *and in custody be released on bail,* and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified".

(Underlined* for emphasis)

It is clear from a bare reading of the provisions that for making an application in terms of Section 439 of the Code a person has to be in custody. Section 438 of the Code deals with "direction for grant of bail to person apprehending arrest". In *Balchand Jain v. State of M.P., (1976) 4 SCC 572* it was observed that the expression "anticipatory bail" is really a misnomer because what Section 438 contemplates is not anticipatory bail, but merely an order directing the release of an accused on bail in the event of his arrest. It is, therefore, manifest that there is no question of bail unless a person is arrested in connection with a non-bailable offence by the police. The distinction between an order in terms of Section 438 and that in terms of Section 439 is that the latter is passed after arrest whereas the former is passed in anticipation of arrest and becomes effective at the very moment of arrest. (See: *Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565*)

In *Salauddin Abdulsamad Shaikh v. State of Maharashtra, (1996) 1 SCC 667* it was observed as follows : (SCC p. 668, para 2)

> "Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed and that is the reason why the High Court very rightly fixed the outer date for the continuance of the bail and on the date of its expiry directed the petitioner to move the regular court for bail. That is the correct procedure to follow because it must be realised that when the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted."
>
> (emphasis supplied)

In *K.L. Verma case, (1998) 9 SCC 348* this Court observed as follows: (SCC pp. 350-51, para 3)

> "This Court further observed that anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed. It was, therefore, pointed out that it was necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submit-

ted. By this, what the Court desired to convey was that an order of anticipatory bail does not enure till the end of trial but it must be of limited duration as the regular court cannot be bypassed. The limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to move the regular court for bail and to give the regular court sufficient time to determine the bail application. *In other words, till the bail application is disposed of one way or the other the court may allow the accused to remain on anticipatory bail. To put it differently, anticipatory bail may be granted for a duration which may extend to the date on which the bail application is disposed of or even a few days thereafter to enable the accused person to move the higher court, if they so desire."*

(emphasis supplied)

The reference to this Court's observation as quoted above was to *Salauddin* case (supra).

The grey area according to us is the following part of the judgment in *K.L. Verma case (supra)* "or even a few days thereafter to enable the accused persons to move the higher court, if they so desire" (SCC p. 351, para 3).

Obviously, the requirement of Section 439 of the Code is not wiped out by the above observations. Section 439 comes into operation only when a person is "in custody". In *K.L. Verma case (supra)* reference was made to *Salauddin case* (supra). In the said case there was no such indication as given in *K.L. Verma case* that a few days can be granted to the accused to move the higher court if they so desire. The statutory requirement of Section 439 of the Code cannot be said to have been rendered totally inoperative by the said observation.

In view of the clear language of Section 439 and in view of the decision of this Court in *Niranjan Singh v. Prabhakar Rajaram Kharote, (1980) 2 SCC 559* there cannot be any doubt that unless a person is in custody, an application for bail under Section 439 of the Code would not be maintainable. The question when a person can be said to be in custody within the meaning of Section 439 of the Code came up for consideration before this Court in the aforesaid decision.

The crucial question is when is a person in custody, within the meaning of Section 439 of the Criminal Procedure Code? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself of the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor presidential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. The word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibbling and hide-and-seek niceties sometimes heard in court that the police have taken a

man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law.

Since the expression "custody", though used in various provisions of the Code, including Section 439, has not been defined in the Code, it has to be understood in the setting in which it is used and the provisions contained in Section 437 which relate to jurisdiction of the Magistrate to release an accused on bail under certain circumstances which can be characterised as "in custody" in a generic sense. The expression "custody" as used in Section 439, must be taken to be a compendious expression referring to the events on the happening of which the Magistrate can entertain a bail petition of an accused. Section 437 envisages, inter alia, that the Magistrate may release an accused on bail, if such accused appears before the Magistrate. There cannot be any doubt that such appearance before the Magistrate must be physical appearance and the consequential surrender to the jurisdiction of the Court of the Magistrate.

In *Salauddin case* also this Court observed that the regular court has to be moved for bail. Obviously, an application under Section 439 of the Code must be in a manner accordance with law and the accused seeking remedy under Section 439 must ensure that it would be lawful for the court to deal with the application. Unless the applicant is in custody his making application only under Section 439 of the Code will not confer jurisdiction on the court to which the application is made. The view regarding extension of time to "move" the higher court as culled out from the decision in *K.L. Verma case* (supra) shall have to be treated as having been rendered per incurim, as no reference was made to the prescription in Section 439 requiring the accused to be in custody. In *State v. Ratan Lal Arora, (2004) 4 SCC 590* it was held that where in a case the decision has been rendered without reference to statutory bars, the same cannot have any precedential value and shall have to be treated as having been rendered per incuriam. The present case stands at par, if not, on a better footing. The provisions of Section 439 do not appear to have been taken note of.

For making an application under Section 439 the fundamental requirement is that the accused should be in custody. As observed in *Salauddin case* the protection in terms of Section 438 is for a limited duration during which the regular court has to be moved for bail. Obviously, such bail is bail in terms of Section 439 of the Code, mandating the applicant to be in custody. Otherwise, the distinction between orders under Sections 438 and 439 shall be rendered meaningless and redundant.

If the protective umbrella of Section 438 is extended beyond what was laid down in *Salauddin case* the result would be clear bypassing of what is mandated in Section 439 regarding custody. In other words, till the applicant avails remedies up to higher courts, the requirements of Section 439 become dead letter. No part of a statute can be rendered redundant in that manner.

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39. INDIAN PENAL CODE, 1860 – Section 149
Determination of liability under Section 149 – Question to be examined is whether accused was member of unlawful assembly and not whether he actually took active part in crime – Law explained.
State of U.P. v. Kishan Chand and others
Judgment dt. 20.08.2004 by the Supreme Court in Criminal Appeal No. 29 of 1999, reported in (2004) 7 SCC 629

Held :

It is a well-established principle of law that when the conviction is recorded with the aid of Section 149, relevant question to be examined by the court is whether the accused was a member of an unlawful assembly and not whether he actually took active part in the crime or not. The Constitutional Bench of this Court in *Masalti v. State of U.P., (1964) 8 SCR 133,* SCR at p. 148 held :

> "What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141 IPC. Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141."

Further, at SCR p. 149 it is said :

> "In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of the offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly."

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40. CRIMINAL PROCEDURE CODE, 1973 – Section 389 (1)
Suspension of execution of sentence – Suspension is different from grant of bail-Court is required to record reasons for ordering suspension – Law explained.

Kishori Lal v. Rupa and others
Judgment dt. 23.09.2004 by the Supreme Court in Criminal Appeal No. 1067 of 2004, reported in (2004) 7 SCC 638

Held :

Section 389 of the Code deals with suspension of execution of sentence pending the appeal and release of the appellant on bail. There is a distinction between bail and suspension of sentence. One of the essential ingredients of Section 389 is the requirement for the appellate court to record reasons in writing for ordering suspension of execution of the sentence or order appealed against. If he is in confinement, the said court can direct that he be released on bail or on his own bond. The requirement of recording reasons in writing clearly indicates that there has to be careful consideration of the relevant aspects and the order directing suspension of sentence and grant of bail should not be passed as a matter of routine.

The appellate court is duty-bound to objectively assess the matter and to record reasons for the conclusion that the case warrants suspension of execution of sentence and grant of bail. In the instant case, the only factor which seems to have weighed with the High Court for directing suspension of sentence and grant of bail is the absence of allegation of misuse of liberty during the earlier period when the accused-respondents were on bail.

