JOTI JOURNAL

Vol. XIII
FEBRUARY 2007 (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

TRAINING COMMITTEE

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH

JABALPUR - 482 007

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Ved Prakash Sharma — Director

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Shailendra Shukla — Addl. Director

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SUBJECT- INDEX

FROM THE PEN OF THE EDITOR

Ved Prakash
Director, JOTRI

Esteemed Readers!

Justice happens to be the first and foremost urge of a human being for a dignified living. The tool of law, though not exactly a scientific tool, aims at creating a just society; meaning thereby a society in which every individual may not only feel safe but also have the fullest opportunity for physical, psychological and moral development. The real growth and development of a civilized society indeed is measured not in terms of economic prosperity but in terms of level of human development at the scale of Human Development Index.

A Judge has the peculiar and the most difficult task of imparting justice by applying the principles of law. But then as put forth by Justice Felix Frankfurther, *"What is decisive for a Judge's functioning on the Court is his general attitude towards law, the habits of mind that he has formed or is capable of unforming, his capacity for detachment, his temperament or training for putting his passion behind his judgment instead of infront of it."*

Nay not say, less the prejudice on the part of the Judge, more the quality of justice. The duty of judging can be properly discharged only when a Judge, free from prejudices, has a proper understanding of the social context in which the law has to be applied so as to ensure justice in real sense. This has also been referred to as social context judging which requires an open approach free from all types of *isms*. This requires efforts on our part to acquire basic understanding about the prevailing social milieu. This aspect of judging should always be kept in view to make the justice real and effective.

As we know justice delivery system is undergoing through a process of mega reforms. Judicial education and training has been said to be part of this reform process. In year 2006 in total 35 training programmes/workshops for Judicial Officers, Prosecutors and Officers of some other departments, who have an important role in the judicial process, were organized by this Institute. These programmes basically aimed at capacity building and motivating the participants for attitudinal reforms by having the idea of serviceability. The question remains as to what extent these programmes could help the participants? In order to find out the answer, the Institute has embarked upon a broad based research study. The idea behind this exercise happens to be to find out as to what extent the mission of judicial education undertaken by JOTRI has been able to help the process of judicial reforms and whether some changes are required in the methods of judicial education.

The Institute commenced its activities in the current year with a workshop focusing on issues of Female Foeticide, Trafficking in Women/Children and Child Marriage. It was sponsored by National Committee for Legal Aid Services – India. Apart that, we organized a two days' workshop for Joint Registrars and Deputy Registrars of Co-operative Department on – 'Judicial Process under Co-operative Societies Act' and a five days' Condensed (Course) for Additional District Judges. The Institute was also associated with National Judicial Academy, Bhopal in organizing a three days programme (2nd, 3rd and 4th February, 2007) on – 'Delay and Arrears Reduction'. This programme was organized in National Judicial Academy, Bhopal in which around 120 Judicial Officers from Gujarat, Madhya Pradesh, Maharashtra and Gujarat participated. The programme was highly appreciated and had immense significance because the participants came out with innovative suggestions for reducing delays and arrears. These suggestions can ultimately help in preparing the strategy for reduction of delay and arrears.

Presently a lot of debate and discussion is going on regarding the issue of Judicial Accountability. In Part I of the Journal we are having the privilege of publishing a lecture on Judicial Accountability delivered on 8th April, 2006 by Hon'ble Shri Justice K.G. Balakrishnan, Judge Supreme Court of India (as His Lordship then was) at Gwalior. It gives a deep insight about how a Judge is expected to conduct himself and what should be the overall approach while discharging the onerous duties of Judgeship. Apart this, articles of bi-monthly training programme and an article on 'Plea Bargaining' also find place in Part I.

In Part II of the journal, we are including some latest pronouncements of far reaching importance. Full Bench decision in *Bhagwati Bai and another v. Bablu @ Mukund and others, 2006 (4) MPLJ 579* (Note No. 34) resolves the controversy relating to right of Legal Representatives of injured where death was not a result of accident. Judgment by Hon'ble the Apex Court in *Jagmodhan Mehtabsing Gujaral and others v. State of Maharashra, (2006) 8 SCC 629* (Note number 47) suggesting the approach to be adopted by Courts while dealing with cases relating to theft of Electricity is again quite noteworthy. In the earlier issue (December 2006) we published M.P. Case Management Rules, 2006 In this issue we are including Case Flow Management Rules which have come into force after being notified in the Official Gazette. Application of these rules may prove quite helpful in ensuring timely and qualitative justice.

