JOTI JOURNAL

Vol. XII
FEBRUARY 2006 (BI-MONTHLY)

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

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SUBJECT- INDEX

FROM THE PEN OF THE EDITOR

VED PRAKASH
Director, JOTRI

Esteemed Readers

The February issue of JOTI 2006 is before you and through this column I again have the opportunity to share my thoughts and experiences with you. No doubt, year 2005, 'The Year of Excellence in Judiciary' has become part of the immeasurable past yet it has left within each of us the spirit of excellence which in the words of Brain Tracy is not a destination but a continuous journey that never ends. In my opinion it is a sort of an unending pious mission for mankind.

The Institute commenced its academic and training activities of year 2006 with a noble and innovative exercise by organizing a five days' workshop on - *Judicial Ethics, Norms of Behaviour and Temperamental Moderation* (6th January to 10th January, 2006) which we conceived and designed with the motivation and guidance provided by Hon'ble the Chief Justice. The workshop focused on various aspects of personality development. The participants' response was very positive. They found it very educative and useful.

Personality in its simplistic sense is the sum total of physical, intellectual, emotional, attitudinal, ethical and behavioural attributes of a person. One's conduct and behaviour reflects the inherent traits of his personality. It has been said that main task of a person in life is to give birth to himself, to become what he potentially is by carefully developing his personality. Careful, conscious and consistent efforts aimed at personality development may definitely help in building a positive personality.

It is very often remarked that strength of democracy lies in a strong, independent and vibrant judiciary. But then the strength of judiciary lies in the strength of the personality of the Judges who man it. Various qualities of personality which a Judge must acquire and develop have been precisely and beautifully put forth by the Apex Court in *Shirish Kumar's case, (1997) 6 SCC 339* in the following manner:

> "..The conduct of every judicial officer should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamour, regardless of public praise, and indifferent to private, political or partisan influences; he should administer justice according to law, and deal with his appointment as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should

he administer the office for the purpose of advancing his personal ambitions or increasing his popularity. If he tips the scales of justice, its rippling effect would be disastrous and deleterious."

Every judicial officer must have a determination and should strive hard to acquire and develop these qualities so that he can build a personality befitting with the onerous office of a Judge; a personality which can help in serving the institution of Judiciary in an ideal manner.

In Part I of this issue we have the privilege to publish the Address delivered by Hon'ble the Chief Justice in the State level Conference of District Judges held on 25.02.2006 at Jabalpur. Keeping with our commitment made earlier in JOTI December, 2005 issue, with this issue we are starting a series of articles on Examination of witness, Witness Protection and Marshalling/appreciation of Evidence. First article of the series is being included in Part I. As promised earlier, we are also starting a series which relates to day-to-day legal problems confronted by Judges in Court working. I would solicit the co-operation of judicial officers to send not only the problems but also the probable solutions with reasoning so that ultimately the Journal can become more utility-oriented.

Part II, as usual, is abound with various latest important judicial pronouncements including one in *SBP & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618 (7 Judges) (Note No. 44)* in which the Apex Court after overruling its earlier decision in *Konkan Railway's case, (2002) 2 SCC 388* has held that power exercised by Chief Justice under Section 11 (6) of Arbitration & Conciliation Act, 1996 is judicial in nature. Decision in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla & Anr., 2005 (2) ANJ (SC) 487 (Note No. 48)* is also noteworthy which delineates about the liability of a Director of a Company for dishonour of cheque.

The concept of Coparcenary and consequently the stream of succession in Hindu Law stands very much altered with the latest amendments in the Hindu Succession Act,1956, which we are including in Part IV. An amendment in Madhya Pradesh Gram Nyayalaya Adhiniyam, 1996 also finds place in this part.

I hope that the Journal continues to retain its worth and utility so as to evoke your interest and enrich your knowledge in the field of law.

Thank you!

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HOISTING OF FLAG ON REPUBLIC DAY BY HON'BLE THE CHIEF JUSTICE SHRI A.K. PATNAIK IN THE HIGH COURT OF MADHYA PRADESH, JABALPUR
(26-01-2006)

OPENING OF THE CONFERENCE HALL OF JOTRI BY HON'BLE THE CHIEF JUSTICE SHRI A.K. PATNAIK ACCOMPANIED BY THE CHAIRMAN, HIGH COURT TRAINING COMMITTEE

PART - I

INAUGURAL ADDRESS BY HON'BLE SHRI JUSTICE A.K. PATNAIK, CHIEF JUSTICE, MADHYA PRADESH HIGH COURT AT THE DISTRICT JUDGES' CONFERENCE AT JABALPUR ON 25.2.2006

On behalf of the High Court of Madhya Pradesh, I welcome you all to this District Judges' Conference. In this inaugural address, I would like to tell you as to why we have called this conference of District Judges of the State of Madhya Pradesh.

Hon'ble the Chief Justice of India has addressed a letter dated 23rd December, 2005 asking me to initaiate steps for early disposal of different types of cases pending in the subordinate courts. He has mentioned in the said letter that to maintain the faith of society in the justice delivery system, it is imperative for us to take immediate steps for expeditious disposal of cases and he has suggested some measures for expeditious disposal of different types of cases pending in the subordinate Courts of Madhya Pradesh. During this conference, we would like to discuss with you the measures suggested in the said letter of Hon'ble Chief Justice of India and then work out the specific measures which are to be adopted in the State of Madhya Pradesh to dispose of the different types of cases mentioned in the letter.

After taking over charge as the Chief Justice of Madhya Pradesh High Court in October, 2005, I have been going round to different places in the State of M.P. and the Advocates and the Judicial Officers in all these palaces have been making a grievance that the existing yard-stick in terms of units prescribed by the High Court for disposal of different types of cases by judicial officers in the subordinate courts has been affecting the quality of justice. The yard-stick prescribed by the High Court is meant to ensure that Judicial Officers do the required amount of work without sacrificing the quality of justice. We would like to discuss with you the areas in which the existing yard-stick prescribed by the High Court in terms of units is affecting the quality of justice and as to how best the existing yard-stick could be rationalized to achieve the required quantity of disposal as well as the required quality of justice.

We have also received complaints from members of the Bar that the subordinate courts are refusing bails in deserving cases and are convicting the accused even where there is no evidence for such conviction apprehending that the High Court may initiate disciplinary proceedings against judicial officers if they grant bail or acquit the accused. Such conduct of the judicial officers will erode the confidence of the public in the justice delivery system and will

unnecessarily burden the High Court with bail petitions, revisions, appeals etc. We would like to discuss during this District Judges' Conference this particular compliant made by the members of the Bar throughout the State.

Several petty criminal cases as well as civil cases can be disposed of through alternative dispute resolution. In the State of Madhya Pradesh, Lok Adalats held under the Legal Services Authority Act, 1987 could be an effective mode to settle compoundable offences and petty civil disputes. We would like to discuss with you the feasibility and modalities of settling such criminal cases and civil cases through the Lok Adalats.

The State of Madhya Pradesh has 855 judicial officers and it is not possible for the High Court to supervise the work of each and every judicial officer of the State. Such supervision can only be possible through the District Judges of each district who should act as the eyes and ears of the High Court in his district. The District Judge acts as the Head of the Judiciary in the district and must have total supervisory control over the judicial officers working in the concerned district. He has to ensure that all the judicial officers working in the judiciary in his district are punctual in attending the Courts and do not rise from the courts before the time is over. He must ensure that there is no indiscipline amongst the judicial officers working under him. He has to ensure that the judicial officers do not leave the station or headquarters without the prior permission of the competent authority. He must intervene wherever the relationship between the Bar and the Judicial Officers gets bitter affecting the court work. Correct and prompt supervision by the District Judge will improve the work culture and bring about efficiency in the Subordinate Judiciary.

I have come to learn during my visits to different places that our Civil Judges Class II-cum-Magistrates appointed in 2003 lack the required experience and cannot properly decide the more difficult cases. The District Judges should ensure that they put in right amount of work. They should guide them in this regard wherever necessary. They must also have strict control over the ministerial staff in the different establishments of the subordinate judiciary and take prompt action against those who are corrupt. A separate paper on areas of administration which require your attention is being circulated to you all.

Before I conclude, I would like to remind you all that the reputation of the judiciary depends upon the integrity of the Judges manning the Judiciary and the ministerial staff aiding the work of the judiciary. Misconduct, misdemeanour, inefficiency and incompetence of such judicial officers and ministerial staff may tarnish the image of entire judiciary. I appeal to all of you to please ensure that the subordinate judiciary in Madhya Pradesh earns a reputation of providing speedy and unpolluted justice to the people of the State of Madhya Pradesh.

THE ART OF WRITING JUDGMENT

JUSTICE K.S. SHRIVASTAVA
Former Judge, High Court of A.P.

Though it is a vital thing for the litigants to know who ultimately wins and who loses, the losing party is also entitled to know why and how he has lost his case. Even he who wins is keen to know how the merits of his case has been recognised and how far he has scored. The final verdict or judgment, therefore, is required to be a well reasoned out solemn document which must satisfy this natural curiosity of the parties submitting themselves to be judged and governed by the law as administered by the law as administered by the judge. A finding based upon a process of reasoning, therefore, is the crux and very soul of every judgment.

A judgment in a civil or a criminal case, broadly speaking and under normal circumstances, consists of the following parts :-

1. Introductory: The nature of the case or the charge against the accused;
2. The admitted or undisputed facts, if any;
3. The statement of prosecution / plaintiff's case;
4. Plea or defence of accused / defendant;
5. Points for determination;
6. Reasons for the findings, i.e., discussion of evidence and other material on record, and,
7. The result, i.e. the operative part.

The opening words of a judgment should show in a few lines the nature of the dispute in civil cases or the offence with which the accused is charged in a criminal case, e.g. "The suit is for damages for malicious prosecution" or "for possession of the property fully described in plaint para-for mesne profits and injunction", or " The accused is charged of the offence punishable under section -for having committed...."

The purpose is to tell anybody reading it at the outset what the case is about. The opening para thus should state in the briefest possible way theme or nature of the dispute that one is called upon to decide.

The second or the next part should refer to the "admitted facts". It is necessary to grasp the distinction between "alleged facts" and "admitted facts". The "alleged" are those which one side puts forward and which are either denied or not admitted by the other side. These are to be proved by the side alleging them. The "admitted" facts are those which neither side disputes i.e.

those facts which are common to both. But only those admitted facts should be stated which are necessary to show the whole setting of the case.

The third and the fourth parts are very important. In civil cases, one should state only those material facts which are alleged by the plaintiff and then state in another para the facts denied by the defendant, including the specific defense raised by him. In other words, those material portions of the pleadings which have culminated in formulation of the points of controversy to be resolved (issues) need only be set out. Similarly, in a criminal case, while stating the prosecution story, it should be a simple narration of all relevant material facts or circumstances omitting unnecessary details.

Next comes the stages of formulation of the points for determination (Issue). In a civil matter, it is merely a reproduction of the issue already framed. So far as the criminal cases are concerned, the points to be formulated for discussion to some extent should comprise of facts alleged by the prosecution, the defense raised if any, and the ingredients of the charge levelled against the accused. Care should be taken that nothing that is material has been overlooked and any possibility of the judgment being assailed before the appellate authority on any such ground.

The most important part of the judgment is the discussion of each point/ issue and pronouncement of a clear positive finding thereon supported or based upon a sound reasoning. Maximum portion of the judgment, and by far the most important portion of it, must be devoted to the discussion of the evidence adduced by both the parties. Against each issue/point so formulated findings in brief should be entered which helps a reader in appreciating the discussion of the following paragraphs and at a glance he gets an idea of the entire structure.

At this stage it must be emphasised that unless the decision is first reached in your mind, never attempt writing of the judgment, for confused writing of judgment connotes the confused stage of mind. It would be worth – while; therefore, *spending more time in thinking out the logical sequence that in actually writing of judgment i.e.* "to begin without knowing what you are going to say and to leave off without knowing what you have said."

A reference to the witnesses is sometimes made by names and sometimes by numbers, which is as confusing as it is annoying. The desirable course, therefore, would be to refer them as far as possible by names and to mention the numbers in bracket e.g. Gopal (P.W.1). The documents should be referred to by the Exhibit numbers i.e. seizure memo. (Ex. P.1) or sale deed (Ex. P. 4). The property or muddemal in criminal cases should be referred to by their article numbers e.g., axe (Art2) or handkerchief (Art 3). Thus there should be some method or consistency while referring to the witnesses, documents and the articles. So also the reference to reported decision or precedents should be made

by names of the parties volumes and the page, e.g. *Kulsum Bai and another Vs. Kullu 2000 M.P.L.J. Page 1.*

What is expected in the discussion part is proper marshalling of the evidence. The discussion part of the judgment generally should be dominated not by mere narration of deposition of each and every witness but by marshalling of evidence. Marshalling means *grouping, the evidence to a particular point.* A reference to irrelevant or unnecessary evidence which is of no assistance for the determination of the point under discussion should be avoided. The conclusions must be based on the culminative effect of all the material and relevant evidence and having weighed all probabilities a judicial mind must echo." I may be wrong but I have no doubts.

The basic material difference between trial of a criminal case on one hand and civil case on the other is that the burden in a criminal case generally remains static from beginning to end and it remains on the prosecution, while in a civil case, it may be one-sided, may be divided or may be shifting from one side to the other as the trial proceeds and it is obviously because both the parties are required to unfold their respective versions on the points in controversy through their pleadings. As a matter of fact, when in a civil suit both the parties have led evidence, the question of burden of proof loses all importance. The prosecution, in a criminal case, has to prove the guilt of the accused beyond reasonable doubt. It is difficult to define the expression "reasonable doubt". All that can be said is that it connotes that degree of doubt which would prevent a reasonable and just man from coming to a conclusion of guilt. In the trial of civil case, however, the matters are decided by preponderence of evidence. Evidence may be defined very simply as "the means by which facts are proved". In deciding the credibility of a witness, three important points to be ascertained are 1. Whether they have a means of gaining correct information. 2. Whether they have any interest in concealing the truth. 3. Whether they have agreed in their testimony on material points. At times the evidence, though seemingly credible, may be conflicting or evenly balanced and has to be judged in the light of the probabilities, principles of human action and admitted facts. Suffice it to say that in considering whether a fact is proved or not, the court must primarily consider whether there is a requisite degree of probability of the fact having existed on a consideration or various matters properly brought before it and on an overall consideration of the facts and circumstances of individual cases without over straining the need for accuracy in the statement of witnesses.

There are cases based on circumstantial evidence alone and can be revealing under certain conditions as testimony of eye–witnesses. The essentials of circumstantial evidence to prove any offence thus are :-

1. Irrefutable circumstance, i.e. the circumstances of conclusive nature and tendency must be established from which conclusions are to be drawn;
2. All facts must be consistence with the hypothesis of the guilt of the accused.
3. The circumstance should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved.

It is well settled that the cumulative effect of all the circumstance must be such as to negative the innocence of the accused and bring an offence home to him beyond a reasonable doubt.

Direct evidence may suffer from infirmity of testimony. Likewise circumstantal evidence is prone to suffer not only from this infirmity but also from infirmity of inferences drawn by a judge. In believing or disbelieving the evidence and in drawing inferences, a Judge, therefore, has to act on his reason in conformity with his knowledge, observations and worldly experience.

A point that is obvious need not be laboured. So also copious citation of case laws on an obvious point also must be avoided. *One should first ascertain facts with accuracy before turning to the authorities.* The duty of presiding officer is to ascertain and follow the latest pronouncements of the Supreme Court or the High Courts.

Judgments must be broken up into paragraphs of reasonable length. Length of a paragraph ordinarily should not exceed 3/4 of the page. Repetition, diffuseness and prolixity should be avoided and one should try to be as brief as possible. But brevity should not be confused with obscurity.

At the end of the judgment, or in the operative part, the result of the decision should be expressed in clear and understandable language. It is always advisable to read the relevant section of the penal law before passing any sentence of conviction.

Lastly, needlessly violent language and abusive generalisation against police or any witness or a party should be avoided. No doubt, wickedness, trickery or unfairness on the part of any party or witness should be rightly commented upon and criticised but then what should linger on in the mind of reader must be, not the edge of such expressions but the judicial and equanimity of a Judge.

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INTERCOUNTRY ADOPTION

VED PRAKASH
Director, JOTRI

'Adoption' as defined in International Encyclopedia of Social Science (volume I page 96) 'is an institutionalized practice through which an individual belonging by birth to one kinship group acquires new kinship ties that are socially defined as equivalent to the congenital ties'. As per Law Lexicon (by P. Ramanatha Aiyer,2nd edition) adoption is 'the legal act whereby an adult person takes a minor into the relation of child, and thereby acquires the rights and incurs the responsibilities of a parent in respect to such minor.' Intercountry or transnational adoption is one in which parents domiciled in one nation adopt a child domiciled in another nation in accordance with the laws of the child's nation. Adoption may be either to fulfill the natural desire for a son/daughter as an object of affection and a protector in old age or for humanitarian motive for caring and bringing up an abandoned or destitute child.

Adoption is an important facet of Hindu Law. However, it is an alien concept to Muslim Law. The practice of adoption is also obtainable among the continent nations of Europe but it was unknown to common law of England prior to 1926 when Adoption of Child Act, 1926 gave this concept statutory recognition.

Intercountry adoption first became popular after World War II and escalated after the Korean Conflict because of the efforts of humanitarian programs working to find homes for children left orphaned by the wars. More recently, prospective parents from Western countries have turned to intercountry adoption as the number of healthy babies domestically available for adoption has steadily declined. According to the available statistics, in year 2000 around 18,000 children from other countries were adopted by persons living in U.S.A.. While the maximum number of children have been adopted from China, India finds itself in the list of such countries at eighth place. From 1991 to 1996 around 6,300 Indian children were adopted by foreign nationals.

No doubt the concept of intercountry adoption basically proceeds on the ground that an orphaned, deprived and destitute child should find a comfortable home and surroundings for his growth, however, it has been found that undesirable organizations or individuals are also active in the field of intercountry adoption with a view to trafficking of children and their misuse for inhuman purposes leading to their exploitation.

Article 39 (f) of the Constitution of India (as amended by 42nd Amendment of 1976) ordains the State to direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in condition of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

National Policy for the Welfare of the Children declares quite unequivocally that – 'The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programme should find a promi-

nent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve out larger purpose of reducing inequality and ensuring social justice.

Declaration regarding rights of the child adopted by General Assembly of the United Nations on 20th November, 1959 in its preamble says that – "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth" and that "mankind owes to the child the best it has to give.". Principle 9 of the Declaration states that – 'the child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be subject of traffic in any form'.

A convention on protection of children and co-operation in respect of intercountry adoption was held at Hague in 1993(commonly known as Hague Adoption Convention). In this convention a multilateral treaty was approved by 66 nations on 29th May, 1993 which aimed at protecting the children, the birth parents and adoptive parents in intercountry adoption and to prevent child trafficking and other abuses. By now many countries including the U.S.A. (Intercountry Adoption Act, 2000) have enacted law to govern and regulate intercountry adoptions.

Despite all these pro-child provisions and declarations in national and international arena, exploitation of children still continues unabated and one of the forms, most heinous in its nature, is trafficking of children under the veil of intercountry adoptions.

STATUTORY LAW :

It is apposite to state that In India efforts to enact a comprehensive law relating to adoption of children were started as early as in 1972. Adoption of Children Bill, 1972, which was introduced in Rajya Sabha in that very year, could not be passed because there was some opposition on the ground that it was considered to be an attempt to interfere with the Muslim personal law. Thereafter, another bill – Adoption of Children Bill, 1980 was introduced in Lok Sabha in December 1980 which contained an express provision that it will not apply to Muslims. This bill also could not take the shape of enacted law.

In the aforesaid background, Hindu Adoption and Maintenance Act, 1956, Guardians and Wards Act, 1890 and Juvenile Justice (Care and Protection of Children) Act, 2000 are required to be examined for considering the legal position regarding intercountry adoption.

As far as Hindu Adoption and Maintenance Act, 1956 is concerned, it basically deals with and regulates adoption of a Hindu child below 15 years of age provided he/she has not already been adopted. The adoptive parents must be Hindu. From the provisions of this Act it is quite clear that the Act may not apply in a situation where a foreign national who is not a Hindu wants to adopt a

destitute or orphaned child about whom it is also not clear that he or she is Hindu. Therefore, this Act may not be of any utility as far as intercountry adoptions are concerned.

Guardians and Wards Act, 1890 basically does not provide anything about adoption or intercountry adoption, rather it provides for appointment of guardian of the person or property of the minor and confers this jurisdiction on District Court as defined in Section 4 (5) (a) of the Act. Sections 7, 17 and 26 of this Act are relevant in this respect. Section 6 provides that where the Court is satisfied that it is for the welfare of the minor that an order should be made appointing a guardian of his person or property or both or declaring a person to be such a guardian, the Court may make an order accordingly. Section 17 provides that in appointing guardian of a minor, the court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor and in considering what will be for the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent and any existing or previous relations of the proposed guardian with the minor or his property. Section 26 provides that a guardian of the person of a minor appointed, by the court shall not, without the leave of the court by which he was appointed, remove the ward from the limits of its jurisdiction, except for such purposes as may be prescribed. The leave to be granted by the court may be special or general. The practice which has hitherto prevailed is to get oneself appointed as guardian of a child, and then with the permission of the court to accompany him or her to the country of destination.

Juvenile Justice (Care and Protection of Children) Act, 2000 in Section 41 provides for adoption of such children who are orphaned, abandoned, neglected or abused. Section 41 starts with the Clause that primary responsibility for providing care and protection for the child shall be that of his family. Sub- section 2 thereof says that – 'Adoption shall be resorted to for the rehabilitation of the children who are orphaned, abandoned, neglected or abused through institutional and non-institutional methods. Elaborate provisions to govern and regulate the process of adoption have not been made in the Act, therefore, Subsection 3 of Section 41 provides that the adoption can be in accordance with various guidelines issued from time to time by the State Governments. Jurisdiction to give child in adoption have been conferred on the Juvenile Justice Board which after carrying out such investigations as are required for giving children in adoption in conformity with guidelines issued by the State may pass appropriate order. Sub- section 5 and 6 of Section 41 stipulate other important conditions regarding adoption.

The aforesaid parameters laid down in Section 41 are not at all comprehensive; therefore, one is required to look into judicial pronouncements on this point.

JUDICIAL PRONOUNCEMENTS :

The Apex Court took cognizance of the issue relating to intercountry adoption in *Lakshmikant Pandey v. Union of India, (1984) 2 SCC 244* on the basis of a letter written by one Laxmi Kant Pandey,who complained of mal-practices indulged in by some social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The Court considered the problem at great length. The decision has referred to three classes of children:

(i) children who are orphaned and destitute or whose biological parents cannot be traced;

(ii) children whose biological parents are traceable but have relinquished or surrendered them for adoption; and

(iii) children living with their biological parents.

The third category has been expressly excluded from consideration as far as the decision is concerned "for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents". The reason being no parent with whom the child is living would agree to give a child in adoption unless he or she is satisfied that it would be in the best interest of the child.

The directions which have been given in the aforesaid decision are limited to the first and second categories of children with more stringent requirements being laid down in respect of children in the first category of cases. As far as adoption of children falling within the second category is concerned, the requirements are not so stringent. All that is required is that they (viz., the biological parents) should be properly assisted in making a decision about relinquishing the child for adoption, by the Institution or Centre or Home for Child Care or social or child welfare agency to which the child is being surrendered. Before a decision is taken by the biological parents to surrender the child for adoption, they should be helped to understand all the implications of adoption including the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child. In the aforesaid case it has further been mandated by the Apex Court that the biological parents should not be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision. But once the decision is taken and not reconsidered within such further time as may be allowed to them, it must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filing an application for appointment of the foreigner as guardian of the child. Thereafter, there can be no question of once again consulting the biological parents whether they wish to give the child in adoption or they want to take it back.

To ensure the compliance of the various directions issued by the Apex Court regarding inter country adoption, Central Adoption Resource Agency (CARA) was set up in June, 1990 by the Government of India under Ministry of Welfare. CARA functions as an autonomous agency and is required to eliminate all sorts of malpractices which may be there in inter country adoption. For initiating the process of intercountry adoption a no objection Certificate from CARA has to be obtained. A Home Study Report is also required to be enclosed with an application for adoption to be routed through a foreign and enlisted agency, which must be an enlisted agency in India with a copy of CARA. The Home Study Report is required to contain the following particulars:

(a) Social Status and family background;

(b) Description of Home;

(c) Standard of living as it appears in the Home;

(d) Current relationship between husband and wife;

(e) Current relationship between the parents and children (if any);

(f) Development of already adopted children (if any);

(g) Current relationship between the couple and the members of each other's family;

(h) Employment status of the couple;

(i) Health details such as clinical test, heart condition, past illness etc. (medical certificate etc.);

(j) Economic status of the couple;

(k) Accommodation for the child;

(l) Schooling facilities;

(m) Amenities in the Home;

(n) Reasons for wanting to adopt an Indian child;

(o) Attitude of grand-parents and relatives towards Adoption;

(p) Anticipated plans for the adoptive child;

(q) Legal status of the prospective adopting parents.

The report is required to be notarised which must in turn be attested either by an Officer of the Ministry of External Affairs or an Officer of the Justice or Social Welfare Department of the foreign country concerned or by an Officer of the Indian Embassy or High Commission or Consulate in that country.

The guidelines and directions issued by the Apex Court from time to time though to a large extent have reduced the malpractices involved in intercountry adoptions, still the need for a comprehensive legislation on the lines suggested by the Hague Convention is need of the hour. Till such a law is enacted, it is the duty of the Courts that the aforesaid guidelines should be complied with in letter and spirit so that the larger interests of the children are safeguarded in accordance with the constitutional requirements.

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MAKING OF A JUDGE

B.N. SAKSENA,
District Judge (Retd.)

Every man is not a Judge, though judge he must. What makes the difference is the aptitude and the equipment. A Judge has to have many eyes, bereft of the ego of the 'I', to be able to see diverse phases of human mind in true perspectives amidst conflicting versions, discrepancies and anomalies and consequent confusions, lest aspects relevant to exploration of truth may escape his vision and jeopardise dispensation of Justice. Like God, he is to be everywhere in all his expositions, but visible nowhere, his writ still having its sway all over.

Nature ingrains sense of justice in some and others acquire it by constant practice. For one who aspires to be a Judge, and not a mere decider of cases, has to cultivate this sense as a way of life, to become a trait of his character, to guide him as a beacon-light, when the occasion arises, onto the right path in the pursuit of justice.

Naturally, a Judge has to be a wise man. Ignorance cannot be a proper Judge. And wisdom comes by a continuous process of learning, unless God-gifted. Then, there is no limit of learning, and progress rests on receptability of mind. A closed mind closes the doors on the inflow of knowledge. Moreover, knowledge has no pedigree; it may come from any quarter, even from an ignorant or an upstarter. It is nobody's monopoly. Accordingly, it is naturally expected of a Judge to give a patient hearing to all without discrimination and without a frown on the face.

A Judge should ensure a fear-free atmosphere in the courtroom which may enthuse an aggrieved or his counsel to speak out his mind without inhibitions. While preserving decorum of the Court with due firmness, a Judge should bear a congenial disposition. His conduct should inspire confidence and not awe. Contempt of Court is a shield and not a sword, to be brandished as a mark of authority and power to command submission. Besides, a good Judge has also to keep in mind that as a Judge, he is not only a teacher of the Bar, but also a student of the Bar. Unless the Bar is good and strong, the Judge is likely to suffer and vice versa.

A Judge may do well to keep in mind that subtility is not a synonym of wisdom and uncalled for pedantry is often beset with risk of law being lost in language. It is, however, a different matter if dispensation of justice is conveyanced in appropriately attractive language without loss of precision.

Above all a Judge has to be a gentlemen in all circumstances, with intimate knowledge of human fairs, fouls and failings. He should keep his mind in proper balance, without a tilt on any side. He should never divorce humanism

from reason, as it is an integral part of justice, and a wise corollary of the well known saying that "Man is not made for laws. Laws are made for man." Similarly, a Judge should not hanker or run after popularity, let popularity follow him, tagged with his virtues. A manoeuvred popularity often tends to blur the vision and, in ultimate consequence, may derail justice.

Many a time people say that "Justice is blind;" if there is blindness anywhere, the blame lies either with the law or the legal system, or with the seekers or supporters of justice for their playing imposters, and lastly, the Judge being also not immune. The course of justice is not smooth; it has a lot of curves and blind turns as well. Its path is zig-zag, clouded with human prejudices and tarnished by a variety of temptations at various levels. With an astute mind and a clean conscience a Judge has to steer clear, as best as he can, out of the man-made chaos. That should be his honest endeavour.

It is of paramount importance that while moving among people a Judge should be cautious to avoid any sort of closeness, even an impression of closeness, with them, in order to maintain what in common parlance is known as "judicial aloofness", to safeguard his position as a Judge from being abused or exploited. Similarly, he should keep himself above narrow considerations of caste, creed, religion, groupism etc. He should so conduct himself that his very presence may inspire confidence. Like Caesar's wife, He should be above suspicion.

●

Keep away from people who try to belittle your ambitions. Small people always do that, but the really great make you feel that you, too, can become great.

- MARK TWAIN

"न्यायालय प्रशासन के वित्तीय पहलू"

आर.के.मिश्रा
प्राचार्य, ले.प्रशि. शाला, जबलपुर

न्यायालयीन कार्य व्यवस्था में प्रतिदिन सम्पन्न होने वाले वित्तीय संव्यवहारों के संदर्भ में शासकीय नियमों के प्रावधानों के विषय में पूर्व प्रकाशित अंक (जोती अक्टूबर 2005 भाग 1 पृष्ठ 196) में कुछ बिन्दुओं में जानकारी प्रकाशित की जा चुकी है। वित्तीय प्रशासन से संबंधित कुछ अन्य महत्वपूर्ण बिन्दुओं के संबंध में यहां विचार किया जा रहा है।

राशि जमा कैसे होगी :– म.प्र. कोषालय संहिता में वर्णित प्रावधानानुसार शासन की ओर से राशि अधिकृत अधिकारी द्वारा ही प्राप्त की जावेगी। राशि प्राप्त करने के संबंध में निम्नांकित प्रक्रिया होगी:–

(अ) राशि मनी रिसीप्ट बुक के माध्यम से सीधे प्राप्त की जा सकती है।

(ब) राशि चालान के माध्यम से सीधे बैंक में जमा कराई जा सकती है।

(स) यदि राशि चैक के माध्यम से प्राप्त की जा रही है तो मनी रिसीप्ट चैक समाशोधित (क्लीयरेंस) होने के उपरान्त ही जारी की जावे।

(द) किसी भी स्थिति में शासकीय कोष में राशि चालान के माध्यम से जमा होने पर क्रेडिट सर्टीफिकेट सिर्फ कोषालय अधिकारी ही जारी कर सकेंगे।

सिविल कोर्ट डिपाजिट (Civil Court Deposit) नियमन:– सिविल कार्ट निक्षेप राशियों के जमा/पुर्नभुगतान की प्रक्रिया म.प्र. के कोषालय संहिता भाग 1 के सहायक नियम 568 से 582 तथा उच्च न्यायालय म.प्र. के द्वारा जारी आदेश/निर्देश के अनुसार नियमित होगी।

प्राप्ति एवं पुनर्भुगतान :–

सिविल न्यायालय निक्षेप की राशि न्यायालय/दण्डाधिकारी द्वारा स्वयं या उनके द्वारा प्राधिकृत अधिकारी द्वारा प्राप्त एवं वापिस की जा सकेगी। (म.प्र. कोषालय संहिता भाग–1 सहायक नियम 570) इस तरह प्राप्त/वापिस राशियों का उल्लेख महालेखाकार को भेजे जाने वाले मासिक धन ऋण ज्ञापन में होना चाहिये।

किन्हीं परिस्थितियों में तत्काल वितरण हेतु प्राप्त की राशियों का नियंत्रण सहायक नियम 571 में वर्णित प्रावधानानुकूल होगा, जिसमें वर्णित है कि भले ही राशि तुरंत वितरण के लिये प्राप्त हुई हो किन्तु इसका लेखांकन "शैरिफ के लघुखाता" में किया जाना चाहिये। अल्प निक्षेपों को लेखबद्ध करने की विस्तृत प्रक्रिया जब कभी उच्च न्यायालय द्वारा महालेखाकार के परामर्श से तय व विनिर्धारित की जा सकती है।

सिविल न्यायालय निक्षेप (सी.सी.डी.) राशि की वापिसी:–

सिविल निक्षेप राशि की वापिसी हेतु निर्धारित प्रपत्र पर वापसी प्रमाणक सक्षम/प्राधिकृत अधिकारी द्वारा जारी किया जावेगा। वापसी आदेश जारी करते समय संधारित अभिलेखों से पुष्टि कर ली जावे कि वापसी योग्य राशि न्यायालय अभिलेखों में दर्ज है। वापसी आदेश ऐसे अधिकारी द्वारा जारी किया जावे जिसके अभिप्रमाणित नमूना, हस्ताक्षर कोषालय में उपलब्ध हों। सहायक नियम 578 में वर्णित

प्रावधानानुसार यदि निक्षेप की वापसी हेतु प्रमाणक उसके जारी होने के 15 दिवस के अंदर भुगतान हेतु प्रस्तुत नहीं किया जाता है तो जब तक कि वह विशेष रूप से नवकृत नहीं किया जाता है भुगतान नहीं किया जाना चाहिये। उन प्रकरणों में जिसमें संयुक्त हित जुड़ा है रु. 500/– से अधिक निक्षेप वापसी प्रमाणक यदि एक पावती स्टाम्प रसीद उस पर चिपका है यद्यपि उसको एक से अधिक व्यक्तियों द्वारा अभिस्वीकृत किया गया, पर्याप्त रूप से मुद्रांकित माना जावेगा। अर्थात वापसी भुगतान प्रमाणक में जो रू. 500/– से अधिक राशि जारी किया गया है उसमें एक रूपये का राजस्व स्टाम्प लगाकर पावती ली जानी चाहिये।

सिविल न्यायालय के नाजिर द्वारा भुगतान किये गये प्रमाणक पर उस कर्मचारी द्वारा अदा (Paid) मुद्रांकित होना चाहिये।

सहायक नियम 571 के अनुसार प्रतिलिपियों हेतु अग्रिमों के रूप में सिविल न्यायालयों द्वारा प्राप्त की गई अल्प राशियों तथा वापस हुई खुराक राशि एवं उससे की गई वापसियों को न्यायालय की प्राप्तियों एवं भुगतान की पंजी में सभी को प्रविष्टि नहीं किया जाना चाहिये। बल्कि इन संव्यवहारों के उपरान्त शेष राशि की प्रविष्टी किया जाना चाहिए। इन अग्रिमों को साथ–ही–साथ उन राशियों को जो दांडिक प्रकरणों में प्रतिलिपियों हेतु अग्रिमों के रूप में प्राप्त हुये हैं, उच्च न्यायालय द्वारा विहित प्रक्रिया के अनुसार संव्यवहारित किया जाना चाहिये।