The mere fact that during the trial, they were granted bail and there was no allegation of misuse of liberty, is really not of much significance. The effect of bail granted during trial loses significance when on completion of trial, the accused persons have been found guilty. The mere fact that during the period when the accused persons were on bail during trial there was no misuse of liberties, does not per se warrant suspension of execution of sentence and grant of bail. What really was necessary to be considered by the High Court is whether reasons existed to suspend the execution of sentence and thereafter grant bail. The High Court does not seem to have kept the correct principle in view.

A similar question was examined in *State of Haryana v. Hasmat, (2004) 6 SCC 175.*

In *Vijay Kumar v. Narendra, (2002) 9 SCC 364 and Ramji Prasad v. Rattan Kumar Jaiswal, (2002) 9 SCC 366* it was held by this Court that in cases involving conviction under Section 302 IPC, it is only in exceptional cases that the benefit of suspension of sentence can be granted.

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41. CIVIL PROCEDURE CODE, 1908 – O.2 R.2
O.2 R.2, applicability of – Objection regarding bar under O.2 R.2, proof of – Defendant is required to plead and prove the bar – Law explained.
Dalip Singh v. Mehar Singh Rathee and others
Judgment dt. 15.07.2004 by the Supreme Court in Civil Appeal No. 4457 of 1999, reported in (2004) 7 SCC 650

Held:

The *sine qua non* for applicability of Order 2 Rule 2 CPC is that a person entitled to more than one relief in respect of the same cause of action has omitted to sue for some relief without the leave of the court. When an objection regarding bar to the filing of the suit under Order 2 Rule 2 CPC is taken, it is essential for the court to know what exactly was the cause of action which was alleged in the previous suit in order that it might be in a position to appreciate whether the cause of action alleged in the second suit is identical with the one that was the subject-matter of the previous suit. As the plea had not been raised in the written statement and no issue framed on this point, no opportunity was provided to Respondent 1 to lead evidence to rebut the same. In the absence of pleadings and proof of identity of cause of action, the appellant could not be permitted to raise the plea of bar of Order 2 Rule 2 CPC.

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42. CRIMINAL PROCEDURE CODE, 1973 – Sections 397 & 401
Revisional power, exercise of – Though Revisional Court can exercise all appellate powers, the power not to be exercised as a second appellate power – Law explained.
State of Maharashtra v. Jagmohan Singh Kuldip Singh Anand and others
Judgment dt. 27.08.2004 by the Supreme Court in Criminal Appeal No. 952 of 2004, reported in (2004) 7 SCC 659

Held :

The revisional court is empowered to exercise all the powers conferred on the appellate court by virtue of the provisions contained in Section 401 CrPC. Section 401 CrPC is a provision enabling the High Court to exercise all powers of an appellate court, if necessary, in aid of power of superintendence or supervision as a part of power of revision conferred on the High Court or the Sessions Court. Section 397 CrPC confers power on the High Court or Sessions Court, as the case may be,

> "for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior court".

It is for the above purpose, if necessary, the High Court or the Sessions Court can exercise all appellate powers. Section 401 CrPC conferring powers of an appellate court on the revisional court is with the above limited purpose. The provisions contained in Section 395 to Section 401 CrPC, read together do not indicate that the revisional power of the High Court can be exercised as a second appellate power.

On this aspect it is sufficient to refer to and rely on the decision of this Court in *Duli Chand v. Delhi Admn., (1975) 9 SCC 649*, in which it is observed thus: (SCC p. 651, para 5)

"The High Court in revision was exercising supervisory jurisdiction of a restricted nature and, therefore, it would have been justified in refusing to reappreciate the evidence for the purposes of determining whether the concurrent finding of fact reached by the learned Magistrate and the learned Additional Sessions Judge was correct. But even so, the High Court reviewed the evidence presumably for the purpose of satisfying itself that there was evidence in support of the finding of fact reached by the two subordinate courts and that the finding of fact was not unreasonable or perverse".

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43. CRIMINAL PROCEDURE CODE, 1973 – Section 401 (3)
Revisional power, exercise of – Interference in acquittal – Revisional Court cannot convert finding of acquittal into one of conviction – Court can interfere when material evidence has been overlooked – Law explained.
Ram Briksh Singh and others v. Ambika Yadav and another
Judgment dt. 09.03.2004 by the Supreme Court in Criminal Appeal No. 523 of 1997, reported in 2004 7 SCC 665

Held :

The principles on which a revisional court can set aside a judgment and order of acquittal passed in favour of the accused are well settled by a catena of judgments. The difficulty, however, arises at times about the application of the said principles. It is true that there is a statutory prohibition contained in sub-section (3) of Section 401 of the Criminal Procedure Code on converting a finding of acquittal into one of conviction and what is prohibited cannot be done indirectly as well. The question, however, is, has the High Court indirectly done what is prohibited.

Sections 397 to 401 of the Code are a group of sections conferring higher and superior courts a sort of supervisory jurisdiction. These powers are required to be exercised sparingly. Though the jurisdiction under Section 401 cannot be invoked to only correct wrong appreciation of evidence and the High Court is not required to act as a court of appeal but at the same time, it is the duty of the court of correct manifest illegality resulting in gross miscarriage of justice.

More than half a century ago, in *D. Stephens v. Nosibolla, AIR 1951 SC 196* this Court held that revisional Jurisdiction when it is invoked against an order of acquittal by a private complainant is not to be lightly exercised, it could be exercised only in exceptional cases to correct a manifest illegality or to prevent gross miscarriage of justice and not to be ordinarily used merely for the reason that the trial court has misappreciated the evidence on record.

In *K. Chinnaswamy Reddy v. State of A.P., AIR 1962 SC 1788* a note of caution was appended so that the High Court does not convert a finding of acquittal into one of conviction by the indirect method of ordering retrial when it

cannot directly convert a finding of acquittal into a finding of conviction in view of specific statutory prohibition. While noticing that it is not possible to lay down the criteria for determining exceptional cases which would cover all contingencies for exercise of revisional power, some cases by way of illustration were mentioned wherein the High Court would be justified in interfering with the finding of acquittal in revision. The High Court would be justified to interfere where material evidence is overlooked by the trial court.

In a recent decision in *Bindeshwari Prasad Singh v. State of Bihar (now Jharkhand), (2002) 6 SCC 650* noticing principles laid down in *Stephens* (supra) and *Chinnaswamy Reddy* (supra) it was held that the High Court was not justified in reappreciating the evidence on record and coming to a different conclusion in a revision preferred by the informant under Section 401 of the Code since it was well settled that the order of acquittal cannot be interfered with in revision merely on the ground of errors in appreciation of evidence.

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44. PRECEDENTS :

Precedent, application of – Circumstantial flexibility – One additional or different fact may make difference between conclusion in two cases.

Punjab National Bank v. R.L. Vaid and others

Judgment dt. 20.08.2004 by the Supreme Court in Criminal Appeal No. 917 of 2004, reported in (2004) 7 SCC 698

Held :

There is always peril in treating the words of a judgment as though they are words in a legislative enactment and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a difference between conclusions in two cases. Disposal of cases by merely placing reliance on a decision is not proper. Precedent should be followed only so far as it marks the path of justice, but you must cut out the dead wood and trim off the side branches else you will find yourself lost in thickets and grantees said Lord Denying, while speaking in the matter of applying precedents. The impugned order is certainly vague.

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45. INDIAN PENAL CODE, 1860 – Section 304-B

Expression "soon before" as used in Section 304-B – The expression anticipates proximate and live link between effect of cruelty and death – Law explained.

Balwant Singh and another v. State of Punjab

Judgment dt. 12.08.2004 by the Supreme Court in Criminal Appeal No. 1415 of 2003, Reported in (2004) 7 SCC 724

Held :

These decisions and other decisions of this Court do lay down the proximity test. It has been reiterated in several decisions of this Court that "soon before" is an expression which permits of elasticity, and therefore the proximity test has to be applied keeping in view the facts and circumstances of each case. The facts must show the existence of a proximate live link between the effect of cruelty based on dowry demand and the death of the victim.