'Fresh justice is the sweetest', said Francis Bacon. Let there be all round efforts to ensure that justice is fresh and not stale.

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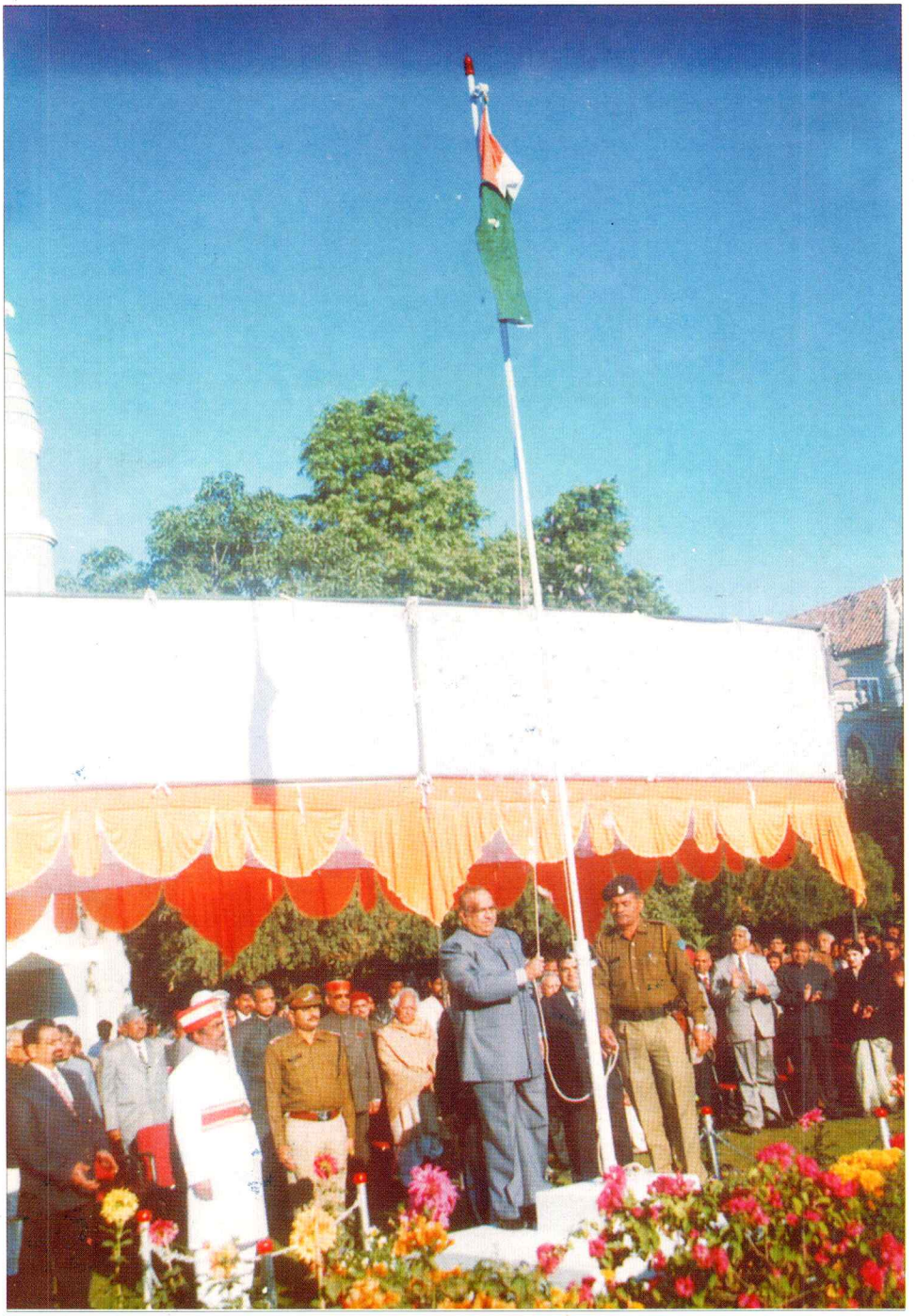

Hon'ble the Chief Justice Shri A.K. Patnaik unfurling the National Flag on Republic Day (26th January, 2007) in the precincts of the High Court at Jabalpur

Hon'ble the Chief Justice Shri A.K. Patnaik delivering the Inaugural Address on the opening day of the Judicial Colloquium on – 'Problem of Female Foeticide and Trafficking' held on 6th & 7th January, 2007 at Hotel Gulzar Towers, Jabalpur