सीधे न्यायालय द्वारा निक्षेप स्वीकार करना:–

यदि किसी जमाकर्ता को न्यायालय आदेशों के अधीन किसी राशि को कोषालय में जमा करने में कठिनाई/असुविधा प्रतीत हो उसे न्यायालय द्वारा सीधे प्राप्त किया जा सकता है। (म.प्र. कोषालय संहिता भाग–1 सहायक नियम 573)। प्राप्ति के बाद न्यायालय उस राशि को सीधे कोषालय भेजेगा। कोषालय अथवा उप–कोषालय से संलग्न उसी नगर का न्यायालय प्रतिदिन प्रेषण (रिमिटेन्स) भेजेगा। दूरस्थ स्थानों में स्थित न्यायालय नियत अंतरालों में प्रेषण (रिमिटेन्स) भेजने के लिये स्वतंत्र रहेंगे किन्तु अंतरालों में भेजे जाने वाले रिमिटेन्स के प्रकरणों में अधिकृत अधिकारी को प्राप्त राशियों के संबंध में सतत निगरानी रखनी चाहिये। उसी प्रकार जब किसी दावेदार को निक्षेप का पुर्नभुगतान प्राप्त करने हेतु कोषालय जाने में असुविधा हो तो न्यायाधीश उसे नगदी में अदा कर सकता है, बशर्ते न्यायालय में चालू निक्षेप प्राप्तियों से अथवा कार्यालय स्थायी अग्रिम से भुगतान करने हेतु पर्याप्त राशि (निधि) उपलब्ध हो।

उपरोक्त स्थिति में न्यायालय में सकल प्राप्तियों को कोषालय की ओर से प्रेषित (रिमिटेड) के समान बताया जाना चाहिये तथा किये गये भुगतान आदेशों द्वारा समर्थित होना चाहिये। यदि प्राप्तियां भुगतानों से अधिक है तो अधिक को नगदी में कोषालय में जमा किया जावेगा तथा यदि भुगतान प्राप्तियों से अधिक है तो कोषालय को आधिक्य का भुगतान न्यायालय को करना चाहिये जो कि इस तरह स्थायी अग्रिम लेखा की पूर्ति करेगा।

स्मरण रहे कि कोई भी स्थाई अग्रिम विशेषत: निक्षेप की वापसी हेतु न दिया जावे और न ही पृथक रखा जायेगा।

सिविल न्यायालय निक्षेप प्रारंभिक अभिलेख:–

म.प्र. कोषालय संहिता भाग–1 के सहायक नियम 577 के अनुसार सिविल न्यायालय निक्षेप (सी.सी.डी.) के संबंध में निम्नांकित अभिलेख संधारित किये जाने चाहिये:–

1. निक्षेप प्राप्तियों की पंजी – प्रपत्र एम.पी.टी.सी. 64

2. निक्षेप से किये गये भुगतान – प्रपत्र एम.पी.टी.सी. 65

(निक्षेप की वापसियों के लिये)

स्मरण रहे कि अदालती एवं गैर अदालती स्टाम्प के संबंध में पेनाल्टी से संबंधित राशि सी.सी.डी. में जमा नहीं की जावेगी।

3. आहरण एवं संवितरण अधिकारियों को ध्यान देने योग्य बातें:–

आहरण एवं संवितरण अधिकारी से तात्पर्य उस अधिकारी से है जो कोषालय देयक अथवा चैक के माध्यम से राशि का आहरण करता है एवं उसे संवितरित करता है। किसी भी आहरण संवितरण अधिकारी को पहली बार (जब नया कार्यालय प्रारंभ हो) कोषालय से आहरण प्रारंभ करने के लिये म.प्र. कोषा. संहिता भाग–1 के नियम 15 सी के अनुसार महालेखाकार द्वारा जारी प्राधिकारी पत्र की आवश्यकता होती है। यह प्राधिकार महालेखाकार द्वारा दो स्थितियों में जारी किया जाता है।

1. स्थायी प्राधिकार

2. अस्थायी प्राधिकार

स्थायी प्राधिकार असीमित अवधि के लिये वैध होता है जब कि दूसरी ओर अस्थायी प्राधिकार के माध्यम से अधिकारी 1 मार्च से 28 फरवरी तक की आहरण संवितरण कर सकते हैं। आहरण अधिकारी जब भी प्रथम बार कोषालय से आहरण आरंभ करेगा उसे मध्य प्रदेश कोषालय संहिता भाग–1 के सहायक नियम 157 में दी गई विहित प्रकिया द्वारा नमूना हस्ताक्षर कोषालय में प्रस्तुत (Specimen Signature) किसी वरिष्ठ अथवा अन्य अधिकारी जिसके आदर्श नमूना हस्ताक्षर कोषालय में पूर्व से ही उपलब्ध हो, के द्वारा अभिप्रमाणित करा कर कोषालय अधिकारी को चाहे गये प्रारूप में तीन प्रतियों में प्रस्तुत करना चाहिये।

जब कोई ऐसा अधिकारी अपने कार्यालय का प्रभार अन्य अधिकारी को सौंपता है, वह उसी प्रकार कार्यमुक्त करने वाले अधिकारी के नमूना हस्ताक्षर संबंधित कोषालय अधिकारी को अभिप्रमाणित कर भेजेगा, भेजे जाने वाले नमूना हस्ताक्षर अग्रेषित किये जाने वाले पत्र के अतिरिक्त एक कागज की शीट पर होने चाहिये। जिन्हें पत्र को अग्रेषित करने वाले अधिकारी द्वारा अभिप्रमाणित किये जाने चाहिये।

आहरण अधिकारी द्वारा संधारित किये जाने वाले अभिलेख:–

आहरण एवं संवितरण अधिकारी द्वारा निम्नांकित महत्वपूर्ण अभिलेख संधारित किये जाते हैं, इन्हें दो वर्गों में विभाजित किये जाने से समझने में सुविधा होगी।

1. आहरण हेतु संधारित अभिलेख

2. संवितरण एवं उसके बाद के अभिलेख

(1) आहरण हेतु संधारित अभिलेख:– प्रत्येक आहरण अधिकारी कोषालय से देयक/चैक के माध्यम से राशि का आहरण करता है। आहरण की सामान्य प्रक्रिया के तहत उसे कोषालय में देयक प्रस्तुत करना होता है। इस तरह कार्यालय में तैयार किये जाने वाले देयक, उसके कोषालय में प्रस्तुत कर राशि/चैक प्राप्त करने की प्रक्रिया में उपयोगी अभिलेख निम्नानुसार हैं:–

(अ) बिल रजिस्टर:– म.प्र. कोषालय संहिता भाग–1 के सहायक नियम 157 के अनुसार समस्त कार्यालय प्रमुखों को, जो उनके द्वारा हस्ताक्षरित देयकों पर कोषालय से धन का आहरण करने हेतु अधिकृत हैं, म.प्र. कोषालय संहिता भाग–2 प्रपत्र –17 दो पर देयक पंजी संधारित करना होगी। इस पंजी में प्रतिवर्ष देयक क्रमांक परिवर्तित किये जावेंगे अर्थात वित्तीय वर्ष से बिल क्रमांक 1 से प्रारंभ होगा। इस पंजी की विज्ञप्त (राजपत्रित) अधिकारी द्वारा मासिक समीक्षा की जावेगी, अर्थात कुल कितने देयक तैयार हुये उनमें से कितनों को कोषालय में प्रस्तुत किया गया एवं कितने देयक अन्य कार्यालय को पृष्ठांकित किये गये हैं।

बिल रजिस्टर में 1 से 17 कॉलम होते हैं इनमें से 1 से 4 तक के कॉलमों की पूर्ति तैयार देयक में हस्ताक्षर करते समय की जावेगी। कॉलम क्रमांक 5 से 17 तक के कॉलम कोषालय में देयक प्रस्तुत करने में, चैक प्राप्त होने एवं उसकी प्रविष्टी कैश बुक में होने के उपरान्त पूर्ण किये जायेंगे। इस कार्यवाही पर यथासमय आहरण एवं संवितरण अधिकारी को निगरानी रखनी चाहिये।

(2) बिल ट्राजिट बुक:– (बी.टी.बी.) म.प्र. शासन वित्त विभाग के परिपत्र क्रमांक 240/2003/ई/ चार, भोपाल दिनांक 29/09/2003 में निहित प्रावधानानुसार एकीकृत कोषालयीन कम्प्यूटराईजेशन परियोजना के अंतर्गत कोषालयीन प्रक्रिया में परिवर्तन के फलस्वरूप देयक प्रस्तुत करने हेतु प्रयोग में लाये जा रहे बी.टी.आर. (बिल ट्राजिट रजिस्टर) के स्थान पर नवीन व्यवस्था में बिल ट्राजिट बुक (बी.टी.बी.) का उपयोग दिनांक 01.10.2003 से प्रारंभ किया गया। प्रत्येक बी.टी.बी. सौ पृष्ठों की होगी। जिसमें प्रत्येक पृष्ठ के दो पर्ण होगें इसमें से एक पर्ण कोषालय द्वारा देयक प्रस्तुत करने के समय रख लिया जावेगा और प्रतिपर्ण बी.टी.बी. में ही रहेगा। इसका प्रदाय कोषालय के माध्यम से किया जावेगा जिसके लिये रू. 25/– का चालान लेखाशीर्ष:–

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101 लेखन सामग्री संबंधी प्राप्ति

बी.टी.बी. का मूल्य

में आहरण अधिकारी द्वारा जमा करना होगा। इसके प्रदाय के लिये निर्धारित मांग पत्र चालान की मूल प्रति संलग्न करते हुये कोषालय अधिकारी को अधिकृत वाहक के माध्यम से भेजा जावेगा। जब भी नई बी.टी.बी. का आरंभ किया जावे तो टी.सी.एस. प्रपत्र 3 पर निम्नानुसार प्रमाण पत्र अंकित करना होगा।

"प्रमाणित किया जाता है कि _____ (डी.डी.ओ. का पद नाम)_____
को दिनांक _____ को जारी की गई बिल ट्राजिट बुक क्रमांक _____ में से _____ तक कुल टोकन है। मेरे द्वारा इनकी गणना कर ली गई है एवं प्रमाणित किया जाता है कि पूर्व उपयोग में की जा रही बिल ट्राजिट बुक के समस्त टोकन का उपयोग कर लिया गया है अथवा निरस्त की जा चुकी है।"

इस प्रमाण पत्र में दायीं ओर आहरण अधिकारी के हस्ताक्षर होगें और वायीं ओर कोषालय अधिकारी इसे अभिप्रमाणित करेंगे। नये देयक नये बी.टी.बी. में दर्ज करने के पूर्व प्रमाण पत्र पर डी.डी.ओ. के हस्ताक्षर एवं कोषालय अधिकारी के प्रति हस्ताक्षर हो जाने चाहिये। प्रमाण पत्र बुक के पहले टोकन के प्रतिपर्ण के पिछले हिस्से में दर्ज किया जावे ताकि कार्यालयीन अभिलेख प्रमाणित हो सके।

(शेष अगले अंक में)

ACADEMIC ACTIVITIES OF J.O.T.R.I. - AN ANNUAL REPORT OF THE YEAR 2005

By Shailendra Shukla
Addl. Director

In the year 2005, thirty six courses were organized by Judicial Officers' Training and Research Institute, High Court of Madhya Pradesh, Jabalpur. The year 2005 being the 'Year of Excellence', a number of courses were organized at various District headquarters so as to avoid displacement of Judicial Officers in order to save their travelling time. In continuance of the practice of last year, this year also marked involvement of Officers of other departments such as Forest and Electricity etc. in order to obtain fruitful results at the stage of investigation as also to apprise them of the intricacies involved at the trial stage.

The training for each category of officers was imparted in different batches. The categories of officers/employees and their respective training sessions are enumerated below :

1. Training of Newly Recruited Civil Judges –

In the year 2004, 168 judicial officers were recruited in Civil Judge Class II cadre. These officers were imparted induction training in four phases. Some of the judicial officers, who joined on a later date, were imparted first phase institutional training and some others second stage institutional training during January and February as per the following details :

S.No.	Phase	No. of Participants	Days	Dates	Venue
1.	First phase	4	1 month	17.01.2005 to 26.02.2005	J.O.T.R.I
2.	Second Phase	5	1 month	27.01.2005 to 26.02.2005	J.O.T.R.I

2. Refresher Courses for Civil Judges Class I –

Refresher courses for Civil Judges Class I were organized in the year 2005 in separate batches so that all the officers of this cadre could be imparted training on relevant subjects triable by them.

These Refresher Courses were held respectively at Rewa, Gwalior, Indore, Jabalpur and at Bhopal.

The chart below depicts the details of the courses :

S.No.	Months	No. of Officers	Date	No. of Days	Venue
1.	January	50	20.01.2005 to 23.01.2005	4 days	Rewa
2.	February	50	17.02.2005 to 20.02.2005	4 days	Gwalior

3.	March	50	10.03.2005 to 13.03.2005	4 days	Indore
4.	March	50	17.03.2005 to 20.03.2005	4 days	abalpur
5.	April	50	07.04.2005 to 10.04.2005	4 days	Bhopal

These courses apart, a condensed course for forty two Civil Judges Class I was held at Jabalpur for sixteen days from 04.07.2005 to 19.07.2005.

3. Courses for Officers of HJS –

Advance Course training for officers of HJS in the year 2005 commenced in the form of an advance course for Fast Track Courts. This was followed by Refresher Courses for regular Additional District & Sessions Judges spread over the year. The chart below depicts the details of advance courses:

S.No.	Name of the course	Category of officers	No. of Officers	Date	No. of Days	Venue
1.	Advance Course	Fast track Court Judges	21	27.06.2005 to 02.07.2005	6	Jabalpur
2.	-do-	A.D.Js (1st Batch)	45	06.09.2005 to 10.09.2005	5 days	Jabalpur
3.	-do-	AD.Js (2nd Batch)	45	17.10.2005 to 21.10.2005	5 days	Jabalpur
4.	-do-	A.D.Js. (3rd Batch)	45	07.11.2005 to 11.11.2005	5 days	Jabalpur
5.	-do-	A.D.Js. (4th Batch)	50	05.12.2005 to 09.12.2005	5 days	Jabalpur

4. Training for Ministerial Staff –

In the year 2005, training for class II and Class III employees of the Judicial Branch of the High Court was continued under the aegis of the Hon'ble High Court. This apart, computer training was also imparted to the ministerial staff of the High Court. The chart below depicts the details of training imparted to ministerial staff :

S. No.	Category of employees	Type of training	No. of employees	Days	Date	Venue
1.	Class II and Class III of Judicial Branch of High Court	Job related training	50	2 days	08.01.2005 & 09.01.2005	J.O.T.R.I

2.	-do-	-do-	50	2 days	05.02.2005 & 06.02.2005	J.O.T.R.I
3.	Ministerial staff of High Court	Computer training	40 (20 employees each in two shifts of morning & evening)	1 month for both the shifts	29.07.2005 to 25.08.2005	Jabalpur
4.	-do-	-do-	30 (15 employees each in two shifts of morning & evening	-do-	02.09.2005 to 30.09.2005	Jabalpur
5.	-do-	-do-	-do-	-do-	14.10.2005 to 29.10.2005	Jabalpur

5. Training for Prosecution Officers –

It was being felt that the manner in which trials are conducted in criminal Courts often results in failure of justice at the altar. It was considered necessary that proper training be imparted to the prosecutors to make them conversant with legal and procedural intricacies in criminal trials and to bring about uniformity in the manner in which trials are conducted in general. The training was imparted to Prosecution Officers in different batches and the chart below depicts the details thereof:

S. No.	Category of Officers	No. of Officers	Name of the Course	No. of	Date days	Venue
1.	A.D.P.Os.	50	Training on Prosecution Methods & Skills	6 days	19.09.2005 to 24.09.2005	Jabalpur
2.	-do-	-do-	-do-	-do-	02.10.2005 to 07.10.2005	Bhopal
3.	-do-	-do-	-do-	-do-	21.11.2005 to 26.11.2005	Jabalpur
4.	-do-	-do-	-do-	-do-	19.12.2005 to 24.12.2005	Jabalpur

WORKSHOPS :

Various short duration workshops were organized in the year 2005 in diverse fields. These are enumerated as below :

i. Workshop on Family Laws and Gender Justice :

In the recent past Family Courts have been constituted in 7 Districts of the State which aim at realizing the objective of Family Courts Act, 1984, i.e. promoting conciliation and securing speedy settlement of disputes relating to mar-

riage and family affairs. A four days' Workshop-cum-Refresher Course on "Family Laws and Gender Justice" was organized in order to inculcate requisite degree of sensitization amongst the Presiding Officers so that they may deal with delicate issues involving matrimonial and family disputes. Disputes relating to adoption and other related matters were also exhaustively dealt with in this Workshop. The chart below depicts the details of the workshop:

S.No.	Category of Officers	No. of Participants	Duration	Date	Venue
1.	Presiding Judges Family Courts and ADJs dealing with matrimonial cases	Presiding Judges Family Court – 11 ADJs dealing with matrimonial cases – 14 **TOTAL 25**	4 days	15.8.2005 to18.8.2005	Jabalpur

ii. Workshops on Forest Laws :

A very high acquittal rate in forest cases was a pointer to the defects in investigational proceedings. A close study of sampled records of disposed of cases exposed that amongst other factors responsible for high acquittal rates, investigational lacunae were the major ones. In order to iron out these lacunae, it was considered proper to impart training to forest officers regarding the various investigational aspects. Judicial Officers were also included in these workshops so that they may be acquainted with finer aspects of forest laws and trials pertaining to them.

The first such workshop had already been held in the year 2004. In continuance of the pursuit, more workshops were held in the year 2005.

The chart below depicts schedule of workshops on Forest Laws :

S.No.	Category of Officers	No. of Participants	Duration	Date	Venue
1.	Judicial Officers & Forest Officers	70	1 day	06.03.2005	Rewa
2.	Judicial Officers & Forest Officers	70	1 day	03.04.2005	J.O.T.R.I
3.	Judicial Officers & Forest Officers	70	1 day	17.04.2005	Indore
4.	Judicial Officers & Forest Officers	75	1 day	01.05.2005	Bhopal
5.	Judicial Officers & Forest Officers	75	1 day	15.05.2005	Gwalior

iii. Workshops on Indian Electricity Act, 2003 :

The Indian Electricity Act, 2003 had many grey areas and contained provisions which were absolutely different from the earlier Act of 1948. It was con-

sidered necessary to bring about uniformity in the understanding of the various provisions of the Act amongst Special Judges appointed under the Act as also the Officers of the Electric companies. A number of workshops were therefore organized on the subject. Officers of the rank of D.S.P. were also included in these workshops in order to develop a sense of understanding and co-operation between the police agency and prosecuting electrical companies.

The chart below clearly depicts schedule of workshops on Indian Electricity Act :

S.No.	Category of Officers	No. of Participants	Duration	Date	Venue
1.	Officers of Electricity Co./ Spl. Judges, CJMs/police Officers of D.S.P. rank	63	1 day	10.07.2005	Jabalpur
2.	Officers of Electricity Co./ Spl. Judges, CJMs/Police Officers of D.S.P. rank	60	1 day	17.07.2005	Jabalpur
3.	Officers of Electricity Co./ Spl. Judges, CJMs/Police Officers of D.S.P. rank	60	1 day	24.07.2005	Indore
4.	Officers of Electricity Co./ Spl. Judges, CJMs/Police Officers of D.S.P. rank	60	1 day	07.08.2005	Ujjain
5.	Officers of Electricity Co./ Spl. Judges, CJMs/Police Officers of D.S.P. rank	60	1 day	17.09.2005	Bhopal
6.	Officers of Electricity Co./ Spl. Judges, CJMs/Police Officers of D.S.P. rank	60	1 day	09.10.2005	Gwalior

iv. Workshop on Procedural Aspects under N.D.P.S. Act, 1985 :

In the N.D.P.S Act, 1985, various amendments have been incorporated of late, which were important to be discussed with the Special Judges appointed under the Act in the light of pronouncements of Superior Courts so as to bring about uniformity in understanding the provisions of the Act.

The chart below depicts the schedule of the workshop on the subject :

S.No.	Category of Officers	No. of Participants	Duration	Date	Venue
1.	Special Judges (N.D.P. S.)	32	1 day	17.12.2005	Jabalpur

BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent by this Institute for discussion in the bi-monthly district level meeting of August, 2005. The Institute has received articles from various districts. Articles regarding topic no. 4 & 5 received from Morena & Neemuch, respectively, are being included in this issue. As we have not received worth publishing articles regarding remaining topics, i.e. topic no. 1, 2 and 3, therefore Institutional Articles are being published on topic no. 2 and 3. Topic no.1 shall be sent in future to the other group of districts for discussion:

1. Whether a person enlarged on bail by a superior Court can be re-arrested by police or taken into custody by Magistrate, if subsequently a more serious offence is made out against him regarding the same incident ?

   क्या वरिष्ठ न्यायालय द्वारा जमानत पर मुक्त व्यक्ति को उसी घटनाक्रम में प्रगट होने वाले अधिक गंभीर अपराध के लिये पुलिस द्वारा पुनः गिरफ्तार किया जा सकता है अथवा मजिस्ट्रेट द्वारा अभिरक्षा में लिया जा सकता है?

2. Nature and scope of jurisdiction exercisable by Human Rights Courts under the Protection of Human Rights Act, 1993?

   मानव अधिकार संरक्षण अधिनियम, 1993 के अन्तर्गत मानव अधिकार न्यायालय की अधिकारिता का स्वरूप एवं विस्तार क्या है?

3. Explain the procedure to be adopted by a Magistrate/Court when accused raises the plea of juvenility? Whether a finding recorded on this count by Magistrate/Court is binding on Juvenile Board?

   अभियुक्त द्वारा किशोरवयता का अभिवाक करने की दशा में मजिस्ट्रेट/न्यायालय द्वारा क्या प्रक्रिया अपनायी जानी चाहिये? क्या मजिस्ट्रेट/न्यायालय का तद्विषयक निष्कर्ष किशोर बोर्ड पर बंधनकारी है?

4. What is the jurisdictional competence of a Special Court regarding trial relating to an offence other than those covered by the Special Law, though committed in the same transaction?

   ऐसे अपराध के विचारण के विषय में विशेष न्यायालय की विचारण अधिकारिता का स्वरूप क्या हैं, जो विशेष अधिनियम के अन्तर्गत प्रावधित अपराध के साथ उसी घटनाक्रम में कारित हुआ है?

5. Whether a tenant is required to deposit time barred rent to have benefit of Section 12 (3) of the M.P. Accommodation Control Act, 1961 against eviction?

   क्या निष्कासन से बचाव हेतु म.प्र. स्थान नियंत्रण अधिनियम, 1961 की धारा 12(3) का लाभ प्राप्त करने के लिये किरायेदार को कालवाधित किराया जमा करना वांछनीय है?

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NATURE AND SCOPE OF JURISDICTION OF HUMAN RIGHTS COURT

Institutional Article
By VED PRAKASH,
Director, JOTRI

"Human Rights" as defined in Section 2 (d) of the Protection of Human Rights Act, 1993 (hereinafter referred to as 'the Act') mean "The rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution of India or embodied in the International Covenants and enforceable by courts in India."

The Act, which replaced the Human Rights Ordinance (No. 30 of 1993) was brought into force retrospectively with effect from 28.9.1993. It aims at better protection of human rights and to attain this objective provides for the constitution of National Human Rights Commission, State Human Rights Commissions and Human Rights Courts.

The Statement of Objects and Reasons relating to Protection of Human Rights Bill inter alia provided as under:

> "There has been growing concern in the country and abroad about issues relating to human rights. Having regard to these changing social realities and the emerging trends in the nature of crime and violence, Government has been reviewing the existing laws, procedures and system of administration of justice with a view to bringing about greater accountability and transparency in them and devising efficient and effective methods of dealing with the situation."

The aforesaid statement indicates that the Act was enacted to devise effective methods for dealing with the situation of violation of human rights in view of the emerging trends in nature of crime and violence relating to violation of human rights.

Section 30 of the Act, which finds place in Chapter VI entitled "Human Rights Courts" provides for constitution of Human Rights Courts with the object of speedy trial of 'offences arising out of violation of human rights'. Section 30 runs as under:

> "30. Human Rights Court
>
> For the purpose of providing for speedy trial of 'offences arising out of violation of human rights', the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a Court of Session to be a Human Rights Court to try the said offences:

Provided that nothing in this section shall apply if –

(a) a Court of Session is already specified as a special court; or

(b) a Special Court is already constituted,

for 'such offences' under any other law for the time being in force."

Section 31 provides that the State Government shall by notification specify a Public Prosecutor or appoint an advocate as Special Public Prosecutor for the purpose of conducting cases in Human Rights Courts.

Section 37, which finds place in Chapter VIII, further provides for constitution of special investigation team by the Government for purposes of 'investigation and prosecution of offence, arising out of violations of human rights'.

The State Government in exercise of powers conferred by Section 30, vide notification dated 9th September, 1996 published in Madhya Pradesh Gazette dated 27.9.1996, has specified the Court of Sessions Judge in each Sessions Division of the State as Human Rights Court and has further specified all the Public Prosecutors as Special Public Prosecutors for the purpose of conducting cases in Human Rights Courts. Under Section 18 (1) the Human Rights Commission enjoys power to recommend to the concerned Government or Authority for initiation of proceedings for prosecution against public servants violating human rights.

PROBLEMS:

Though Human Rights Courts have been specified and Special Public Prosecutors for such Courts have also been specified in the State of Madhya Pradesh but it is not clear as to what constitutes 'an offence arising out of violation of human rights'.

The expression 'offences arising out of violation of human rights', as used in Section 30 of the Act has not been defined or elaborated anywhere in the Act. The definition of 'human rights' as contained in Section 2 (d) of the Act is, no doubt, quite exhaustive. However, every violation of human rights cannot be brought within the fold of expression 'offence arising out of violation of human rights' because all the fundamental rights as contained in Part III of the Constitution of India come within the ambit of human rights. (See – *Paramjit Kaur v. State of Punjab & Ors., AIR 1999 SC 340*) and by no stretch of reasoning it can be said that violation of every fundamental right would constitute an independent offence. In *J.P. Ravidas & Ors. v. Navyuvak Harijan Utapan Multi Unit Industrial Co-operative Society Ltd. & Ors, AIR 1996 SC 2151* the Apex Court resorting to Article 25 (1) of the Universal Declaration of Human Rights, 1948, which provides that even one has right to food, clothing and housing, held that right to residence is one of the fundamental and human rights under Article 21 read with Article 19 (1)(e) of the Constitution to those persons who cannot afford to purchase a site and to construct flats thereon.

In *Muralidhar Dayandeo Kesekar v. Vishwanath Pandu Barde, 1995 Suppl. (2) SCC 549* the Apex Court has held that right to economic empowerment of the Scheduled Tribes as enshrined under Article 46 of the Constitution of India is a fundamental human right in the light of Articles 1, 3, 17, 22 and 25 of the Universal Declaration of Human Rights, 1948. In *Tahsi Delek Gaming Solutions Ltd. & anr. v. State of Karnataka, Civil Appeal No. 7308, 7309/2005,* decided by the Apex Court on 8.12.2005 right to access to justice and in *Dwarika Prasad Agrawal (Dead) by L.Rs. v. B.D. Agrwal & Ors, AIR 2003 SC 2696* right to get a fair trial have been held to be basic fundamental human rights. Indeed violation of all these rights can not by itself constitute an offence in each case.

In view of the above, whether violation of a human right will constitute a punishable offence or not shall have to be decided on the basis of general criminal law. *Ex consequentie*, it can well be said that the Act does not create any new offence.

Here it is noticeable that section 4 (2) of the Code of Criminal Procedure provides that all offences under any other law (other than IPC) shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions (that is the procedure prescribed in Cr.P.C.), but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Clearly enough the Act nowhere provides anything regarding manner or place of investigation, inquiry and trial, etc. of the offences triable by the Special Court under the Act.

This brings us to the question as to whether an offence involving a violation of human rights shall be triable exclusively by the Human Rights Court or that the Court of competent jurisdiction under Cr.P.C. and a Human Rights Court shall have concurrent jurisdiction. This problem in fact emerges because Section 30 does not envisage exclusive jurisdiction of Human Rights Courts nor the provisions of this section are worded in the manner so as to give them an overriding effect. This issue was considered by Madras High Court in *Tamilnadu Pazhangudi Makkal Sangam v. State of Tamilnadu, Criminal Revision No. 868/ 1995, decided on 23.06.1997.* Examining the ambit and scope of Section 30 of the Act, the Court held that the Human Rights Court will have jurisdiction to try all such offlences even if such offences fell within the jurisdictional competence of the Magistrate.

The next problem which requires consideration relates to the mode of cognizance by Human Rights Court in respect of offences involving violation of human rights. The Act is silent about the mode of taking cognizance. This issue was also considered by the Madras High Court in *Tamilnadu Pazhangudi Makkal Sangam's case (supra)* and it was held that a Human Rights Court will have original jurisdiction to try all cases of violation of human rights notwithstanding their classification into various categories of offences. The Court was of the view that the Human Rights Court may try a case according to Summons Trial/ Warrant Trial/Sessions Trial depending upon the classification of the offences. However, in *Gangula Ashok v. State of A.P., (2000) 2 SCC 504* the Apex Court

has made it very clear that whenever Sessions Court has been declared as Special Court under some special law then such Court retains its character as Sessions Court and unless the Act specifically empowers such Court to take cognizance without committal, it is only on the committal of the case under Section 209 of Cr.P.C. that such Court can take cognizance of the case. In the background of this pronouncement and looking to the fact that Court specified u/s 30 is essentially a Court of Session; it will not have any jurisdiction to take cognizance of any matter directly, meaning thereby to proceed with the matter it will be necessary that the case is filed before the Court of competent Magistrate and the Human Rights Courts shall have the jurisdiction take cognizance only after committal of such case to it.

In *A. Govardhan Reddy v. S.P., Adilabad Distt, 1997 (5) ALD 761* a person in police custody, who was accused of an offence, was allegedly beaten by a Sub-Inspector. The person approached the Magistrate and prayed for registering a case against the Sub-Inspector. The prayer was however refused. The accused person approached the High Court for issuing a direction to register a criminal case for violation of human rights against the Sub-Inspector. The Court was of the view that the accused persons should have lodged a complaint before the human rights Court constituted u/s 30 of the Act because it has the jurisdiction to decide the same in accordance with the law. In appeal the Division Bench of the High Court agreed with this view and held that in the absence of any special procedure for trial of such offences a Human Rights Court will have to follow the procedure prescribed under the Code of Criminal Procedure. The Court further held that as the Human Rights Court was the Court of Session, it does not have original jurisdiction and hence all complaints will have to be filed before the Magistrate for committal proceedings u/s 209 of Cr.P.C.

INVESTIGATION:

Though Section 37 provides that Government may constitute special investigating team for investigating offences arising out of violation of human rights but so far no such team has been constituted in the State. In absence of any provision in the Act prescribing a special procedure of investigation the police shall have the general powers of investigation under Cr.P.C. In non-cognizable cases it will be only by way of complaint that the matter can be initiated. Here also there may be some problem because it is nowhere provided in the Act as to who can lodge the complaint in connection with offences arising out of violation of human rights.

What can be culled out from the aforesaid discussion is that basically violation of human rights will constitute an offence only if the act complained of has already been specified as an offence in some law. The case may be investigated by the police if it is cognizable and in case of non-cognizable case a complaint may be filed. However, the case must be presented before the Magistrate. Human Rights Court can take cognizance of such case and proceed with it only after committal.

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JURISDICTION OF COURTS REGARDING DETERMINATION OF JUVENILITY

Institutional Article
By VED PRAKASH,
Director, JOTRI

Juvenile Justice (Care & Protection of Children) Act, 2000 (hereinafter referred to as 'the Act'), *inter alia* provides for protection and trial of 'juveniles in conflict with law' i.e. a juvenile who is alleged to have committed an offence. As per Section 2 (k) 'Juvenile' means a person who has not completed 18 years of age. 'Juvenile Justice Board' constituted u/s 4 of the Act has exclusive jurisdiction u/s 6 (1) of the Act to deal with all proceedings relating to 'juvenile in conflict with law'.

The question of age of the person claiming to be a juvenile ultimately relates to the jurisdiction of the Court because if the person is found to be a juvenile, then a Court of ordinary jurisdiction under the Code of Criminal Procedure, 1973 shall stand deprived of its jurisdiction and the matter will come within the exclusive jurisdiction of the Board constituted under Section 4 of the Act.

In *Gopinath Ghosh v. State of West Bengal, AIR 1984 SC 237,* the Apex Court while dealing with the case, in which question of juvenility was raised before it for the first time, observed that whenever a case is brought before the Magistrate and the accused appears to be aged 21 years or below, before proceeding with the trial or undertaking an inquiry, an inquiry must be made about the age of the accused on the date of the occurrence. This ought to be more so where special Acts dealing with juvenile delinquent are in force.

In *Bhola Bhagat v. State of Bihar, AIR 1998 SC 236* the Apex Court has further clarified the obligation of the Court in this respect in the following terms:

> "Keeping in view the beneficial nature of the socially oriented legislation, it is an obligation of the Court where such a plea is raised to examine that plea with care and it cannot fold its hand and without returning a positive finding regarding that plea, deny the benefit of the provisions to an accused. The Court must hold an inquiry and return a finding regarding the age, one way or the other. We expect the High Court and subordinate Courts to deal with such cases with more sensitivity, as otherwise the object of the Acts would be frustrated and the effort of the legislature to reform the delinquent child and reclaim him as a useful member of the society would be frustrated."

From the aforesaid it is crystal clear that the Courts are under an obligation to consider the plea of an accused claiming himself to be a juvenile and may not escape from their responsibility. Therefore, the question arises as to what course should be adopted by a Court when a question regarding juvenility of a person is raised before it or a person brought before it appears to be a juvenile.

Various situations in which a Court shall be required to consider the question of juvenility may be summed up as under:

(1) Before the Court of Magistrate:

(a) When matter is at remand/pre-cognizance/bail stage

(b) After submission of charge-sheet in a case triable by a Court of Session.

(c) In a case triable by the Magistrate itself.

(2) Before the Court of Session:

(a) While considering an application of bail u/s 439 Cr.P.C.

(b) In a case received by it after committal in which Magistrate has recorded the opinion that the accused is not a juvenile.

(c) In a case in which Magistrate initially forwarded the case to the Board with the opinion that accused appears to be a juvenile but the Board after enquiry did not find him to be juvenile and the case being exclusively triable by Sessions Court was committed to it.