Since one of the ingredients of the offence under Section 304-B is that such cruelty should have been meted out to the deceased soon before her death, it is for the prosecution to establish affirmatively that the victim was subjected to cruelty and harassment based on dowry demand soon before her death. In the instant case, we find that at least for a year and three months before her death there is no evidence to even remotely suggest that the victim was subjected to cruelty or harassment of the nature specified in Section 304-B IPC. The proximity test is, therefore, not satisfied. We, therefore, hold that there is not sufficient evidence on the basis of which conviction under Section 304-B IPC can be founded.

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46. JUDICIARY :

Remarks in judicial order against Judicial Officer – Restraint, care and circumspection to be observed – Mode to be adopted against an arraigned officer – Law explained.

In the Matter of: 'RV', A Judicial Officer

Judgment dt. 06.10.2004 by the Supreme Court in Criminal Appeal No. 1152 of 2004, reported in (2004) 7 SCC 729

Held :

Time and again this Court has emphasised the need for keeping the subordinate judiciary under control- Disciplinary, administrative and judicial- of the High Court. However, at the same time this Court has cautioned the High Courts by stressing upon the need for restraint, care and circumspection while exercising its power of superintendence lest those who dispense justice to others should themselves suffer injustice. It would suffice to make a reference to only a few of the decisions. In *Mahabir Singh v. State of Haryana, (2001) 7 SCC 148* this Court emphasised the need for maintaining judicial restraint and avoiding unnecessary castigation of (police and) subordinate judiciary. Again in *R.C. Tamrakar v. Nidi Lekha, (2001) 8 SCC 431* reiterating its observations in several earlier cases this Court held that judicial restraint is a virtue concomitant of every judicial dispensation. The higher tiers are provided in the judicial hierarchy to set right the errors which could possibly have crept in, in the findings, orders or proceedings of the courts at the lower tiers.

> "Such powers are certainly not for belching diatribe at judicial personages in lower cadre. It is well to remember the words of a jurist that 'a Judge who has not committed any error is yet to be born'." (SCC p. 436, para 16)

Castigating members of the subordinate judiciary does no good to the system as placing on public record the aspersions cast on them, shakes the very confidence of the people in judicial institutions. Such remarks, if avoidable and uncalled for, compel the members of the subordinate judiciary to approach the High Court seeking expunction of the remarks, which is rather unfortunate.

In *'K' A Judicial Officer, In re (2001) 3 SCC 54* a Bench presided over by the then Chief Justice of India had occasion for dealing with such an issue in very many details and from several angles. This Court reminded the High Courts that the supervisory jurisdiction vesting in them over the subordinate judiciary was meant to be exercised like a friend, philosopher and guide. The power vesting in the higher echelons is not meant for cracking the whip or for being exercised with vindictiveness on errors, mistakes or failures committed by those in lower echelons which does no errors, mistakes or failures committed by those in lower echelons which does no good to the system but has to be exercised for the purpose of toning up the system so that the mistakes, errors or failures which may have been committed unknowingly or unwittingly are not repeated. The Court illustratively enumerated the consequences which flow on to the subordinate judiciary when the High Courts indulge in castigating its members, which is at times, an uncalled-for display of judicial might. This Court took care to see that its observations may not be misunderstood and suggested an alternative, safe and advisable course so as to be just and fair to the members of the subordinate judiciary whose conduct or behaviour having come to notice during the course of hearing on the judicial side did not meet the approval of the High Court. This Court suggested : (SCC p. 66, para 16)

> "The conduct of a judicial officer, unworthy of him, having come to the notice of a Judge of the High Court hearing a matter on the judicial side, the lis may be disposed of by pronouncing upon the merits thereof as found by him but avoiding in the judicial pronouncement criticism of, or observations on the 'conduct' of the subordinate judicial officer who had decided the case under scrutiny. Simultaneously, but separately, in-office proceedings may be drawn up inviting attention of the Hon'ble Chief Justice to the facts describing the conduct of the Subordinate Judge concerned by sending a confidential letter or note to the Chief Justice. It will thereafter be open to the Chief Justice to deal with the subordinate judicial officer either at his own level or through the Inspecting Judge or by placing the matter before the Full Court for its consideration. The action so taken would all be on the administrative side. The Subordinate Judge concerned would have an opportunity of clarifying his position or putting forth the circumstances under which he acted. He would not be condemned unheard and if the decision be adverse to him, it being on administrative side, he would have some remedy available to him under the law. He would not be rendered remediless."

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47. LAND ACQUISITION ACT, 1894 – Section 28-A

Remedy u/s 28-A available only to a party who has not sought reference u/s 18 of the Act – Law explained.

Des Raj (Deceased) through LRs. and others v. Union of India and another

Judgment dt. 01.10.2004 by the Supreme Court in Civil Appeal No. 5025 of 1999, reported in (2004) 7 SCC 753

Held:

In our view, the appellarts are not entitled to cliam enhanced compensation pressing into service the provisions of Section 28-A of the Act. The learned counsel for the appellants before the High Court did not press the claim of the appellants on this ground as recorded in the impugned judgments, having not made the applications within the prescribed time. Moreover, benefit of Section 28-A is available only to the parties who had not sought reference under Section 18 of the Act for enhancement of the compensation. This provision is not available to persons who seek reference under Section 18 of the Act for enhancement of the compensation and do not challenge judgment of the Reference Court or the judgment of the High Court thereafter. A Bench of three learned Judges of this Court in *Scheduled Caste Coop. Land Owning Society Ltd. v. Union of India, (1991) 1 SCC 174* in this regard, in para 4, has held thus: (SCC p. 178)

> "4. ... Any person who does not accept the award so made" may, by written application to the Collector, require that the matter be referred for the determination of the court whereupon the provisions of Sections 18 and 28 shall, so far as may be, apply to such reference as they apply to a reference under Section 18. It is obvious on a plain reading of sub-section (1) of Section 28-A that it applies only to those claimants who had failed to seek a reference under Section 18 of the Act. The redetermination has to be done by the Collector on the basis of the compensation awarded by the court in the reference under Section 18 of the Act and an application in that behalf has to be made to the Collector within 30 days from the date of the award. Thus only those claimants who had failed to apply for a reference under Section 18 of the Act are conferred this right to apply to the Collector for redetermination and not all those like the petitioners who had not only sought a reference under Section 18 but had also filed an appeal in the High Court against the award made by the Reference Court. The newly added Section 28-A, therefore, clearly does not apply to a case where the claimant has sought and secured a reference under Section 18 and has even preferred an appeal to the High Court. This view, which we take on a plain reading of Section 28-A finds support from the judgment of this Court in *Mewa Ram v. State of Haryana, (1986) 4 SCC 515.*

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48. PREVENTION OF CORRUPTION ACT, 1988 – Section 19
Sanction for prosecution – Scope and applicability of Section 19 – Expression "failure of justice" as used in Section 19, meaning of – Law explained.
State by Police Inspector v. T. Venkatesh Murthy
Judgment dt. 10.09.2004 by the Supreme Court in Criminal Appeal No. 997 of 2004, reported in (2004) 7 SCC 763

Held :

Section 19 is a part of Chapter 5 of the Act which deals with "Sanction for Prosecution and Other Miscellaneous Provisions". The section has four subsections which read as follows:

> "19. *Previous sanction necessary for prosecution.*- (1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,-
>
> (a) in the case of person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;
>
> (b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government of that Government;
>
> (c) in the case of any other person, of the authority competent to remove him from his office.
>
> (2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.
>
> (3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-
>
> (a) no finding, sentence or order passed by a Special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

4. In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

Explanation.- For the purposes of this section,-

(a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."