Hon'ble Shri Justice Dipak Misra addressing the participants on the opening day of the Judicial Colloquium on – 'Problem of Female Foeticide and Trafficking' held on 6th & 7th January, 2007 at Hotel Gulzar Towers, Jabalpur

(From R to L) Hon'ble Shri Justice Arun Mishra, Hon'ble Shri Justice Dipak Misra, Hon'ble Shri Justice S.S. Jha and Ved Prakash Sharma, Director, JOTRI in a session of the Judicial Colloquium on – 'Problem of Female Foeticide and Trafficking' held on 6th & 7th January, 2007 at Hotel Gulzar Towers, Jabalpur

Participant Judicial Officers in the Judicial Colloquium on – 'Problem of Female Foeticide and Trafficking' held on 6th & 7th January, 2007 at Hotel Gulzar Towers,Jabalpur

Hon'ble Shri Justice Dipak Misra, Chairman of High Court Training Committee deliberating in workshop on – 'Judicial Process under Co-operative Societies Act' for Joint Registrars and Deputy Registrars of Co-operative Department held at JOTRI on 22nd & 23rd January, 2007

Participant Joint Registrars and Deputy Registrars of Co-operative Department in the workshop on – 'Judicial Process under Co-operative Societies Act' held at JOTRI on 22nd & 23rd January, 2007

A. K. Patnaik
Chief Justice

191, South Civil Lines,
Jabalpur - 482 001
Tel. (O) 2626443
(R) 2678844
2678855
2626746 (Net)
Fax 0761-2678833

Dated : .10.01.2007

MESSAGE

I understand that Judicial Officers' Training and Research Institute is publishing its first issue of JOTI Journal of the year 2007.

JOTRI is developing into a very useful training centre for Judicial Officers of the State of Madhya Pradesh and over the years, has accumulated a lot of material relating to different subjects of law and administration of justice. Such material is being published from time to time and should be read by every judicial officer of the State to keep him abreast of the latest law and decisions of the Supreme Court and the High Courts.

I am quite sure that the first issue of JOTI Journal of the year 2007 will be informative and interesting to read.

(A.K. PATNAIK)

PART - I

JUDICIAL ACCOUNTABILITY*

The concept of accountability is derived from an old French equivalent for *'competes a rendre'* meaning the rending of accounts. The standard definitions of accountability emphasise both information and sanctions. Governments are accountable if citizens can discern representative from unrepresentative governments and can sanction them appropriately.

Judiciary is the branch of Government that interprets the laws or says what the laws mean. Democracy means a form of government in which citizens share the power. The Indian Constitution accepts the Montesquiean theory of division of powers. Judiciary within the sphere of its activities enjoys independence which enables it to make free and fearless decisions. The problem arises where this judicial independence is misused resulting in hue and cry all over the world. Forget judicial independence, it is time for judicial accountability. Judges in some parts of the country are becoming increasingly nervous claiming that their judicial independence is being threatened. The real problem is that they are afraid of judicial accountability and the ever increasing demands by the public that the judiciary be held accountable for their actions, to cease their judicial activism and the wrongful rulings which are unjustly ruining peoples' lives. Recently, a critic Tom De Lay commenting on the American judges said :

> *"It is the judges in this country who have become tyrannical and irrational, despots in black robes, enamoured with themselves"*

Members of the judiciary nationwide claimed that they were intimidated by De Lay. This dispute arose when a woman by name Terri Schindler-Schiavo died 13 days after the court ordered for withdrawal of her feeding tube. The critic said that the federal judiciary was "responsible" for Schiavo's death. De Lay said that the Congress retains oversight of the federal courts and should use it to hold judges accountable. But the judges from Maine to California cried that the doctrine of separation of powers gave them independence and they should not be accountable to anyone. De Lay wrote a book "Men in Black : How the Supreme Court is destroying America" and in the book he alleges that nine justices were engaged in an activist agenda that oversteps the bounds of the Constitution.