Before proceeding with the analysis it may be worthwhile to have a look at the relevant provisions of the Act. Section 7 of the Act which is in *pari materia* of Section 8 of the Juvenile Justice Act, 1986 (since repealed) provides the procedure to be followed by a Magistrate for recording an opinion regarding juvenility of a person brought before it. It runs as under :

> **S.7 Procedure to be followed by a Magistrate not empowered under the Act.—(1)** When any Magistrate not empowered to exercise the powers of a Board under this Act is of the opinion that a person brought before him under any of the provisions of this Act (other than for the purpose of giving evidence), is a juvenile or the child, he shall without any delay record such opinion and forward the juvenile or the child and the record of the proceeding to the competent authority having jurisdiction over the proceeding.
>
> (2) The competent authority to which the proceeding is forwarded under sub-section (1) shall hold the inquiry as if the juvenile or the child had originally been brought before it.

Section 6 of the Act which confers exclusive jurisdiction on Juvenile Justice Board regarding all the proceeding relating to 'juvenile in conflict with law' is also apposite here because sub-clause (2) of it provides that High Court and the Court of Session may also exercise the powers of the Board in appeal, revision or otherwise. It runs as under:

> "**S.6 (2)** The powers conferred on the Board by or under this Act may also be exercised by the High Court and the

> Court of Session, when proceeding comes before them in appeal, revision or otherwise."

Here it is noteworthy that Section 49 of the Act confers upon the Board the power to determine about the juvenility of an accused brought before it.

COURT OF MAGISTRATE

If the issue of juvenility comes before the Court of Magistrate in the situations contemplated above in 1 (a), 1 (b) and 1 (c) then provisions of Section 7 (1) of the Act (extracted hereinabove) shall be squarely applicable.

Considering the scope of Section 8 of the Juvenile Justice Act, 1986 (in pari materia with Section 7 of the Act) our own High Court in *Dhanna alias Karia v. State of M.P., 1996 (2) MPLJ 235* has observed as under:

> "Under the Act, if the circumstances exists, **firstly,** the person brought before Magistrate appears to be child, **secondly,** he is brought before him under the provisions of the Act otherwise than for the purpose of leading evidence and **lastly** when the Magistrate is not empowered, then the magistrate is required to record his opinion and to forward the child to the competent authority."

Interpreting Section 8 (1) of the Act of 1986 it was held in *Suresh Agrawal v. State of M.P., 1998 (1) JLJ 274* that :

> "...the Magistrate is under an obligation to record an opinion and if he is satisfied that the accused is a delinquent juvenile he would refer the case to the Juvenile Court and thereafter the Juvenile Court shall proceed with the matter in accordance with the Section 8 (2) of the Act, and after conducting the inquiry determine the age and such determination shall have the presumption of correctness under section 32 of the Act."

From the aforesaid it is clear that whenever a person is brought before a Magistrate except as a witness, and he appears or claims to be a juvenile, then the Magistrate is required to record an opinion regarding juvenility of such person. This may be in remand proceedings, bail proceedings, committal proceedings or during trial of a case.

If the Magistrate has recorded an opinion u/s 7 (1) that a person brought before him is a juvenile, such Magistrate, obviously will forward the case to the Board and the Board will have to conduct an inquiry under Clause (2) of Section 7 r/w/s 49 of the Act as if such person had originally been brought before it. This finding in view of Section 49 of the Act is final and cannot be challenged before Magistrate if the case is sent back to him by the Board because the person has not been found to be a juvenile. However, such an order of the Board can appropriately be challenged u/s 52 of the Act by way of appeal before the Court of Session.

If the Magistrate comes to the conclusion that the person brought before him is not a juvenile then the Magistrate can proceed with the case and may commit it to the Sessions Court if it is triable exclusively by the Court of Session or may try it himself if it is triable by the Court of Magistrate.

COURT OF SESSION

Section 7 (1) stipulates only the course to be followed by a Magistrate. It does not provide as to what course shall be adopted by a Court other than the Court of Magistrate when an accused person appears or is brought before it and such person appears to be a juvenile or claims to be a juvenile and seeks to be tried by the Juvenile Justice Board. Again no express provision is there in the Act to indicate the course to be adopted by a Sessions Court when the plea of juvenility is taken before it during the hearing of a bail petition u/s 439 of the Code. Whether the Sessions Court can proceed to determine the age of such person by holding an inquiry in exercise of the power conferred on it u/s 6 (2) of the Act which empowers it to exercise the powers of the Board when the proceedings come before it in appeal, revision or otherwise? Whether the proceeding relating to bail can be categorized as 'a proceeding' covered by Section 6 (2)?

When the case comes before Sessions Court after committal the plea of juvenility can again be raised before it though it was unsuccessfully raised before the Magistrate. The Sessions Court may also be inclined in appropriate cases to consider whether the person brought before him is a juvenile though no such plea is raised by the accused.

The issue relating to the competence of the Sessions Court to consider the question of juvenility of an accused in a trial pending before it was considered by our own High Court in *Sunil v. State of M.P., 2001 (2) MPHT 102.* With reference to Section 7 (3) of the Juvenile Justice Act, 1986 which was in identical terms with that of Section 6 (2) of the Act.The Court held that Section 7 (3) of the Act has conferred the power of the Board on the High Court and Court of Session when a proceeding comes before them 'in appeal, revision or otherwise'. The Court opined that it is very clear from the use of word 'otherwise' in sub-section (3) of Section 7 of the Act of 1986 that in case a matter is pending before the Court of Session for trial, then it is authorized to exercise the powers conferred upon the Board or Juvenile Justice Court under Section 32 (1) of the Act of 1986. In other words, under Section 32 (1) of the old Act the Court of Session had the jurisdiction to hold enquiry regarding age of an accused in a trial pending before it.

In view of the above it is amply clear that a Sessions Court which has received the case after committal has the jurisdiction to examine the question of juvenility if the matter has come directly to it without being forwarded to the Juvenile Board irrespective of the fact that the committal Magistrate considered it or not. However, if the Magistrate forwarded the case to Board u/s 7 (1) and the Board recorded a finding u/s 7 (2) r/w/s 49 to the effect that the person is not a juvenile, consequently returning back the case to the Magistrate and the same being committed by the Magistrate to the Court of Session then inter-

ference by Sessions Court in the finding recorded by the Juvenile Board would not be permissible because the order of the Board could only be challenged u/s 52 before the appellate forum, i.e. the Sessions Court by way of appeal. (See – *Anjali Benarjee v. Ajad Kumar Ratha, 2003 (4) MPLJ 40.*)

The finding recorded by the Sessions Court regarding juvenility in exercise of the powers u/s 6 (2) of the Act may be either in the negative or positive. If it is a finding against the person then the Sessions Court will have to proceed with the trial. However, the question arises, that if the finding is in positive, meaning thereby, such person is found to be a juvenile then whether the proceedings should be forwarded along with such person directly to the Juvenile Court, which is a course prescribed for the Magistrate u/s 7 (1) of the Act or the charge-sheet be returned to the police for being submitted before the Board. In *State of M.P. v. Dilip and Ors, 2002 (2) MPHT 564,* the later course has found approval of the Court.

Here the question arises whether the Board has the jurisdiction to re-determine the juvenility of the accused who has already been declared juvenile by the Sessions Court. The answer may be in negative for two reasons – Firstly, the Sessions Court has decided the issue of juvenility in exercise of the powers of the Board conferred on it u/s 6 (2) of the Act. Hence reconsideration of the same will be a futile exercise. Secondly, it may be against propriety that a lower forum attempts to re-determine what has already been decided by the superior Court. The issue in this very perspective was considered by Allahabad High Court in *Naseem v. State of U.P., 1995 All LJ 1473.* The Court observed as under:

> "If the High Court or the Court of Session holds an inquiry and declares that the accused is a juvenile, it can make further order to separate the case of the juvenile and refer to the Juvenile Court and can also grant bail to the juvenile or refer the bail application also to the Juvenile Court for grant of bail. However, if the High Court or the Court of Session, as the case may be, immediately records its opinion **'without holding an inquiry'** on evidence that the applicant appears to be juvenile on the basis of visual perception or on the basis of some document and then directed the Juvenile Court to make an inquiry as to the age of the applicant whether he is a juvenile or not, only then the Juvenile Court on receipt of the records will proceed to hold an inquiry about the age under S. 32 of the Act. It is crystal clear that the Juvenile Court will not hold an inquiry again as to the age of the person whether he is a juvenile or not after the High Court or the Court of Session, as the case may be, has already held the inquiry and after receiving evidence has recorded a finding declaring the person as a juvenile."(emphasis supplied)

The question remains as to whether the Sessions Court can examine the issue of juvenility while hearing an application for bail u/s 439. Before delving

deep into this question it is noticeable that Section 7 (1) which confers power on Magistrate to record opinion about juvenility does not limit its power to cases pending for trial or committal. Rather it includes all cases where a juvenile is brought before it except for the purpose of deposing before it (See Section 7 (1)). If a Magistrate can determine the age u/s 7 (1) while considering bail, which power has not been excluded u/s 7 (1) then why a Sessions Judge may not have this power while considering bail? The expression 'proceedings' used in Section 6(2) will no doubt include a proceeding u/s 439 of the Code.

The question is whether the Court should exercise this power itself and hold an inquiry regarding age or should advise the applicant to approach the Court of Magistrate who has the power to record opinion about age u/s 7 (1) of the Act. No doubt, the Sessions Court can itself hold an inquiry to find out whether the person claiming to be a juvenile is a juvenile or not because a proceeding for grant of bail u/s 439 is also a proceeding within the meaning of Section 6(2) of the Act, but if the Sessions Court embarks upon such a course then it will have to conduct the inquiry as per Section 49 and in such inquiry may also be required to record statements of witnesses though not necessarily in every case. However, the preferable course may be to advice the applicant to approach the Court of Magistrate who u/s 7 (2) of the Act who may record an opinion in this respect and proceed thereunder as explained above.

CONCLUSION

On the basis of aforesaid analysis, the legal position can be summed up as under:

1. Whenever a person is brought before a Magistrate in a proceeding of remand, bail, committal or trial, who appears to be a juvenile or claims to be a juvenile, the Magistrate as per Section 7 (1) of the Act should record his opinion regarding juvenility of such person.
2. If the Magistrate finds such that person is a juvenile then he should forward him along with the record of the cases to Juvenile Justice Board. The Board u/s 7 (2) of the Act should proceed to hold an inquiry irrespective of the opinion recorded by the Magistrate.
3. The finding of the Board is final subject to appeal u/s 52 of the Act and cannot be interfered with even by the Sessions Court unless the matter has come before him in appeal.
4. If the Magistrate finds that such person is not a juvenile then he can proceed with the matter or commit the case as the case may be.
5. The Court of Session, when the matter comes before it after committal or in a petition for bail u/s 439, has jurisdiction to decide about the juvenility provided it has not earlier been decided by the Board. In case of independent proceeding for bail the Sessions Court may also advise such person to approach the Court of Magistrate and the Magistrate, who has jurisdiction to record opinion about juvenility u/s 7 (1) of the Act.

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विशेष अधिनियम में प्रावधित अपराध से भिन्न अपराध के विचारण के विषय में विशेष न्यायालय की विचारण अधिकारिता

न्यायिक अधिकारीगण
मुरैना

विशेष न्यायालय की विचारण अधिकारिता के स्वरूप पर विचार किये जाने के सन्दर्भ में सर्वप्रथम सामान्य विधि के उपबंध अवलोकनीय हैं। इस क्रम में दण्ड प्रक्रिया संहिता, 1973 की धारा–4 सुसंगत है जो भारतीय दण्ड संहिता और अन्य विधियों के अधीन अपराधों के विचारण के विषय में प्रावधित करती है। धारा–4 निम्नवत् है:–

धारा – 4 (1) – – –

(2) किसी अन्य विधि के अधीन सब अपराधों का अन्वेषण, जांच, विचारण और उनके संबंध में अन्य कार्यवाही इन्हीं उपबंधों के अनुसार किन्तु ऐसे अपराधों के अन्वेषण, जांच विचारण या अन्य कार्यवाही की रीति या स्थान का विनियमन करने वाली तत्समय प्रवृत्त किसी अधिनियमित के अधीन रहते हुए, की जावेगी।

उपर्युक्त उपबंधों की व्याख्या करते हुए माननीय सर्वोच्च न्यायालय ने न्याय दृष्टांत *विवेक गुप्ता विरूद्ध सेन्ट्रल ब्यूरो ऑफ इन्वेस्टीगेशन एवं एक अन्य, (2003) 8 एस.सी.सी. 628* में यह प्रकट किया है कि यदि किसी अपराध, घटना के न्याय प्रशासन बाबत् यदि कोई विशेष कानूनी उपबंध है तो वहां सामान्य विधि के सिद्धांत आकर्षित न होकर विशेष विधि के प्रावधान अध्यारोही प्रभाव रखते हैं। इससे यह स्पष्ट हो जाता है कि विशेष अधिनियम के तहत् गठित विशेष न्यायालय की विचारण अधिकारिता में विशेष अधिनियम के उपबंध विचारणीय होंगे।

विशेष अधिनियम में प्रावधित अपराध के साथ यदि उसी घटनाक्रम में कोई ऐसा अपराध घटित होता है जो कि उस विशेष अधिनियम के अन्तर्गत विशेष न्यायालय द्वारा अनन्य रूप से विचारण योग्य नहीं हैं तो उसका विचारण किस न्यायालय द्वारा किया जावेगा, इस बिन्दु को विधायिका द्वारा विधान निर्माण के समय ध्यान में रखकर अभी तक के विधानों की विरचना की गयी है। सामान्यतः अधिकांश विशेष अधिनियमों में विशेष न्यायालय की अधिकारिता विषयक यह प्रावधान मिलता है कि ऐसा न्यायालय उसी घटनाक्रम में हुए अपराधों का भी विचारण कर सकता है। ऐसे अधिनियमों में कुछ प्रमुख अधिनियम निम्नवत् हैं:–

1. स्वापक औषधि एवं मनोत्तेजक पदार्थ अधिनियम, 1985 की धारा 36–ए उप धारा (2)
2. आतंकवादी एवं विघटनकारी गतिविधि निवारण अधिनियम, 1987 की धारा 12
3. सती निवारण अधिनियम, 1987 की धारा 12

4. भ्रष्टाचार निवारण अधिनियम, 1988 की धारा 4 उप धारा (3)

5. म.प्र. डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, 1981 की धारा 7 उप धारा (2)

वही इसके विपरीत विद्युत अधिनियम, 2003, जिसके अन्तर्गत इस अधिनियम में वर्णित कुछ अपराधों के विचारण हेतु विशेष न्यायालय के गठन का उपबंध धारा–153 में किया गया है, में ऐसा कोई उपबंध नहीं है कि ऐसा विशेष न्यायालय उसी घटनाक्रम में हुए ऐसे अपराध का विचारण करने की अधिकारिता भी रखेगा, जो इस अधिनियम के अधीन अनन्य रूप से ऐसे न्यायालय द्वारा विचारण योग्य नहीं है। इसके विपरीत इस अधिनियम की धारा 153 में यह प्रावधान है कि इस अधिनियम के धारा 135 से 139 में वर्णित अपराध का ही विशेष न्यायालय द्वारा विचारण किया जा सकता है।

इस प्रकार विद्युत अधिनियम, 2003 के अधीन गठित विशेष न्यायालय किसी ऐसे अपराध का विचारण नहीं कर सकता है जो कि इस अधिनियम द्वारा विचारण योग्य नहीं है भले ही ऐसा अपराध उसी घटनाक्रम में कारित हुआ हो।

उपरोक्त से यह बात उभर कर सामने आती है कि विशेष न्यायालय द्वारा किन अपराधों का विचारण किया जा सकता है, इस बाबत् सामान्यतया आवश्यक प्रावधान विशेष अधिनियमों में किये गये हैं जिससे यह स्पष्ट हो जाता है कि कोई विशेष न्यायालय, विशेष अधिनियम के द्वारा विचारण योग्य अपराध के साथ जुड़े हुए किसी अन्य अपराध का विचारण तभी कर सकेगा, जब उसे ऐसा करने की अधिकारिता से विशेष अधिनियम द्वारा सशक्त किया गया हो।

लेकिन यदि विशेष न्यायालय के गठन करने वाले उक्त विशेष अधिनियम में इस संबंध में सशक्त करने वाले प्रावधान नहीं हैं तो वहां सामान्य विधि अर्थात् द.प्र.सं. के उपबंध लागू होंगे और वैसी अवस्था में यदि विशेष अधिनियम के द्वारा विचारण योग्य अपराध के साथ कोई अन्य अपराध उसी घटनाक्रम में घटित हुआ है तो उसका विचारण विशेष न्यायालय द्वारा उस सीमा तक किया जा सकेगा जबकि ऐसा किया जाना सामान्य विधि के तहत् अनुज्ञेय हो।

परिणामतः उपर्युक्त विवेचना से यह स्पष्ट हो जाता है कि ऐसे अपराध जो कि विशेष अधिनियम द्वारा विचारण योग्य अपराध के साथ जुड़े हुए हैं उनका विचारण विशेष न्यायालय द्वारा किया जावेगा या नहीं, इसके लिये सर्वप्रथम विशेष अधिनियम के प्रावधानों को देखना होगा और यदि उसमें सशक्त करने वाले प्रावधान हैं तो विशेष न्यायालय द्वारा ऐसा विचारण किया जा सकता है और यदि विशेष अधिनियम इस बिन्दु पर मौन है तो सामान्य विधि के उपबंधों के अन्तर्गत अधिकारिता होने पर ही उसका विचारण विशेष न्यायालय द्वारा तक किया जा सकता है।

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JURISDICTIONAL COMPETENCE OF A SPECIAL COURT RELATING TO AN OFFENCE OTHER THAN THOSE COVERED BY THE SPECIAL LAW

Institutional Supplement
By Shri Shailendra Shukla
Addl. Director

One aspect that has been left untouched in the aforesaid article relates to the contingency when the same transaction involves offences under more than one Special Act. In such situation the question for consideration naturally would be whether any one of the Special Courts can try all the offences being committed in the course of the same transaction or trial would have to be conducted by Special Courts separately. For example if an offence under the N.D.P.S. Act is committed by an accused and at the same time he also commits an offence under M.P. Dacaity Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981 then whether any one of the Special Courts constituted under either of these two Acts is empowered to try both the offences or whether each offence will have to be tried by the Special Court constituted for such offence.

Special Courts are constituted to try offences under Special Acts meaning thereby that only a Special Court has exclusive jurisdiction to try a particular offence for which it is constituted. It may be that the Special Court may also try other offences if provision has been made to that effect in the Special Act but under no circumstance a Special Court can try an offence for which another Special Court has been constituted. Therefore, the only solution is that though the offences have been committed in the same course of transaction, two separate challans shall have to be filed : one before the Special Court constituted to try N.D.P.S. cases and the other before the Court constituted to try case under Dacaity Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981 and these Special Courts shall try the special offences for which they have been constituted.

Another point which also requires consideration is whether a person accused of committing an offence not falling within the purview of the Special Act can be tried jointly with a person accused of such offence as well as an offence covered by the Special Act?

This peculiar question was considered in detail by the Apex Court in, *Vivek Gupta v. Central Bureau of Investigation and another, (2003) 8 SCC 628.* The Apex Court held that in view of the provisions contained in Section 223 of the Code of Criminal Procedure such person who has not been charged with an offence under the Special Act but has been charged with an offence under the other law alongwith the accused who has been charged with such offence as

well as the offence under the Special Act can be tried jointly in the same trial by the Special Judge with the help of enabling provision contained in the Special Act.

For the sake of convenience we are reproducing hereunder some of the provisions contained in some Special Acts which enable the Courts constituted under the respective Acts to try an offence committed in the same transaction –

1. **Narcotics and Psychotropic Substances Act, 1985 :**

   S.36 A. Offences triable by Special Courts.—

   (1) ———

   (2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

2. **Prevention of Corruption Act, 1988 :**

   S.4. Cases triable by Special Judges.—

   (1) ——-

   (2) ——-

   (3) When trying any case, a Special Judge may also try any offence, other than an offence specified in Section 3, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

3. **Terrorist and Disruptive Activities (Prevention) Act, 1987 : (Since repealed)**

   S.12. Power of Designated Courts with respect to other offences

   (1) When trying any offence, a Designated Court may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence.

4. **Commission of Sati (Prevention) Act, 1987 :**

   S.12. Power of Special Court with respect to other offences

   (1) When trying any offence under this Act, a Special Court may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence.

5. **Essential Commodities Act, 1955 :**

   S.12 AA. Offences triable by Special Courts (Since repealed)

(1) ——

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act, with which the accused may, under the Code, be charged at the same trial :

Provided that such other offence is, under any other law for the time being in force, triable in a summary way:

Provided further that in the case of any conviction for such other offence in such trial, it shall not be lawful for the Special Court to pass a sentence of imprisonment for a term exceeding the term provided for conviction in a summary trial under such other law.

6. M.P. Dacaity Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981 :

S.7. Jurisdiction of special courts.-

(1) ——

(2) In trying any specified offence, a Special Court may also try any offence other than the specified offence with which the dacoit may, under the Code, be charged at the same trial, if the offence is connected with the specified offence.

The Electricity Act contains no enabling provision empowering the Special Court constituted under the Act to try offences other than those mentioned in the Act. In absence of any enabling provision, the Special Court may not try other offence such as those under IPC.

Thus, we see that in absence of an enabling provision, a Special Court may not try offences other than those for which the Special Court has been constituted.

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The Secreat of health for both mind and body is not to mourn for the past, not to worry about the future, or not to anticipate troubles, but to live the present moment wisely and earnestly.

THE BUDDHA

WHETHER A TENANT IS REQUIRED TO DEPOSIT TIME BARRED RENT TO HAVE BENEFIT OF SECTION 12 (3) OF THE M.P. ACCOMMODATION CONTROL ACT, 1961

Judicial Officers
District Neemuch

Section 12 (1) (a) of the Madhya Pradesh Accommodation Control Act, 1961 (hereinafter to be referred as the Act) provides that in case a tenant has neither paid nor tendered whole of the arrears of the rent 'legally recoverable' from him within two months of the date on which a notice of demand for the arrears of rent has been served on him by the landlord in the prescribed manner, a suit for eviction may be instituted against him. Section 12 (3) of the Act stipulates further that no order for the eviction of a tenant shall be made on the ground as specified in clause (a) of sub-section (1), if the tenant makes payment or deposits as required by Section 13 of the Act.

Section 13 (1) reads as under :

13. When tenant can get benefit of protection against eviction.-

(1) On a suit or any other proceeding being instituted by a landlord on any of the grounds referred to in section 12 or in any appeal or any other proceeding by a tenant against any decree or order for his eviction, the tenant, shall, within one month of the service of writ of summons or notice or appeal or of any other proceeding or within one month of institution of appeal or any other proceeding by the tenant, as the case may be, or within such further time as the Court may on an application made to it allow in this behalf, deposit in the Court or pay to the landlord, an amount calculated at the rate of rent at which it was paid, for the period for which the tenant may have made default including the period subsequent thereto up to the end of the month previous to that in which the deposit or payment is made; and shall thereafter continue to deposit or pay, month by month by the 15th of each succeeding month a sum equivalent to the rent at that rate till the decision of the suit, appeal or proceeding, as the case may be.

Under Section 13 (1) of the Act, a tenant is bound to deposit rent within one month of the date of service of the summons on him unless the Court on an application for extension of time has extended the same.

Section 13 (5) provides that if a tenant makes deposit or payment as required by sub-section (1) or sub-section (2), no decree or order shall be made by the Court for the recovery of possession of the accommodation on the ground of default in payment of rent by the tenant, but the Court may allow such cost as it may deem fit to the landlord.

Thus it is clear that if the tenant makes payment of the arrears of the rent then no decree of eviction on the ground of default of payment can be passed against him.

Under Section 13 (1) of the Act there is no mention of "time barred" rent. Section 12 (1) (a) of the Act also refers to whole of the arrears of the rent, legally recoverable from tenant. In the case of *Abdul Gaffur v. Avdani, 1973 MPLJ 179* it has been held that the tenant in order to get benefit of Section 13 (1) of the Act must pay or tender all arrears of rent including those beyond limitation. However, in *Mankuwar Bai and others v. Sunderlal Ram Bharosa Jain, MPLJ 1978 page 143 (F.B.)* this matter came up for consideration before the Full Bench of M.P. High Court. The reason for reference was opposing views expressed in *Abdul Gaffur's case* (Supra) and in *New Delhi Municipal Committee v. Kaluram, AIR 1976 SC 1637.* The Court held that the tenant is not obliged under Section 13 (1) of the Act to deposit the time barred rent. The Court relied upon the dictum laid down by the Hon'ble the Supreme Court in *New Delhi Municipal Committee (Supra)* in which it was ruled that there was no power to recover rent which is barred by limitation.

After pronouncement of the judgment in *Mankuwar Bai's (Supra)*, another Apex Court judgment came up which again tended to take the same view as expressed in *Abdul Gaffur's case (Supra).* This case was *Khadi Gram Udyog Trust v. Shriram Chandraji Mandir, AIR 1978 SC 287.* In this case the Apex Court was faced with the interpretation of the expression "entire amount of rent due" made in U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972. The Apex Court held that the expression, "entire amount of rent due" also includes rent which has become time barred. The Apex Court confirmed the Allahabad High Court judgment passed in civil revision number 2217 of 1975 and also approved the Full Bench decision of Patna High Court in *Nandan Sharma v. Mt. Maya Devi, AIR 1977 Pat. 283 (FB).* The Apex Court, in arriving at this conclusion, had relied upon the decision in *Bombay Dyeing and Manufacturing Company Ltd. v. The State of Bombay, AIR 1958 SC 328* where in it was held that the statute of limitation only bars the remedy but does not bar a debt except in cases provided for by Section 28 of the Limitation Act which does not apply to a debt.

After receiving the opinion of the three Judge Full Bench in *Mankuwar Bai's Case (Supra)*, when the matter was again being argued before the Second Appellate Court, the counsel for the appellant argued that in view of the Apex Court judgment in *Khadi Gram Udyog Trust (Supra)*, the time barred rent was liable to be paid by the tenant and on not paying the same, he would be liable to be evicted. The Hon'ble Second Appellate Court realizing that the Full Bench opinion regarding time barred rent may be running counter to the Apex Court judgment, again referred the matter for being considered by a Larger Bench. Consequently, a Full Bench of the High Court of Madhya Pradesh comprising five Judges examined the matter in detail and held in *Mankuwar Bai and others v. Sunderlal Rambharosa Jain, 1978 MPLJ 405* that the Apex Court judgment in *Khadi Gram Udyog Trust (Supra)* pertained to U.P. Urban Building (Regu-

lation of Letting Rent and Eviction) Act, 1972 wherein the words "entire amount of rent due" were used which were different from the words "whole of the arrears of rent legally recoverable from him" as contained in Section 12 (1) (a) of M.P. Accommodation Control Act. It was further observed that in M.P. Accommodation Control Act a tenant not depositing this amount would have his defence struck off and there was no corresponding provision in the U.P. Act. Thus whereas on one hand the landlord can recover only legally enforceable rent on the other hand the tenant was also made to suffer for not paying such arrears. These differences between the Rent Acts of UP and MP were highlighted by the Full Bench (five Judges) in *Mankuwar Bai's case (Supra)* and it was held that the ratio of the Apex Court judgment in *Khadi Gram Udyog Trust case (Supra)* was not applicable to the provisions of the M.P. Accommodation Control Act.

Recently, the Apex Court in *Bhimsen Gupta v. Bishwanath Prasad Gupta, (2004) 4 SCC 95,* while interpreting the words "lawfully payable" as occurring in Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982 has held that these words were different from the words "legally recoverable" and therefore, although the remedy of the landlord to recover the rent is barred but it is not a ground for defeating the claim of the landlord for decree of eviction.

The words used in Section 12 (1) (a) M.P. Accommodation Control Act, 1961 are "legally recoverable", meaning thereby that the suit for non-payment of time barred arrears of rent is not maintainable as time barred rent is "not legally recoverable".

Thus in the regions of Madhya Pradesh where M.P. Accommodation Control Act, 1961 is applicable, a time barred rent is not legally recoverable and therefore, eviction of tenant cannot be sought on the ground of such rent. However one comes across a few judgments of High Court which run counter to the above stated settled position. These cases are *Shyam Bhagwan v. Sheikh Nizam, 1994 MPLJ 260 = 1994 JLJ 143* and *Bharosi Lal v. Rehan Ahmed, 2002 (1) MPWN SN 146.* All are Single Bench decisions. Judgment, which is as per the settled position as stated in *Mankuwar Bai's case (Supra)* is *Arun Kumar v. Krishna Gopal Sharma, 2005 (4) MPLJ 24.* In this case it has been held that the claim of the landlord for recovery of time barred rent is not enforceable in Court of law.

Finally, in view of the Full Bench (5 Judges) judgment of the High Court of Madhya Pradesh in *Mankuwarbai and others v. Sunderlal Rambharosa Jain, 1978 MPLJ 405* it stands concluded that in those regions of Madhya Pradesh where M.P. Accommodation Control Act applies, a tenant is not obliged to deposit time barred rent to claim benefit of Section 12 (3) (1) of M.P. Accommodation Control Act, 1961 against eviction.

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EXAMINATION OF WITNESS AND WITNESS PROTECTION

VED PRAKASH
Director, JOTRI

A witness, who happens to be eyes and ears of the Court, occupies the central stage in the system of dispensation of justice because more often than not it is with the help of evidence coming through witness that the truth can be explored and justice can be rendered. Exercise of examination of witnesses consumes major portion of the working hours of a Court. Presiding Officers of the Courts, counsel for the parties and prosecutors remain busy throughout the day in this exercise which aims at discerning the truth concerning the *lis*.

Experience shows that many a times this exercise becomes a cause of harassment and embarrassment to a witness who may feel reluctant to be a witness again in future. At times in criminal cases, cross examination goes on till a witness is made to feel totally defeated. Commenting upon the helpless and miserable situation of a witness in a criminal trial, the Apex Court in *Swaran Singh v. State of Punjab, AIR 2000 SC 2017,* observed as under :

> "It has become more or less a fashion to have a criminal case adjourned again till the witness tires and he gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only that a witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him. In adjourning the matter without any valid cause a court unwittingly becomes party to miscarriage of justice. A witness is then not treated with respect in the court. He is pushed out from the crowded courtroom by the peon. He waits for the whole day and then he finds that the matter adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in Court, he is subjected to unchecked and prolonged examination and cross-examination and finds himself in a hapless situation. For all these reasons and others a person abhors becoming a witness. It is the administration of justice that suffers."

Again, many a times the examination is very prolix. This prolixity not only results in wastage of valuable time of Court but it also puts the Judge or the Magistrate to the difficult task of finding out the portion of evidence having a bearing on the dispute. The situation very often is the result of not applying the relevant provisions of law in a proper and effective manner. Therefore, one is required to look back to the relevant provisions of Indian Evidence Act.

Chapter 10 of the Indian Evidence Act comprising Sections 136-166 encapsulates the provisions relating to examination of witness. Except Section 166, which confers on jurors and assessor power to put questions, and has become obsolete after abolition of jury system in India, the remaining provisions

knit together an exhaustive scheme for effective and proper examination of a witness so that truth can be brought forth before the Court without putting the witness to harassment and humiliation. To attain this end, there are provisions which empower the Court to control and regulate the examination of a witness without compromising with the ultimate objective of finding out the truth to arrive at a just decision in a case.

The scheme contained in Chapter 10 can be examined under the following heads :

i. General Provisions of Explanatory nature (Sections 135, 137, 138, 141).

ii. Provisions outlining the scope of Examination-in-Chief and re-examination (Sections 137, 142, 154 and 157).

iii. Provisions outlining scope of cross examination and aiming at search of truth (Sections 138, 143, 145, 146, 147 and 155 of Indian Evidence Act and Section 161 of Code of Criminal Procedure).

iv. Powers and duties of the Court (Sections 136, 148, 152 and 165).

v. Rights of a witness and witness protection (Sections 149, 150, 151 and 152, 159 and 160).

The relevant provision of law classified under various heads as stated hereinabove may further be examined so as to find out their purport, object and thrust.

(i) General Provisions of explanatory nature - Section 135 in general terms provides about the order of production and examination of witness which has to be regulated by the law of civil or criminal procedure for the time being in force. Orders 17 and 18 of the Code of Civil Procedure and Chapters 18, 19, 20 and 21 of the Code of Criminal Procedure, respectively, provide regarding the practice and procedure to be followed relating to production and examination of witnesses.

A person who has to be examined in a particular case as a witness generally should be asked to remain outside the Court when the evidence of other witness is being recorded which is in accordance with the rule of fairness. If this could not be done because his presence was not noticed, the Court should examine him and record his statement with a note that he was present in Court when other witnesses were being examined. If necessary the Court should ask the explanation of the witness on this point. But there is in law no justification for cancellation of the evidence. The Court should also consider what value should be attached to the testimony of such witness because he happened to be present in Court when the other witnesses were being examined. But the question of probative value of such evidence is different from its admissibility. (See - *The State v. Sohansingh, AIR 1955 M.B. 78)*

Section 137 stipulates various stages of examination of a witness i.e examination in chief, cross examination and re-examination.

No doubt the examination-in-chief and cross- examination must relate to fact in issue or relevant facts but as stated in Section 138, cross-examination need not be confined to the facts to which the witness testified in his examination-in-chief

LEADING QUESTION

A leading question, as provided u/s 141, is a question suggesting the answer which the person putting it wishes or expects to receive. A question may be leading because of its form but mere form of the question may not be determinative as to whether it is a leading question or not. Use of expression 'whether or not' will seldom remove leading character of a question. Precise mode may be to examine whether an ordinary man would get an impression that the person putting the question expects answer in a particular way.

As pointed out earlier with reference to Section 137 of the Evidence Act, examination of a witness by the party calling such witness is termed as examination-in-chief; examination by the adverse party is called cross-examination; and examination of such witness subsequent to the cross-examination by the party calling such person is called re-examination.

The question arises whether examination of a witness, who has been declared hostile by the party calling him u/s 154 can be categorized or termed as cross-examination or it remains examination-in-chief for all intents and purposes.

Before adverting to this issue, it is apposite to refer to Section 154 of the Evidence Act, which runs as under:

> "154. Question by party to his own witness.- The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party."

It is noteworthy that Section 154 simply permits a party to put questions to his witness which might be put in cross-examination by the adverse party. This section nowhere says that a witness may be cross-examined by the party calling it.

Considering the scope of Section 154 of the Evidence Act, in a decision rendered by a Full Bench of the Calcutta High Court *[Prafulla Kumar Sarkar v. Emperor, 1931 Cal 401 (FB])* Rankin, C.J. observed as under:

> " .... the reason why S. 154 does not say that with the permission of the Court a party may cross-examine his own witness is simply that this would in strictness be a contradiction in terms, Cross-examination means examination by the adverse party as distinct from the party who calls the witness (S. 137). This is I think the whole explanation of the use of the phrase: 'put any question to him which might be put in cross-examination by the adverse party.'