A combined reading of sub-sections (3) and (4) makes the position clear that notwithstanding anything contained in the Code no finding, sentence and order passed by a Special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in the sanction required under sub-section (1), unless in the opinion of that court a failure of justice has in fact been occasioned thereby.

Clause (b) of sub-section (3) is also relevant. It shows that no court shall stay the proceedings under the Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice.

Sub-section (4) postulates that in determining under sub-section (3) whether the absence of, or any error, omission or irregularity in the sanction has occasioned or resulted in a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

Explanation appended to the section is also of significance. It provides, that for the purpose of Section 19, error includes competency of the authority to grant sanction.

The expression "failure of justice" is too pliable or facile an expression, which could be fitted in any situation of a case. The expression "failure of justice" would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in *Town Investments Ltd. v. Deptt. of Environment,*

(1977) 1 All ER 813). The criminal court, particularly the superior court, should make a close examination to ascertain whether there was really a failure of justice or it is only a camouflage. (See *Shamnsaheb M. Multtani v. State of Karnataka, (2001) 2 SCC 577*).

It would also be relevant to take note of Sections 462 and 465 of the Code, which read as follows :

> "462. *Proceedings in wrong place.*- No finding, sentence or order of any criminal court shall be set aside merely on the ground that the inquiry, trial or other proceedings in the course of which it was arrived at or passed, took place in a wrong sessions division, district, subdivision or other local area, unless it appears that such error has in fact occasioned a failure of justice.
>
> ★ ★ ★
>
> 465. *Finding or sentence when reversible by reason of error, omission or irregularity.*- (1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered by a court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that court, a failure of justice has in fact been occasioned thereby.
>
> (2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

In *State of M.P. v. Bhooraji, (2001) 7 SCC 679* the true essence of the expression "failure of justice" was highlighted. Section 465 of the Code in fact deals with "finding or sentences when reversible by reason of error, omission or irregularity", in sanction.

In the instant case neither the trial court nor the High Court appear to have kept in view the requirements of sub-section (3) relating to question regarding "failure of justice". Merely because there is any omission, error or irregularity in the matter of according sanction, that does not affect the validity of the proceeding unless the court records the satisfaction that such error, omission or irregularity has resulted in failure of justice. The same logic also applies to the appellate or revisional court. The requirement of sub-section (4) about raising the issue at the earliest stage has not been also considered.

49. **CRIMINAL PROCEDURE CODE, 1973 – Sections 169, 170 & 173 Courses open to the Magistrate in respect of report submitted u/s 173 of the Code – Expression "charge sheet" and "final report", meaning and purport of- Duty of Magistrate to summon complainant before accepting final report or refusing to take cognizance – Law explained.**

Gangadhar Janardan Mhatre v. State of Maharashtra and others Judgment dt. 28.09.2004 by the Supreme Court in Criminal Appeal No. 639 of 1999, reported in (2004) 7 SCC 768

Held :

When a report forwarded by the police to the Magistrate under Section 173 (2) (i) is placed before him several situations arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either *(1)* accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156 (3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate he has again option of adopting one of the three courses open i.e. (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156 (3). The position is, therefore, now well settled that upon receipt of a police report under Section 173 (2) a Magistrate is entitled to take cognizance of an offence under Section 190 (1) (b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190 (1) (b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise his powers under Section 190 (1) (b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190 (1) (a) though it is open to him to act under Section 200 or Section 202 also. [See *India Carat (P) Ltd. v. State of Karnataka, (19989) 2 SCC 132*] The informant is not prejudicially affected when the Magistrate decides to take cognizance and to proceed with the case. But where the Magistrate decides that sufficient ground does not subsist for proceeding further and drops the proceedings or takes the view that there is

material for proceeding against some and there are insufficient grounds in respect of others, the informant would certainly be prejudiced as the first information report lodged becomes wholly or partially ineffective. Therefore, this Court indicated in *Bhagwant Singh case, (1985) 2 SCC 537 case* that where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceedings against some of the persons mentioned in the first information report, notice to the informant and grant of opportunity of being heard in the matter becomes mandatory. As indicated above, there is no provision in the Code for issue of a notice in that regard.

We may add here that the expressions "charge-sheet" or "final report" are not used in the Code, but it is understood in Police Manuals of several States containing the rules and regulations to be a report by the police filed under Section 170 of the Code, described as a "charge-sheet". In case of reports sent under Section 169 i.e. where there is no sufficiency of evidence to justify forwarding of a case to a Magistrate, it is termed variously i.e. referred charge, final report or summary. Section 173 in terms does not refer to any notice to be given to raise any protest to the report submitted by the police. Though the notice issued under some of the Police Manuals states it to be a notice under Section 173 of the Code, there is nothing in Section 173 specifically providing for such a notice.

As decided by this Court in *Bhagwant Singh case (supra)* the Magistrate has to give notice to the informant and provide an opportunity to be heard at the time of consideration of the report. It was noted as follows : (SCC p. 542, para 4)

> "[T]he Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report"

Therefore, the stress is on the issue of notice by the Magistrate at the time of consideration of the report. If the informant is not aware as to when the matter is to be considered, obviously, he cannot be faulted, even if protest petition in reply to the notice issued by the police has been filed belatedly. But as indicated in *Bhagwant Singh case (supra)* the right is conferred on the informant and none else.

When the information is laid with the police, but no action in that behalf is taken, the complainant is given power under Section 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facia case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he

is empowered to take cognizance of the offence and would issue process to the accused. These aspects have been highlighted by this Court in *All India Institute of Medical Sciences Employees' Union (Regd.) v. Union of India, (1996) 11 SCC 582.* It was specifically observed that a writ petition in such cases is not to be entertained.

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50. INDIAN PENAL CODE, 1860 – Section 376

Prosecutrix of a sex offence is a competent witness u/s 118 Evidence Act- Evidence of prosecutrix is just like evidence of an injured person- No rule of law that her evidence cannot be accepted unless corroborated – Law explained.

Sri Narayan Saha and another v. State of Tripura

Judgment dt. 08.09.2004 by the Supreme Court in Criminal Appeal No. 637 of 2003, reported in (2004) 7 SCC 775

Held :

A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Indian Evidence Act, 1872 (in short "the Evidence Act") nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecurtix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

The aforesaid position was highlighted in *State of Maharashtra v. Chandraprakash Kewalchand Jain,(1990) 1 SCC 550 and Kernel Singh case, (1995) 5 SCC 518.*

In India if the prosecutrix happened to be a married person, she will not do anything without informing her husband. Merely because the complaint was lodged less than promptly, does not raise the question that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women. It casts doubt and shame upon her rather than comfort and sympathy. Therefore, the delay in lodging complaint in such cases does not necessarily indicate that her version is false.

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51. CRIMINAL PROCEDURE CODE, 1973 – Section 164
Retracted confession, evidential value of – Such confession requires corroboration for being acted upon – Law explained.
Parmananda Pegu v. State of Assam
Judgment dt. 02.09.2004 by the Supreme Court in Criminal Appeal No. 1501 of 2003, reported in (2004) 7 SCC 779

Held :

In order to be assured of the truth of confession, this Court, in a series of decisions, has evolved a rule of prudence that the court should look to corroboration from other evidence. However, there need not be corroboration in respect of each and every material particular. Broadly, there should be corroboration so that the confession taken as a whole fits into the facts proved by other evidence. In substance, the court should have assurance from all angles that the retracted confession was, in fact, voluntary and it must have been true. The law on the subject of retracted confession has been succinctly laid down by a three-Judge Bench of this Court in *Subramania Goundan v. State of Madras, 1958 SCR 428* which lays down : (SCR pp. 440-41)

> "The next question is whether there is corroboration of the confession since it has been retracted. A confession of a crime by a person, who has perpetrated it, is usually the outcome of penitence and remorse and in normal circumstances is the best evidence against the maker. The question has very often arisen whether a retracted confession may form the basis of conviction if believed to be true and voluntarily made. For the purpose of arriving at this conclusion the court has to take into consideration not only the reasons given for making the confession or retracting it but the attending facts and circumstances surrounding the same. It may be remarked that there can be no absolute rule that a retracted confession cannot be acted upon unless the same is corroborated materially. It was laid down in certain cases one such being *Kesava Pillai, In re ILR, (1930) 53 Mad 160* that if the reasons given by an accused person for retracting a confession are on the face of them false, the confession may be acted upon as it stands and without any corroboration. But the view taken by this Court on more occasions than one is that as a matter of prudence and caution which has sanctified itself into a rule of law, retracted

confession cannot be made solely the basis of conviction unless the same is corroborated one of the latest cases being *Balbir Singh v. State of Punjab, AIR 1957 SC 217,* but it does not necessarily mean that each and every circumstance mentioned in the confession regarding the complicity of the accused must be separately and independently corroborated, nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made. It would be sufficient, in our opinion, that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession."