This case evoked widespread comments from the legal fraternity. The former Supreme Court Justice Sandra Day O'Connor, in her speech on

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* Late Justice Hargovind Mishra and late Shri Puttulal Dubey Memorial Law Lecture delivered on 8th April, 2006 by Hon'ble Shri Justice K.G. Balakrishnan, Judge, Supreme Court of India (as His Lordship then was), at Gwalior

Georgetown University criticized the efforts of lawmakers to save the life of Terri Schiavo, and complained about the harsh criticism of the courts. In response to Sandra Day O'Connor's speech, Fr. Frank Pavone, National Director of Priests for Life, declared, *"Justice O'Connor has it backwards. Dictatorships begin with the idea that government can deprive people of their fundamental rights. That is what happened to Terri, who was neither terminally ill, nor comatose, nor on life support" and "When Supreme Court justices such fundamental points wrong, we have got a problem, and they deserve all criticism we can muster."*

At least in the United States, more and more members of the public feel that it is time to be vigilant against the members of the judiciary who are strong-arming the public, who make up the law as they go along, thumb their noses at the Constitution and establish case laws and then claim that they have followed the rule of law. They exhort people and say the public has an obligation and duty to speak up too – and to hold the judiciary accountable, just as accountable, if not more than the executive and legislative branches of the Government. There is no separation of powers when it comes to governmental accountability. The press and some judicial activists said that the judiciary must cease their intimidation of the public. For some unknown reasons the members of the judiciary seem to think that a black robe and gavel allows them to play God and that is just not so.

We cannot simply ignore the new wave of criticism that is coming against the judiciary from all sides. An effective functioning of the judicial system depends not only on justice in fact being administered but also on the feeling of citizens that they are being provided fair treatment and just decisions. The ultimate reason for any type of judicial discipline is to maintain public confidence in the judiciary. A legal system can function only as long as the public accepts and abides by the decisions rendered by the Courts and the public will accept and abide by these decisions only if it is convinced that the judges are fair and impartial; anything which tends to weaken that conviction should be avoided. The age old rule often cited is that justice must not only be done, but it must also be perceived to be done.

The service rendered by judges demands the highest qualities of learning, training and character. These qualities are not to be measured according to the quantity of the work done. A form of life and conduct far more severe and restricted than that of ordinary people is required from judges, and, though unwritten, has mostly been observed. But recently there were series of criticisms and some remedial measures were also taken. Accountability of the judiciary in respect of its judicial functions and orders is to be met with provisions for appeal, revision and review of orders.

In view of the failure of the present mechanism for removal of judges for serious misconduct and proved misbehaviours, some legislation is on the anvil. I do not propose to discuss the provisions of the proposed Act in detail.

There has been tremendous progress in the field of administrative law. The process of judicial review often pitted the judiciary against the executive leading to charges of government by the judiciary. An unelected judiciary overruling the laws passed by the elected representatives of the people has been considered undemocratic and violative of the principles of majoritarianism. This argument is conceptually incorrect. The governmental authorities especially politicians dislike being told publicly that they were wrong and they acted contrary to law. Sometimes while striking down the Governmental action, some strong language is used and even motives attributed. There is also a pernicious tendency on the part of some to attack judges if the decisions do not go the way they want or if it is not in accordance with their view. There is nothing wrong in critically evaluating the judgment. The improper and intemperate criticism of judges owing to dissatisfaction with their decisions constitutes a serious inroad into the independence of the judiciary. It is essential in a county governed by the rule of law that every decision must be made under the rule of law and not under the pressure of one group or another. Those who indulge in such improper and intemperate attack on judges little realize what serious damage they are doing to the institution of the judiciary.

In Australia, where the native title case provoked unprecedented criticism against the High Courts, Prof. H.P. Lee on Monash University wrote as follows :

> *"Scurrilous abuse of particular members of the judiciary or attacks which question the integrity of judicial institutions undermine public confidence in the courts and acceptance of their decisions. This is not to suggest that courts should be immune from criticism. On the contrary, the judgment of the courts should be scrutinized and critically evaluated. But those who hold positions of power and influence in the country have a responsibility to ensure that the line between measured criticism of judgments and denigration of judges is not traversed. Constitutionalism in Australia is not enhanced by hostility directed against the judiciary which plays such a pivotal role in maintaining the rule of law."*

In the case of *D.C. Saxena and Dr. D.S. Saxena v. Hon'ble the Chief Justice of India, AIR 1996 SC 2481*, the Supreme Court of India also expressed its view in the following lines :