> The second observation is that while the mere putting of a question in a leading form is not necessarily tantamount to cross-examination there is no doubt as to the power of the Judge to give leave to put a leading question to one's own witness. This is plain from S. 142 the second part of which goes further than English law and requires the Judge to give permission in certain cases."

The issue was also considered by the Apex Court in *Sat Paul v. Delhi Administration, AIR 1976 SC 294* the Apex Court while advising against the use of expression such as 'declared hostile' or 'declared unfavourable' by Court observed in para 43 that:

> "The matter can be viewed yet from another angle. Section 154 speaks of permitting a party to put to his own witness "questions which might be put in cross-examination." It is not necessarily tantamount to "cross-examining" the witness. 'Cross-examination', strictly speaking means cross-examination by the adverse party as distinct from the party calling the witness. (Section 137, Evidence Act). That is why Section 154 uses the phrase "put any questions to him which might be put in cross-examination by the adverse party".

The issue was also examined by our own High Court in *Banshilal v. State of M.P. and another, 1981 JLJ 143* and it was clearly held that examination of a witness by the party calling such witness remains examination-in-chief inspite of his being asked questions by such party which otherwise could be asked only in cross-examination by the adverse party. The Court made it clear that only the examination by adverse party is called cross-examination.

In the light of aforesaid , it is crystal clear that examination of a witness u/s 154 by the party who has called him can never be treated as cross-examination. No doubt, in some decisions the examination of a witness u/s 154 has been referred to as cross-examination but then the legal position as stipulated by the Apex Court in *Sat Paul's case (supra)* makes the situation clear enough.

The question arises when a party seeks leave of the Court u/s 154 of the Evidence Act and on being allowed proceeds to examine a witness u/s 154 what may be ideal phraseology to be used by the Court in this respect? As advised by the Apex Court in *Sat Paul's case (supra)* the Court should avoid use of expressions like 'declared hostile' or 'declared unfavourable' despite such declaration been made by the party who has called the witness. The Court may well be justified in making a note to the effect that - The party calling the witness (plaintiff/defendant/prosecution/defence) has declared him hostile and seeks permission to put questions u/s 154 of the Evidence Act.

Record perused. Permission granted or refused.

Examination-in-chief to continue.

(Contd.....)

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विधिक समस्याऐं एवं समाधान

[न्यायिक दायित्वों के निर्वहन के क्रम में अनेक प्रकार की विधिक समस्यायें समय–समय पर न्यायाधीशों के समक्ष उपस्थित होती हैं। ऐसी समस्याओं के विधि सम्मत समाधान के सुस्पष्ट सोच के अभाव में न केवल न्यायदान में विलम्ब की सम्भावना बढ़ जाती है अपितु न्याय के हनन का खतरा भी आसन्न रहता हैं। इस अंक के साथ हम विधिक समस्याओं और उसके समाधान के बारे में यह नियमित स्तम्भ प्रारम्भ कर रहे हैं। प्रयास यह होगा कि समस्या के सम्यक समाधान के विषय में विश्लेषणात्मक दृष्टिकोण अपनाया जावे।]

प्रारम्भिक वाद प्रश्न की विरचना किन परिस्थितियों में की जानी चाहिये ?

प्रारम्भिक वादप्रश्न विरिचित कर उसके आधार पर वाद का निराकरण करने के विषय में व्यवहार प्रक्रिया संहिता, 1908 में आदेश 14 नियम 2 उपनियम (2) के प्रावधान सुसंगत हैं, जो निम्नवत् हैं–

> Order 14 Rule (2) (ii). - Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to –
>
> (a) the jurisdiction of the Court, or
>
> (b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

नियम 2 के उक्त प्रावधान सिविल प्रक्रिया संहिता (संशोधन) अधिनियम, 1976 के द्वारा हुए संशोधन के परिणामस्वरूप अस्तित्व में आये हैं। उक्त प्रावधानों के अवलोकन से यह स्पष्ट है कि न्यायालय विधि के किसी वादप्रश्न को प्रारम्भिक वादप्रश्न के रूप में उसी दिशा में निराकृत कर सकता है जबकि विधि का ऐसा वादप्रश्न या तो न्यायालय की अधिकारिता के विषय में हो या तत्समय प्रवृत्त किसी विधि के अन्तर्गत वाद के वर्जन के विषय में हो। ऐसी दशा में किसी ऐसे वादप्रश्न का, जो विशुद्ध विधि का तो है लेकिन न्यायालय की अधिकारिता का विधि के अन्तर्गत वाद के वर्जन के विषय में नहीं है, निराकरण प्रारम्भिक वादप्रश्न के रूप में नहीं किया जायेगा।

समान रूप से यदि वादप्रश्न न्यायालय की अधिकारिता या विधि के अन्तर्गत वाद के वर्जन से संबंधित है लेकिन विशुद्ध रूप से विधि का वादप्रश्न नहीं है तो भी उसका निराकरण प्रारम्भिक वादप्रश्न के रूप में नहीं किया जा सकेगा।

साथ ही ऐसा वादप्रश्न जिसका विनिश्चिय साक्ष्य के बिना करना संभव नहीं है, शुद्ध विधि का वादप्रश्न नहीं होगा तथा उसका विनिश्चय प्रारम्भिक वादप्रश्न के रूप में नहीं किया जा सकता हैं।

न्यायशुल्क के संदाय का प्रश्न सीधे तौर पर न्यायालय की अधिकारिता से संबंध रखता है। अतः उसे वादोत्तर प्रस्तुत करने से पूर्व उठाया जा सकता है; संदर्भः *दिलीप सिंह विरूद्ध मालम सिंह, ए.आई. आर. 1986 एम.पी. 270।* न्याय दृष्टांत *सुजीर केशव नायक विरूद्ध सुजीर गनेश नायक, ए.आई. आर. 1992 एस.सी. 1326* में किया गया विधिक प्रतिपादन भी इस संबंध में उल्लेखनीय है जिसमें यह ठहराया गया है कि न्यायशुल्क का प्रश्न न्यायालय की अधिकारिता से जुड़ा हुआ है। अतः प्रतिवादी द्वारा इस विषय में आपत्ति उठाये जाने पर उसे प्रारम्भिक वादप्रश्न के रूप में निराकृत किया जाना चाहिये।

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क्या न्यायिक मजिस्ट्रेट प्रथम श्रेणी (न्या.म.प्र.श्रे.) पराक्रम्य लिखत विलेख अधिनियम, 1881 की धारा 138 के अन्तर्गत प्रावधित अपराध के लिये दोषसिद्ध अभियुक्त पर रुपया 5000/– से अधिक अर्थदण्ड अधिरोपित कर सकता है?

दाण्डिक मामले में दण्ड अधिरोपित करने के बारे में न्यायिक मजिस्ट्रेट प्रथम श्रेणी की सामान्य अधिकारिता का उल्लेख दण्ड प्रक्रिया संहिता की धारा 29 (2) में किया गया है जो निम्नवत् हैः–

> "29 (2). The Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding five thousand rupees or of both."

पराक्रम्य लिखत विलेख अधिनियम,1881 (अत्रपश्चात केवल 'अधिनियम') में धारा 138 के अपराध के लिये दो वर्ष तक का कारावासीय दण्ड तथा अनादृत चैक की राशि की दुगनी राशि तक अर्थदण्ड का प्रावधान 'अधिनियम' की धारा 138 में किया गया है।

'अधिनियम' की धारा 143 (1), जो दण्ड प्रक्रिया संहिता, 1973 के तद्प्रतिकूल उपबंधों के बावजूद न्या.म.प्र.श्रे. को धारा 138 के अपराधों का संक्षिप्त विचारण करने की अधिकारिता प्रदान करती है, निम्नवत् हैः–

> "*143. Power of Court to try cases summarily* – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials:

Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees."

धारा 143 (1) के अवलोकन से प्रकट होता है कि यदि न्या.म.प्र.श्रे द्वारा धारा 138 के अपराध का विचारण संक्षिप्त प्रक्रिया के अन्तर्गत किया जा रहा है तो दोषसिद्ध व्यक्ति पर एक वर्ष से अनाधिक कारावासीय दण्ड तथा रुपया 5000/– से अधिक अर्थदण्ड अधिरोपित करने की अधिकारिता उसे प्राप्त है।

अतः यह तो निसन्देह स्पष्ट है कि 'संक्षिप्त विचारण' में न्या.म.प्र.श्रे. धारा 138 के अपराध के लिये अनादृत चैक की दुगनी राशि की सीमा तक अर्थदण्ड अधिरोपित कर सकता है भले ही ऐसी राशि रुपये 5000/– से अधिक हो लेकिन ऐसे अपराध के लिये समन विचारण के अन्तर्गत अभिलिखित दोषसिद्धि में 5000/– रुपये से अधिक अर्थदण्ड अधिरोपित करने की स्पष्ट अधिकारिता के अभाव में ऐसा करना कहां तक विधि सम्मत होगा यह निर्वचन का विषय हो सकता है क्योंकि धारा 143 में प्रयुक्त भाषा का सहज, सरल एवं शाब्दिक निर्वचन ऐसी किसी अधिकारिता के अभाव की ओर इंगित करता है।

उक्त स्थिति किंचित विस्मयजनक लग सकती है क्योंकि दाण्डिक प्रक्रिया के अन्तर्गत संक्षिप्त विचारण में दण्ड अधिरोपित करने की शक्तियां सामान्य विचारण में दण्ड अधिरोपित करने की शक्तियों से किंचित सीमित होती है (संदर्भ धारा 262 (1) दण्ड प्रक्रिया संहिता), लेकिन धारा 143 के वाचन से अर्थदण्ड के विषय में प्रतिकूल स्थिति प्रकट होती है क्योंकि जहां एक ओर संक्षिप्त विचारण में रुपया 5000/– से अधिक अर्थदण्ड अधिरोपित किया जा सकता है वही दूसरी ओर समन विचारण में ऐसी विनिर्दिष्ट अधिकारिता का अभाव होने के कारण दण्ड प्रक्रिया संहिता की धारा 29 (2) के अन्तर्गत रुपये 5000/– तक का अर्थदण्ड अधिरोपित करने की अधिकारिता रहेगी। 'अधिनियम' 1881 में धारा 143 वर्ष 2001 के संशोधन द्वारा वास्तव में इस उद्देश्य से जोड़ी गई ताकि न्या.म.प्र.श्रे. के समक्ष विचारण में ही मामले में यथोचित दण्ड अधिरोपित किया जा सके लेकिन धारा 143 की उक्त शब्दावली, जो विधायन की त्रुटि का आभास कराती है, संशोधन के मूल उद्देश्य को काफी सीमा तक निष्प्रभावी बना देती है।

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PART - II

NOTES ON IMPORTANT JUDGMENTS

1. TRANSFER OF PROPERTY ACT, 1882 – Section 105
INDIAN EASEMENTS ACT, 1882 – Section 5
Lease and licence, distinction between – Law explained.
Mohammad Hanif v. Mandir of Shri Badebalaji and others
Reported in 2005 (4) MPLJ 130

Held :

There is a distinction between the 'lease' and 'licence'. Section 105 of the Transfer of Property Act defines a lease of immovable property as transfer of right to enjoy of such property made for a certain time in consideration for a price paid or promised and section 52 of the Indian Easement Act defines a licence which is as under :–

> "Where one person grants to another, or to a definite number of other persons, a right to do or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a license.

Apart from this the definition given in the Easement Act, the classic definition of licence was pronounced by C.J. Vaughan in the seventeenth century in *Thomas vs. Sorrell, (1673) Vaughan 351* where the Lordship has held as under :–

> "A dispensation or licence properly passeth no interest nor alters" or transfers property in any thing, but only makes an action "lawful, which without it had been unlawful".
>
> "There is one golden rule which is of very general application namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind. It seems to me this is a clear example of application of that rule."

The Lord Denning in *Cobb vs. Lane reported in 1952-1 ALL ER 1199* has held as under :–

> "The question in all these cases is one of intention. Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land."

After discussing in detail the Hon'ble Subba Rao J. in *Associated Hotels of India Ltd vs. R. N. Kapoor reported in AIR 1959 SC 1262* laid down the following proposition :–

"(1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form (2) the real test is the intention of the parties - whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease, but if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, "prima facie, he is considered to be a tenant, but circumstances may be established which negative the intention to create a lease."

The same principle has been further followed by the Hon'ble Apex Court in the case of *Khalil Ahmed Bashir Ahmed vs. Tufehussein Samashbhai Sarangpurwala reported in AIR 1988 SC 184 :*

"If an interest in immovable property entitling the transferee to enjoyment was created, it was a lease; if permission to use land without exclusive possession was alone granted, a licence was the legal result."

The above principle has been further been reiterated by the Hon'ble Apex Court in the case of *Chandy Varghese and others vs. K. Abdul Khader and others reported in (2003) 11 SCC 328 :-*

"Lease" is "a transfer of interest in land" whereas "licence" is a right granted to another person over immovable property to do or continue to do some act which would in the absence of such right be unlawful and which does not amount to easement nor creates any interest in the property".

Thereafter in the case of *C.M. Beena and another vs. P.N. Ramachandra Rao reported in (2004) 3 SCC 595 :-*

"Generally speaking, the difference between a "lease" and "licence" is to be determined by finding out the real intention of the parties as decipherable from a complete reading of the document, if any, executed between the parties and the surrounding circumstances. Only a right to use the property in a particular way or under certain terms given to the occupant while the owner retains the control or possession over the premises results in a licence being created; for the owner retains legal possession while all that the licensee gets is a permission to use the premises for a particular purpose or in particular manner and but for the permission so given the occupation would have been unlawful.

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2. **CIVIL PROCEDURE CODE, 1908 – O.47 R.1**
Ambit and scope of review – Total non-consideration of material and relevant documentary evidence, held, a ground to review the order.
R.K. Piplewar v. State of M.P.
Reported in 2005 (II) MPWN 89

Held :

In the case of *Ranjeet Singh Sonkar v. Basant Kumar Dvivedi and others, 1993 (1) Vibha 179,* the Single Bench of this Court while deciding the scope of the review application in para 8 has held that if a material and relevant documentary evidence is not considered, it would amount to mistake apparent on the face of record and in that case the review is permissible. Similar is the view of the Division Bench of this Court in the case of *State of Madhya Pradesh v. Jaswantpuri and others 1989, JLJ 413 = AIR 1989 MP 115.*

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3. **MOTOR VEHICLES ACT, 1988 – Section 149 (2)**
Driving licence, validity of – Licence not bearing endorsement of R.T.O., effect of – Insurance Company, held not exonerated.
Champalal v. United Insurance Company Ltd.
Reported in 2005 (II) MPWN 126

Held :

The Insurance Company has preferred appeal only against this award mainly on the ground that the deceased driver was not holding valid licence. It has already come on record that the deceased was holding a valid licence to drive light motor vehicles. Even if it was not endorsed by the RTO would not materially change or alter the responsibility of the Insurance Company, as has been held by the Hon'ble Supreme Court in the matter of *Ashok Gangadhar v. Oriental Insurance Company, reported in 2000 ACJ 319,* which has been followed by this Court in several other cases.

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4. **SERVICE LAW**
Compassionate appointment – Principles governing grant of compassionate appointment – Law explained.
Pushpendra Singh Baghel v. State of M.P. and others
Reported in 2005 (4) MPLJ 424

Held :

From the said decisions, the following principles emerge :

(a) Compassionate appointment is an exception to the general rule relating to appointment to public service, which is by open invitation and a competitive process.

(b) Compassionate appointment can be only in accordance with the Scheme governing such appointment and not dehors the Scheme.

(c) Compassionate appointment is given to enable the family to tide over sudden crisis on account of death of breadwinner. It cannot be converted into a boon by seeking or providing an appointment to a Class I or Class II post.

(d) Compassionate appointments should be made only to Class III or IV posts and not for class-I or Class-II posts. A provision for appointment to such lower posts in a justifiable exception to the general rule that appointment to public service can only be on the basis of open invitation of applications and merit. A Compassionate appointment when made to a higher post (class I or II posts) ceases to be a justifiable exception, and will be treated as it will be discriminatory and violative of Articles 14 and 16 of the Constitution.

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5. SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 3 (1) (x)
Utterance of word *"Chamara"* without any intention to insult or humiliate, whether an offence u/s 3(1) (x) of the Act? Held, No.
Anil Kumar Pandey v. Daulat Prasad
Reported in 2005 (4) MPLJ 467

Held :

On looking to the averments made in para-5 of the complaint, it appears that there was a dispute of account between the two parties and because of that applicant had insulted and intimidated the respondent. The allegations made in para-5 of the complaint also find support by the evidence adduced by the complainant before the Court. Aforesaid allegations and the evidence prima facie constitute the offence under sections 294 and 506-II, Indian Penal Code. However, prima facie it does not appear that the applicant had intimidated or insulted the respondent with intent to humiliate him because of his being a member of Scheduled Caste. Merely utterance of word "Chamara" without there being any intention to insult or humiliate a member of Scheduled Caste shall not make out the offence under section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

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6. SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 3(2)(v)
Accused persons convicted by trial Court for offence u/s 302/149 IPC and Section 3 (2) (v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act – Conviction u/s 302/149 altered to one u/s 323/149 – Accused persons cannot be convicted u/s 3 (2) (v).
Maiyadeen and others v. State of M.P.
Reported in 2005 (4) MPLJ 470

Held :

So far as the conviction of appellants under section 3(2) (v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is concerned, after holding the appellants not guilty for the offence punishable under section 302/149, Indian Penal Code, is not possible. Section 3(2)(v) of the Act is reproduced as under :

> 3. *Punishment for offences of atrocities:*
>
> "(1) XXX XXX XXX
>
> (2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, –
>
> (i) to (iv) XXX XXX XXX "
>
> (v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;

On going through the provision, it is apparent that since the offence under section 302/149, Indian Penal Code has not been found proved against the appellants, the aforesaid provisions shall not be applicable as offences which have been found proved against them are not punishable with imprisonment for the term of ten years and more. Hence, the conviction of the appellants under section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act deserves to be set aside.

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7. ELECTRICITY ACT, 2003 – Section 151
Applicability of Section 151 – Being a procedural provision it must be liberally interpreted – Law explained.
Sheikh Mohd. Khalil v. State of M.P.
Reported in 2005 (4) MPLJ 479

Held :

Section 151 of the Act is a procedural provision and must be liberally interpreted. If a complaint is directly made to the Court, the Court would normally send it for investigation to the police and call for the report. To cut short that procedure, Rule 12 enables that the complaint can be made to the police and the police will send the complaint along with its report to the Court for taking cognizance. Even though the said rule came later, the same procedure was adopted in this case and such a procedure does not go against section 151 of the Act. Admittedly, the complaint was also made by a person enumerated under section 151 of the Act as competent to make it.

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8. CRIMINAL PROCEDURE CODE, 1973 – Section 311
Recall of witness prayed on the ground that earlier satement was made under threat – Court directing recall without inquiry – Held, recall not sustainable.
Rajpal Singh v. C.B.I., Bhopal
Reported in 2005 (4) MPLJ 482

Held :

The aforesaid cited case of *Zahira Habiballah Sheikh and another v. State of Gujarat and others, (2004) 4 SCC 158* popularly known as *'Best Bakery Case'* was decided on the alleged elaborate facts and circumstances against prosecution agency and the *de novo* trial was ordered. But in the case at hand, the situation and the allegations are not the same as before the Apex Court while deciding the aforesaid *'Best Bakery Case'* (supra). While on the other hand, the case cited by applicant in the matter of *Satyajit Banerjee and others v. State of W.B. and others, (2005) 1 SCC 115* in which by giving some clarification regarding aforesaid *'Best Bakery Case'* (supra) it has been held as under :

> "25. The stands taken before the High Court to justify acceptance of additional evidence and directions for retrial were reiterated.
>
> 26. Mr. Sushil Kumar, learned Senior Counsel for the accused submitted that it is not correct to say that application under section 391 of the Code was not admitted. It was in fact admitted and rejected on merits. it is also not correct to say that the investigation was perfunctory. The affidavits sought to be brought on record were considered on their own merits. While Zahira's prayer was for fresh investigation, the State's appeal in essence was for fresh trial. The four persons whose affidavits were pressed into service were PWs 1, 6, 47 and 48. They were examined as Pws and there was no new evidence. There can be no re-examination on the pretext used by the State for retrial. The original appeal filed by the State was Appeal No. 956 of 2003. There was first an amendment in September, 2003, and finally in December, 2003. The stand got changed from time to time. What essentially was urged or sought for, related to fresh trial on the ground that investigation was not fair. The stand taken by the State in its appeal is also contrary to evidence on record. Though one of the grounds seeking fresh trial was the alleged deficiencies of the Public Prosecutor in conducting the trial and for not bringing on record the contradictions with reference to the statements recorded during investigation, in fact it has been done. There was nothing wrong in treating the statement of Rahish Khan as the FIR. The High Court has rightly concluded that Zahira's statement was manipulated as if she had given information at the first point of time which is belied by the fact that it reached the Court concerned after three days. The High Court after analyzing the evidence has correctly come to the conclusion that the police ma-

nipulated in getting false witnesses to rope in wrong people as the accused. Irrelevant and out-of-context submissions are said to have been made and grounds taken and reliefs sought for any Zahira in her appeal."

In view of the aforesaid decisions of the Apex Court, the extra-ordinary circumstances are not available in the case at hand in which the principles laid down in the *'Best Bakery Case'* (supra) could be applied at this stage but the circumstance warrants to follow the principles dictum laid down in the matter of Satyajeet (supra) till some extent.

In view of the aforesaid, this Court is of the considered view that after examining of the witness, only on the basis of some complaint which is not supported by prima facie evidence the witness cannot be recalled. Before re-calling the witness the alleged circumstance in the complaint of the witness should be examined by the trial Court itself or through any reliable agency and in such inquiry any circumstances as mentioned in the complaint are found correct then only such application could be allowed.

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9. MOTOR VEHICLES ACT, 1988 – Section 166
Whether registration of case by police pertaining to accident is sine qua non for maintaining action u/s 166? Held, No – Tribunal can consider case even in the absence of criminal case.
Yashwant Singh Baghel and another v. Shiv Prasad Vishwakarma and others
Reported in 2005 (4) MPLJ 531

Held :

The provisions regarding claim under the Motor Vehicles Act are enacted by keeping in view the social welfare of the justice to the community and whenever the incident of vehicular accident takes place and in pursuance of it any person like appellant No. 1 got injured and circumstances are proved then the claimant is always entitled for compensation irrespective whether the police has registered the offence regarding the incident or not. Because no claim case can be left over on the mercy of the police.

It is also a settled principle that every case is decided on appreciation of its own pleadings, circumstances and the evidence recorded in it if such accident and injuries are proved then the compensation should be awarded such claim can not be left over on the mercy of the criminal case or its papers. The party has right to prove his case by leading the evidence before the Tribunal and Tribunal may consider even in the absence of the criminal case. My aforesaid view is based on a decided case in the matter of *Brestu Ram vs. Anant Ram and another, reported in 1990 ACJ 333* in which it was held as under:

"17. I am not impressed by the assertion of the respondents that no report to the police was made as to this accident. Circumstances have

been explained by Sukh Dev, PW 3, it is not understood as to why the same was not made by the Doctor who was legally bound to do so, could it be expected that an injured person and Sukh Dev, PW 2 and Sant Ram, PW 3, who were looking after him, would do so after leaving the claimant in such a stage of tragedy. Therefore, even if no report to the police was made, no adverse inference can be drawn out of this failure. The Tribunal has drawn certain inferences as if it was trying a criminal case. Such a course is not available to the Tribunal."

The aforesaid principle was also laid down by High Court of Judicature at Patna (Ranchi Bench) in the matter of *Mohd. Moinuddin vs. Haliman Nisha and others* reported in *ACJ 532.*

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10. CENTRAL MOTOR VEHICLE RULES, 1989 – R.16
Issuance of driving licence – Whether licensing authority is empowered to issue driving licence with retrospective effect ? Held, No.
Gyanendra Singh v. National Insurance Co. Ltd. and others
Reported in 2005 (4) MPLJ 566

Held :

Chapter II of the Rules provides for licensing of drivers of motor vehicles. Aforesaid rules provide procedure for issuance of the driving licence. As per rules 3 and 4, the manner is provided for issuance of learning licence and evidence as to the correctness of address and age. Rule 5 provides medical certificate to be issued of a learner's licence or a driving licence. This provides that every application for issuance of the learner's licence or driving licence or for making addition of another class or description of motor vehicle to a driving licence shall be accompained by a medical certificate in Form 1-A issued by a registered medical practitioner. Sub-section (3) of section 5 provides that the medical certificate issued shall be valid for a period of one year from the date of its issue. Rule 10 applies for application for learner's licence and Rule 11 provides for preliminary test for learner's licence, Rule 14 provides for application for driving licence. As per Rule 14, an application for a driving licence shall be made in Form 4 and shall be accompanied by an effective learner's licence to drive the vehicle of the type to which the application relates. The appropriate fee shall be accompanied with three recent photographs of the applicant and medical certificate. After completion of the aforesaid formalities, Rule 15 provides driving test. This rule specifically provides that no person shall appear for the test of competence to drive unless he is holding a learner's licence for a period of atleast 30 days. The test of competence to drive shall be conducted by the licensing authority or such other person as may be authorised in this behalf by the State Government. Sub-rule (3) of Rule 15 provides various tests to be satisfied by the person who applies for the licence. Thereafter, Rule 16 provides for issuance of driving licence.

Aforesaid provisions specifically make it clear that before issuance of the driving licence, person has to apply for learner's licence and has to go various tests as required under Rule 15 (3) of the Rules. Thereafter, if medical test is not conducted then he has to go for medical test and thereafter, driving licence shall be issued. Aforesaid procedure has to be fulfilled on a particular date and only thereafter, licence can be issued. Aforesaid facts specifically show that no driving licence can be issued with retrospective effect and only prospective driving license can be issued. Merely that in Form No. 6 there is a provision that a person is authorised to drive transport vehicle with effect from a particular date, will not authorise licencing authority to issue driving licence with retrospective effect. But this provision is made to specify the date from which the applicant is authorised to drive transport vehicle. It is in respect of the transport vehicle. Anyhow, driving license for light motor vehicle can be issued only with prospective authorisation or prospective licence and not retrospective license. If this analogy is not accepted, person who is involved in the accident may approach to the licencing authority for issuance of licence with retrospecive effect covering the date of accident. This will create complication. No licencing authority is empowered to issue driving licence with retrospective effect.

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11. CRIMINAL PROCEDURE CODE, 1973 – Section 125 (3)
Recovery of maintenance allowance – Applicant not required to file fresh application every month.
Ajab Rao v. Rekha Bai and another
Reported in 2005 (4) MPLJ 579

Held :

Once the machinery of law was set in motion for recovery of arrears for the amount falling due in future till termination, the Court can always order recovery of the same. A person who is entitled to maintenance cannot be asked to file fresh applicaiton every month for recovery of maintenance allowance. Where the applicant persistently evaded payment of maintenance, the action of magistrate sentencing him for delay in non-payment of maintenance after issuing distress warrant is justified. As the provision under section 125 of the Code is a social legislation obstacles have to be overcome and technicalities ignored in order to implement it. In the case of arrears of maintenance for several months, magistrate had jurisdiction to sentence the applicant to imprisonment.

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12. ARBITRATION AND CONCILIATION ACT, 1996 – Section 11 (8)
Appointment of arbitrator – Court not bound by any clause in agreement limiting appointment to a person or class of persons – Law explained.
Narain Industries v. Diamond Cement and another
Reported in 2005 (4) MPLJ 583

Held :

Under section 11 (8) of the Act while making appointment of an arbitrator, this Court is not bound by such clause restricting the appointment to any person or class of persons named in the agreement. This Court has only to give due regard to any qualifications required of the arbitrator by the agreement of the parties and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. In my considered view clause 32 of the agreement will not come in the way of this Court in appointing a retired High Court Judge as arbitrator keeping in view provisions of section 11 (8) of the Act.

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13. CRIMINAL PROCEDURE CODE, 1973 – Section 452
Disposal of property – Admissions/Confessions of accused, use of for the purpose of disposal of property – Such admissions/confessions can be used for disposal of property.
Uma Shankar v. State of M.P. and another
Reported in 2005 (4) MPLJ 585

Held :

At earlier occasion such question was answered by this Court in the matter of *Munshi Lal vs. Sewaram and others reported in 1987 M.P.L.J. 332* in which it was held as under:

> "Held, that for the purpose of disposal of property the statement made by the accused to the police during the course of investigation can be used as evidence against him because such statement is not being used against the accused in any enquiry or trial. Disposal of property is a separate proceeding. At the conclusion of enquiry or trial any admission or confession of fact with regard to seized property made by the accused during investigation can be used for determining the question as to in whose favour the order of disposal of property be passed. The admission of the accused led to the discovery of the material fact and the police recovered the property which was stolen according to the admission of the accused; the Sessions Judge was satisfied that the property belonged to the complainant and the said property therefore was liable to be returned to the complainant except insofar as the order regarding currency notes was made. Currency notes are unidentifiable property and, therefore they should be returned to the person from whose possession they had been recovered. *1963 JLJ Note No. 87,* Rel. *AIR 1968 MP 270* Ref."

The aforesaid case was decided on the basis of some earlier decided cases of this Court and in view of the aforesaid principles if we examined the case at hand then it is apparent that the confessional statement of the respondent No. 2 was recorded by the police and in pursuance of that the properties were seized, identified by the complainant and not claimed by the accused by submitting the cogent evidence or by cross-examining the complainant and their

witnesses. So, in view of the aforesaid principles the order passed by the appellate Court is not sustainable.

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14. MOTOR VEHICLES ACT, 1988 – Section 166
Expression 'legal representative', meaning of for the purpose of Motor Vehicles Act – Whether parents will be covered by expression 'legal representative' when husband is alive? Held, No – Law explained.
Ramsingh and another v. Shivaji Rao and others
Reported in 2005 (2) ANJ (MP) 392

Held :

The respondents in the present case have raised a preliminary objection to the effect that the present appellants who are the parents of the deceased, have no right to file the claim petition as respondent No. 7 who is the husband of the deceased, is alive and, therefore, in view of Section 15 of the Hindu Succession Act, so long as the husband who is Class I heir of a lady is alive, the parents who are Class III heirs of the lady, are not entitled to get compensation. In reply to this argument, learned counsel for the appellants relied on a judgment of the Apex Court in case of *G.S.R.T. Corporation, Ahmedabad vs. Ramanbhai, AIR 1987 SC 1690,* and submitted that in view of the provisions of Section 165 and Section 166 of the Motor Vehicles Act any person who is aggrieved or injured by the death of the deceased, is entitled to file an application for compensation. The Apex Court in that case after considering all the relevant laws has laid down in para 9 that an application for compensation arisen out of an accident may be made by all or any of the legal representatives. The expression "legal representative" is defined in Section 2 (ii) of the Code of Civil Procedure and defines that a legal representative is "a person who in law represents the estate of the deceased person, and includes any person who intermeddles with the estate of the deceased ....". The above dictum in terms does not apply to the case before the Claims Tribunal, but it has to be stated that even in ordinary parlance the said expression is understood almost in the same way in which it is defined in the Code of Civil Procedure. The Apex Court held in the said case that an application for compensation may be made by the legal representatives of the deceased or their agent, and that such an application can be made on behalf of or for the benefit of all the legal representatives. Both the person or persons who can make an application for compensation and the persons for whose benefit such application can be made, are thus indicated in Section 110-A of the Old Motor Vehicles Act. This section in a way is a substitute to the extent indicated above for the provisions of Section 1A of the Fatal Accidents Act, 1855. Under the Fatal Accident Acts, 1855 only a dependent was entitled to make an application for compensation. Thus, as held by the Apex Court, any legal representative can file an appliation for compensation.

Now, the question is whether the present appellants are the legal representatives of the deceased. The Division Bench of this Court in case of *Halkibai and another vs. Managing Director, Rajasthan State Road Transport Corporation*

and other (2004 ACJ 481) has considered the matter at length and laid down that the brother of the deceased who is a Class II heir of the deceased is not entitled to compensation for the death of the deceased when class I heir of the deceased is available. According to the Division Bench the question whether a person is a legal representative or not shall be decided in accordance with the personal law. Thus, in the present case the respondent No.7 was the only legal representative of the deceased to file the claim petition.

Learned counsel for the appellant has also relied on a judgment of this Court in case of *Anil Tiwari and Others vs. Saheb Singh and Others, (2000 (1) JLJ 138)*. The said judgment is quite distinguishable, as in that case the deceased was unmarried who was adopted by his uncle and, therefore, this Court in that case has held that the uncle is a legal representative, but this is not the situation in the present case. Another judgment relied on by the learned counsel for the appellant is the judgment in *Lila Bai vs. Atar Singh, (1997 (II) MPWN-N. 186.* But that judgment is quite distinguishable. In that case it is nowhere laid down that the personal law shall not be applicable to Section 166 of the Motor Vehicles Act. Moreover, any observations made to that effect by the learned Single Judge in that case are contrary to the Division Bench Judgment of this Court in *Halki Bai's* case (supra). Another judgment cited by the learned counsel for the appellant in *1997 ACJ 1388* where the Allahabad High Court has laid down that personal law is not applicable to Seciton 166 of the Motor Vehicles Act. However, as there is a direct Division Bench Judgment of this Court on the question, I need not rely on the judgment of the Allahabad High Court.

In the result, I hold that the present appellants are not the legal representatives in view of the fact that the husband of the deceased is alive.

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15. JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000 – Section 12
Bail – Bail to the juvenile is mandatory unless conditions laid down u/s 12 established.
Hansraj v. State of M.P.
Reported in 2005 (2) ANJ (MP) 407

Held:

The bail to the juvenile offender is mandatory. It can only be rejected on the ground enumerated under Section 12 of the Juvenile Justice (Care & Protection of Children) ACt, 2000 (for short the 'Act'). The grounds of rejection under Section 12 of the Act are that if there appears reasonable ground for believing that the release is likely to bring him into association with any known criminal to expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.

The applicant is a first offender. The conclusion of the Courts below that his case falls under Section 12 of the Act is based merely on the ground that there is a *prima facie* case against him and he was absconding for 3 months. The explanation of the applicant is that he was trying for the anticipatory bail

and as such, he was arrested after the period of three months. The purpose of the provisions of Section 12 of the Act will be defeated if the bail of the juvenile offender is rejected without the reasonable ground and on surmises and in a casual manner.