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52. CRIMINAL PROCEDURE CODE, 1973 – Section 319
Discretion to proceed against a person u/s 319, exercise of – Discretion should be exercised only to achieve criminal justice – Factors to be considered – Law explained.
Krishnappa v. State of Karnataka
Judgment dt. 25.08.2004 by the Supreme Court in Criminal Appeal No. 934 of 2004, reported in (2004) 7 SCC 792

Held :

Mr Sanjay Hedge, learned counsel appearing for the respondent State, contends, relying upon the decision of this Court in *Municipal Corpn. Of Delhi v. Ram Kishan Rohtagi, (1983) 1 SCC 1* that the trial court had the power to summon the appellant in exercise of power under Section 319 CrPC even when the proceedings had been earlier quashed qua him and the trial court committed serious illegality in observing to the contrary and thus the High Court rightly reversed the order of the Magistrate. Though an order under Section 319 CrPC summoning a person can be made on fulfilment of the conditions stipulated therein even when the proceedings had earlier been quashed, but in the present case the Magistrate did not dismiss the application merely on the ground of the proceedings having been quashed against the appellant. The Magistrate first on examination of evidence, came to the conclusion that the possibilities of the appellant being convicted were remote and, thereafter, made a passing reference to the factum of the proceedings having been quashed in the year 1995. In *Ram Kishan Rohtagi case (supra)* while holding that despite proceedings having been quashed, a person can be proceeded with, a note of caution was added that the power under Section 319 CrPC was discretionary and had to be used sparingly only on the existence of compelling reasons.

In *Michael Machado v. Central Bureau of Investigation, (2000) 3 SCC 262* construing the words "the court may proceed against such person" in Section 319 CrPC, this Court held that the power is discretionary and should be exercised only this Court held that the power is discretionary and should be exercised only to achieve criminal justice and that the court should not turn against another person whenever it comes across evidence connecting that other person also

with the offence. This Court further held that a judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has already proceeded and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. The court, while examining an application under Section 319 CrPC, has also to bear in mind that there is no compelling duty on the court to proceed against other persons. In a nutshell, it means that for exercise of discretion under Section 319 CrPC, all relevant factors, including the one noticed above, have to be kept in view and an order is not required to be made mechanically merely on the ground that some evidence had come on record implicating the person sought to be added as an accused.

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53. CIVIL PROCEDURE CODE, 1908 – O.8 R.10
Written statement, filing of after limitation of ninety days – Court has discretion to take it on record after prescribed period – Law explained.
Jasvindar Kaur (Smt.) v. Smt. Charanjeet Kaur
Reported in 2004 (II) MPWN 108

Held :

It is the case of the petitioner that as an application under Order 7 Rule 11 CPC filed by him on 5.10.2002 was pending, he could not file the written statement in time. On 20.10.2003 plaintiff-respondent filed an application for closing right of the petitioner to file written statement. It was only on 26.3.2004 that the argument on the application filed by the petitioner under Order 7 Rule 11 CPC was rejected and on the same day application filed by the plaintiff-respondent for closing the right of the petitioner was allowed. Petitioner claims for quashing the order and permit him to file his written statement. In support of his contention petitioner has placed reliance on the judgments of this Court in the case of *Mithumal v. Ku. Kavita [2003 (II) MPWN SN 102] and Asarfilal v. Smt. Vimla Devi [2003 (II) MPWN SN 101].*

Per contra, Shri Chaturvedi, learned senior counsel argued that inspite of repeated opportunities being granted to the petitioner, written statement has not been filed. Accordingly, learned Court has exercised jurisdiction under the provisions of Order 8 Rule 1 CPC which is in accordance with law, therefore, no case for interference is made out. In support of his contention Shri Chaturvedi invites my attention to certain observations made by the Supreme Court in the case of *Ramesh Chand Ardawatiya v. Anil Panjwani [(2003) 7 SCC 350].*

Having heard learned counsel for the parties and on perusal of the record it is seen that the only reason indicated by the Court for not taking the written statement on record and closing the right of petitioner is that written statement was not filed within 90 days. Reasons explained for not filing the same was that petitioner's application under section 10 CPC was pending and they were awaiting decision on the said application. In the case of Mithumal (supra) and *Asarfilal* (supra), it has held by a Bench of this Court that even after amendment to the

provisions of Order 7 Rule 11 CPC, trial Court is empowered to take on record written statement filed beyond the period of 90 days if sufficient reason for delay is furnished. Even the Supreme Court in the case of *Ramesh Chand* (supra) has observed that Court has discretion to permit filing of belated written statement but such discretion should be exercised in reasonable manner keeping in view the relevant circumstances of the case, conduct of the defendant and the likelihood of any prejudice to the plaintiff or loss of vested right accrued to him.

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54. VAN UPAJ (VYPAR VINIYAMAN) ADHINIYAM, 1969 (M.P.) – Section 19 (1) (b)
Confiscation of property other than forest produce by forest official– Before confiscation such officer should consider question of release u/s 19 (1) (b).
Govind v. Up – Vanmandladhikari, Dhar
Reported in 2004 (II) MPWN 124

Held :

The petitioner is infact aggieved by a confiscation proceeding initiated by the Forest authorities under the provisions of Indian Forest Act read with the provision of Adhiniyam, 1969, referred *supra*. In these proceedings, the tractor bearing No. MP/11/A/3780 and trolley bearing No. MP/11/A/3781 was seized by the Forest authorities, which according to petitioners, belong to them. It was noticed by the Forest authorities that this tractor-trolley was being used for carrying some forest produce (teak wood) illegally without obtaining necessary pass/permission from the authorities concerned. The impugned orders, referred *supra*, were passed in those confiscation proceedings against the petitioner throughout and hence, in writ.

In somewhat similar circumstances, an issue came up before the Supreme Court of India in a case reported in 2000 (2) Vidhi Bhasvar 1= (2000) 1 SCC 323 [*Dinesh Kumar Kartike v. State of M.P. and others*]. In this case also, proceedings for confiscation of a tractor-trolley were questioned under the aforementioned two Acts. Their Lordships of Supreme Court then referred to and relied upon section 19 (1) (b) of the Adhiniyam which empowers the Forest authorities to release the tractor-trolley under the Adhiniyam, provided the person concerned complies the requirement of section 19 (1) (b) of the Adhiniyam. Their Lordships felt that since the said section was not taken care of nor noticed by the Forest authorities while passing the order and hence, the matter was remanded to the Forest authorities for its, examination in the light of the requirement of section 19 (1) (b). I am inclined to quote *in verbatim* the entire judgment of Supreme Court to enable the Forest authorities to pass the orders in the light of the observations by their Lordships of Supreme Court in the aforesaid case:

> "2. After hearing the counsel on both sides and after going into the facts, we are of the view that the following order would meet the ends of justice.