> *"..... administration of justice and Judges are open to public criticism and public scrutiny. Judges have their*

accountability to the society and their accountability must be judged by the conscience and oath to their office, i.e. to defend and uphold the Constitution and the laws without fear and favour. Thus the Judges must do, in the light given to them to determine, what is right. Any criticism about judicial system or the Judges which hampers the administration of justice or which erodes the faith in the objective approach of the Judges and brings administration of justice to ridicule must be prevented . The contempt of court proceedings arise out of that attempt. Judgments can be criticized. Motives to the Judges need not be attributed. It bring the administration of justice into disrepute. Faith in the administration of justice is one of the pillars on which democratic institution functions and sustains. In the free market place of ideas criticism about the judicial system or judges should be welcome so long as such criticism does not impair or hamper the administration of justice. This is how the court should exercise the powers vested in them and Judges to punish a person for an alleged contempt by taking notice of the contempt suo motu or at the behest of the litigant or a lawyer ..... Law is not in any doubt that in a free democracy everybody is entitled to express his honest opinion about the correctness or legality of a judgment or sentence or an order of a court but he should not overstep the bounds. Though he is entitled to express that criticism objectively and with detachment in a language dignified and respectful tone with moderation, the liberty of expression should not be a license to violently make personal attack on a Judge. Subject to that, an honest criticism of the administration of justice is welcome since justice is not a cloistered virtue and is entitled to respectful scrutiny. Any citizen is entitled to express his honest opinion about the correctness of the judgment, order or sentence with dignified and moderate language pointing out the error or defect or illegality in the judgment, order or sentence. That is after the event as post-mortem."

At the same time, there must be open justice which, in its various manifestations, is the basic mechanism of ensuring judicial accountability. The Judges sit in open Court, publish reasons, accord fair procedure and avoid perceived bias and ensure fairness in trial. All are important things as part of judicial accountability. It is also important that the Judges should strive for higher standards. It is the Judges' professional duty to do all that is reasonably possible

to equip himself or herself to perform judicial duties with a high degree of competence. Competency is not an ethical issue. But it touches ethics in two ways. There is a duty to admit that one has to perform confidently and this includes a continuing duty to improve confidence in areas where weakness is detected. There is also a moral obligation to participate in suitable forms of judicial education and once the Judge realizes that he or she is incurably incompetent there is a duty to resile. The continued professional development is the only way to improve the performance standard.

The words of Lord McCluskey are worthy of recollection :

> *"He has been elevated to a position in which he wields a royal authority. The apparatus of State lies ready to enforce his orders. The visible symbols of his office, the way he dresses, the place in which he sits, the manner in which he is addressed, the respect which he is accorded, all are designed to buttress that authority to intimidate those who might wish to challenge or evade it."*

According to Lord McCluskey the temptations a new Judge is exposed to include arrogance, self-esteem and impatience. A Judge is never answerable to his fellow Judges, or to Parliament or to public opinion for his decision. His grosser excesses may be curbed on appeal. But he cannot be called to account in the way an elected representative is. According to Learned Hand:

> *"His authority and immunity depend upon the assumption that he speaks from the mouth of others, he must present his authority by cloaking himself in the majesty of an over shadowing past."*

Judicial independence and accountability of Judges are closely connected subjects and the question usually raised is whether accountability of Judges can be achieved without sacrificing the independence of the judiciary. *"The concept of independence of the judiciary is a noble concept which inspires the Constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle that funs through the entire fabric of the Constitution it is the principle of the rule of law under the Constitution. It is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law thereby making the rule of law meaningful and effective." (S.P. Gupta v. Union of India, (1981) Supp SCC 87).*

The idea of judicial independence is embodied in our Constitution through various provisions. Undoubtedly, the judiciary, the third branch of the Government, cannot act in isolation. The thrust of this principle is to ensure that adjudications are untrammeled by external pressures or controls and the courts and tribunals are insulated from executive control. However, judicial

independence is not an absolute thing and one should not give too much importance to the independence of the judiciary.

The Chief Justice of Tasmania said about judicial independence:

> "It is the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon any person or institution, including in particular, the executive arm of the Government over which they do not exercise direct control".

Patrick Devlin in his book 'The Judge' opined :

> *"The social service which the judge renders to the community is the removal of a sense of injustice. To perform this service the essential quality which he needs is impartiality and next after that the appearance of impartiality. I put impartiality before the appearance of it simply because without the reality the appearance would not endure....."*

Patrick Devlin also draws distinction between the activist and dynamic lawmaking. In activist lawmaking the idea is taken from the consensus and demands utmost sympathy from the lawmaker. In dynamic lawmaking the idea is created outside the consensus and, before it is formulated, it has to be propagated. This needs more than sympathy; it needs enthusiasm. Enthusiasm is not and cannot be a judicial virtue. it means taking sides and, if a judges takes sides on such issues on controversial subjects, he loses the appearance of impartiality and quite possibly impartiality itself.