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16. CRIMINAL PROCEDURE CODE, 1973 – Sections 156 (3), 200 and 202 Whether Magistrate can direct investigation u/s 156 (3) relating to a complaint disclosing case triable by Court of Session? Held, No. Kamlesh Pathak and five others v. State of Madhya Pradesh and another
Reported in 2005 (2) ANJ (MP) 436

Held :

Counsel for the respondent heavily relied upon the judgment of the Apex Court in the case of *Suresh Chand Jain vs. State of Madhya Pradesh & Another (2001 (1) Crimes 171 (SC)*, in which it is held that in a private complaint the Magistrate has power to direct police for investigation under Section 156 (3) Cr.P.C. before taking cognisance of the offence. The Magistrate can also order police to register the First Information Report and conduct investigation and in such case the Magistrate is not bound to examine the complainant. After perusing the said judgment I find that in that case the complaint was about commission of offence under Section 420 I.P.C. which is an offence triable by Judicial Magistrate First Class, which is not the situation in the present case. In that case also the Apex Court was not considering the powers of Magistrate in respect of directions under Section 156 (3) Cr.P.C. which is an offence triable by Sessions Court. Hence, the said judgment is distinguishable.

Thus, after perusing the aforesaid case laws and the language of proviso to Section 202 it clearly appears that the Magistrate has no power to issue direction under Section 156 (3) Cr.P.C. in cases where offence is triable exclusively by Sessions Court and if directions are issued that would be without jurisdiction. In case a complaint is made to the Magistrate of an offence which is exclusively triable by Sessions Court it is incumbent on him to call upon the complainant to produce witnesses on which he rely and after recording their statements the Magistrate may decide whether cognizance of offence is to be taken or not. In the present case the Court has not followed the said procedure and has directed investigation by police under Section 156 (3) Cr.P.C.

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17. CIVIL PROCEDURE CODE, 1908 – O.14 R.1
Framing of issues, principle and object behind – Absence of an issue on a material point, effect of – Law explained.
Aminuddin v. Rafiquddin
Reported in 2005 (II) MPJR 480

Held :

The purpose of framing an issue was dealt with by Apex Court, though in

a proceeding under the Representation of People Act, 1951 in the case of *Makhan Lal Bangal vs. Manas Bhunia and others (2001 SAR [Civil] 268).* The same is of immense guidance to the case at hand. It is observed by the Apex Court as under:

> "...The stage of framing the issues is an important one inasmuch as on that day the scope of the trial is determined by laying the path on which the trial shall proceed excluding diversions and departures therefrom. The date fixed for settlement of issues is, therefore, a date fixed for hearing. The real dispute between the parties is determined, the area of conflict is narrowed and the concave mirror held by the Court reflecting the pleadings of the parties pinpoints into issues the disputes on which the two sides differ. The correct decision of civil lis largely depends on correct framing of issues, correctly determining the real points in controversy which need to be decided. The scheme of Order XIV of the Code of Civil Procedure dealing with settlement of issues shows that an issue arises when a material proposition of fact or law is affirmed by one party and denied by other. Each material proposition affirmed by one party and denied by other should form the subject of a distinct issue. An obligation is cast on the Court to read the plaint/petition and the written statement/counter, if any, and then determine with the assistance of the learned counsel for the parties, the material propositions of fact or law on which the parties are at variance. The issue shall be framed and recorded on which the decision of the case shall depend. The parties and their counsel are bound to assist the court in the process of framing of issues. Duty of the counsel does not belittle the primary obligation cast on the Court. It is for the Presiding Judge to exert himself so as to frame sufficiently expressive issues. An omission to frame proper issue may be a ground for remanding the case for retrial subject to prejudice having been shown to have resulted by the omission. The petition may be disposed of at the first hearing if it appears that the parties are not at issue on any material question of law or of fact and the court may at once pronounce the judgment. If the parties are at issue on some questions of law or of fact, the suit or petition shall be fixed for trial calling upon the parties to adduce evidence on issues of fact. The evidence shall be confined to issues and the pleadings. No evidence on controversies, not covered by issues and the pleadings, shall normally be admitted, for each party leads evidence in support of issues the burden of proving which lies on him. The object of an issue is to tie down the evidence and arguments and decision to a particular question so that there may be no doubt on what the dispute is. The judgment, then proceeding issue-wise would be able to tell precisely how the dispute was decided."

At the juncture, I may refer will profile to the decision rendered in the case *Kameswaramma vs. Subba Rao, AIR 1963 S.C. 884,* wherein the Apex Court held:

"Where the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mis-trial which vitiates proceedings. The suit could not be dismissed on the narrow ground and also there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion and neither party claimed that it had any further evidence to offer."

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18. CRIMINAL PROCEDURE CODE, 1973 – Section 125
Whether wife surrendering her right to maintain while obtaining divorce from husband can subsequently claim maintenance u/s 125? Held, No.
Nirpat Singh v. Kiran Bai
Reported in 2005 (II) MPJR 493

Held :

The case of the petitioner/husband is that during the pendency of application u/s 125 Cr.P.C., there had been a mutual divorce as per caste custom. On 14.6.96, accepting the divorce, the respondent received Rs. 18,000/- lumpsum from the petitioner and voluntarily surrendered her rights to seek maintenance from the petitioner. She agreed to withdraw the proceedings on application u/s 125 Cr.P.C. pending before the ACJM, Dindori. Evidence to this effect has been adduced. D.W.-1 Nirpat Singh has stated that the matrimonial life of petitioner and respondent was not satisfactory and the respondent was residing with her parents. A suit for seeking dissolution of marriage was also filed by the petitioner. On the background aforesaid, there had been a caste panchayat on 14.6.96, wherein the respondent/wife agreed for a mutual divorce and received Rs. 18,000/- from the petitioner. She voluntarily surrendered her rights of maintenance. Document Exhibit D-1 was accordingly executed and signed by P.W.-1 Kiranbai and D.W.-1 Nirpat Singh. D.W.-2 Bansu Singh, D.W.-3 Sukhram Singh are attesting witnesses of this document exhibit D-1 incorporating mutual divorce as per caste custom and receiving Rs. 18,000/- voluntarily surrendering the rights of maintenance. There is no evidence to contradict the aforesaid statements of D.W.-1 Nirpat Singh, D.W.-2 Bansu Singh and D.W.-3 Sukhram Singh. Accordingly, it has been proved that by executing exhibit D-1 on 14.6.96, the respondent/wife obtained a mutual divorce as per caste custom and having received Rs. 18,000/- voluntarily surrendered her rights of maintenance. Further, she had agreed to withdraw the pending proceeding u/s 125 Cr.P.C. It is contended that even after divorce, the respondent/wife may seek maintenance u/s 125 Cr.P.C.

Section 127 (3) Cr.P.C. lays down:-

"127. *Alternation of allowance* :- (3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or

has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that:-

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance or interim maintenance, as the case may be after her divorce, cancel the order from the date thereof."

The provision u/s 125 Cr.P.C. therefore, lays down that even where there had been an order of maintenance to wife on proof of a change in the circumstances to the effect that wife has obtained a divorce and that she had voluntarily surrendered her rights to maintenance after her divorce, the Magistrate may cancel the order from the date thereof. Vide exhibit D-1, the respondent/wife accepting mutual divorce and receiving Rs. 18,000/-, voluntarily surrendered her rights to maintenance and agreed to withdraw the proceedings arising out of her application u/s 125 Cr.P.C.

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19. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 23-A
Premises let out for composite purpose – Landlord can seek eviction on the basis of bona fide need for either purpose.
Avinash Agrawal & Ors. v. Smt. Reena Agrawal
Reported in 2005 (II) MPJR SN 31

Held:

As regards, the objection of the learned counsel for the applicants that the subject premises was let our for composite purposes, it is suffice to say that though it is not proved that the subject premises was let out for composite purposes, otherwise also the premises let out for composite purposes is liable to be got vacated in case of establishment of bonafide need for either purpose.

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20. CONSTITUTION OF INDIA – Articles 37 & 19 (6)
PRECEDENTS :

(i) Fundamental Rights v. Directive Principles – Directive principles to be kept in mind while judging reasonableness of the restrictions imposed on fundamental rights – Ratio laid down in *Kesavananda Bharati's case, (1973) 4 SCC 225* should be kept in mind.

(ii) Constitutional validity of ban on slaughter of cow progeny – Such ban being in the interest of general public not unconstitutional.

(iii) Doctrine of *'stare decisis'*, meaning and aplicability – Doctrine of *'stare decisis'* not a dogmatic rule allergic to logic and reason.

State of Gujarat v. Mirzapuri Moti Kureshi Kassab Jamat & Ors.
Reported in 2005 (II) MPJR 407 (S.C.)

Held :

(i) His Holiness *Kesavananda Bharati Sripadagalvaru and Anr. v. State of Kerala and Anr., (1973) 4 SCC 225,* a thirteen-Judge Bench decision of this Court is a turning point in the history of Directive Principles jurisprudence. This decision clearly mandated the need for bearing in mind the Directive Principles of State Policy while judging the reasonableness of the restriction imposed on Fundamental Rights. Several opinions were recorded in *Keshavananda Bharati* and quoting from them would significantly increase the length of this judgment. For our purpose, it would suffice to refer to the seven-Judge Bench decision in *Pathumma and Others v. State of Kerala and Ors., (1978) 2 SCC 1,* wherein the learned Judges neatly summed up the ratio of *Kesavananda Bharati* and other decisions which are for our purpose. *Pathumma* (supra) holds :-

"(1) Courts interpret the constitutional provisions against the social setting of the country so as to show a complete consciousness and deep awareness of the growing requirements of society, the increasing needs of the nation, the burning problems of the day and the complex issues facing the people, which the legislature, in its wisdom, through beneficial legislation, seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid. This Court while acting as a sentinel on the *qui vive* to protect fundamental rights guaranteed to the citizens of *the country must try to strike a just balance between the fundamental rights and the larger and broader interests of society* so that when such a right clashes with a larger interest of the country it must yield to the latter. (Para 5)

(2) *The Legislature is in the best position to understand and appreciate the needs of the people as enjoined in the Constitution.* The Court will interfere in this process only when the statute is clearly violative of the right conferred on a citizen under Part III or when the Act is beyond the legislative competence of the legislature. The courts have recognised that *there is always a presumption in favour of the constitutionality of the statutes and the onus to prove its invalidity lies on the party which assails it.* (Para 6)

(3) The right conferred by Article 19 (1) (f) is conditioned by the various factors mentioned in clause (5). (Para 8)

(4) The following tests have been laid down as guidelines to indicate in what particular circumstances a restriction can be regarded as reasonable:

(a) *In judging the reasonableness of the restriction the court has to bear in mind the Directive Principles of State Policy.* (Para 8)

(b) The restrictions must not be arbitrary or of an excessive nature so as to go beyond the reguirements of the interests of the general public.

The legislature must take intelligent care and deliberation in choosing the course which is dictated by reason and good conscience so as *to strike a just balance between the freedom in the article and the social control* permitted by the restrictions under the article. (Para 14)

(c) No abstract or general pattern or fixed principle can be laid down so as to be of universal application. It will have to vary from case to case and having regard to the changing conditions, the values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances all of which must enter into the judicial verdict. (Para 15)

(d) The Court is to examine the nature and extent, the purport and content of the right, the nature of the evil sought to be remedied by the statute, the ratio of harm caused to the citizen and the benefit conferred on the person or the community for whose benefit the legislation is passed. (Para 18)

(e) There must be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object which is sought to be achieved. (Para 20)

(f) The needs of *the prevailing social values* must be satisfied by the restrictions meant to protect social welfare. (Para 22)

(g) The restriction has to be viewed not only from the point of view of the citizen but the problem before the legislature and the object which is sought to be achieved by the statute. In other words, the Court must see whether the social control envisaged by Article 19 (1) is being effectuated by the restrictions imposed on the fundamental right. *However important the right of a citizen or an individual may be it has to yield to the larger interests of the country or the community.* (Para 24)

(h) The Court is entitled to take into consideration matters of common report history of the times and matters of common knowledge and the circumstances existing at the time of the legislation for this purpose. (Para 25)"

In *State of Kerala and Anr. v. N.M. Thomas and Ors., (1976) 2 SCC 310,* also a seven-Judge Bench of this Court culled out and summarized the ratio of this Court in *Kesavananda Bharati.* Fazal Ali, J. extracted and set out the relevant extract from the opinion of several Judges in *Kesavananda Bharati* and then opined:

"In view of the principles adumbrated by this Court it is clear that the directive principles form the fundamental feature and the social conscience of the Constitution and the Constitution enjoins upon the State to implement these directive principles. The directives thus provide the policy, the guidelines and the end of socio-economic freedom and

> Articles 14 and 16 are the means to implement the policy to achieve the ends sought to be promoted by the directive principles. So far as the courts are concerned where there is no apparent inconsistency between the directive principles contained In Part IV and the fundamental rights mentioned in Part III, which in fact supplement each other, there is no difficulty in putting a harmonious construction which advances the object of the Constitution. Once this basic fact is kept in mind, the interpretation of Articles 14 and 16 and their scope and ambit become as clear as day."

The massage of *Kesavananda Bharati* is clear. The interest of a citizen or section of a community, howsoever important, is secondary to the interest of the country or community as a whole. For judging the reasonability of restrictions imposed on Fundamental Rights the relevant considerations are not only those as stated in Article 19 itself or in Part-III of the Constitution; the Directive Principles stated in Part-IV are also relevant. Changing factual conditions and State policy, including the one reflected in the impugned enactment, have to be considered and given weightage to by the courts while deciding the constitutional validity of legislative enactments. A restriction placed on any Fundamental Right, aimed at securing Directive Principles will be held as reasonable and hence intra vires subject to two limitations: first, that it does not run in clear conflict with the fundamental right, and secondly, that it has been enacted within the legislative competence of the enacting legislature under Part XI Chapter I of the Constitution.

(ii) The utility of cow cannot be doubted at all. A total ban on cow slaughter has been upheld even in *Quareshi-I.* The controversy in the present case is confined to cow progeny. The important role that cow and her progeny play in the Indian Economy was acknowledged in *Quareshi-I* in the following words:

> "The discussion in the foregoing paragraphs clearly establishes the usefulness of the cow and her progeny. They sustain the health of the nation by giving them the life giving milk which is so essential an item in a scientifically balanced diet. The working bullocks are indispensable for our agriculture, for they supply power more than any other animal. Good breeding bulls are necessary to improve the breed so that the quality and stamina of the future cows and working bullocks may increase and the production of food and milk may improve and be in abundance. The dung of the animal is cheaper than the artificial manures and extremely useful. In short, the back bone of Indian agriculture is in a manner of speaking the cow and her progeny. Indeed Lord Linlithgow has truly said- "The cow and the working bullock have on their patient back the whole structure of Indian agriculture." (Report on the Marketing of Cattle In India, p.20). If, therefore, we are to attain sufficiently in the production of food, if we are to maintain the nation's health, the efficiency and breed of our cattle

population must be considerably improved. To attain the above objectives, we must devote greater attention to the preservation, protection and improvement of the stock and organise our agriculture and animal husbandry on modern and scientific lines."

On the basis of the available material, we are fully satisfied to hold that the ban on slaughter of cow progeny as imposed by the impugned enactment is in the interests of the generaly public within the meaning of clause (6) of Article 19 of the Constitution.

(iii) *Stare decisis* is a Latin phrase which means "to stand by decided cases; to uphold precedents; to maintain former adjudication". This principle is expressed in the maxim *"stare decisis etnon quieta movere"* which means to stand by decisions and not to disturb what is settled. This way aptly put by Lord Coke in his classic English version as "Those things which have been so often adjudged ought to rest in peace". However, according to Justice Frankfurter, the doctrine of *stare decisis* is not "an imprisonment of reason" (Advanced Law Lexicon, P. Ramanath Aiyer, 3rd Edition 2005, Volume 4, p.4456). The underlying logic of the doctrine is to maintain consistency and avoid uncertainty. The guiding philosophy is that a view which has held the field for a long time should not be disturbed only because another view is possible.

The trend of judicial opinion, in our view, is that *stare decisis* is not a dogmatic rule allergic to logic and reason; it is a flexible principle of law operating in the province of precedents providing room to collaborate with the demands of changing times dictated by social needs, State policy and judicial conscience.

Stare decisis is not an inexorable command of the Constitution or jurisprudence. A careful study of our legal system will discern that any deviation from the straight path of *stare decisis* in our past history has occurred for articulable reasons, and only when the Supreme Court has felt obliged to bring its opinions in line with new ascertained fact, circumstances and experiences. *(Precedent in Indian Law.* A Laxminath, Second Edition 2005. p.8).

Given the progressive orientation of the Supreme Court, its creative role under Article 141 and the creative elements implicit in the very process of determining rat*io decidendi,* it is not surprising that judicial process has not been crippled in the discharge of its duty to keep the law abreast of the times, by the traditionalist theory of stare decisis (ibid, p.32). Times and conditions change with changing society, and, "every age should be mistress of its own law" - and era should not be hampered by outdated law. "It is revolting", wrote Mr. Justice Holmes in characterstically forthright language, "to have no better reason for a rule of law than it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply presists from blind imitation of the past". It is the readiness of the judges to discard that which does not serve the public, which has contributed to growth and development of law. (ibid, p.68)

The doctrine of *stare decisis* is generally to be adhered to, because well settled principles of law founded on a series of authoritiative pronouncements ought to be followed. Yet, the demands of the changed facts and circumstances dictated by forceful factors supported by logic, amply justify the need for a fresh look.

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21. PREVENTION OF FOOD ADULTERATION ACT, 1954 – Section 13 (2) Proof of Compliance of Section 13 (2) – Compliance be proved by original postal receipt unless Court permits proof by secondary evidence.
Anil Kumar Jain v. State of M.P.
Reported in 2005 (II) MPWN 136

Held :

I have also found some substance in the submission of the applicant that section 13 (2) of the said Act was not complied because Ex. P-16 was sent by the registered post but the original postal receipt was not produced instead only photo copy was submitted and proved without any permission of the court under section 65 of the Evidence Act. As such without proof of original document such evidence is not reliable. Therefore issuance of notice is also doubtful, for the sake of argument if it is accepted that notice was sent to the applicant then concerning registers in original were not produced or proved only some copies were exhibited on record, which are also secondary evidence. On this count also issuance of notice is doubtful. Besides this service of notice was not proved by submitting acknowledgement due receipt and why it could not be submitted. For this no explanation was put forward by the prosecution. Therefore, it is clear that section 13 (2) of the said Act was not complied. Consequently, the applicant is entitled to get the benefit of non-complicance of this also.

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22. CRIMINAL PROCEDURE CODE, 1973 – Section 437 (6) Applicability of Section 437 (6) – The provisions are mandatory – Accused entitled to be released on bail unless Magistrate for reasons to be recorded directs otherwise.
Damodar Singh Chauhan v. State M.P.
Reported in 2005 (II) MPWN 138

Held :

The contention of learned counsel for the petitioner is that the offence for which the petitioner is being tried is triable by a Magistrate First Class and the case was fixed for the first time on 19.8.2004 for recording the evidence in the case but the trial of the petitioner was not concluded within the period of 60 days and, therefore, the petitioner is entitled for bail under section 437 (6) of CrPC but the Court below have erred in rejecting the application which is contrary to law.

Before we discuss the facts of the case in hand, it is necessary to have a look on the provision of section 437 (6) of the Code of Criminal Procedure which is as follows :

> "If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs."

It is clear that the above provision is mandatory in nature and according to this provision if the Magistrate is trying a case in which the accused is charged for a non-bailable offence and the trial of the case is not concluded within a period of 60 days from the first date fixed for taking evidence in the case and if the accused is in custody during the whole of the said period then he becomes entitled to be released on bail, provided the Magistrate rejects the bail application after recording in writing the reasons therefor.

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23. MOTOR VEHICLES ACT, 1988 – Sections 147 and 149
Insurance company, liability of – Cover note and policy issued by the Insurance Company though premium not received – Policy not cancelled for non-receipt of premium – Company held liable to indemnify insured.
Raman Asthana v. Mahila Siyabai
Reported in 2005 (II) MPWN 142

Held :

Counsel for the appellant submitted that the Claims Tribunal has committed an error in holding that the vehicle was not insured. He invited attention of the Court to the policy Ex. P-2. Effective date of commencement of the insurance is 5.12.1984 for the period upto 4.12.1985. Counsel for the appellant submitted that during the subsistence of the insurance policy, vehicle was insured on the date of accident i.e. on 20.5.1985. Counsel for the appellant further submitted that the Claims Tribunal has wrongly interpreted the provisions of 64-VB of the Insurance Act, 1938.

Counsel for the respondent insurance company submitted that actually premium was received by the company on 23.5.1985, therefore, insurance company is not liable.

This question has been considered by the apex Court in the case of *Oriental Insurance Co. Ltd. v. Inderjit Kaur and others* [1998 (I) MPWN 164 = AIR 1998 SC 588]. In this case, it is held that Chapter 11 of the Motor Vehicles Act, 1988 provides for the insurance of motor vehicle against third party risk and while interpreting section 64-VB of the Insurance Act, 1938, it is held that the insurance company, being an authorised insurer, issued a policy of insurance to

cover the bus without receiving the premium therefor. By reason of the provisions of sections 147 (5) and 149 (1) of the Motor Vehicles Act, the insurance company become liable to indemnify third parties in respect of the liability which that policy covered and to satisfy awards of compensation in respect thereof, notwithstanding its entitlement to avoid or cancel the policy for the reason that the cheque in payment of the premium thereon had not been honoured.

Apart from the aforesaid judgment, it may further be mentioned that the insurance policy was issued in pursuance of the cover note whereby the vehicle was insured for the period between 5.12.1984 to 4.12.1985. Said policy was not cancelled for non-receipt of the premium. Therefore, insurance company cannot be absolved of its liability. Finding of the Claims Tribunal that the insurance company is not liable to indemnify the insured is set aside.

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24. INDIAN PENAL CODE, 1860 – Sections 120-A and 120-B
Criminal Conspiracy, nature and proof of – Overt act not essential to constitute criminal conspiracy – Conspiracy can be proved by circumstantial evidence.
Dhananjaya v. State of M.P.
Reported in 2005 (II) MPWN 143

Held :

Section 120-A and 120-B of the IPC brought the law of conspiracy in India by making the overt act unessential when conspiracy is to commit a punishable offence. The offence of conspiracy is agreement between two or more persons to do any illegal act or a legal act by illegal means which may or may not be done but the very agreement is an offence and punishable. Overt act in a case of conspiracy consists in the agreement of the parties. The very plot is an act itself and the act of each of the parties is promise against promise enforced for a criminal object or for use of criminal means completes the offence.

In a case of conspiracy it is difficult to establish the same by direct evidence. Conspiracy can be proved by circumstantial evidence showing connection between the alleged conspiracy and the act done pursuant to that conspiracy. When from the allegations made in the charge sheet it can be inferred that accused entered into a conspiracy with other person to commit an offence, there is justification in framing the charge against that accused and in directing him to stand for trial. The gist of the offence of conspiracy lies in forming the scheme of agreement between the parties.

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25. WORDS AND PHRASES :
Expression 'fraud', meaning, expanse and connotation of – Fraud involves deceit and injury to the person deceived and vitiates every solemn act – Law explained.
State of A.P. v. T. Suryachandra Rao
Reported in 2005 (II) MPWN 145 (S.C.)

Held :

By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from ill-will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived the second condition is satisfied. [See *Vimla (Dr.) v. Delhi Admn., AIR 1963 SC 1572 at pp. 1576-77 para 14 and Indian Bank v. Satyam Fibres (India) (P) Ltd., (1996) 5 SCC 550].*

A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. [See *S.P. Chengalvaraya Naidu v. Jagannath, (1994) 1 SCC 1].*

"Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury enures there from although the motive from which the representations proceeded may not have been bad. An act of fraud on Court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void *ab initio.* Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. [See *Ram Chandra Singh v. Savitri Devi, (2003) 8 SCC 319].*

"Fraud" and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, 'wing me into the easy-hearted man and trap him into snares'. It has been defined as an act of trickery or deceit. In *Webster's Third New International Dictionary* "fraud" in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In *Block's Law Dictionary,* "fraud" is defined as an intentional perversion

of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In *Concise Oxford Dictionary,* it has been defined as criminal deception, use to false representation to gain unjust advantage; dishonest artifice or trick. According to *Halsbury's Laws of England,* a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact, Section 17 of the Contract Act, 1872 defines "fraud" as an act committed by a party to a contract with the intent to deceive another. From dictionary meaning or even otherwise fraud arises out of a deliberate active role of the representator about a fact, which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with the knowledge that it was false. In a leading English case i.e. *Derry v. Peek,* [(1886-90) All ER Rep 1 = (1889) 14 AC 337 (HL)] what constitutes "fraud" was described thus :

> "Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false."

But "fraud" in public law is not the same as "fraud" in private law. Nor can the ingredients, which establish "fraud" in commercial transaction, be of assistance in determining fraud in administrative law. It has been aptly observed by Lord Bridge in *Khawaja v. Secy. of State for Home Deptt.,* [(1983) 1 All ER 765=1984 AC 74 = (1982) 1 WLR 948 (HL)] that it is dangerous to introduce maxims of common law as to effect of fraud while determining fraud in relation to statutory law. "Fraud" in relation to statute must be a colourable transaction to evade the provisions of a statute.

> 'If a statute has been passed for some one particular purpose, a Court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope, Present-day concept of fraud on statute has veered round abuse of power or *mala fide* exercise of power. It may arise due to overstepping the limits of power or defeating the provision of statute by adopting subterfuge or the power may be exercised for extraneous or irrelevant considerations. The colour of fraud in public law or administrative law, as it is developing, is assuming different shades. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. That is, misrepresentation must be in relation to the

conditions provided in a section on existence or non-existence of which power can be exercised. But non-disclosure of a fact not required by a statute to be disclosed may not amount to fraud. Even in commercial transactions non-disclosure of every fact does not vitiate the agreement. 'In a contract every person must look for himself and ensures that he acquires the information necessary to avoid bad bargain.' In public law the duty is not to deceive." [See *Shrisht Dhawan v. Show Bros.*, (1992) 1 SCC 534].

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26. SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 3(1) (x)
Offence u/s 3(1) (x), ingredients of – Merely calling a person by his caste without proof of intention to insult/intimidate/humiliate will not constitute offence.
Jasrath Singh and another v. State of Madhya Pradesh
Reported in 2005 (4) MPHT 390

Held :

To constitute an offence under Section 3 (1) (x) of the Act it is necessary that whoever, not being a member of Scheduled Caste intentionally insults or intimidates with intent to humiliate a member of Scheduled Caste or a Scheduled Tribe in any place within public view. The words "intentional", "insult" and "humiliation" have been used in this Section but they have not been defined in the Act. As per Webster Dictionary, the word "Intent" means having the mind bent on an object, "intentional" means done purposely. The term "intentional" has been used in relation to act done by or with intention, which means to do wrong with intent. As per Law Lexicon, a person who, by his declaration, act or omission, had caused another to belief a thing to be true and to act upon that belief, must be held to have done so "intentionally" within the meaning of the Statute. As per Webster, "to insult" is to treat with abuse, insolence, or contempt; to commit an indignity upon, as to call the main liar. A gross indignity offered to another whether by act or by word is known as "insult". An insult is an indolent attack. It is more easy to imagine an affront where none was intended than an insult. As per Webster, in common parlance the word "humiliation" means to lower the dignity of, painfully humbling, the state of being humble and free from pride. As per Oxford dictionary "humiliate" means to cause a person to feel disgrace, humble condition or attitude of mind. In the background of the definition of the aforesaid words, to prove the offence under the aforesaid section, it is necessary that there must be an element of intentionally committing the insult or intimidating with intent to humiliate a member of Scheduled Caste and for that the evidence of the witness should be consistent and reliable. When there is caste-based rivalry between the parties and hatred against the members of appellant community, the evidence has to be scrutinised carefully and there should be very cogent and independent evidence of causing insult intentionally.

So far as this case is concerned, there is no consistent evidence on record regarding intentional insult or intimidation with intent to humbiliate a member of Scheduled Caste. Raghuvir Singh Chowdhary (P.W. 5), who is a member of Janpad and was present in the meeting appears to be a responsible person has deposed that they have said *"Yaha Chamar Panchayat Ho Rahi He"* and these words are neither offending nor it can be said that they were told with the intention of insult or they come within the purview of intimidation with intent to humiliate a member of Scheduled Caste. Merely calling a person from the caste name without the proof of any intention of intentionally insulting or humiliating will also not constitute the offence referred under the section.

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27. LIMITATION ACT, 1963 – Section 3

Section 3, nature of – Provisions are of mandatory nature – Court can *suo motu* take notice of the question of limitation and dismiss the suit – Law explained.

State of Madhya Pradesh v. Chhindwara Cold Storage Co. Pvt. Ltd. and another

Reported in 2005 (4) MPHT 402

Held :

It is true that the appellant did not file any written statement and did not contest the suit but it is always for the plaintiff to establish that his case is within limitation. In the present case, the plaintiff-company failed to prove that its case is within limitation. Simply because the appellant defendant No. 2 was *ex parte* before the Trial Court, a time barred claim could not have been decreed against it. When the Courts find that the suit has been filed after the period of limitation, they are bound to be dismissed even if limitation may not have set up as a defence. The fact that a party did not raise the plea of limitation before the Trial Court would not disentitle it to raise the same in appeal. Where the suit is filed beyond the period of limitation prescribed and there is no question of condoning delay, the Trial Court had no jurisdiction to entertain such suit on merits and decree the same.

The provisions under Section 3 of the Limitation Act are absolute and mandatory. Even at an appellate stage, it is the duty of the Court to dismiss the suit which, on the face of it, is barred by time. Despite the fact that the issue was not raised by a party the Court can suo motu take notice of the question of limitation.

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28. CRIMINAL TRIAL :

Non-production of articles in evidence during trial, defect of — Such defect being of technical nature may be allowed to be rectified by remanding the case.

Manoj Rawat v. State of Madhya Pradesh

Reported in 2005 (4) MPHT 438

Held :

On appeal, the Appellate Court has remanded the case for retrial on the ground that the articles seized from the applicant were not brought before the Court during trial or shown to the witnesses in proof thereof and as such the seizure of those articles was not legal in the eyes of law in the absence of material exhibit of the articles. The Appellate Court relied upon the Division Bench decision of this Court rendered in the case of *State of M.P. Vs. Krishna Kumar*, (1997) 1 M.P. Weekly Note 203.

It is urged on behalf of the applicant that the prosecution had every opportunity to produce the articles during the trial before the Court and on having failed to do so it can not be allowed to fill up the lacuna. Reliance has been on the decision of the Supreme Court rendered in the cse of *Abinash Chandra Bose Vs. Bimal Krishna Sen and another*, AIR 1963 SC 316.

Non-production of the articles seized before the Court during trail for showing to the witnesses in proof thereof, in my considered opinion, is a technical lacuna particularly when the seizure memo of the articles, Ex. P-2, has been proved. Thus, to deny the opportunity to remove the formal defect would amount to a bort a case against an alleged offender indulged in the act of gambling. It is to be noted that the police recovered cash of Rs. 14,300/- and nine "satta" slips from him.

In *State of Gujarat Vs. Mohanlal, AIR 1987 SC 1321*, it has been held by the Supreme Court that ends of justice are not satisfied only when the accused in a criminal case is acquitted. The Community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the Community deserves equal treatment at the hands of the Court in the discharge of its judicial functions. The Community or the State is not a *persona non-grata* whose cause may be treated with disdain.

Recently, in the caseof *Zahira Habibullah Sheikh and another Vs. State of Gujarat and others, AIR 2004 SC 3114*, the Supreme Court has held that every endeavour should be made by the Trial Court to see that the trial is fair and it will not be correct to say that it is only the accused who must be fairly dealt with. According to the Supreme Court that would be turning Nelson's eyes to the needs of the Society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. The Supreme Court has further held that the Presiding Judge must not be a spectator and a mere recording machine but should be becoming a participant in he trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth and administer justice with fairness and impartiality both to the parties and to the community.

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29. HINDU MARRIAGE ACT, 1955 – Section 13 (1) (i-b)
Desertion – Wife staying separately without making any effort to reside with the husband – *Animus deserendi* on the part of wife clearly established.
Geeta Jagdish Mangtani v. Jagdish Mangtani
Judgment dt. 20.9.2005 passed by the Supreme Court in Civil Appeal No. 576 of 2003, reported in (2005) 8 SCC 177

Held :

The most important fact which emerges is that from 2-6-1993, the parties have been staying separately and there is total lack of any effort on their part to stay together. Since the wife left the matrimonial home on 2-6-1993 and has, admittedly, not returned to the said home, the absence of any desire on her part to honour the matrimonial obligation is clear. In this connection the observation of the High Court is worth reproducing :

> ".... Both the husband and wife have renounced the relationship as husband and wife since June 1993 and from the record of the case also presently the questions which I have asked in the chamber, I am satisfied that both the husband and wife had no intention to live together as husband and wife and decided to break off from the relationship of marriage or withdraw that companionship of husband and wife. Desertion means rejection by the party of all the obligations of marriage and permanent forsaking or abandonment of one spouse by the other without any reasonable cause and without the consent of the other.
>
> 14.7. I have considered the entire aspect and there is no useful purpose to have kept the parties as husband and wife particularly from 1993 when both the husband and wife have not stayed together. Though I have made efforts to see that the wife can go to her matrimonial home at Mumbai or the husband can stay at Gandhidham but unfortunately this Court's effort to reunite them as husband and wife failed. This Court has therefore no alternative but to pass the order for divorce to see that both people can be free to have their own house in this behalf because to keep both the husbandand wife together when one stays at Mumbai and another at Gandhidham, without the intention to stay together, would serve no purpose. Therefore, the marriage is completely, broken down and no useful purpose would be served by dismissing the second appeal."

We are of the view that these observations of the High Court are fully justified in the facts of the present case. One has to particularly note the fact that the parties knew even prior to marriage whatever they were earning. The earnings of the wife from a government job before the marriage was more than double of that of the husband. With the knowledge of this fact the parties entered into matrimonial alliance. The marriage survived only for a brief period of about

seven months. After 2-6-1993 till the exchange of notices and replies during September to December 1996 and filing of the divorce petition ultimately by the husband on 31-12-1996, there has been no attempt on the part of the wife to stay with the husband. She is a school teacher and it is common knowledge that in schools there are long vacations during summer months, more so, in government schools where the wife teaches. At least during those holidays she could have visited the husband at Ulhasnagar along with her son and stayed with him. There is nothing on record to show that any such attempt was ever made by her to visit the husband during this entire period. She has stated in her evidence that the husband used to come and stay with her during her during her vacations. This has been denied by the husband. Therefore, the conclusion is inevitable, that there was never any attempt on the part of the wife to go to her husband's house i.e. matrimonial home of the parties after she left on 2-6-1993. From this fact alone animus deserendi on the part of the wife is clearly established. She has chosen to adopt a course of conduct which proves desertion on her part. In facts and circumstances of the case, it cannot be said that this desertion on the part of the wife was with a reasonable cause. Such a course of conduct over a long period indicates total abandonment of marriage and cannot be justified on the ground of monetary consideration alone as a reasonable cause to desert. It also amounts to wilful neglect of the husband by the wife.