3. The appellant challenges an order of confiscations of truck bearing No. MPQ 6789. Notice was issued by this Court on 16.11.1998 calling upon the respondent to show cause why an appropriate order in terms of section 19 (1) (b) or the Madhya Pradesh Van Upaj (Vyapar Viniyaman) Adhiniyam, 1969 should not be passed. Section 19 (1) (b) of the Act reads as follows :

> '18. *Composition of offences*- (1) The State Government may, by notification empower a Forest Officer-
>
> (a) * * *
>
> (b) When any property other than a specified forest produce has been seized as liable to confiscation, to release the same on payment of the value thereof as estimated by such officer.'

On a perusal of the SLP paper-book, we find that the Forest Officer concerned had not focused his attention on the enabling provision of section 19 (1) (b) of the Act. We, therefore, direct the Forest Officer concerned to consider the question of release of the truck already confiscated under section 19 (1) (b) of the Act and pass appropriate orders in the facts and circumstances of the case. The appeal is disposed of accordingly. No orders as to costs."

In my opinion, this Court has to issue directions keeping in view the directions given by the Supreme Court in *Dinesh Kumar's case,* supra.

Accordingly, while maintaining all the orders passed in this writ petition, it is directed to concerned Forest authorities to pass similar orders in the light of the requirement of section 19 (1) (b) of the Adhiniyam and keeping in view the observations made by the Supreme Court in the aforementioned case.

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55. STAMP ACT, 1899- Section 2 (5)
Document whether bond or Promissory note, test to determine- Law explained.
Jeevanlal Jain v. Smt. Khatija Bai
Reported in 2004 (II) MPWN 149

Held :

The question, as to what should be the test to determine the true nature of a particular document remains no longer *res integra* so far as this High Court is concerned. The question arose before the Full Bench of Madhya Pradesh High Court, as to what should be the true criteria in determining the nature of a document and in what circumstances the same can be held to be a bond or a promissory note in the case of *Sant Singh v. Madandas Panika (1976 JLJ 235).* The Full Bench of this High Court laid down following tests so far as promissory note is concerned as also the bond. This is what their Lordships unanimously held :

The essentials of a promissory note are:

(1) An unconditional undertaking to pay;

(2) The sum should be a sum of money and should be certain;

(3) The payment should be to the order of a person who is certain, or to the bearer of the instrument; and

(4) The maker should sign it.

If these four conditions exist, the instrument is a promissory note.

The essentials of a bond are:

(1) There must be an undertaking to pay;

(2) The sum should be a sum of money but not necessarily certain;

(3) The payment will be to another person named in the instrument;

(4) The Maker should sign it,

(5) The instrument must be attested by a witness; and

(6) It must not be payable to order or bearer.

Their Lordships then made a comparison between the essentials of a promissory note and those of a bond and culled out three distinguishing features as follows :

(i) If money payable under the instrument is not certain, it cannot be a promissory note, although it can be a bond.

(ii) If the instrument is not attested by a witness, it cannot be a bond, although it may be a promissory note.

(iii) If the instrument is payable to order or bearer, it cannot be a bond, but it can be a promissory note.

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56. CRIMINAL TRIAL :

Appreciation of evidence- Police witness, testimony of- Testimony of police witness if found trustworthy can be relied even when panch witness turn hostile.

Babulal v. State of M.P.

Reported in 2004 (2) JLJ 425

Held :

It is contended by the learned counsel for the appellant that the statements of the police witnesses should not be relied in view of the fact that the independent witnesses have turned hostile. The contention of the learned counsel for the appellant is against the settled preposition of law that the statements of the police witnesses are acceptable after the close scrutiny of their statement. It is recently observed in *P.P. Fatmabee v. State of Kerala [2004 SCC (Cr.) 1]* that mere fact that the "panch" witness does not support the prosecution case by itself would not make the prosecution story less acceptable, if otherwise the Court is satisfied from the material on record and evidence of the seizing authority that such seizure was genuinely made.

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57. COURT FEES ACT, 1870 – Section 7 (iv) (c)
Plaintiff claiming relief for recovery of Rs. 2,79,000/- *Ad valorem* Court Fee payable u/s 7 (iv) (c).
State of M.P. and another v. Siyaram Verma
Reported in 2004 RN 62

Held :

The last submission made by the counsel as regards the payment of court-fee, according to him the plaintiff by the said suit has claimed for relief for recovery of Rs. 2,79,000/- and paid court-fee of an amount of Rs. 50/-. According to him, ad valorem court-fee is payable looking to the nature of relief claimed by the plaintiff. For this purpose, he relies on the judgment of Division Bench of this Court in the case of *Jagdish Tiwari v. State of M.P., 1999 (2) MPLJ 332.* In the aforesaid case a suit was filed by plaintiff for declaration to avoid liability of recovery of Rs. 1,36,989/- on the ground that auction held for auctioning 3020 Khair trees may be declared as illegal as no concluded contract had come into existence. Division Bench of this Court has held that as the plaintiff wants to avoid liability he is required to pay *ad valorem* court-fee under section 7 (iv) (c) of the Court Fees Act.

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58. ADVERSE POSSESSION :
Claim of title on the basis of adverse possession – Claimant must prove hostile assertion of title against true owner and commencement of adverse possession.
Ram Singh v. Ramchandra and another
Reported in 2004 RN 72

Held :

Though the possession of the defendant was for more than 12 years it has been held by the first appellate Court which is a final Court of facts that the possession of the defendant was permissive. This finding is based on the admission of the defendant himself in evidence. Therefore, this finding cannot be said to be perverse or unreasonable. The Supreme Court has held in *Persinni v. Sukhi, (1993) 4 SCC 375* that the burden is on the person who claims title on the basis of adverse possession to establish that his possession is adverse to the true owner. Again it has been reiterated in *Annasaheb v. Balwant, AIR 1995 SC 895* that the burden is on the defendant to prove affirmatively that he is in possession 'in hostile assertion' i.e. a possession which is expressly or impliedly in denial of the title of the true owner. The defendant raising the plea must clearly state when the adverse possession commenced and the nature of such possesson. This principle has been further reiterated in *M.C. Sharma v. Raj Kumari Sharma, AIR 1996 SC 869.*

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59. LIMITATION ACT, 1963 – Articles 72 and 113
Claim for damages in respect of injury sustained due to fall of electric pole, limitation for – Article 72, applicability of in such a case – Held, Article 113 is applicable and not Article 72.
M.P. Electricity Board and others v. Kalekhan
Reported in 2004 (2) JLJ 414

Held :

Brief facts of the case are that the respondent filed a suit for compensation for the injuries sustained by him due to the fall of electric pole on his body on 16.6.1988. Due to the said accident, the respondent-plaintiff suffered various injuries and, therefore, he filed the present suit for compensation on 25.6.1991. In the plaint it is alleged that the cause of action to the present suit was accrued on 16.6.1988 and the period of limitation for claiming compensation is three years which expired on 15.6.1991. However, at that time, the Court was closed due to summer vacation and 22.6.1991 was the last day of summer vacation. 23.6.1991 was a Sunday. 24.6.1991 was a holiday due to Id-ul-Zuha and the suit was filed on 25.6.1991, i.e., the Court reopening day, hence the suit is within limitation.

Defendant raised a plea that the present suit is governed by Article 72 of the Limitation Act and the limitation for filing a suit is one year, hence the present suit is barred by limitation. On the basis of the pleadings Court has framed several issues out of which issue No. 5 relates to limitation. This issue was tried as a preliminary issue and decided against the defendant, hence this revision.

In the present case, the applicants were not acting under any statutory powers but they have neglected in following their statutory duties. The protection of Article 72 of the Act will be applicable when the authorities act contrary to any statutory command and not only when the authority has omitted to do its statutory duty.