Both judicial independence and judicial accountability are vital for maintaining the rule of law in the democratic system of Government. The call for judicial accountability is gaining momentum and the judiciary is no longer a sacrosanct and inviolable sanctuary of its occupants. Lord Atkin said years back that justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

> *"Judges exercise power. With power comes responsibility. In a rationally organized society, there will be proportion between the two. The question of judicial responsibility accordingly becomes more or less significant, depending on the power of the Judge in question".*

The above words of Prof. Merryman is applicable to Indian courts also. Since last few years, the powers of the Indian courts have increased in manifold ways. In view of the unprecedented expansion of the Judges' procedural and substantive responsibilities, it is quite natural that the powers of the courts have

increased. Litigation is no longer a pure affair 'between the parties' and the Judge is no longer a passive referee having no power. The powers of superior courts also have increased due to the expansive and variegated forms of litigation. Expansive interpretation of the various provisions of the Constitution has also vested the courts with multifarious jurisdiction, e.g., the wide interpretation given to Article 21 of the Constitution widens the origin of litigation surrounded with the various forms of Right to life embodied in the Constitution. The narrow interpretation adopted by the Supreme Court in *A.K. Gopalan's* case was given a go-bye in *Maneka Gandhi's* case and various other subsequent decisions. The commencement of Public Interest Litigations also gave rise to different types of litigations. Citizens came to court when the public authorities failed to discharge their statutory and constitutional obligations. When there were blatant violations of law, the Court started giving directions ignoring the age old principle of *'Locus Standi'*. The traditional rule regarding *Locus Standi* that judicial remedy is available to a person who has suffered legal injury by reason of violation of his legal right has drastically changed and it was held that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any legal right or any burden is imposed in contravention of Constitutional or legal provisions or without authority of law or any such legal wrong or legal injury or legal burden is threatened and such person or a determinate class of persons by reason of poverty, helplessness or disability is unable to approach the Court for relief, then any member of the public can maintain an application for appropriate direction, order or writ in the High Court under Article 226 and incase of breach of any fundamental right before the Supreme Court under Article 32.

The various forms of public interest litigations resorted to in the superior courts also led to the increase of the power of the courts. This also led to the growing need of public accountability. The public accountability of Judges was demanded for various reasons. Some of the reasons could be classified as :

(i) Growth in size and complexity of the judiciary in the modern welfare state and more and more citizens approaching the court for redressal of their grievances.

(ii) educated citizens wanted Judges to be accountable

(iii) Judges are appointed or selected and the public have no direct control over them

(iv) Judges could be removed only through constitutional procedure and the procedure for removal is difficult.

(v) There are no provisions for remedying minor misbehaviour such as maltreatment of witness or party.

(vi) Judges commit mistake but there is no remedy. many times, misbehaviour or mistake is not corrected by the superior court and there is a feeling that the Judges of the superior court protect their own men and it is useless to make complaints. There is no constitutional or statutory mechanism by which the aggrieved litigant can get redressal of his grievances.

Justice Jackson of the US Supreme Court once said, *"Judges sometimes exhibit vanity, irascibility, narrowness, arrogance and other weakness to which the human flesh is heir."*

The real problem is the non-availability of mechanics to which the average complainant and litigant can resort to. In the American State of California, there is a commission by name 'Commission on judicial performance'. This commission has got the power to recommend to the State for removal of a Judge. In Phillipines, it is said a Judge who has not delivered a judgment within three months runs the risk of suspension of his salary till judgment is delivered. In Sweden and Finland, the Ombudsman is empowered to supervise the courts.

In England, the Crown had been taking steps to exercise control over the judiciary. One of the extreme forms of control was the removal of Judges. James I removed Chief justice Coke in 1660 for his refusal to submit to his wishes. Coke and all other Judges refused to accept the advice of the King. When the Parliament became supreme, it also sought to control the judiciary. An earlier English Act prescribed an oath that Judges shall not receive any fee or present from a party to a case. The doctrine of pleasure was also introduced and it was laid down that the Judges could hold office during good behaviour. The scrutiny of judicial tenure was finally established in 1700 by an Act or Settlement and the Act provided that the Judges of the highest court could be removed only upon an address by both houses of Parliament. Still the independence of Judges was not complete and the Judges used to continue only for six months after the death of the King. There was unlimited discretion to remove the Judges or to allow them to continue. In 1925, an Act was passed, namely, Supreme Court of Judicature (Consolidation) Act, which provided that all Judges of the Court of Appeal with the exception of Lord Chancellor, shall hold office during good behaviour, subject to a power of removal by His/Her Majesty on an address to His/Her Majesty by both houses of Parliament.