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30. CRIMINAL TRIAL :

N.D.P.S. ACT, 1985 – Sections 41(2) and 42 (1)

(i) Whether there is a legal bar for a police man to act as panch witness? Held, No.

(ii) Compliance of Section 42 regarding sending information to superior officer – Whether officer of gazetted rank is required to send information to superior officer? Held, No.

Judgment dt. 03.10.2005 passed by the Supreme Court in Criminal Appeal No. 1127 of 2004, reported in (2005) 8 SCC 183

Held :

So far as the point regarding non-association of independent witnesses is concerned, the same is intended to throw doubt upon the recovery of the contraband drug. Exhibit P-2 is the panchnama which is signed by the two independent witnesses, the three officers of the Department and the two accused. It contains a clear description of how the search was made and the contraband was seized. It is a case of recovery of 20 kg of diazepam which is a banned drug as per the Schedule to the Act. When the quantity recovered is so large, it does not appear to be a case of planting. Further a perusal of the panchnama leaves no scope for doubting the seizure. So far as association of independent witnesses is concerned it will be seen that the time of search was 5.30 a.m. in the morning. At that hour it is difficult to get people from the general public to act as independent witnesses. Still the officer managed to get two witnesses, one of of

whom has been examined. Refering to the statement of PW5, the learned counsel for the appellant tried to pick holes in it. In our view, there is no substance in the argument. PW 5 is a reserve policeman and there is no bar in law for a policeman to act as a mediator/panch witness. It should be kept in view that this was a raid which was conducted by excise officials and not by the police.

The question for our consideration is : whether it is necessary for officers of the gazetted rank to comply with sub-section (2) of Section 42 i.e. send the information taken down in writing by the officers to immediate official superior within seventy-two hours. According to the learned counsel for the appellants Section 42(2) is mandatory and covers all officers including officers of gazetted Rank. It does not make any distinction between a gazetted and a non-gazetted officer and, therefore, all empowered officers must comply with sub-section (2) of Section 42.

It will be seen from Section 41 (2) that it refers to only officers of gazetted rank and it is such officers who can authorise their suboradinates, not below the rank of peon, sepoy or constable, to carry out arrest, search or seizure. The function of arrest, search and seizure carried out under Section 42 (1) is by officers who do not have warrants or authorisation in their hands before proceeding to take action. This is as per the heading of the section which reads: "Power of entry, search, seizure and arrest without warrant of authorisation." Under Section 41 it is the specified Magistrates who issue warrants of arrest and it is officers of gazetted rank who give who give authorisation in favour of their juniors. Provisions of sub-section (2) of Section 42 are meant to cover cases falling under Section 42(1). Therefore, in our view, the requirement under Section 42(2) need not be extended to cases of arrest, search and seizue by officers of gazetted rank. The officer of gazetted rank while authorising junior officers under Section 41(2) knows what he is requiring them to do and, therefore, there is no need for reporting. For this reason Section 41 does not contain any such requirement. The need for reporting under Section 42(2) arises because the officer proceeds without authorisation in terms of Section 41(1) or 41(2). The requirement of informing the immediate official superior under Section 42(2), in our view, has to be confined to cases where the action is taken by officers below the rank of gazetted officers without authorisation.

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31. CRIMINAL PROCEDURE CODE, 1973 – Section 197
Protection available u/s 197, nature and applicability of – Expression 'official duty', meaning of – Section does not get immediately attracted on institution of case – Law explained.
Centre for Public Interest Litigation and another v. Union of India and another
Judgment dt. 06.10.2005 passed by the Supreme Court in IA No. 1 in Writ Petition (C) No. 387 of 2005, reported in (2005) 8 SC 202

Held :

The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon to offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the commission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case.

Use of the expression "official duty" implies that the act or omission must have been done by the public servant in the course of his service and that it should have been in discharge of his duty. The section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty.

If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty then it must be held to be official to which applicability of Section 197 of the Code cannot be disputed.

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32. SERVICE LAW :

Subsistence allowance, effect of nonpayment of – Mere nonpayment not a ground to vitiate proceedings – Law explained.

U.P. State Textile Corpn. Ltd. v. P.C. Chaturvedi and others

Judgment dt. 03.10.2005 passed by the Supreme Court in Civil Appeal No. 7240 of 2003, reported in (2005) 8 SCC 211

Held :

So far as the effect of not paying the subsistence allowance is concerned, before the authorities no stand was taken by Respondent 1 employee that because of nonpayment of subsistence allowance, he was not in a position to participate in the proceedings, or that any other prejudice in effectively defending the proceedings was caused to him. He did not plead or substantiate also that the nonpayment was either deliberate or to spite him. It is ultimately a question of prejudice. Unless prejudice is shown and established, mere nonpayment of subsistence allowance cannot ipso facto be a ground to vitiate the proceedings in every case. It has to be specifically pleaded and established as to in what way the affected employee is handicapped because of non-receipt of subsistence allowance. Unless that is done, it cannot be held as an absolute position in law that nonpayment subsistence allowance amounts to denial of opportunity and vitiates departmental proceedings.

The above position was highlighted in *Indra Bhanu Gaur v.Committee, M.M. Degree College, (2004) 1 SCC 281.*

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33. CONSTITUTION OF INDIA – Article 226

Writ Jurisdiction – Existence of alternate remedy, whether a bar to exercise jurisdiction under Art. 226 ? – Law explained.

Sanjana M. Wig (Ms) v. Hindustan Petroleum Corpn. Ltd.

Judgment dt. 15.9.2005 passed by he Supreme Court in Civil Appeal No. 7337 of 2004, reported in (2005) 8 SCC 242

Held :

The principal question which arises for consideration is as to whether a discretionary jurisdiction would be refused to be exercised solely on the ground of existence of an alternative remedy which is more efficacious. Ordinarily, when a dispute between the parties requires adjudication of disputed question of facts wherefor the parties are required to lead evidence both oral and documentary which can be determined by a domestic forum chosen by the parties, the Court may not entertain a writ application. (See *Titagarh Paper Mills Ltd. v. Orissa*

SEB, (1975) 2 SCC 436 and *Bisra Stone Lime Co. Ltd. v. Orissa SEB, (1976) 2 SCC 167*).

However, access to justice by way of public law remedy would not be denied when a lis involves public law character and when the forum chosen by the parties would not be in a position to grant appropriate relief.

A Division Bench of this Court in *ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd., (2004) 3 SCC, 553* observed that in certain cases even a disputed question of fact can be gone into by the court entertaining a petition under Article 226 of the Constitution, holding: (SCC p. 572, para 28)

> "28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See *Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1*). And this Plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

In *Harbanslal Sahnia v. Indian Oil Corpn. Ltd., (2003) 2 SCC 107, Lahoti, J.,* (as His Lordship then was), relied upon *Whirlpool Corpn v. Registrar of Trade Marks* (supra) observing that in an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies : (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the virus of an Act is challenged.

We may, however, notice that the Bench did not notice the earlier decisions in *Titagarh Paper Mills Ltd., (supra) and Bisra Stone Lime Co. Ltd.* (supra). However, there cannot be any doubt whatsoever that the question as to when such a discretionary jurisdiction is to be exercised exercised or refused to be exercised by the High Court has to be determined having regard to the facts and circumstances of each case wherefor, no hard-and-fast rule can be laid down.

A three-Judge Bench of this Court in State of H.P. v. Gujarat Ambuja Cement Ltd., (2005) 6 SCC 499, referring to Harbanslal Sahnia (supra) held : (SCC pp. 517-18, paras 22-23)

"22[24] ..... There are two well-recognised exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.

23[25] Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute."

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34. CRIMINAL PROCEDURE CODE, 1973 – Sections 386, 384 and 385 Criminal Appeal, disposal of – Duty of the appellate Court while deciding a criminal appeal – Law explained.
State of M.P. v. Ballare alias Ram Gopal
Judgment dt. 20.10.2005 passed by the Supreme Court in Criminal Appeal No. 1355 of 2005, reported in (2005) 8 SCC 249

Held :

Chapter XXIX of the Code of Criminal Procedure deals with Appeals. Section 384 CrPC empowers the appellate court to dismiss an appeal summarily if it considers that there is no sufficient ground for interference. Section 385 CrPC gives the procedure for hearing appeals not dismissed summarily and Section 386 CrPC gives the powers of the appellate court. In *Amar Singh v. Balwinder Singh* the duty of the appellate court while hearing a criminal appeal in the light of the aforesaid provisions was explained and, para 7 of the Report reads as under: (SCC pp. 525-26)

"7. The learned Sessions Judge after placing reliance on the testimony of the eyewitnesses and the medical evidence on record was of the opinion that the case of the prosection was fully established. Surprisingly, the High Court did not at all consider the testimony of the eyewitnesses and completely ignored the same. Section 384 CrPC empowers the appellate court to dismiss the appeal summarily if it

considers that there no sufficient ground for interference. Section 385 CrPC lays down the procedure for hearing appeal not dismissed summarily and sub-section (2) thereof casts an obligation to send for the records of the case and to hear the parties. Section 386 CrPC lays down that after perusing such record and hearing the appellant or his pleader and the Public Prosecutor, the appellate court may, in an appeal from conviction, reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a court of competent jurisdiction. It is, therefore, mandatory for the appellate court to peruse the record which will necessarily mean the statement of the witnesses. In a case based upon direct eyewitness account, the testimony of the eyewitnesses is of paramount importance and if the appellate court reverses the finding recorded by the trial court and acquits the accused without considering or examining the testimony of the eyewitnesses, it will be a clear infraction of Section 386 CrPC. In *Biswanath Ghosh v. State of W.B.* it was held that where the High Court acquitted the accused in appeal against conviction without waiting for arrival of records from the Sessions Court and without perusing evidence adduced by the prosecution, there was a flagrant miscarriage of justice and the order of acquittal was liable to be set aside. It was further held that the fact that the Public Prosecutor conceded that there was no evidence, was not enough and the High Court had to satisfy itself upon perusal of the records that there was no reliable and credible evidence to warrant the conviction of the accused. In State of *U.P. v. Sahai* it was observed that where the High Court has not cared to examine the details of the intrinsic merits of the evidence of the eyewitnesses and has rejected their evidence on general grounds, the order of acquittal passed by the High Court resulted in a gross and substantial miscarriage of justice so as to invoke extraordinary substantial miscarriage of justice so as to invoke extraordinary jurisdiction of the Supreme Court under Article 136 of the Constitution."

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35. RENT CONTROL AND EVICTION :
Bona fide need – Landlord has a privilege to choose nature of business and place of business – Tenant cannot dictate terms – Bona fide requirement has to be seen on the date of the petition – Generally, subsequent events not relevant.
Sait Nagjee Purushotham & Co. Ltd v. Vimalabai Prabhulal and others Judgment dt. 04.10.2005 passed by the Supreme Court in Civil Appeal No. 1113 of 2003, reported in (2005) 8 SCC 252

Held :

In the case of *Pratap Rai Tanwani v. Uttam Chand, (2004) 8 SCC 490* it was

held that the bona fide requirement of the landlord has to be seen on the date of the petition and the subsequent events intervening due to protracted litigation will not be relevant. It was held that the crucial date is the date of petition. Their Lordships further observed that the normal rule is that the rights and obligations of the parties are to be determined on the date of the petition and that subsequent events can be taken into consideration for moulding the relief provided such events had a material impact on those rights and obligations. It was further observed by Their Lordships that it is a stark reality that the longer is the life of the litigation the more would be the number of developments sprouting up during the long interregnum. Therefore, the courts have to take a very pragmatic approach of the matter. It is common experience in our country that specially landlord-tenant litigation prolongs for a long period. It is true that neither can the person who has started the litigation sit idle nor can the development of the events be stopped by him. Therefore, the crucial event should be taken as on the date when the suit for eviction was filed unless the subsequent event materially changed the ground of relief.

In the case of *Gaya Prasad v. Pradeep Srivastava, (2001) 2 SCC 604* Their Lordships observed that the landlord should not be penalised for the slowness of the legal system and the crucial date for deciding the bona fides of the requirement of the landlord is the date of his application for eviction. Their Lordships also observed that the process of litigation cannot be made the basis for denying the landlord relief while litigation at least reaches the final stages. However, Their Lordships further added that subsequent events may in some situations be considered to have overshadowed the genuineness of the landlord's need but only if they are of such nature and dimension as to completely eclipse such need and make it lose significance altogether.

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36. SERVICE LAW :

Back wages, entitlement for – Appellant terminated from service because of conviction – Subsequent acquittal in appeal does not automatically entitle him to back wages – Law explained.
Baldev Singh v. Union of India and others
Judgment dt. 28.10.2005 passed by the Supreme Court in Civil Appeal No. 3892 of 1999, reported in (2005) 8 SCC 747

Held :

As the factual position noted clearly indicates, the appellant was not in actual service for the period he was in custody. Merely because there has been an acquittal does not automatically entitle him to get salary for the period concerned. This is more so, on the logic of no work no pay. It is to be noted that the appellant was terminated from service because of the conviction. Effect of the same does not get diluted because of subsequent acquittal for the purpose of counting service. The aforesaid position was clearly stated in *Ranchhodji Chaturji Thakore v. Supdt. Engineer, Gujarat Electricity Board, (1996) 11 SCC 603.*

The position was reiterated in *Union of India v. Jaipal Singh, (2004) 1 SCC 121.*

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37. NOISE POLLUTION (REGULATION AND CONTROL) RULES, 2000 – Rule 5

Restriction on the use of loud speaker/public address system – Sub-rule (3) stipulating power of the State to grant exemption not *ultra vires* – Law explained.

Noise Pollution (VII), in Re [Forum, Prevention of Environmental & Sound Pollution] v. Union of India and another

Judgment dt. 28.10.2005 passed by the Supreme Court in Civil Appeal No. 3735 of 2005, reported in (2005) 8 SCC 796

Held:

Rule 5 of the Noise Rules reads as under :

> "5. *Restrictions on the use of loudspeakers/public address system.* – (1) A loudspeaker or a public address system shall not be used except after obtaining written permission from the authority.
>
> (2) A loudspeaker or a public address system shall not be used at night (between 10.00 p.m. to 6.00 a.m.) except in closed premises for communication within, e.g. auditoria, conference rooms, community halls and banquet halls.
>
> (3) Notwithstanding anything contained in sub-rule (2), the State Government may, subject to such terms and conditions as are necessary to reduce noise pollution, permit use of loudspeakers or public address systems during night hours (between 10.00 p.m. to 12.00 midnight) on or during any, cultural or religious festive occasion of a limited duration not exceeding fifteen days in all during a calendar year."

Sub-rule (3) has been inserted in the present form by the Noise Pollution (Regulation and Control) (Amendment) Rules, 2002 with effect from 11.10.2002. The constitutional validity of sub-rule (3) was put in issue by the appellant herein by filing a writ petition in the High Court of Kerala. By its judgment dated 14-3-2003, the High Court has directed the petition to be dismissed and the sub-rule has been held to be *intra vires*. The aggrieved petitioner has filed this petition by special leave.

On behalf of the appellant, it has been submitted that this Court in its judgment dated 18.7.2005 *Noise Pollution* (V), In *re (2005) 5 SCC 733 has* held that freedom from noise pollution is a part of the right to life under Article 21 of the Constitution. Noise interferes with the fundamental right of the citizens to live in peace and to protect themselves against forced audience. This Court has also held that as between 10 p.m. and 6 a.m. which is the time for the people to sleep and have peace, no noise pollution can be permitted. The appellant also submits that the impugned sub-rule (2) which permits the State Government to

relax the applicability of sub-rule (2) and grant exemption therefrom between 10 p.m. and 12 midnight, is violative of Article 21 of the Constitution and runs counter to the law laid down by this Court in *Noise Pollution (V), In re (supra).*

The learned Solicitor General has defended the *vires* of the said sub-rule (3) and also the judgment of the High Court. In his submission, the power to grant exemption is a reasonable restriction placed in public interest. The relaxation is for a period of 2 hours only and that too far a maximum of 15 days in all during a calendar year confined to cultural or religious occasions. Since the power has been conferred on the State Government by the Central Government it cannot further be delegated. The power would be exercised by the State Government by keeping in view the interest of the entire State population.

Looking at the diversity of cultures and religions in India, we think that a limited power of exemption from the operation of the Noise Rules granted by the Central Government in exercise of its statutory power cannot be held to be unreasonable. The power to grant exemption is conferred on the State Government. It cannot be further delegated. The power shall be exercised by reference to the State as a unit and not by reference to districts, so as to specify different dates for different districts. It can be reasonably expected that the State Government would exercise the power with due care and caution and in the public interest. However, we make it clear that the scope of the exemption cannot be widened either by increasing the number of days or by increasing the duration beyond two hours. If that is attempted to be done, then the said sub-rule (3) conferring power to grant exemption may be liable to be struck down as violative of Articles 14 and 21 of the Constitution. We also make it clear that the State Government should generally specify in advance, the number and particulars of the days on which such exemption will be operative. Such specification would exclude arbitrariness in the exercise of power. The exemption, when granted, shall not apply to silence zone areas. This is only as a clarification as, this even otherwise is the position of law.

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38. SERVICE LAW :

Voluntary retirement – Withdrawal of application for voluntary retirement, permissibility of – It can be withdrawn even after acceptance if relationship of employer and employee exists – Law explained.
Srikantha S.M. v. Bharath Earth Movers Ltd.
Judgment dt. 07.10.2005 passed by the Supreme Court in Civil Appeal No. 1404 of 2003, reported in (2005) 8 SCC 314

Held:

In *Balram Gupta v. Union of India, 1987 Supp SCC 228* referred to above, the employee withdrew his notice of voluntary retirement on account of persistent and personal requests from the staff members. But the prayer for withdrawal was not allowed by the employer on the ground that it had already been accepted by the Government. Moreover, Rule 48-A (4) of the Central Civil Serv-

ices (Pension) Rules, 1972 precluded the government servant from withdrawing his notice except with specific approval of the appointing authority.

Deprecating the stand taken by the Government, this Court held that it was not proper for the Government not to accede to the request of the employee. "In the modern age we should not put embargo upon people's choice or freedom", – stated the Court (SCC pp. 235-36, para 12).

The Court added: (SCC p. 236, para 13)

> "In the modern and uncertain age it is very difficult to arrange one's future with any amount of certainty; a certain amount of flexibility is required, and if such flexibility does not jeopardise Government or administration, administration should be graceful enough to respond and acknowledge the flexibility of human mind and attitude and allow the appellant to withdraw his letter of retirement in the facts and circumstances of this case. Much complications which had arisen could have been thus avoided by such graceful attitude. The court cannot but condemn circuitous ways 'to ease out' uncomfortable employees. As a model employer the Government must conduct itself with high probity and candour with its employees."

In *Power Finance Corpn. Ltd. v. Pramod Kumar Bhatia, (1997) 4 SCC 280* a workman applied for voluntary retirement pursuant to the scheme framed by the Corporation to relieve surplus staff. The Corporation vide an order dated 20.12.1994 accepted voluntary retirement of the workman with effect from 31.12.1994 subject to certain conditions. Subsequently, however, the Corporation withdrew the scheme. It was held that the order dated 20.12.1994 was conditional and unless the employee was relieved from the duty on the fulfilment of those conditions, the order of voluntary retirement did not become effective. The employee, therefore, could not assert that the voluntary retirement was effective and claim benefits on that basis.

The Court said: (SCC p. 282, para 7)

> "7. *It is now settled legal position that unless the employee is relieved of the duty, after acceptance of the offer of voluntary retirement or resignation, jural relationship of the employee and the employer does not come to an end.* Since the order accepting the voluntary retirement was a conditional one, the conditions ought to have been complied with. Before the conditions could be complied with, the appellant withdrew the scheme. Consequently, the order accepting voluntary retirement did not become effective. Thereby no vested right has been created in favour of the respondent. The High Court, therefore, was not right in holding that the respondent has acquired a vested right and, therefore, the appellant has no right to withdraw the scheme subsequently." (emphasis supplied)

In *J.N. Srivastava v. Union of India, (1998) 9 SCC 557* a notice of voluntary retirement was given by an employee on 3-10-1989 which was to come into effect from 31.1.1990. The notice was accepted by the Government on 2.11.1989 but the employee withdrew the notice vide his letter dated 11.12.1989. It was held that withdrawal was permissible though it was accepted by the Government, since it was to be made effective from 31.1.1990 and before that date it was withdrawn.

In *Shambhu Murari Sinha v. Project and Development India, (2000) 5 SCC 625 (Shambhu Murari Sinha I)* an application for voluntary retirement of an employee dated 18.10.1995 was accepted by the employer vide letter dated 30.7.1997 with further intimation that "release memo along with detailed particulars will follow". The workman was actually relieved on 26.9.1997. In the meanwhile, however, by a letter dated 7.8.1997, he withdrew the application dated 18.10.1995, by which he sought voluntary retirement. It was held that the effective date of voluntary retirement was 26.9.1997 and before that date it was permissible for the workman to withdraw his retirement. The appellant was, therefore, held entitled to remain in service.

In *Shambhu Murari Sinha v. Project and Development India Ltd., (2002) 3 SCC 437 (Shambhu Murari Sinha II), the view taken in Shambhu Murari Sinha* (supra) was reiterated. It was held that when voluntary retirement was withdrawn by an employee, he continued to remain in service. The relationship of employer and employee did not come to an end and the employee had *locus penitentiae* to withdraw his proposal for voluntary retirement. He was, therefore, entitled to rejoin duty and the Corporation was bound to allow him to work.

On the basis of the above decisions, in our opinion, the learned counsel for the appellant is right contending that though the respondent Company had accepted the resignation of the appellant on 4.1.1993 and was ordered to be relieved on that day, by a subsequent letter, he was granted casual leave from 5.1.1993 to 13.1.1993. Moreover, he was informed that he would be relieved after office hours on 15.1.1993. The *vinculum juris*, therefore, in our considered opinion, continued and the relationship of employor and employee did not come to an end on 4.1.1993. The relieving order and payment of salary also make it abundantly clear that he was continued in service of the Company up to 15.1.1993.

In the affidavit-in-reply filed by the Company, it was stated that resignation of the appellant was accepted immediately and he was to be relieved on 4.1.1993. It was because of the request of the appellant that he was continued up to 15.1.1993. In the affidavit-in-rejoinder, the appellant had sated that he reported for duty on 15.1.1993 and also worked on that day. At about 12.00 noon, a letter was issued to him stating therein that he would be relieved at the close of the day. A cheque of Rs.13,511 was paid to him at 17.30 hrs. The appellant had asserted that he had not received terminal benefits such as gratuity, provident fund, etc. It is thus proved that up to 15.1.1993, the appellant remained in serv-

ice. If it is so, in our opinion, as per settled law, the appellant could have withdrawn his resignation before that date. It is an admitted fact that a letter of withdrawal of resignation was submitted by the appellant on 8.1.1993. It was, therefore, on the Company to give effect to the said letter. By not doing so, the Company has acted contrary to the law and against the decisions of this Court and hence, the action of the Company deserves to be quashed and set aside.

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39. EVIDENCE ACT, 1872 – Sections 107 and 108
Presumption about death of a person, who has not been heard for seven years – Presumption not about date or time of death – Difference in English and Indian Law.
Saroop Singh v. Banto and others
Judgment dt. 07.10.2005 passed by the Supreme Court in Civil Appeal No. 4426 of 1999, reported in (2005) 8 SCC 330

Held :

Sections 107 and 108 of the Evidence Act read:

> "107. *Burden of proving death of person known to have been alive within thirty years,* – When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.
>
> 108. *Burden of proving that person is alive who has not been heard of for seven years.* – Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

Section 108 is a proviso to Section 107.

There is neither any doubt nor dispute that the date of death of Indira Devi is not certain. By reason of the aforementioned provision, a presumption of death can be raised. In this case, however, death of Indira Devi is not in question, the date of death is. In the instant case, both the parties have failed to prove the date of death of Indira Devi. However, having regard to the presumption contained in Section 108 of the Evidence Act, the Court shall presume that she was dead having not been heard of for a period of seven years by those who would naturally have heard of her, if she had been alive, but that by itself would not be a ground to presume that she had died seven years prior to the date of institution of the suit

In *Lal Chand Marwari v. Mahant Ramrup Gir (AIR 1926 PC 1)* it was observed: (IA p. 32)

> "Now upon this question there is, Their Lordships are satisfied, no difference between the law of India as declared in the Indian Evidence

Act and the law of England: *Rango Balaji v. Mudiyeppa, ILR (1899) 23 Bom 296*, searching for an explanation of this very persistent hearsay Their Lordships find it in the words in which the rule both in India and in England is usually expressed. These words taken originally from Phene's Trusts, In *re (1861-73) All ER Rep. 514* run as follows:

"If a person has not been heard of for seven years, there is a presumption of law that he is dead: but at what time within that period he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential.'

Following these words, it is constantly assumed – not perhaps unnaturally – that where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This of course is not so. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself be stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one 'of not less than seven years'."

In *LIC of India v. Annuradha, (2004) 10 SCC 131* this Court held : (SCC pp. 137-38, para 12)

"12. Neither Section 108 of the Evidence Act nor logic, reason or sense permit a presumption or assumption being drawn or made that the person not heard of for seven years was dead on the date of his disappearance or soon after the date and time on which he was last seen. The only inference permissible to be drawn and based on the presumption is that the man was dead at the time when the question arose subject to a period of seven years' absence and being unheard of having elapsed before that time. The presumption stands unrebutted for failure of the contesting party to prove that such man was alive either on the date on which the dispute arose or at any time before that so as to break the period of seven years counted backwards from the date on which the question arose for determination. At what point of time the person was dead is not a matter of presumption but of evidence, factual or circumstantial, and the onus of proving that the death had taken place at any given point of time or date since the disappearance or within the period of seven years lies on the person who stakes the claim, the establishment of which will depend on proof of the date or time of death."

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40. HINDU MARRIAGE ACT, 1955 – Section 11
Void marriage – Marriage of a person having a living spouse at the time of marriage is null and void – Formal declaration by way of decree of nullity not necessary – Law explained.
M.M. Malhotra v. Union of India and others
Judgment dt. 04.10.2005 passed by the Supreme Court in Civil Appeal No. 5185 of 2001, reported in (2005) 8 SCC 351

Held :

For appreciating the status of a Hindu woman marrying a Hindu male with a living spouse some of the provisions of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Marriage Act") have to be examined. Section 11 of the Marriage Act declares such a marriage as null and void in the following terms:

> "11. *Void marriages.* – Any marriage solemnised after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5."

Clause (i) of Section 5 lays down, for a lawful marriage, the necessary condition that neither party should have a spouse living at the time of the marriage. A marriage in contravention of this condition, therefore, is null and void. By reason of the overriding effect of the Marriage Act as mentioned in Section 4 no aid can be taken of the earlier Hindu law or any custom or usage as a part of that law inconsistent with any provision of the Act. So far as Section 12 is concerned, it is confined to other categories of marriages and is not applicable to one solemnised in violation of Section 5(i) of the Act. Sub-section (2) of Section 12 puts further restrictions on such a right. The cases covered by this section are not void ab initio, and unless all the conditions mentioned therein are fulfilled and the aggrieved party exercises the right to avoid it, the same continues to be effective. The marriages covered by Section 11 are void ipso jure, that is, void from the very inception, and have to be ignored as not existing in law at all, if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a court in a proceeding specifically commenced for the purpose.

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41. WORDS AND PHRASES :
Expression "misconduct", meaning of.
M.M. Malhotra v. Union of India and others
Judgment dt. 04.10.2005 passed by the Supreme Court in Civil Appeal No. 5185 of 2001, reported in (2005) 8 SCC 351

Held :

It has therefore, to be noted that the word "misconduct" is not capable of

precise definition. But at the same time though incapable of precise definition, the word "misconduct" on reflection receives its connotation from the context, the delinquency in performance and its effect on the discipline and the nature of the duty. The act complained of must bear a forbidden quality or character and its ambit has to be construed with reference to the subject-matter and the context wherein the term occurs, having regard to the scope of the statute and the public purpose it seeks to serve.

In *Union of India of India v. Harjeet Singh Sandhu, (2001) 5 SCC 593* in the background of Rule 14 of the Army Rules, it was held that any wrongful act or any act of delinquency which may or may not involve moral turpitude would be "misconduct" under Rule 14.

In *Baldev Singh Gandhi v. State of Punjab, (2002) 3 SCC 667* it was held that the expression "misconduct" means unlawful behaviour, misfeasance, wrong conduct, misdemeanour, etc.

Similary, in *State of Punjab v. Ram Singh Ex. Constable, (1992) 4 SCC 54* it was held that the term "misconduct" may involve moral turpitude. It must be improper or wrong behaviour, unlawful behaviour, wilful in character, forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character.

"Misconduct" as stated in *Batt's Law of Master and Servant* (4th Edn. at p. 63) "comprised positive acts and not mere neglects or failures". The definition of the word as given in Ballentine's Law Dictionary (148th Edn.) is: "A transgression of some established and definite rule of action, where no discretion is left except what necessity may demand, it is a violation of definite law, a forbidden act. It differs from carelessness."

It may be generally stated that the conduct rules of the government and public sector corporations constitute a code of permissible acts and behaviour of their servants.

The scheme of the Conduct Rules, almost invariably, is to first of all enunciate a general rule of conduct and behaviour followed by specific prohibitions and restrictions. For example, Rule 3 of the Central Civil Services (Conduct) Rules, 1964 which occurs under the heading "General" provides that every government servant shall at all times:

"(i) maintain absolute integrity;

(ii) maintain devotion to duty ; and

(iii) do nothing which is unbecoming of a government servant."

42. PREVENTION OF CORRUPTION ACT, 1988 – Section 19
CRIMINAL PROCEDURE CODE, 1973 – Section 300
Sanction for prosecution – Valid sanction *sine qua non* for taking cognizance – Question regarding grant of sanction ordinarily be decided at the stage of taking cognizance – A judgment recorded without a valid sanction is without jurisdiction – Bar of Section 300 Cr.P.C. not applicable where judgment rendered without jurisdiction.
State of Karnataka through CBI v. C. Nagarajaswamy
Judgment dt. 07.10.2005 passed by the Supreme Court in Criminal Appeal No. 1279 of 2002, reported in (2005) 8 SCC 370

Held :

Section 19 of the Act mandates that no court shall take cognizance of offence punishable under the provisions specified therein except with the previous sanction by the authorities specified therein.

Ordinarily, the question as to whether a proper sanction has been accorded for prosecution of the accused persons or not is a matter which should be dealt with at the stage of taking cognizance. But in a case of this nature where a question is raised as to whether the authority granting the sanction was competent therefor or not, at the stage of final arguments after trial, the same may have to be considered having regard to the terms and conditions of service of the accused for the purpose of determination as to who could remove him from service.

Grant of proper sanction by a competent authority is a sine qua non for taking cognizance of the offence. It is desirable that the question as regards sanction may be determined at an early stage. (See- *Ashok Sahu v. Gokul Saikia, 1990 Supp SCC 41 and Birendra K. Singh v. State of Bihar, 2000 SCC 498.*)

But, even if a cognizance of the offence is taken erroneously and the same comes to the court's notice at a later stage a finding to that effect is permissible. Even such a plea can be taken for the first time before an appellate court. (See *B. Saha v. M.S. Kochar, (1979) 4 SCC 177, SCC para 13 and K. Kalimuthu v. State, (2005)* 5 SCC 512.

It is true that in terms of clause (2) of Article 20 of the Constitution no person can be prosecuted and punished for the same offence more than once. Section 300 of the Code was enacted having regard to the said provision. Sub-section (1) of Section 300 of the Code reads as under :

> "300. *Persons once convicted or acquitted not to be tried for same offence* – (1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of Section

221, or for which he might have been convicted under sub-section (2) thereof."

The essential conditions for invoking the bar under the said provision are:

(i) the court had requisite jurisdiction to take cognizance and tried the accused; and

(ii) the court has recorded an order of conviction or acquittal, and such conviction/acquittal remains in force.

The question came up for consideration before the Federal Court in *Basdeo Agarwalla v. King Emperor, AIR 1954 FC 16* wherein it was held that if a proceeding is initiated without sanction, the same would be null and void.

In *Yusofalli Mulla Noorbhoy v. R. 76 IA 158* it was held : (IA p. 168)

"[16.].... A court cannot be competent to hear and determine a prosecution the institution of which is prohibited by law, and Section 14 prohibits the institution of a prosecution in the absence of a proper sanction. The learned Magistrate was no doubt competent to decide whether he had jurisdiction to entertain the prosecution and for that purpose to determine whether a valid sanction had been given, but as soon as he decided that no valid sanction had been given the court became incompetent to proceed with the matter. Their Lordships agree with the view expressed by the Federal Court in *Agarwalla* case (supra) that a prosecution launched without a valid sanction is a nullity."

The matter came up before this Court in *Budha Mal v. State of Delhi, Cr. Apped No. 17 of 1952* wherein a trial of the appellant therein for alleged commission of an offence under Section 161 of the Penal Code resulted in conviction but an appeal thereform was accepted on the ground that no sanction for the prosecution of the appellant was accorded therefor. The police prosecuted the appellant again after obtaining fresh sanction whereupon a plea of bar thereto in terms of Section 403 of the Code was raised. Mahajan, J. speaking for a Division Bench opined :

"We are satisfied that the learned Sessions Judge was right in the view he took. Section 403 CrPC applies to cases where the acquittal order has been made by a court of competent jurisdiction but it does not bar a retrial of the accused in cases where such an order has been made by a court which had no jurisdiction to take cognizance of the case. It is quite apparent on this record that in the absence of a valid sanction the trial of the appellant in the first instance was by a Magistrate who had no jurisdiction to try him."

The aforementioned cases were noticed by a Constitution Bench of this Court in *Baij Nath Prasad Tripathi v. State of Bhgal, 1957 SCR 650* wherein a similar plea was repelled stating : (SCR p. 654)

"The Privy Council decision is directly in point, and it was there held that the whole basis of Section 403 (1) was that the first trial should have been before a court competent to hear and determine the case and to record a verdict of conviction or acquittal; if the court was not so competent, as for example where the required sanction for the prosecution was not obtained, it was irrelevant that it was competent to try other cases of the same class or indeed the case against the particular accused in different circumstances, for example if a sanction had been obtained."

In *Mohd. Safi v. State of W.B., 1965 3 SCR 467* this Court held: (SCR p. 471 E-H)

"[6.] It is true that Mr Ganguly Could properly take cognizance of the offence and, therefore, the proceedings before him were in fact not vitiated by reason of lack of jurisdiction. But we cannot close our eyes to the fact that Mr Ganguly was himself of the opinion – and indeed he had no option in the matter because he was bound by the decisions of the High Court – that he could not take cognizance of the offence and consequently was incompetent to try the appellant. Where a court comes to such a conclusion, *albeit* erroneously, it is difficult to appreciate how that court can absolve the person arraigned before it completely of the offence alleged against him. Where a person has done something which is made punishable by law he is liable to face a trial and this liability cannot come to an end merely because the court before which he was placed for trial forms an opinion that it has no jurisdiction to try him or that it has no jurisdiction to take cognizance of the offence alleged against him. Where, therefore, a court says, though erroneously, that it was not competent to take cognizance of the offence it has no power to acquite that person of the offence. An order of acquittal made by it is in fact a nullity."