The wordings of the Article are very significant. Article 72 of the Act is reproduced as under:

"For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in the territories to which this Act extends.	One year	When the act or omission takes place"

From a bare reading of the said Article it is clear that the act or omission must be in pursuance of any enactment in force, hence, mere failure to perform a statutory duty will not be sufficient to attract Article 72 of the Act. So long as there is breach of some enactment or command issued by any enactment, Article 72 of the Act will not come into play. This is not the case here. It is true

that maintaining the electric supply of pole is a statutory duty of the respondent MPEB. However, in maintaining the electric supply of the poles cannot be said to be a violation of any command issued by an enactment. Counsel for the petitioner has failed to place on record any enactment which directs the respondent to maintain the poles. For this purpose counsel for the respondent has relied on the judgment of Apex Court in the case of *State of Punjab v. M/s Modern Cultivators, AIR 1965 SC 17* in which Apex Court has held that the compensation against the Government for maintaining the canal properly and it is further held that there is no breach of any enactment to attract Article 2 of the old Act which is *para materia* with Article 72 of the present Act. Act or omission which can claim statutory protection or is alleged to be in pursuance of statutory provision may attract Article 72 of the Act but the act or omission must be one which must be said to be in pursuance of an enactment. Mere omission or failure in following statutory duty is not covered by Article 72 of the Act. In that case the allegations against the statutory authority was that the authority has failed to maintain the canal properly. According to the Apex Court the said failure is not in pursuance of the statutory authority to attract Article 72 of the Act. A similar view is taken by Punjab High Court in the case of East *Punjab Province (State of Punjab) v. Modern Cultivators, Ladwa AIR 1960 Punjab 66* in which Punjab High Court has held that failure of local body to maintain water string in proper order or failure to maintain the canal Bank in proper order is a failure of statutory duty and, therefore, Article 72 of the Act will not be applicable in passing of any enactment to the effect.

In the light of these judgments I find that in absence of any enactment having a force of command against the petitioner to maintain electric pules Article 72 of the Act will not be applicable merely because petitioner has failed to perform statutory duty.

There is no other Article governing the situation prevailing in the present case. Hence Article 113 of the Act which is a residual clause will come into play. A limitation for filing a suit under Article 113 of the Act is three years, hence trial Court was right in holding that the suit is within limitation.

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60. JUVENILE JUSTICE ACT, 1986 - Section 2 (k)
Juvenile - Relevant date to determine juvenility - Crucial date is the date of commission of offence and not the date when that person is brought before the competent authority - Contra view expressed in Arnit Das's case, (2000) 5 SCC 488 expressly overruled - Applicability of Juvenile Justice (Care and Protection of Children) Act, 2000 in cases initiated under Act of 1986 and pending when the Act of 2000 came into effect - Law explained.
Pratap Singh v. State of Jharkhand & Anr.
Judgment dt. 02/02/2005 by the Supreme Court in Criminal Appeal No. 210 of 2005

Section 20 of the Act as quoted above deals with the special provision in respect of pending cases and begins with non-obstante clause. The sentence "Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any Court in any area on date of which this Act came into force" has great significance. The proceedings in respect of a juvenile pending in any court referred to in Section 20 of the Act is relatable to proceedings initiated before the 2000 Act came into force and which are pending when the 2000 Act came into force. The term "any court" would include even ordinary criminal courts. If the person was a "juvenile" under the 1986 Act the proceedings would not be pending in criminal courts. They would be pending in criminal courts only if the boy had crossed 16 years or girl had crossed 18 years. This shows that Section 20 refers to cases where a person had ceased to be a juvenile under the 1986 Act but had not yet crossed the age of 18 years then the pending case shall continue in that Court as if the 2000 Act has not been passed and if the Court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, shall forward the juvenile to the Board which shall pass orders in respect of that juvenile.

In this connection it is pertinent to note that Section 16 of the 2000 Act is identical to Section 22 of the 1986 Act. Similarly Section 15 of the 2000 Act is in pari materia with Section 21 of the 1986 Act. Thus, such an interpretation does not offend Article 20(1) of the Constitution of India and the juvenile is not subjected to any penalty greater than that which might have been inflicted on him under the 1986 Act. Mr. Mishra referred to the decision of the two-Judge Bench of this Court in Criminal Appeal No. 370 of 2003 decided on 31.3.2004 in the case of *Upendra Kumar Vs. State of Bihar*, wherein this Court referred to the earlier decisions of this Court rendered in *Bhola Bhagat vs. State of Bihar, (1997) 8 SCC 720, Gopinath Ghosh vs. State of W.B. 1984 (Supp). SCC 228, Bhoop Ram Vs. State of U.P.(1989) 3 SCC 1* and *Pradeep Kuamr vs. State of U.P. 1995 Supp (4) SCC 419* where this Court came to the conclusion that the accused who were juvenile could not be denied the benefit of the provisions of the Act then in force. We, therefore, hold that the provisions of 2000 Act would be applicable to those cases initiated and pending trial/inquiry for the offences committed under the 1986 Act provided that the person had not completed 18 years of age as on 1.4.2001.

The net result is:-

(a) The reckoning date for the determination of the age of the juvenile is the date of an offence and not the date when he is produced before the authority or in the Court.

(b) The 2000 Act would be applicable in a pending proceeding in any court/ authority initiated under the 1986 Act and is pending when the 2000 Act came into force and the person had not completed 18 years of age as on 1.4.2001.

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PART - III

CIRCULARS/NOTIFICATIONS

DISPOSAL OF CONFISCATED GOLD AND GOLD ORNAMENTS

Copy of letter No. 262/Acctts/64/3125, dated 16-7-66 issued from Director of Treasuries and Accounts M.P. Bhopal, addressed to all Commissioners of Divisions, All Collectors, All Distt. And Sessions Judges, all Heads of Deptt. All Treasury Officers.

In continuation of Memo No. 1098-878/IV-R-8/66, dated 28th June, 66 from the Finance Deptt. of the Government of Madhya Pradesh the following instructions are issued for regulating the procedure for collecting confiscated gold and gold ornaments at Bhopal Treasury and for sending it to the Mint at Bombay.

2. The Presiding Officer of the Court which makes the order declaring the articles confiscated to Government, should have them weighed in his presence. An exact and detailed descriptive inventory of the articles should be prepared in triplicate and each copy should be authenticated by the full signature of the Presiding Officer. The inventory should also state the approximate total value of the articles. The articles and one copy of the authenticated inventory should be placed in strong cloth-lined envelope and sealed with the official seal of the court, or if there is no such seal, with the personal seal of the Presiding Officer. This envelope should in turn be kept inside another strong cloth-lined envelope and similarly sealed. If the articles are too large, numberous or irregular in shape to be kept inside an envelope strong metal receptacles may be used for this purpose. All the sealing should be done in the presence of the Presiding Officer and over each envelope/receptacle the presiding officer should certify that it was sealed in his presence. If the estimated value of the article is not more than Rs. 5,000 the sealed packets may be sent to the Treasury Officer, Bhopal by registered post/parcel insured for an appropriate amount. If the value exceeds Rs. 5,000 the packets should be sent to the Treasury Officer, Bhopal with a reliable messenger. In either case one copy of the authenticated inventory should be sent simultaneously to the Treasury Officer, Bhopal by name by registered post.

3. Treasury Officer, Bhopal should treat these packets in the same way as valuables lodged in the Treasury for safe custody but keep them in a separate receptacle and maintain a separate register for recording particulars of all such items. Besides other details usually recorded in such cases, this register should also show the estimated value of the articles in each packet as stated by the Presiding Officer of the court concerned. The Treasury Officer should be particularly careful to see that the seal on the packets are intact when they are received by him and that they remain intact till the packets are opened in his

मूल रसीद गुम हो जाने पर पैकेट्स की वापसी
मध्य प्रदेश शासन, वित्त विभाग

एफ क्र. –ई–4–23–74–नि– 5 चार, भोपाल, दिनांक 8 अक्टूबर, 1974.