Judicial independence and integrity carry different meanings depending upon social values, economic and political environment. Judges should have security of tenure and their appointment should be free from political pressure and other irrelevant considerations. After the 1925 Act, only one Judge was removed from office by address, though there were several instances where Judges had to resign due to informal pressure.

Removal of Judges after an address in the Parliament also is under severe criticism. In England, there is an elaborate procedure established by parliamentary practices. But there is a thinking that this process also should change. The legislative removal is coloured by political partisanship. The initiation of the process and its ultimate result may be dictated by political considerations. The process of fact finding also may suffer from partisanship. It is quite observable that the members of the political parties take a partisan attitude in such proceedings. In the case of one Judge, the Tory group voted for acquittal while all the Whigs joined in condemnation. The move to impeach Justice Douglas of the US Supreme Court was also sought to be politically motivated. In these times of Parliamentary Government, the legislature is effectively controlled by the Executive. The practice of address in the Parliament was introduced to protect Judges from interference, but the Government has got considerable control over the Parliamentary proceedings and the legislative procedure is not adequate for fact finding. Moreover, members of the legislature are also not adequately qualified for making assessment or taking decisions regarding the impropriety or other judicial misbehaviour allegedly done by the Judge. In India also, we have observed the same scenario when the solitary impeachment proceedings took place in our Parliament. The observations of the committee appointed to reform this practice in England is relevant to be quoted:

> *"The real dangers of this archaic procedure are more serious than the practical problems it would involve. The mere fact that it is so difficult to initiate, so cumbersome to operate and so unlikely to produce satisfactory result i.e., a decision which is just and seen to be just must mean that there are two dangers; indirect pressure will be put on a Judge probably by the Executive to resign, simply in order to circumvent the procedures and that a Judge determined not to give way may be able to continue in office for longer than is desirable. It has been well said that the main purpose of the parliamentary procedure was not to provide method of removing Judges but rather to safeguard them against removal."*

Justice Fortas resigned from the U.S. Supreme Court when the Attorney General met the Chief Justice and told him that unless Fortas resigned, the Justice Department would release damaging information.

Suffice it to say that unless there is an effective mechanism for removal, the aberrant Judges are likely to remain on the bench longer than is desirable.

Generally, the common litigant is aggrieved by complaints mainly of three categories (i) objectionable utterances either in court or outside and not sitting regularly or not maintaining punctuality (ii) administrative acts of the Chief Justice such as making appointments to suit his convenience (iii) certain acts relating

to judicial functioning such as lenient sentences, disregard of established guidelines, unwillingness to write and deliver judgments, favourtism to lawyers or parties. Of course, the correction of purely judicial error should remain in the domain of the appellate system. Failure to follow certain accepted guidelines and law sometimes causes serious problems. It is true that many such cases come to the superior courts. The Judges taking decisions should give their reasons and should follow the accepted legal principles. if a Judge leaves the law and makes his own decisions, 'he loses the protection of the law and sacrifices the appearance of impartiality which is given by adherence to the law. He expresses himself personally to the dissatisfied litigant and exposes himself to criticism' and if the Judge is able to lay the responsibility for the decision at the door of the law itself, he savers himself from criticism and the decision 'leaves no sense of individual injustice'. If the Judge acknowledges his responsibility in creative decision-making, he must be willing to accept criticism. If, on the other hand, he folds his hands and disclaims all creative power, he may console his conscience with the thought that he has no responsibility for the consequences.

The Judicial responsibility and value-laden concepts depend on the social values. Social values are not the same in all societies, they differ from time to time and from place to place. There may be written or unwritten guidelines which Judges are bound to follow.

In *K. Veera Swami v. Union of India and others, (1991) 3 SCC 655,* the Constitution Bench of the Supreme Court held that Sections 5 and 6 of the Prevention of Corruption Act are applicable to Judges of the High Courts and Supreme Court including the Chief Justice of India. That does not mean that any sort of allegation should be made against the Judges of the superior court.