Relying upon *Yusofalli Mulla Noorbhoy* (Supra) it was held : (SCR p. 473 A-B)

"The principle upon which the decision of the Privy Council is based must apply equally to a case like the persent in which the court which made the order of acquittal was itself of the opinion that it had no jurisdiciton to proceed with the case and therefore the accused was not in jeopardy."

(See also *State of Goa v. Babu Thomas, (2005) 8 SCC 130.*)

In a view of the aforementioned authoritative pronouncements, it is not possible to agree with the decision of the High Court that the trial court was bound to record either a judgment of conviction or acquittal, even after holding that the sanction was not valid. We have noticed hereinbefore that even if a judgment of conviction or acquittal was recorded, the same would not make any distinction for the purpose of invoking the provisions of Section 300 of the Code

as, even then, it would be held to have been rendered illegally and without jurisdiction.

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43. MOTOR VEHICLES ACT, 1988 – Sections 166 and 168
Fatal accident – Ascertainment of damages – Multiplier method, application of – Law explained.
Managing Director, TNSTC Ltd. v. K.I. Bindu and others
Judgment dt. 05.10.2005 passed by the Supreme Court in Civil Appeal No. 6143 of 2005, reported in (2005) 8 SCC 473

Held :

The manner of arriving at the damages is to ascertain the net income of the deceased available for the support of himself and his dependants, and to deduct therefrom such part of his income as the deceased was accustomed to spend upon himself, as regards both self-maintenance and pleasure, and to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependants. Then that should be capitalised by multiplying it by a figure representing the proper number of years' purchase.

Much of the calculation necessarily remains in the realm of hypothesis "and in that region arithmetic is a good servant but a bad master" since there are so often many imponderables. In every case "it is the overall picture that matters", and the court must try to assess as best as it can the loss suffered.

There were two methods adopted to determine and for calculation of compensation in fatal accident actions, the first the multiplier mentioned in *Davies v. Powell Duffryl Associates Collieries Ltd., (1942) 1 All ER 657* case and the second in *Nance v. British Columbia Electric Rly. Co. Ltd, (1951) 2 All ER 448.*

The multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalising the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of deceased (or that of the claimants, whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed up over the period for which the dependency is expected to last.

The considerations generally relevant in the selection of multiplicand and multiplier were adverted to by Lord Diplock in his speech in *Mallett v. Mcmonagle, (1969) 2 All ER 178* where the deceased was aged 25 and left behind his widow of about the same age and three minor children. On the question of selection of multiplicand, Lord Diplock observed: (All ER pp. 191 H-192 A)

> "The starting point in any estimate of the amout of the 'dependency' is the annual value of the material benefits provided for the dependants out of the earnings of the deceased at the date of his death.

But... there are many factors which might have led to variations up or down in the future. His earnings might have increased and with them the amount provided by him for his dependants. They might have diminished with a recession in trade or he might have had spells of unemployment. As his children grew up and became independent the proportion of his earnings spent on his dependants would have been likely to fall. But in considering the effect to be given in the award of damages to possible variations in the dependency there are two factors to be borne in mind. The first is that the more remote in the future is the anticipated change the less confidence there can be in the chances of its occurring and the smaller the allowance to be made for it in the assessment. The second is that as a matter of the arithmetic of the calculation of present value, the later the change takes place the less will be its effect on the total award of damages. Thus at interest rates of 4½ per cent the present value of an annuity for 20 years of which the first ten years are at £ 100 per annum and the second ten years at £200 per annum is about 12 years' purchase of the arithmetical average annuity of £150 per annum, whereas if the first ten years are at £200 per annum and the second ten years at £100 per annum the present value is about 14 years' purchase of the arithmetical mean of £150 per annum. If therefore the chances of variations in the 'dependency' are to be reflected in the multiplicand of which the years' purchase is the multiplier variations in the dependency which are not expected to take place until after ten years should have only a relatively small effect in increasing or diminishing the 'dependency' used for the purpose of assessing the damages."

In regard to the choice of the *multiplicand Halsbury's Laws of England* in Vol. 34, para 98 states the principle thus:

"98. *Assessment of damages under the Fatal Accidents Act, 1976.*– The courts have evolved a method for calculating the amount of pecuniary benefit the dependants could reasonably expect to have received from the deceased in the future. First the annual value to the dependants of those benefits (the multiplicand) is assessed. In the ordinary case of the death of a wage-earner that figure is arrived at by deducting from the wages the estimated amount of his own personal and living expenses.

The assessment is split into two parts. The first part comprises damages for the period between death and trial. The multiplicand is multiplied by the number of years which have elapsed between those two dates. Interest at one-half the short-term investment rate is also awarded on that multiplicand. The second part is damages for the period from the trial onwards. For that period, the number of years which have elapsed between the death and the trial is deducted from

a multiplier based on the number of years that the expectancy would probably have lasted: central to that calculation is the probable length of the deceased's working life at the date of death."

As to the multiplier, *Halsbury* states:

"However, the multiplier is a figure considerably less than the number of years taken as the duration of the expectancy. Since the dependants can invest their damages, the lump sum award in respect of future loss must be discounted to reflect their receipt of interest on invested funds, the intention being that the dependants will each year draw interest and some capital (the interest element decreasing and the capital drawings increasing with the passage of years), so that they are compensated each year for their annual loss, and the fund will be exhausted at the age which the court assesses to be the correct age, having regard to all contingencies. The contingencies of life such as illness, disability and unemployment have to be taken into account. Actuarial evidence is admissible, but the courts do not encourage such evidence. The calculation depends on selecting an assumed rate of interest. In practice about 4 or 5 per cent is selected, and inflation is disregarded. It is assumed that the return on fixed interest-bearing securities is so much higher than 4 to 5 per cent that rough and ready allowance for inflation is thereby made. The multiplier may be increased where the plaintiff is a high taxpayer. The multiplicand is based on the rate of wages at the date of trial. No interest is allowed on the total figure."

In both *G.M. Kerala, SRTC v. Susamma Thomas, (1994) 2 SCC 176 and U.P. SRTC v. Trilok Chandra, (1996) 4 SCC 362* the multiplier appears to have been adopted by this Court taking note of the prevalent banking rate of interest.

In fact in *Trilok Chandra case* after reference to the Second Schedule to the Act, it was noticed that the same suffers from many defects. It was pointed out that the same is to serve as a guide, but cannot be said to be an invariable ready reckoner. However, the appropriate highest multiplier was held to be 18. The highest multiplier has to be for the age group of 21 to 25 years when an ordinary Indian citizen starts independently earning and the lowest would be in respect of a person in the age group of 60 to 70, which is the normal retirement age.

Taking into account the relevant factors and the age of the deceased it would be appropriate to apply the multiplier of 13.

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44. ARBITRATION & CONCILIATION ACT, 1996 – Section 11 (6) Power exercised by the Chief Justice of High Court or Chief Justice of India u/s 11 (6), nature of – Power is judicial and not administrative – Contra view expressed in Konkan Railway's case, (2002) 2 SCC

388 expressly overruled.
SBP & Co. v. Patel Engineering Ltd. and other
Judgment dt. 26.10.2005 passed by the Supreme Court in Civil Appeal No. 4168 of 2003 reported in (2005) 8 SCC 618 (7 Judge-Bench)

Held :

Once we arrive at the conclusion that the proceeding before the Chief Justice while entertaining an application under Section 11 (6) of the Act is adjudicatory, then obviously the outcome of that adjudication is a judicial order. Once it is a judicial order, the same, as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach the Supreme Court under Article 136 of the Constitution. If it were an order by the Chief Justice of India, the party will not have any further remedy in respect of the matters covered by the order of the Chief Justice of India or the Judge of the Supreme Court designated by him and he will have to participate in the arbitration before the Tribunal only on the merits of the claim. Obviously, the dispensation in our country, does not contemplate any further appeal from the decision of the Supreme Court and there appears to be nothing objectionable in taking the view that the order of the Chief Justice of India would be final on the matters which are within his purview, while called upon to exercise his jurisdiction under Section 11 of the Act. It is also necessary to notice in this context that this conclusion of ours would really be in aid of quick disposal of arbitration claims and would avoid considerable delay in the process, an object that is sought to be achieved by the Act.

It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award including any in-between orders that might have been passed by the Arbitral Tribunal acting under section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible.

The object of minimising judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution against every order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage.

We, therefore, sum up our conclusions as follows:

(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11 (6) of the Act is not an administrative power. It is a judicial power.

(ii) The power under Section 11 (6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(iii) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated Judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11 (8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

(v) Designation of a District Judge as the authority under Section 11 (6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11 (6) of the Act.

(ix) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11 (6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(x) Since all were guided by the decision of this Court in *Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd., (2002) 2 SCC 388* and orders under Section 11 (6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or Arbitral Tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11 (6) of the Act.

(xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11 (6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that Court designated by the Chief Justice.

(xii) The decision in *Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.* (Supra) is overruled.

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45. N.D.P.S. ACT, 1985 – Section 42
Empowered officer not required to record a general information – Search conducted on the basis of general information – Section 42 not applicable.
Babubhai Odhavji Patel and others v. State of Gujarat
Judgment dt. 27.10.2005 passed by the Supreme Court in Criminal Appeal No. 861 of 1997, reported in (2005) 8 SCC 725

Held :

As regards violation of Section 42 of the NDPS Act, it was contended that PSI L.U. Pandey had received previous information before going for the search, but he had not recorded this information any where and that he had also not informed his superior officers about the proposed seizure. In the present case, the officer who conducted the search was examined as PW 2. What he stated in the evidence was that the DIG had instructed him that intoxicant materials were being transported illegally from the States of Rajasthan and Uttar Pradesh and the vehicles had been passing through Banaskantha district. This was only a general information given by the DIG to PW 2 and such information is not bound to be recorded as a source of information as contemplated under Section 42 of the NDPS Act. Section 42 of the NDPS Act provides that a specific information alone need be recorded by the officer empowered to conduct a search. Here, PW 2 and the members of the patrol team were doing the usual patrol duty and they incidentally came across the tanker lorry in question and on search recov-

ered the contraband substance from the vehicle. We do not think that there is any violation of Section 42 of the NDPS Act.

The counsel for the appellant further contended that the search was conducted at 5.30 a.m., that is, before sunrise and the PSI should have obtained a warrant or authorisation for conducting the search of the vehicle. This plea also is without any merit. The contraband substance, namely, the opium was recovered from the tanker when the usual search of suspected vehicle carrying such contraband was being conducted by the police officials. The police party had no previous information that any contraband substance was being concealed in any building, conveyance or enclosed space and they have to conduct a search pursuant to such information. Then only they would require a warrant or authorisation as contemplated under Section 42 of the NDPS Act. If it is a chance recovery, the procedure contemplated under Section 42 cannot be complied with and the evidence of PW 2 would clearly show that it was a chance recovery.

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46. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (b) Subletting – Tenant disentitled to protection afforded under the Act if he sublets the accommodation at any time during pendency of lease – Law explained.
Shanti Devi (Smt.) (dead) through L.Rs. v. Dwarka Das
Reported in 2005 (3) JLJ 368

Held :

This makes it clear that tenant defendant-respondent, by constituting partnership *vide* Exhibit P-26, sub-let or parted with possession of suit shop in favour of DW 2 Darshanlal.

In *Gajanan Dattatraya v. Sherbanu Patel and others* [AIR 1975 SC 215], it has been held that provisions of the Act indicate that a tenant is dissimulated to any protection under the Act if he is within the mischief of the provisions of section 13 (1) (e), namely, that he has sublet. The language of section 13 (1) (e) is that if the tenant has sublet, the protection ceases. It cannot be contended that the sub-letting must continue at the date of the suit for passing the decree for eviction. The tenant's liability to eviction arises once the fact of unlawfully sub-letting is proved.

In *Navalmal v. Laxansingh* (1992 JLJ 728 = 1991 MPLJ 812) consider the *Gajanan Dattatraya's* case (supra) it has been held:

> "If the tenant has sub-let or parted with possession of the premises or has done any act injurious to the interest of the landlord, cause of action having once accrued to the landlord under the M.P. Accommodation Control Act the Court would not deny the relief of ejectment even after the tenant was prepared to reverse or had in fact reversed the factual possession. The provision rendering tenant liable to ejectment on the ground of sub-letting parting with possession or

assignment of interest is founded on the principle that the tenant who has shown by his such conduct that he does no more need the premises for himself must yield it the landlord and no one else nor he should be permitted to enrich himself at the cost of the landlord."

In *Ramesh Kumar and another v. Shri Sudarshanlal Dube* (1984 MPRCJ Note 41) considering the dictum laid down in *Gajanan Dattatraya's* case (supra) a single Bench of this Court held that the ratio of the decision is not that the sub-lease should subsist on the date of the notice, but the ratio is that the tenant is disentitled to the protection afforded to him under M.P. Accommodation Control Act, if he at any time during the pendency of the lease, sub-lets the suit accommodation or a part thereof. In view of this fact, the Courts below ought to have decreed the suit under section 12 (1) (b) of the Act.

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47. MOTOR VEHICLES ACT, 1988 – Sections 147, 149 and 167 Compensation, claim for – Legal representatives of the deceased employee can seek compensation either under Motor Vehicles Act or Workmen's Compensation Act – Liability of Insurance Company – In case of employee's death Insurer's liability limited to one provided under Workmen's Compensation Act – Law explained.
National Insurance Co. Ltd v. Prembai Patel and others
Reported in 2005 (3) JLJ 385 (SC)

Held :

A person, who has sustained injury or where death has resulted from an accident all or any of the legal representatives of the deceased can claim compensation by moving an application under section 166 of the Act by filing a claim petition before the Motor Accident Claims Tribunal. Section 3 of the Workmen's Compensation Act lays down that if personal injury is caused to a workmen by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of Chapter II of the said Act. Section 167 of the Motor Vehicles Act, 1988 lays down that notwithstanding anything contained in the Workmen's Compensation Act, 1923 where the death of, or bodily injury to, any person gives rise to a claim for compensation under the Act and also under the Workmen's Act, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of the those Acts but not under both. The claim petition had been filed by respondents 3 to 6 claiming compensation for the death of Sunder Singh, who was an employee of respondent No. 2, in an accident arising out of and in the course of his employment.

Therefore, they could claim compensation under either of the Acts. But they chose the forum provided under the Motor Vehicles Act. In a petition under the Workmen's Act the injured or the legal heirs of the deceased workmen have not to establish negligence as a precondition for award of compensation. But the claim petition before the Motor Accident Claim Tribunal is an action in tort

and the injured or the legal representatives of the deceased have to establish by preponderance of evidence that there was no negligence on the part of the injured or deceased and they were not responsible for the accident. The exception to this general rule is given in section 140 of the Act where the legislature has specifically made provisions for payment of compensation on the principle of no fault liability.

The contentions raised turn on the interpretation of sub-sections (1) of sections 147 and 149 of the Act and the same are being reproduced below :

> "147. *Requirements of policies and limits of liability* – (1) In order to comply with the requirements of this Chapter, of insurance must be a policy which –
>
> (a) is issued by a person who is an authorized insurer; and
>
> (b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)–
>
> (i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;
>
> (ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:
>
> Provided that a policy shall not be required—
>
> (i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, any such employee —
>
> (i) engage in driving the vehicle, or
>
> (b) if it is a public service vehicle engaged as a conductor of the vehicle or in examining tickets on the vehicle, or
>
> (c) if it is a goods carriage, being carried in the vehicle, or
>
> (ii) to cover any contractual liability.
>
> *Explanation* – ..... (omitted as not relevant)
>
> 149. *Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks* – (1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered

by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

The heading of Chapter XI of the Act is Insurance of Motor Vehicles Against Third Party Risks and it contains sections 145 to 164. Section 146 (1) of the Act provides that no person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of Chapter XI. Clause (b) of sub-section (1) of section 147 provides that a policy of insurance must be a policy which insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him in respect of death of or bodily injury to any person or passenger or damage to any property of a third party caused by or arising out of the use of the vehicle in public place. Sub-clauses (i) (ii) of clause (b) are comprehensive in the sense that they cover both 'any person' or 'passenger'. An employee of owner of the vehicle, like a driver or a conductor, may also come within the purview of the words 'any person' occurring in sub-clause (i). However, the proviso (i) to clause (b) of sub-section (1) of section 147 says that a policy shall not be required to cover liability in respect of death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Act if the employee is such as described in sub-clauses (a) or (b) or (c). The effect of this proviso is that if an insurance policy covers the liability under the Workmen's Act in respect of death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) (c) of proviso (i) to section 147 (1) (b), it will be a valid policy and would comply with the requirements of Chapter XI of the Act. Section 149 of the Act imposes a duty upon the insurer (insurance company) to satisfy judgments and awards against persons insured in respect of third party risks. The expression— "such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy)" — occurring in sub-section (1) of section 149 is important. It clearly shows that any such liability which is mandatory required to be covered by a policy under clause (b) of section 147 (1), has to be satisfied by the insurance company. The effect of this provision is that an insurance policy which covers only the liability arising under

the Workmen's Act in respect of death of or bodily injury to any such employee as described in sub-clauses (a) or (b) or (c) to proviso (i) to section 147 (1) (b) of the Act, is perfectly valid and permissible under the Act. Therefore, where any such policy has been taken by the owner of the vehicle, the liability of the insurance company will be confined to that arising under the Workmen's Act.

The insurance policy being in the nature of a contract, it is permissible for an owner to take such a policy where under the entire liability in respect of the death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to section 147(1) (b) may be fastened upon the insurance company and insurance company may become liable to satisfy the entire award. However, for this purpose the owner must take a policy of that particular kind for which he may be required to pay additional premium and the policy must clearly show that the liability of the insurance company in case of death of or bodily injury to the aforesaid kind of employees is not restricted to that provided under the Workmen's Act and is either more or unlimited depending upon the quantum of premium paid and the terms of the policy.

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48. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 141
Dishonour of cheque issued on behalf of the company – Liability of Director and officers – Necessary averments to be made in the complaint – Magistrate to issue process only if necessary averments made – Law explained.
S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla & Anr.
Reported in 2005 (2) ANJ (SC) 487

Held :

This matter arises from reference made by a two Judge Bench of this Court for determination of the following questions by a larger Bench.

> "(a) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfil the requirements of the said Section and it is not necessary to specifically state in the complaint that the persons accused was in charge of, or responsible for, the conduct of the business of the company.
>
> (b) Whether a director of a company would be deemed to be in charge of and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.
>
> (c) even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the Managing Directors or Joint Managing Director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against."

The controversy has arisen in the context of prosecutions launched against officers of Companies under Sections 138 and 141 of the Negotiable Instruments Act of 1881 (hereinafter referred to as the "Act").

To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That respondent fails within parameters of Section 141 has to be spelled out. A compalint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141 he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non director can be liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

In view of the above discussion, our answers to the questions posed in the Reference are as under:

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a compalint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint managing Director, these persons are in charge of any responsibility for the conduct of business of the company. Therefore, they get covered

under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141.

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49. CRIMINAL PROCEDURE CODE, 1973 – Section 125
***Natra* form of marriage not a valid marriage in the eyes of law – Wife not entitled to claim maintenance u/s 125 – Law explained.**
Gajraj v. Fulkunwar alias Fulwati Bai and another
Reported in 2005 (2) Vidhi Bhasvar 193

Held :

The main contention of the learned counsel for the applicant is that it is admitted position in the present case that, at the time when *natra* between him and the non-applicant was performed, her previous husband Mohan Singh was alive and that the marriage having had not been dissolved by decree of divorce passed by a competent Court, the non-applicant was not entitled for maintenance and the said *natra* could not be termed as valid marriage. It was further submitted that since no valid marriage was existing between the applicant and non-applicant No. 1, the non-applicant was not entitled to get any amount by way of maintenance from the applicant. Learned counsel has placed reliance on the decision of the Apex Court in *Savitaben Somabhai Bhatiya v. State of Gujarat* [2005 (II) MPWN 15], wherein the same question has been examined in detail. It has been considered by the Apex Court that :

> "In *Smt. Yamunabai's* case, it was held that expression 'wife' used in section 125 of the Code should be interpreted to mean only a legally wedded wife. The word 'wife' is not defined in the Code except indicating in the explanation to section 125 its inclusive character so as to cover a divorcee. A woman cannot be a divorcee unless there was a marriage in the eye of law preceding that status. The expression must therefore be given the meaning in which it is understood in law applicable to the parties. The marriage of a woman in accordance with the Hindu rites with a man having a living spouse is a complete nullity in the eye of law and she is therefore not entitled to the benefit of section 125 of the Code or the Hindu Marriage Act, 1955 (in short the 'Marriage Act'). Marriage with person having living spouse in null and void and not voidable. However, the attempt to exclude altogether the personal law applicable to the parties from consideration is improper. Section 125 of the Code has been enacted in the interest of a wife and one who intends to take benefit under subsection (1) (a) has to establish the necessary condition, namely, that she is the wife of the person concerned. The issue can be decided only by a reference to the law applicable to the parties. It is only where an applicant establishes such status or relationship with reference to the personal law that an application for maintenance can be maintained. Once the

right under the provision in section 125 of the Code is established by proof of necessary conditions mentioned therein, it cannot be defeated by further reference to the personal law. The issue whether the section is attracted or not cannot be answered except by reference to the appropriate law governing the parties. But it does not further the case of the appellant in the instant case. Even if it is accepted as stated by learned counsel for the appellant that husband was treating her as his wife it is really inconsequential. It is the intention of the Legislature which is relevant and not the attitude of the party.

In *Smt. Yamunabai's* case plea similar to the one advanced in the present case that the appellant was not informed about the respondent's earlier marriage when she married him was held to be of no avail. The principle of estaoppel cannot be pressed into service to defeat the provisions of section 125 of the Code.

It may be noted at this juncture that the Legislature considered it necessary to include within the scope of the provision an illegitimate child but it has not done so with respect to woman not lawfully married. However desirable it may be, as contended by learned counsel for the applicant to take note of the plight of the unfortunate woman, the legislative intent being clearly reflected in section 125 of the Code, there is no scope for enlarging its scope by introducing any artificial definition to include woman not lawfully married in the expression 'wife'."

From the evidence on record, it emerges out clearly that the alleged marriage of Fulkunwar with her previous husband had not been legally dissolved and, hence, by the alleged *natra* she did not acquire the status of wife in terms of section 125, CrPC. This is evident from the aforesaid dictum of the Apex Court. Naturally, her application for maintenance so far as her own claim is concerned is, therefore, liable to be dismissed.

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50. BANKER'S BOOKS EVIDENCE ACT, 1891 – Section 4
Proof of the facts of the Account Book maintained by bank – It can be proved by certified copy issued as per Section 2 (8) of the Act. Allahabad Bank, Rewa v. Pramod Kumar Singh and others
Reported in 2005 (2) Vidhi Bhasvar 204

Held :

Learned counsel for the appellant submits that Ex. P-32 to P-34 are the certified copies of the statements of account. Learned counsel submits that "certified copy" is defined under the provisions of the Banker's Books Evidence Act, 1981, which reads as under:

> "2 (8). 'Certified copy' means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary

course of business, and that such book is still in the custody of the bank and where the copy was obtained by a mechanical or other process which in itself ensured the accuracy of the copy, a further certificate to that effect, but where the book from which such copy was prepared has been destroyed in the usual course of the bank's business after the date on which the copy had been so prepared, a further certificate to that effect each such certificate being dated and subscribed by the principal account or manager of the bank with his name and official title."

Shri M.L. Jaiswal, learned senior counsel further placed reliance on section 4 of the Banker's Books Evidence Act, 1891, which deals with mode of proof of entries in bankers' books. Section 4 of the Act, 1981, reads thus:

> "4. Subject to the provisions of this Act, a certified copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise."

As per section 4 of the Act, if a statement of account is submitted duly certified by the Bank Officer, then the entries of the said account have to be treated as sufficient evidence.

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51. SPECIFIC RELIEF ACT, 1963 – Section 38
Perpetual injunction, grant of against removal of gumti constructed on public place – Municipal Corporation having a legal right to remove encroachment, no perpetual injunction can be granted – Law explained.
Indore Municipal Corporation and another v. Kundanlal
Reported in 2005 (2) Vidhi Bhasvar 217

Held :

It is an admitted position in the present case from the pleading of the plaintiff himself that he had constructed his Gumti on the public place and it was not regularised by the Municipal Corporation. Hence, admittedly he had no legal or statutory right to carry on his business in the aforesaid premises. The appellant had power to remove the aforesaid encroachment as per provisions of Municipal Corporation Act, 1956. Sections 307, 321 and 322 prescribe such powers to the Corporation.

In my opinion, both the Courts have committed an error of law in granting permanent injunction in favour of the respondent ignoring the aforesaid statutory powers of the appellant. It is not for the civil Court to decide whether there was obstruction in the traffic or not, or whether it can be regularised or not. The power is with the Corporations/appellant.

The Supreme Court in a judgment reported in *AIR SCW 5923 Friend's C.P.S. Sathppath (dead) L. Rs. v. Andhra Bank Ltd. and others* has specifically held with regard to removal of unauthorised construction, as under:

> "Though the local authorities have the staff consisting of engineers and inspectors whose duty is to keep a watch on building activities and to promptly stop the illegal constructions or deviations coming up, they often fail in discharging their duty. Either they don't act or do not act promptly or do connive at such activities apparently for illegitimate considerations. If such activities are to stop, some stringent actions are required to be taken by ruthlessly demolishing the illegal constructions and non-compoundable deviations. the unwary purchasers who shall be the sufferers must be adequately compensated by builder. The arms of the law must stretch to catch hold of such unscrupulous builders. At the same time, in order to secure vigilant performance of duties, responsibility should be fixed on the officials whose duty it was to prevent unauthorized constructions, but who failed in doing so either by negligence or by connivance."

The Supreme Court in *(2002) 5 SCC 760 (Hindustan Petrolium Corporation v. Shrinarayan and others)*, has held with regard to grant of interlocutory injunction which can also be applied with regard to grant of permanent injunction. It is specifically clear from the above principle that with regard to grant of permanent injunction the Court has to see that whether plaintiff has a legal right asserted by him in his favour of by violation of his right he would suffer irreparable injury. In the present case, admittedly the plaintiff had no legal right to place Gumti on a public place and the Corporation had a legal right to remove such encroachment.

In my opinion, both the Courts have committed an error of law in granting decree of permanent injunction in favour of the plaintiff ignoring the said aspect of law. The Court has no power to permit the encroacher to continue his business on a public place on the basis that if he be removed, he has no other means of his livelihood, in absence of any statutory powers to this effect.

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52. INDIAN PENAL CODE, 1860 – Section 300 thirdly
Culpable homicide and murder – Applicability of Section 300 thirdly – Necessary conditions for applicability – Law explained.
Khuman Singh and others v. State of M.P.
Reported in 2005 (2) Vidhi Bhasvar 250

Held :

The question then is whether in this state of the evidence on record, the case is covered by section 300 thirdly IPC, that is to say, whether the appellants committed the act with the intention of causing bodily injury to the deceased and the bodily injury intended to be inflicted was sufficient in the ordinary course

of nature to cause death. In *Virsa Singh v. State of Punjab* (AIR 1958 SC 465), this Court considered the facts and held that the prosecution must prove the following facts before it could bring the case under section 300 thirdly.

> "First, it must establish, quite objectively that a bodily injury is present;
>
> Secondly, the nature of the injury must be proved. These are purely objective investigations;
>
> Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further and;
>
> Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

In *Anda v. State of Rajasthan* (AIR 1966 SC 151), the same principle has been reiterated in the following words:

> "The third clause views the matter from a general standpoint. It speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensues and the causing of such injury is intended, the offence is murder. Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused, and sometimes both are relevant. The determinant factor is the intentional injury which must be sufficient to cause death in the ordinary course of nature. If the intended injury cannot be said to be sufficient in the ordinary course of nature to cause death, that is to say, the probability of death is not so high, the offence does not fall within murder but within culpable homicide not amounting to murder or something less."

In the same judgment this Court cautioned that no case can be an authority on facts. This is always a question of fact as to whether accused shared a particular knowledge or intent. One must look for a common intention, that is to say, some prior concert, and what that common intention is. One must look for the requisite ingredient that the injuries which were intended to be caused were sufficient to cause death in the ordinary course of nature, and whether the accused possessed the knowledge that the injuries they were intending to cause were sufficient in the ordinary course of nature to cause death.

Keeping these principles in mind and applying them to the facts to this case, we find that the occurrence took place suddenly. There was no premeditation on the part of the appellants and quarrel really arose from a trivial issue.

The parties had danced all night and nothing untoward had happened except this small incident.

Thereafter they proceeded towards their respective villages. It is not the case of the prosecution that the appellants were armed with deadly weapons. Some of them were carrying *lathis*, as are usually carried by the tribles in that part of the State, and had not made any special preparation for the assault. Some others had just picked up stones when the deceased was overpowered, and assaulted him. It is no doubt true that they assaulted the deceased in such a manner that the deceased suffered several fractures, but the injury which caused the death of the deceased was the one suffered by him on account of the rib bone puncturing the liver. We are convinced that this injury was not intended by the appellants, and the injury suffered by the deceased on his liver was at best accidental. We, therefore, hold that section 300 thirdly IPC is not attracted, and it cannot be said that the appellants intended to cause any injury to the liver which perhaps proved fatal.

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53. MOTOR VEHICLES ACT, 1988 – Seciton 147
Insurer's liability – Whether comprehensive policy covers risk of injury to owner – Held, No – Law explained.
Dhanraj v. New India Assurance Co. Ltd. and another
Judgment dt. 24.09.2004 passed by the Supreme Court in Civil Appeal No. 6270 of 2004, reported in 2005 ACJ 1

Held :

The question that arises is whether a comprehensive policy would cover the risk of injury to the owner of the vehicle also. Section 147 of the *Motor Vehicles Act*, 1988, reads as follows :

> "147. *Requirements of policies and limits of liability.* – (1) In order to comply with the requirements of this Chapter, a policy of insurance must be policy which –
>
> (a) is issued by a person who is an authorised insurer; and
>
> (b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) –
>
> (i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including owner of the goods or his authorised representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;
>
> (ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required –

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the *Workmen's Compensation Act,* 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee –

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as a conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation. – For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place not withstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely –

(a) save as provided in clause (b), the amount of liability incurred:

(b) in respect of damage to any property of a third party, a limit of rupees six thousand:

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier."

Thus, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorised representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.

In the case of *Oriental Insurance Co. Ltd. v. Sunita Rathi,* 1998 ACJ 121 (SC), it has been held that the liability of an insurance company is only for the purpose of indemnifying the insured against liabilities incurred towards third person or in respect of damages to property. Thus, where the insured, i.e., an

owner of the vehicle has no liability to a third party the insurance company has no liability also.

In this case, it has not been shown that the policy covered any risk for injury to the owner himself. We are unable to accept the contention that the premium of Rs. 4,989 paid under the heading 'own damage' is for covering liability towards personal injury. Under the heading 'own damage', the words 'premium on vehicle and non-electrical accessories' appear. It is thus clear that this premium is towards damage to the vehicle and not for injury to the person of the owner. An owner of a vehicle can only claim provided a personal accident insurance has been taken out. In this case, there is no such insurance.

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54. MOTOR VEHICLES ACT, 1988 – Section 149
Insurer's liability – Driving licence got renewed after date of accident – Whether insurance company can escape liability ? Policy stipulating clause which entitled any person not having been disqualified from holding effective driving licence to drive – Insurer held liable – Law explained.
Kalyan Singh and another v. Sadarani and others
Judgment dt. 23.03.1999 passed by the Supreme Court in M.A. No. 1388 of 1996, reported in 2005 ACJ 1758 (MP)

Held :

It is not in dispute that the accident occurred on 11.6.1991. The appellant No. 2, Gouri Shanker had been the driver of the vehicle involved in the accident and had held a valid and effective licence for almost eight years. However, this licence was not renewed between the period of 23.7.1990 and 29.7.1991. It was renewed on 29.7.1991. The accident occurred on 11.6.1991.

It is clear from the evidence on record in shape of Exh. D-2 on record that the appellant No. 2 was holding a valid licence from 23.7. 1987 to 22.7.1990 and, thereafter, the licence was renewed as per the document Exh. D-4, for the period 29.7.1991 up to 28.7.1994. Therefore, initially, the appellant No. 2 was holding an effective licence for driving the concerned tractor which caused the accident. It is true that on the date of accident, the licence was not renewed. It was renewed subsequently as already stated. In the light of above facts, it is necessary to construe the condition on which the insurance company would be liable. The concerned condition has been mentioned in the insurance policy, Exh. D-1, as follows :

"Persons or classes of persons entitled to drive. – Any of the following:

(a) The insured

(b) Any other person who is driving on the insured's order or with his permission. Provided that the person driving holds or had held and has not been disqualified from holding an effective driving licence with all the required endorsements thereon as per the *Motor Vehicles*

Act and the Rules made there under for the time being in force to drive the category of motor vehicle insured hereunder"

It is clear from the proviso to the above condition (b) that the person driving holds or had held and has not been disqualified from holding an effective driving licence with all the required endorsements thereon as per the *Motor Vehicles Act* and the Rules made thereunder for the time being in force to drive the category of motor vehicle insured in the policy. This means that even if a person is holding licence in the past that would also be covered by the proviso aforesaid. The only condition is that the person holding licence should not have been disqualified from holding an effective licence in the meanwhile. It is clear that the appellant No. 2 was earlier holding an effective driving licence with all the required endorsements thereon under the *Motor Vehicles Act* and the Rules made thereunder for the time being in force to drive a tractor insured. Subsequently, this licence was renewed showing that the appellant No. 2 was not disqualified from holding the licence. The only lacuna was that the licence was left unrenewed for some time but this would not be taken into consideration in exonerating the insurance company because the insurance company itself says that it will be liable if the person concerned had held the licence.

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55. MOTOR VEHICLES ACT, 1988 – Section 147
Insurer's liability – Whether insurer liable for injuries caused to passengers travelling in goods vehicle ? Held, No – Law explained.
National insurance Co. Ltd. v. Angori Bai and others
Judgment dt. 22.04.2003 passed by the Supreme Court in M.A. No. 144 of 1995, reported in 2005 ACJ 75

Held :

Carrying of passengers in a goods carriage is not contemplated in the Act. There is no provision similar to clause (ii) of the proviso appended to section 95 of the old Act prescribing requirement of insurance policy. Even section 147 of Act mandates compulsory coverage against the death of or bodily injury to any passenger of 'public service vehicle'. The proviso makes it further clear that the compulsory coverage in respect of the conductors and drivers of the public service vehicle and the employees carried in a goods vehicle would be limited to the liability under the *Workmen's Compensation Act*. There is no reference to any passenger in a 'goods carriage'. Therefore, it is held that the provisions of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carriage and the insurer would have no liability therefore. In view of the aforesaid two judgments the contention of insurance company is accepted and it is held that insurance company is not liable to pay compensation.