विषय– मध्यप्रदेश कोष संहिता भाग 1 के सहायक नियम 47 के अनुसार कोषालय में सुरक्षा हेतु रखी गई सम्पत्ति एवं कैश बाक्स की मूल प्राप्ति रसीद गुम जाने पर बाक्स एवं पैकिटों की वापसी हेतु प्रक्रिया।

मध्य प्रदेश कोष संहिता भाग1 के सहायक नियम 48 के प्रावधानानुसार मूल्यवान सम्पत्ति के पैकेट्स उक्त संहिता के सहायक नियम 47 (i) के अनुसार सुरक्षा हेतु कोषालय में रखे जाते हैं तथा उनका इन्द्राज सहायक नियम 48 के अन्तर्गत निर्धारित रजिस्टर में किया जाता है। ऐसे पैकेट्स को वापस करते समय उक्त रजिस्टर में कालम क्रमांक 9 में पावती प्राप्त की जाती है तथा पैकेट्स प्राप्त करते समय कोषालय अधिकारी द्वारा पावती रसीद दी जाती है। वह भी मूलतः वापिस ली जाती है।

2. कुछ प्रकरण ऐसे उत्पन्न हुए हैं जिनमें विभागों में कोषालय द्वारा दी गई मूल रसीद वापिस करने में इसलिए असमर्थता प्रकट की है कि वह खो गई हैं। नियमों में इस सम्बन्ध में प्रावधान नहीं है कि ऐसे प्रकरणों में मूल्यवान वस्तु को किस प्रकार लौटाया जावे। अतः राज्य शासन द्वारा इस बाबत यह प्रक्रिया निर्धारित की जाती है कि मूल रसीद के खो जाने पर कोषालय अधिकारी द्वारा जमाकर्ता अधिकारी से क्षति–पूर्ति बन्ध (Indemnity Bond) प्राप्त किया जावे, जिसमें निम्न बिन्दुओं को सम्मिलित किया जावे –

(अ) मूल रसीद खो जाने का प्रमाण–पत्र;

(ब) मूल रसीद बाद में उपलब्ध होने पर कोषालय को लौटाने का वचन;

(स) बाद में कोई अन्य व्यक्ति/अधिकारी यदि उक्त रसीद प्रस्तुत कर पैकेट आदि की मांग करता है तो उसके लिये सम्बन्धित अधिकारी जो मूल रसीद के अभाव में पैकेट वापस लेता है, मांग करने वाले अधिकारी व शासन के प्रति स्वयं उत्तरदायी होगा।

3. इस सम्बन्ध में मध्यप्रदेश कोष संहिता भाग–1 के सहायक नियम 48 में संशोधन की प्रति संलग्न की जाती है।

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PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE INDIAN PENAL CODE (MADHYA PRADESH AMENDMENT) ACT, 2004.

(No. 14 of 2004)

[Received the assent of the President on the 24th November, 2004 assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)" dated the 2nd December, 2004]

An Act further to amend the Indian Penal Code, 1860 in its application to the State of Madhya Pradesh.

Be it enacted by the Madhya Pradesh Legislature in the Fifty-fifth year of the Republic of India as follows :-

1. Short title.— This Act may be called the Indian Penal Code (Madhya Pradesh Amendment) Act, 2004.

2. Amendment of Central Act No. 45 of 1860 in its application to the State of Madhya Pradesh.— The Indian Penal Code, 1860 (No. 45 of 1860) (hereinafter refrred to as the Principal Act), shall in its application to the State of Madhya Pradesh be amended in the manner hereinafter provided.

3. Insertion of new Section 354 A.— After Section 354 of the Principal Act, the following Section shall be inserted, namely

Assault or use of Criminal force to woman with intent to disrobe her.-

"354-A. Whoever assaults or uses criminal force to any woman or abets or conspires to assault or uses such criminal force to any woman intending to outrage or knowing it to be likely that by such assault, he will thereby outrage or causes to be outraged the modesty of the woman by disrobing or compel her to be naked on any public place, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to ten years and shall also be liable to fine.".

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THE CODE OF CRIMINAL PROCEDURE (MADHYA PRADESH AMENDMENT) ACT, 2004.

(No. 15 of 2004)

[Received the assent of the President on the 26th November, 2004; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)" dated the 6th December, 2004].

An Act further to amend the Code of Criminal Procedure 1973 in its application to the State of Madhya Pradesh.

Be it enacted by the Madhya Pradesh Legislature in the Fifty-fifth year of the Republic of India as follows :-

1. Short title.— This Act may be called the Code of Criminal Procedure, (Madhya Pradesh Amendment) Act, 2004

2. Amendment of Central Act No. 2 of 1974 in its application to the State of Madhya Pradesh.— The Code of Criminal Procedure, 1973 (No. 2 of 1974) (hereinafter referred to as the Principal Act), shall in its Application to the State of Madhya Pradesh, be amended in the manner hereinafter provided.

3. Amendment of Section 125. — In Section 125 of the Principal Act,—

(i) for the marginal heading, the following marginal heading shall be substituted, namely :—

"Order for maintenance of wifes, childern, parents and grand parents."

(ii) In sub-section (1),—

(a) After clause (d), the following clause shall be inserted, namely:—

"(e) his grand father, grand mother unable to maintain himself or herself.";

(b) In the existing para, for the words "a magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding three thousand rupees in the whole, as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct", the words "a Magistrate of the first class may upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father, mother, grand father, grand mother at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct" shall be substituted;

(c) After the existing first proviso, the following proviso shall be inserted, namely :—

"Provided further that the relatives in clause (e) shall only be entitled to monthly allowance for maintenance if their sons or daughters are not alive and they are unable to maintain themselves."

4. Amendment of Section 127.— In sub-section (1) of Section 127 of the Principal Act, for the words, "father or mother" the words "father, mother, grand father, grand mother" shall be substituted.

5. Amendment of First Schedule.— In the First Schedule to the Principal Act under the heading "I-Offences Under The Indian Penal Code", after the en-

tries relating to Section 354, the following entries shall be inserted, namely :—

Section	Offence	Punishment	Cognizable or non-Cognizable	Bailable or non-Bailable	By what court triable
(1)	(2)	(3)	(4)	(5)	(6)
"354-A	Assault or use of Criminal force to woman with intend to disrobe her.	Imprinsonment of not less than one year but which may extend to ten years and fine.	Cognizable	Non-bailable	Court of Session

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MINISTRY OF COMMUNICATIONS AND INFORMATION TECHNOLOGY

No. G.S.R. 285 (E), dated 23rd April, 2004.— In exercise of the powers conferred by Section 87 of the **Information Technology Act, 2000** (21 of 2000), the Central Government hereby makes the following **amendments in the IT Certifying Authority Rules** notified vide Notification No. G.S.R. 789 (E), dated 17th October, 2000.

2. Notwithstanding anything contained in Schedule-IV of the above notification the form for Application for issue of Digital Signature Certificate for the category 'individual' stands amended. The application form for issue of Digital Signature Certificate for subscriber of Government and Banking Sector shall be as per the "Form A" and the application form for issue of Digital Signature Certificate for any other subscriber shall be as per the "Form B".

3. The application form for all other categories of application other than 'Individual' shall remain unchanged.

FORM A

APPLICATION FORM FOR ISSUE OF DIGITAL CERTIFICATE FOR SUBSCRIBER OF GOVERNMENT AND BANKING SECTOR

Class of certificate applied : **Certificate required : Individual/Serven/Web server**

Certificate validity : .....

Name : .....

E-mail address : .....

Office address : .....

(With Designation and Department : .....

(Optional) : .....

: **Telephone** .....