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56. SPECIFIC RELIEF ACT, 1963– Section 22 (1) (a)
Suit for specific performance – Grant of relief – Decree of partition and separate possession can be granted in addition to decree of specific performance – Law explained.
P.C. Varghese v. Devaki Amma Balambika Devi and others
Judgment dt. 07.10.2005 passed by the Supreme Court in Civil Appeal No. 1984 of 2002, reported in (2005) 8 SCC 486

Held :

The submission of Mr. Reddy to the effect that the learned trial Judge committed a serious error in granting a decree for partition along with a decree for specific performance of contract need not detain us long as in view of Section 22 (1) (a) of the Act a decree for partition and separate possession of the property can be granted in addition to a decree for specific performance of contract. As in this case, the appellant herein in view of amended prayer 'C' relinquished his claim in respect of the property belonging to the minor Respondent 4, he also prayed for a decree for partition and such a prayer having been allowed, no exception thereto can be taken. In any event, the said question has not been raised by the respondents before the High Court at all, Section 22 enacts a rule of pleading that in order to avoid multiplicity of proceedings, the plaintiff may claim a decree for possession and/or partition in a suit for specific performance. Even though strictly speaking, the right to possession accrues only when a suit for specific performance is decreed, indisputably such a decree for possession and/or partition is prayed for in anticipation of the grant of prayer for specific performance of contract. (See *Babu Lal v. Hazari Lal Kishori Lal, (1982) 1 SCC 525*)

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57. LAND ACQUISITION ACT, 1894– Section 6
CIVIL PROCEDURE CODE, 1908– Section 9
Suit challenging notification issued u/s 6, maintainability of– Land Acquisition Act being a complete Code in itself Civil Court's jurisdiction stands excluded by necessary implication – Suit not maintainable – Law explained.
Dev Kunwar Ben Shah (Smt.) v. State of M.P. and another
Reported in 2005 (3) JLJ 286

Held :

Question which requires to be determined in the present appeal is whether civil suit is maintainable.

In this case, notification is not under challenge, but declaration is sought that acquisition proceedings have lapsed on the expiry of period of two years after acquisition of land. In the relief clause, plaintiff has prayed that it be declared that after publication of notification under section 4 of the Act on 15.12.1995 entire proceedings had lapsed as the award was not passed within two years and fresh

notification under section 6 of the Act on 13.8.1998 without publication of notification under section 4 is void and contrary to law and is unenforceable against the plaintiff.

In this case, proceedings under section 4 of the Act have not been challenged. What is under challenge is the fresh notification under section 6 of the Act dated 13.8.1998. Therefore, in such a situation, whether such suit will be maintainable. Apex Court, in the case of *State of Bihar v. Dhirendra Kumar* [(1995) (II) MPWN = 1995 MPLJ 751], has held that the Act being a complete Code in itself, jurisdiction of civil Court is excluded by necessary implication, and jurisdiction under Article 226 of the Constitution of India can be invoked. Thus, in view of the judgment of the Apex Court in the aforesaid case which has been followed by Division Bench of this Court in the case of *Pashu Chikitsa Vibhagiya, Sahakari Nirman Samiti Maryadit, Bhopal v. State of M.P. [2000 (3) MPLJ 244]*, suit will not be maintainable. Since, direct judgment covering the question of law has been delivered in the matter of the Act therefore, judgment referred in the case of *Dhulabhai v. State of M.P.* [1969 JLJ 1 = AIR 1969 SC 78], will not be applicable to the present case. Therefore, the suit as filed itself is not maintainable. Even otherwise, since the proceedings are under section 17 of the Act and emergency clause was invoked, therefore, in the light of the judgment in the case of *Satendra Prasad Jain v. State of U.P.* [(1993) 4 SCC 369], provisions of section 11A of the Act will not be applicable. Therefore, the suit has rightly been dismissed by the trial Court.

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58. CIVIL PROCEDURE CODE, 1908 – Section 96 and O.9 R. 13
Whether first appeal maintainable after dismissal of application under O.9 R. 13? Held, Yes – Law explained.
Bhanu Kumar Jain v. Archana Kumar and another
Reported in 2005 (3) JLJ 303 (SC)

Held :

The question which now arises for consideration is as to whether the first appeal was maintainable despite the fact that an application under Order 9 Rule 13 of the Code was dismissed.

An appeal against an *ex parte* decree in terms of section 96 (2) of the Code could be filed on the following grounds :

(i) the materials on record brought on record in the *ex parte* proceedings in the suit by the plaintiff would not entail a decree in his favour, and

(ii) the suit could not have been posted for *ex parte* hearing.

In application under Order 9 Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for *ex parte* hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

When an *ex parte* decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the *ex parte* decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed, as a result whereof the *ex parte* decree passed by the trial Court merges with the order passed by the appellate Court, having regard to Explanation appended to Order 9 Rule 13 of the Code, a petition under Order 9 Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true.

In an appeal filed in terms of section 96 of the Code having regard to section 105 thereof, it is also permissible for an appellant to raise a contention as regards correctness or otherwise of an interlocutory order passed in the suit, subject to the conditions laid down therein.

It is true that although there may not be a statutory bar to avail two remedies simultaneously and an appeal as also an application for setting aside the *ex parte* decree can be filed; one after the other; on the ground of public policy the right of appeal conferred upon a suitor under a provision of statute cannot be taken away if the same is not in derogation or contrary to any other statutory provisions.

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59. CRIMINAL PROCEDURE CODE, 1973 – Section 167 (2)
Computation of period for granting default bail – Either the day of grant of remand or presentation of the charge-sheet be excluded – Law explained.
Ajay Singh v. Surendra and others
Reported in 2005 (3) JLJ 340

Held :

Admittedly, the non-applicants were produced before the said Court on 27.5.2004 and charge-sheet was filed on 25.8.2004. According to the Apex Court judgment rendered in case of *State of M.P. v. Rustam and others [1995 Supp. (3) SCC 221]*, it has ruled in paragraph three which is as under :

> "3. We find that the High Court was in error-both in the matter of computation of the period of 90 days prescribed as also in applying the principle of compulsive bail on entertaining a petition after the challan was filed as the so-called 'indefeasible right' of the accused, in our view, stood defeated by efflux of time. The prescribed period of 90 days, in our view, would instantly commence either from 4.9.1993 (excluding from it 3.9.1993) or 3.12.1993 (including in it 2.12.1993). Clear 90 days have to expire before the right begins. Plainly put, one of the days on either side has to be excluded in computing the prescribed period of 90 days. Sections 9 and 10 of the General Clauses

Act warrant such an interpretation in computing the prescribed period of 90 days. The period of limitation thus computed on reckoning 27 days of September, 31 days of October and 30 days of November would leave two clear days in December to compute 90 days and on which date the challan was filed, when the day running was the 90th day. The High Court was, thus, obviously in error in assuming that on 2.12.1993 when the challan was filed, period of 90 days had expired."

In the judgment of *Rustam* (supra), the Supreme Court has decided the issue as to how the computation of 90 days is to be done. The Supreme Court has held that for computation of clear 90 days, either first day of production of the accused before the learned Magistrate is to be excluded or the date on which the charge-sheet was filed will be excluded. For the purposes of computation of period of 90 days, the Supreme Court has considered the provisions of sections 9 and 10 of the General Clauses Act.

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60. CRIMINAL TRIAL :

Appreciation of evidence – Minor witness, evidence of – Though no law that minor's evidence must always be corroborated by independent evidence but such evidence requires close scrutiny – Law explained.

Pratap Singh and another v. State of Madhya Pradesh
Reported in 2006 (1) MPHT 1 (SC)

Held :

Having heard the learned counsel for the parties, we are of the opinion that the High Court, in the facts and circumstances of the present case, was not justified in reversing the judgment of acquittal passed by the learned Sessions Judge. It is not in dispute that P.W. 2 Mangal Singh was the only eye witness. He was a minor. Although we do not intend to lay down a law that in all situations evidence of a minor must be corroborated by other independent evidence but the evidence P.W. 2 in our opinion required a closer scrutiny. He contradicted himself on material particulars. He did not make any statement before the police that he had seen the occurrence from a mound. Existence of the mound was very vital in the sense that if his statement before the Court to the effect that the deceased, at the time of his assault, remained sitting, a question might have arisen that he was not in a position to witness the entire occurrence in detail from a distance. The distance between the place of occurrence and the place where he was collecting fodder, according to the Investigating Officer, was 105 feet. Furthermore, if upon noticing the appellants proceeding towards the deceased with Barchhi and lathi in their hands he started running towards the place of occurrence, we fail to understand as to how he could climb upon a mound and see the entire occurrence. If he was in a position to see the entire occurrence either from the place where he was cutting the grass or while running towards the place of occurrence, there was absolutely no reason as to why

he should climb upon a mound to see the occurrence. Furthermore he stated that when the appellants saw him, they started running towards him and then he ran towards the village.

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61. LAND ACQUISITION ACT, 1984 – Section 6
Acquisition of land – Whether structures standing on land can be acquired under the Act ? Held, Yes – Law explained.
Anand Buttons Ltd. v. State of Haryana and others
Judgment dt. 10.12.2004 passed by the Supreme Court in Civil Appeal No. 5591 of 1999, reported in (2005) 9 SCC 164

Held :

It is trite law that not only land but also structures on land can be acquired under the Act. As to whether in a given set of circumstances certain land should be exempted from acquisition only for the reason that some construction had been carried out, is a matter of policy, and not of law. If after considering all the circumstances, the State Government has taken the view that exemption of the lands of the appellants would render askew the development scheme of the industrial estate, it is not possible for the High Court or this Court to interfere with the satisfaction of the authorities concerted. We see no ground on which the appellants could have maintained that their lands should be exempted from acquisition. Even if three of the parties had been wrongly exempted from acquisition, that gives no right to the appellants to seek similar relief.

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62. INDIAN PENAL CODE, 1860 – Section 149
Common intention and common object, difference between – Ambit, scope and applicability of Section 149 – Law explained.
Sunil Kumar and another v. State Rajasthan
Judgment dt. 19.01.2005 passed by the Supreme Court in Criminal Appeal No. 123 of 2005, reported in (2005) 9 SCC 283

Held :

"Common object" is different from a "common intention" as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident.

It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful.

Under the Explanation to Section 141, an assembly which was not unlawful when it assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot eo instanti.

Section 149 IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly.

An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard-and-fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at the time of or before or after the occurrence. The word "knew" used in the second limb of the section implies something more than a possibility and it cannot be made to bear the sense of "might have been known". Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was on offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within the first part; out offences committed in prosecution of the common object would be generally, if not always, be within the second part, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. (See *Chikkarange Gowda v. state of Mysore, AIR 1956 SC 731.*)

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63. LAND ACQUISITION ACT, 1894 – Section 23
Compensation, determination of – Determination on yield basis – Parameters to be applied – Usually multiplier of 10 applicable – Law explained.
Assistant Commissioner-cum-Land Acquisition Officer, Bellary v. S.T. Pompanna Setty
Judgment dt. 17.12.2004 passed by the Supreme Court in Civil Appeal No. 8245 of 2004, reported in (2005) 9 SCC 662

Held :

So far as the first point is concerned, the learned counsel for the appellant relied upon a decision of this Court in *State of Gujarat v. Rama Rana, (1997) 2 SCC 693.* In that case compensation was awarded to the claimant on yield basis. There was no sufficient evidence as to the income from agriculture and the Reference Court noticed that the witnesses exaggerated the yield. In the circumstances, the Reference Court determined the market value after deducting 1/3rd towards cultivation expenses and awarded compensation on that basis. The High Court dismissed the appeal and confirmed the order. The State approached this Court. Allowing the appeal and reducing the amount of compensation, this Court observed that it is common knowledge that expenditure is involved in raising and harvesting the crop and on an average, 50% of the value of the crop realised would be spent towards cultivation expenses. Deduction of 1/3rd, in the circumstances, was improper in determining the compensation of the land on the basis of yield. The Court also applied multiplier of 10.

x ____ x ____ x ____ x

In *Special Land Acquisition Officer v. P. Veerabhadarappa, (1984) 2 SCC 120* this Court held that when capitalisation method for valuation is applied, proper multiplier should be 10. As in that case, the State Government submitted that proper multiplier was 12-1/2, the computation was made on that basis. Similarly, in *Special Land Acquisition Officer v. Virupax Shankar Nadagouda, (1996) 6 SCC 124 relying on P. Veerabhadarappa (supra)* this Court determined compensation on the basis of 10 years, multiplier. Again in *Krishi Utpadan Mandi Samiti v. Malik Sartaj Wali Khan, (2001) 10 SCC 660* this Court held that computation of compensation for determination of market value may be carried out on yield basis and multiplier of 10 should be applied. Since multiplier of 20 was applied by the High Court, it was set aside by this Court by reducing the amount of compensation.

From the above cases, it is clear that *normally* in the cases where compensation is awarded on yield basis, multiplier of 10 is considered proper and appropriate.

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PART - III

CIRCULARS/NOTIFICATIONS

Notification No. (36) B-4-48-05-2-IV dated 5th September, 2005. – In exercise of the powers conferred by Section 79 of the **Registration Act, 1908 (No. XVI of 1908),** the State Government hereby makes the following further amendment in this department's notification No. B-818-635-V. S.R., dated 24th February, 1975 and publishes the same as required by Section 79 of the said Act, namely :–

Amendment

In the said notification, in the Table of Registration Fees, in Article 1, after note

(7), the following note shall be inserted, namely :–

(8) Registration fees at the rate of 0.5 percent of the amount secured, subject to a maximum of one thousand rupees, shall be levied on an instrument of agreement relating to the deposit of title deeds

[Published in M.P. Rajpatra (Asadharan) dated 5.9.2005 Page 850]

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Notification No. F-11-37-05-I-9 dated the 10th October, 2005.– In exercise of the powers conferred by Section 27 of the **Right to Information Act, 2005 (No. 22 of 2005),** the State Government, hereby makes the following rules, namely :–

Rules

Chapter-1

Preliminary

1. Short title and commencement.– (1) These rules may be called the **Madhya Pradesh Right to Information (Fees and Appeal) Rules 2005.**

(2) They shall come into force with effect from the date of their publication in the Madhya Pradesh Gazette.

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

(a) "Act" means the right to Information Act, 2005 (No. 22 of 2005).

(b) "Below Poverty Line" means such citizen of State who is declared as below poverty line by the Government of Madhya Pradesh.

(c) "Cost" means the cost which is chargeable for providing information as defined in clause (f) of Section 2 of the Act.

(d) "Fees" means the fees payable under the provisions of the Act.

(e) "Forms" means the forms attached to these rules.

(f) "Sections" means the sections of the Act.

(g) The words used in these rules but not defined shall have the same meaning as they are defined in section 2 of the Act.

Chapter-2
Fees

3. (1) Any person, who is not below the poverty line, desires any material under sub-section (4) of section 4 of the Act, shall submit the application himself, to the State Public Information Officer/Assistant Public Information Officer with non-Judicial stamp of Rs. 10/- or with the receipt of Rs. 10/- (Rupees ten) after making payment in cash. If the application is being sent by post the applicant shall enclose the non-judicial Stamp of Rs. 10/- (Rupees ten).

(2) After receiving the application by the State Public Information Officer or the State Assistant Public Information Officer as the case may be, the printing cost or medium cost price of the material of the information as determined by above Officer shall be deposited by the applicant to the above said officers in cash or in the form of non-judicial stamp. If the amount is deposited in cash by the applicant, the State Public Information Officer or the officer as directed by him shall give a receipt of such amount the amount so deposited shall be deposited into the treasury by a challan.

4. Any person, who is not below the poverty line, desires to seek an information under sub-section (1) of Section 6 and sub-section (1) of Section 7 of the Act shall produce the application before the public Authority or State Public Information Officer or State Assistant public Information Officer, as the case may be, with the non-judicial stamp of Rs. 10/- (Rupees ten) or with the receipt of Rs. 10/- (Rupees ten) by paying in cash.

5. For the purposes of sub-section (5) of section 7 where access to information is to be provided in the printed or in any electronic format, the applicant, who is not below the poverty line, shall deposit the actual cost of the Information as determined by the public Authority or State Public Information Officer or State Assistant public Information Officer in cash or in the form of non-judicial stamp within three days from the date of direction to such officers as directed by the public Authority or State Public Information Officer.

(2) If the applicant wants to examine any document or record, the State Public Information Officer or State Assistant public Information Officer shall depute any subordinate officer for such purpose and the applicant, who is not below the poverty line, shall pay Rs. 50/- (Rupees Fifty) for first hour or fraction there of and Rs. 25/- (Rupees Twenty Five) for every additional fifteen minutes or fraction thereof in cash or in the form of non-judicial stamp.

(3) If the applicant wants the certified samples of any material, the cost determined by the State Public Information Officer of State Assistant public Information Officer of such material, shall be deposited by the applicant to such officer who is directed by the State Public Information Officer, in cash or in the form of non-judicial stamp.

(4) Where the information is stored in the computer, the actual cost of the diskettes or floppies or tape or video cassettes as determined by the State Public Information Officer or the State Assistant Public Officer shall be deposited by the applicant in cash or in the form of non-judicial stamp.

Chapter-3
Pay and other Service Conditions

6. The officer and servants deputed under sub-section (6) of Section 16 shall be paid the same pay and allowances as they were receiving before deputation and for these service conditions the same rules shall be applicable as were applicable before such deputation.

Chapter-4
Appeal

7. First Appeal.– (1) Any person who does not receive a decision within the time specified in sub-section (1) or clause (a) of sub-section (3) of Section 7, or is aggrieved by a decision of the State Public Information Officer, may within thirty days from the expiry of such period or from the receipt of such a decision prefer an appeal, with a memorandum of appeal and the fee of Rs. 50/ - (Rupees Fifty) either in cash or in the form of non-judicial stamp, to such officer who is senior in rank to the State Public Information Officer in each Public Authority :

Provided that such officer may admit the appeal after the expiry of the period of thirty days if he is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) In the memorandum of appeal the name and address of the appellant, the basis of the subject matter of the information with the name and the post of the competent officer, the orders of the competent authority and payment of fee shall be clearly specified.

(3) An appeal under sub-rule (1) shall be disposed of within thirty days of the receipt of the appeal or within such extended period not exceeding a total of forty five days from the date filing thereof, as the case may be, for reasons to be recorded in writing.

(4) The Copy of order passed in appeal shall be given free of cost.

8. Second appeal. – (1) A second appeal against the decision under sub-rule (3) of rule 7 shall lie within ninety days from the date on which the decision should have been made or was actually received, with the State Information Commission :

Provided that the State Information Commission may admit the appeal after the expiry of the period of ninety days if it is satisfied that the appellant was prevented by sufficient cause from filling the appeal in time.

(2) With the memorandum of appeal filed before the State Information Commission the fee of Rs. 100/- (Rupees One hundred) in cash or in the form of non-judicial stamp shall be deposited.

(3) The State Information Commission shall after giving reasonable opportunity of being heard to public Authority or State Public Information Officer or appellant, as the case may be, dispose of the appeal within thirty days from the date of receipt of the appeal for reasons to be recorded in writing.

(4) The decision of the State Information Commission shall be final and binding.

(5) A copy of the decision, of the State Information Commission shall be given free of cost. If the appellant wants to receive the copy of the order by post then after receiving the fee of postal charges, shall be sent within three days.

9. The fee chargeable under rule 7 and 8 shall not be charged from the persons who are of below poverty line.

[Published in M.P. Rajpatra (Asadharan) dated 10.11.2005 1084 (6-8)]

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Notification No. F-30-8-2002-X-3 dated the 16th May, 2005.– In exercise of the powers conferred by Section 76 read with Section 41 and 42 of the Indian Forest Act, 1927 (No. 16 of 1927), the State Government hereby makes the following **amendments in the Madhya Pradesh Transit (Forest Produce) Rules, 2000,** namely :—

Amendment

In the said rules,—

1. In rule 4,—
   (a) sub-rule (1) of part (B) shall be omitted.
   (b) in clause (a) of sub-rule (2) of part (B), item No. (i) and (iii) and entries relating thereto shall be omitted; and
   (c) for part (c), the following part shall be substituted, namely :—
   "(c) The Gram Panchayat, or a person authorised by it, shall issue the transit pass for Transporting the forest produce within the district and the adjoining districts. The transit pass for transporting Forest produce to other destinations shall be issued by a Forest Officer authorised by the divisional Forest Officer in this regard."
   (d) in part (D), for the figures and word "45 days" the figures and word "30 days" shall be substituted.
2. In rule 14 the following proviso shall be inserted, namely :—
   "Provided that the State Government may prescribe a fee for placing such a mark on the timber."
3. In rule 17,—
   "(a) for sub-rule (1), the following sub-rule shall be substituted, namely :—
   "(1) The State Government may by Notification specify such species of timber or minor Forest produce for import in Madhya Pradesh for which the importers shall be required to get themselves registered with the Forest Department. Any person who intends to import such species of timber or minor Forest produce shall get himself registered in the Office of the Divisional Forest Officer of the area, where the forest produces is to be transported."
   (b) for sub-rule (3), the following sub-rule shall be substituted, namely :–
   "(3) The person importing the notified forest produce shall submit a quarterly account of the same to the concerned Divisional Forest Officer in Form E".

4. In rule 22, after sub-rule (2), the following sub-rule shall be inserted, namely :-

"(3) In such cases, where the forest produce in respect of which an offence has been committed, is not the property of the government or despite being the property of government, the value of such forest produce is less than one thousand rupees and if the offender has committed the offence for the first time, then the case can be compounded on payment of the sum of ten thousand rupees or the value of the vehicle, whichever is less, by an officer not below the rank of sub-diyisional forest officer. After compounding the offence, no further action shall be taken against the offender. The seized forest produce may be released only if it is not the property of the Government or on payment of the value thereof, as the case may be.".

[Published in M.P. Rajpatra Part IV (Ga) dated 27.5.2005 Pages 210-211]

Notification No. F-30-8-2002-X-3 dated the 16th May, 2005. – In exercise of the powers conferred by clause (b) of proviso to rule 3 of the **Madhya Pradesh Transit (Forest Produce) Rules, 2000**, the State Government hereby **exempts the following species** of forest produce from the operation of the said rules, namely :-

Timber of following species :

(i)	Neelgiri	–	Eucalyptus species
(ii)	Casurina	–	Casuarina equisetifolia
(iii)	Subabul	–	Leucenea sps.
(iv)	Poplar	–	Populus sps.
(v)	Israili Babul	–	Acacia trotilis
(vi)	Vilayati Babul	–	Prosopis Juliflora
(vii)	Babul	–	Acacia Nilotica
(Viii)	Neem	–	Azadirachta Indica
(ix)	Mango	–	Mangifera Indica

(x) All other species of Imported/conferous timber (Chir, Kail, Devdar and Pine) which are not found in Madhya Pradesh, even if they are known by some other name.

[Published in M.P. Rajpatra (Asadharan) Part IV (Ga) dated 27.5.2005 Page 211]

●

Notification No. F-17 (E)-40-88 XXI-B-I dated 5th November, 2005.– In exercise of the powers conferred by Article 234 read with the proviso to **Article 309 of the Constitution of India,** the Governor of Madhya Pradesh in consultation with the High Court and State Public Service Commission, hereby makes the following further amendments in the **Madhya Pradesh Lower Judicial Service (Recruitment and Conditions of Service) Rules, 1994,** namely :-

Amendments

In the said rules, –

(1) For rule 3, the following rule shall be substituted, namely :–

"3. **Constitution of Service.** – (1) The service shall consist of following categories, namely :–

(i)	Civil Judge (Entry Level)	Rs. 9000-250-10750-300-13150 -350-14550)
(ii)	Civil Judge Grade-II [On completion of 5 years continuous service from the date of entry, first stage of Assured Career Progression (ACP) Scale].	(Rs. 10750-300-13150-350-14900)
(iii)	Civil Judge Grade-I [On completion of another 5 years continuous service in grade-II. Second Stage of Assured Career Progression (ACP) Scale.]	(Rs. 12850-300-13150-350-15950-400-17550)
(iv)	Senior Civil Judge (Promotion Cadre)	(Rs. 12850-300-13150-350-15950-400-17550)
(v)	Senior Civil Judge/Chief Judicial Magistrate/Additional Chief Judicial Magistrate Grade-II (On completion of 5 years continuous service in the cadre of Senior Civil Judge). First Stage of Assured Career Progression (ACP) Scale.	(Rs. 14200-350-15950-400-18350)
(vi)	Senior Civil Judge Grade-I (On completion of another 5 years of continuous service in the cadre of Senior Civil Judge/Chief Judicial Magistrate/Additional Chief Judicial Magistrate Grade-II). Second stage of Assured Career Progression (ACP) Scale.	(Rs. 16750-400-19150-450-20500)

(2) The service shall consist of the following persons :–

(a) Persons who, at the time of commencement of these rules, are holding substantially or in officiating capacity, the post of Civil Judge.

(b) Persons entitled to the service in accordance with the provisions of these rules.".

(2) For rule 4, the following rule shall be substituted, namely :–

"**4. Strength of Service.** – The Strength of service shall be as determined by the Government from time to time in consultation with the High Court :

Provided that the number of posts in categories (iv), (v) and (vi) taken together in the cadre of Senior Civil Judge shall be 40 percent of the total number of posts in the cadre of Civil Judges.".

(3) For rule 5 the following rule shall be substituted, namely :–

"**5. Method of appointment and the appointing authority.** – (1) All appointment to category (i) of Rule 3 (1) shall be made by the Governor by direct recruitment in accordance with the recommendation of the Commission on selection.

Candidates shall be slected on the basis of Written Examination Conducted by the Public Service Commission and Viva Voce thereafter :

Provided that the procedure and curriculum for holding examination for the seleciton of candidates shall be prescribed by the Public Service Commission in consultation with the High Court and State Government :

Provided further that two sitting Judges of the High Court to be nominated by the Chief Justice shall be the members of the Selection Committee and the Senior Judge shall preside over the committee.

(2) Examination shall be conducted every year as far as possible on the basis of availability of the vacancies by the Public Service Commission for selection of candidates.

(3) Appointment to the Cadre of Senior Judge shall be made by the High Court by selection on the basis of merit-cum-seniority from amongst the Civil Judges who have completed 5 years of continuous service.

(4) Appointing to the post of Chief Judicial Magistrate/Additional Chief Judicial Magistrate under Section 12 of the Code of Criminal Procedure, 1973, shall be made from amongst the Senior Civil Judges, by the High Court, on the basis of merit-cum-seniority.

(5) ACP scales as provided in categories (ii), (iii), (v) and (vi) under sub-rule (1) of Rule 3, shall be granted by the High Court to the members of the service on appraisal of their work and performance and on completion of requisite continuous period of service as indicated in that sub-rule.

(4) For rule 7, the following rule shall be substituted, namely :–

"**7. Eligibility.**– No person shall be eligible for appointment by direct recruitment to posts in category (i) of rule 3 (1) unless :–

(a) he is a citizen of India;

(b) he has attained age of 21 years and not completed the age of 35 years on the 1st day of January of the next following year in which application for appointment are invited:

Provided that the upper age limit shall be relaxable upto a maximum of three year if a candidate belongs to Scheduled Castes, Scheduled Tribes or Other Backward Classes :

Provided further that the upper age limit of a candidate who is a Government servant (whether permanent or temporary) shall be relaxable upto 38 years;

(c) he possesses a degree in law of any recognised University;

(d) he has good character and is of sound health and free from any bodily defect which renders him unfit for such appintment.

(5) For clause (c) of rule 11, the following clause shall be substituted, namely :–

"(c) It shall be competent for the High Court at any time during or at the end or the period of probation in the case of Civil Judge (entry level) to recommend termination of his service and in the case of Senior Civil Judge, to revert him to his substantive post.".

(6) For rule 14, the following rule shall be substituted, namely :–

"14. Pay, allowances and other conditions of service.– (1) The Dearness Allowance of the members of Lower Judicial Service be governed by the Madhya Pradesh Judicial Service Revision of Pay Rules, 2003 and the same D.A. formula as being adopted at Central Government be followed.

(2) The basic pay of Civil Judge and Senior Civil Judge shall be 42.3% and 58.5% respectively of the salary of High Court Judge.

(7) For rule 16, the following rule shall be substituted, namely :–

"16. Superannuation. – Subject to the provision contained in the Rule 56 (3) of the Fundamental Rules and Rule 42 (1) (b) of M.P. Civil Services (Pension) Rules, 1976, the age of superannuation of a member of service shall be 60 years.

(8) For rule 18, the following rule shall be substituted, namely :–

"18. Deputation – Any member of the Service may with the concurrence of the High Court be deputed for not exceeding the continuous period of 4 years to perform the duties of any post in the Central Government or the State Government or to service in any organization, which is wholly or partly owned or controlled by the Government.

(9) In rule 19, after the words "any particular case," the words "or class of cases" all be inserted.

(10) For rule 20, the following rule shall be substituted, namely :–

"20. Repeal. – All Rules corresponding to these Rules, Orders and Resolutions, if any, and in force immediately before their commencement are hereby repealed in respect of matters covered by these Rules:

Provided that any order made or action taken under the Rules, orders and resolutions so repealed shall be deemed to have been made or taken under the corresponding provisions of these rules.

[Published in M.P. Rajpatra (Asadharan) dated 5.11.2005 Pages 1082 (2-5)]

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PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE HINDU SUCCESSION (AMENDMENT) ACT, 2005

(39 of 2005) (5 Sept. 2005)

The Hindu Succession (Amendment) Bill 2005 was passed by the Rajya Sabha on 16th August, 2005 and by the Lok Sabha on 29th August, 2005 and Assented by the President of India on 5th Sept. 2005 – Came into force on 9th Sept. 2005.

An Act further to amend the Hindu Succession Act, 1956.

Be it enacted by Parliament in the Fifty-sixth Year of the Republic of India as follows :–

1. Short title and Commencement – (1) This Act may be called the Hindu Succession (Amendment) Act, 2005.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Amendment of Section 4 – In Section 4 of the Hindu Succession Act, 1956 (30 of 1956), (hereinafter referred to as the principal Act), sub-section (2) shall be omitted.

3. Substitution of new Section for Section 6 – For Section 6 of the principal Act, the following Section shall be substituted, namely :–

6. Devolution of interest in coparcenary property – (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a co-parcener shall, –

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the caparcenary property as she would have had if she had been a son ;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son,

and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidated any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of co-parcenary ownership and shall be regarded, not with standing any thing contained in this Act or any

other law for the time being in force, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005 his interest in the property of a Joint Hindu family governed by the Miitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,–

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre- deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a predeceased daughter, as such child would have got had he or she been alive at the time of the partition, shal be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased dauther, as the case may be.

Explanation – For the purposes of this sub-section, the interest of a Hindu Mitakshara co-parcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grand-father or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt :

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect –

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation – For the purposes of clause (a), the expression "son", "grandson" or "great grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to commencement of the Hindu Succession (Amendment) Act, 2005.

(5) Nothing contained in this Section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation – For the purposes of this Section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908), partition effected by a decree of a court.

4. Omission of Section 23 – Section 23 of the principal Act shall be omitted.

5. Omission of Section 24 – Section 24 of the principal Act shall be omitted.

6. Omission of Section 30 – In Section 30 of the principal Act, for the words "disposed of by him", the words "disposed of by him or by her" shall be substitued.

7. Amendment of Schedule – In the Schedule to the principal Act, under the sub-heading *"Class I"*, after the words "Widow of a pre-deceased son of a pre-deceased son", the words "son of a pre-deceased daughter of a pre-deceased daughter; daughter, of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased son of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased son" shall be added.

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Manifest plainness, Embrace simplicity, Reduce selfishness, Have few desires.

- LAO-TZU

Making the simple complicated is commonplace; making the complicated simple, awesomely simple, that's creativity.

- M SCOTT PECK

MADHYA PRADESH ACT

(No. 16 of 2005)

THE MADHYA PRADESH GRAM NYAYALAYA (SANSHODHAN) ADHINIYAM, 2005

[Received the assent of the Governor on the 16th August, 2005; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 22nd August, 2005]

AN ACT FURTHER TO AMEND THE MADHYA PRADESH GRAM NYAYALAYA ADHINIYAM, 1996.

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

1. **Short title and commencement.** – (1) This Act may be called the **"Madhya Pradesh Gram Nyayalaya (Sanshodhan) Adhiniyam, 2005."**

(2) It shall come into force on such date as the State Government may, by notification, appoint.

2. Amendment of Section 16. – In sub-section (1) of Section 16 of the Madhya Pradesh Gram Nyayalaya Adhiniyam, 1996 (No. 26 of 1997) (hereinafter referred to as the Principal Act), –

(i) in the first paragraph, the words "or the Madhya Pradesh Land Revenue Code, 1959 (No. 20 of 1959)" shall be omitted;

(ii) clause (iii) shall be omitted.

3. Amendment of section 17. – In Section 17 of the Principal Act, in the marginal heading, the words "and Revenue Cases" and in the text, the words "or Revenue Case" shall be omitted.

4. Amendment of Section 19. – In Section 19 of the Principal Act, –

(i) in sub-section (1) the words "or Revenue case" shall be omitted.

(ii) in sub-section (2), for the words "Revenue Case" the words "Criminal case" shall be substituted.

5. Amendment of Section 21.– In Section 21 of the Principal Act, the word "Revenue", wherever it occurs shall be omitted.

6. Amendment of Section 26.– In Section 26 of the Principal Act, the words "and revenue", shall be omitted.

7. Amendment of Section 31. – Clause (c) of the proviso to Section 31 of the Principal Act, shall be omitted.

8. Amendment of Section 34. – In Section 34 of the Principal Act, for the words "Civil, Criminal or Revenue Court" the words "Civil or Criminal Court" shall be substituted.

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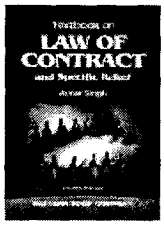

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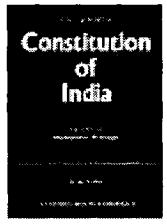

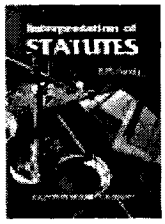

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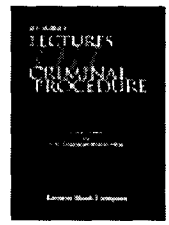

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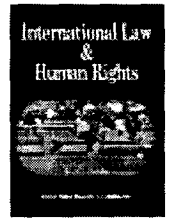

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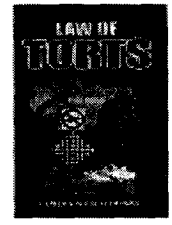

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