As all of you know, the Judges of the superior court had accepted a code of ethics and also formalized an in-house procedure. The in-house mechanism was to deal with the various complaints and acts of misdemeanour. The in-house mechanism, however, does not enjoy a high degree of capability. There is also an allegation that there is no transparency in that system. A legislation known as "Judges Enquiry Bill 2005" is in the offing. The Law Commission has made its recommendations on 31st January, 2006. As per the provisions contained in the Bill, there could be a machinery to investigate into any matter involved in, arising from, or connected with any allegation of misbehaviour or incapacity, made in a complaint against a Judge of the Supreme Court or High Court. The Council would be called "National Judicial Council" consisting of the Chief Justice of India and other members. This Council would have a Secretary and any person can make a complaint in writing involving allegation of misbehaviour or incapacity in respect of a Judge to the Council. The council would conduct an investigation into any complaint and if the complaint is frivolous or vexatious or is not made in good faith, or if there are no sufficient grounds for investigation into the complaint, the same would be dismissed, and if the

complaint is proved to be true, further steps would be taken to remove the judge in accordance with the constitutional provisions. Detailed procedure has been prescribed for the investigation and the entire investigation shall be deemed to be a judicial proceedings within the meaning of Section 193 of the Indian Penal Code. The provisions of the 2005 Bill would enable the Judicial Council to impose minor measures including stopping of assignment of judicial work to the judge. There is also a provision of medical examination of the judge in case there is an allegation that the judge is unable to discharge the duties of his office efficiently due to any physical or mental incapacity and if the allegation is denied, the Council may arrange for medical examination of the Judge by a medical board.

The Law Commission has given some recommendations to make certain cosmetic changes to the Bill and the legislation is likely to be enacted shortly. We hope that the legislation would take the right shape and prescribe as to how the various problems could be dealt with. It is the practice followed by English Judges that whenever a legislation is contemplated, the judges do not participate openly in any discussion on such proposed legislation.

It is a fact that often the allegations are made without understanding the facts of the case or reading the relevant judgment. The reports that come in the media are either fictional, incorrect or bereft of relevant details. Some of the publications only give wrong ideas to its readers. Even then the courts are taking a very lenient view in these matters. There is a great clamour for amending the provisions of the Contempt of Courts Act stating that it is an archaic piece of legislation. Many of the disgruntled litigants want to prosecute the Judges and raise unnecessary allegations to denigrade the judiciary. That will cause serious erosion of the values of the judiciary which will affect their independence. Independence of the judiciary is to be protected and at the same time the principle of accountability of judges should be nurtured. In recent times, some of the judges, against whom serious allegations were made, resigned from service the moment Chief Justice of India suggested them to do so.

But, nevertheless, we must admit one fact that the reputation of the judiciary for independence and impartiality is indisputably a national asset and one Government after another has tried to plunder it. There are instances wherein baseless allegations and criticisms have been hurled against the Judges of the superior courts. Within moments, the very same legislature or the executive demands the services of a sitting judge to inquire into allegations or incidences of public importance. Independence of the judiciary is to be protected and at the same time, Judges of the superior courts should be accountable and they must discharge their functions to imbibe the spirit of constitutional values and abiding faith in the letter and spirit of the oath they have taken in assuming the charge.

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LAW OF INHERITANCE OF AGRICULTURAL LANDS

Justice Subhash Samvatsar
Judge, High Court of M.P.

I have often found that there is always a confusion in the mind of many of the senior lawyers and even Judges about devolution of interest in the agricultural lands. Many a times, the principles of Hindu Laws are made applicable while deciding the succession of agricultural land which is not correct.

Section 4(2) of Hindu Succession Act, 1956 itself makes it clear that the provisions of Hindu Succession Act are not made applicable to the devolution of tenancy rights in respect of the agricultural holdings. This provision is introduced because agriculture is a subject of State List while succession is a matter of Union List.

The provisions of devolution of interest in the agricultural land was made in the Madhya Bharat Land Revenue and Tenancy Act which came into force in the Madhya Bharat region with effect from 2nd October, 1951. Section 82 of the said Act provides for devolution of rights on the death of a male *pakka* tenant as per order of succession given in the said section. By virtue of this section, the property is devolved after the death of *pakka* tenant in accordance with the order mentioned in the said section. Section 77 of the said Act provided a bar on bequest or gift by *pakka* tenant, and therefore, he had no right to make the sale or gift deed in respect of agricultural land.

The Madhya Pradesh Land Revenue Code, 1959 came into force with effect from 2nd October, 1959. Said Code provided for devolution of interest in the agricultural land under Section 164. Initially, Section 164 was identical with Section 82 of the M.B. Land Revenue and Tenancy Act and the property would devolve after the death of Bhumiswami in accordance with the order mentioned in the table under Section 164. At that time also the Bhumiswami had no right to transfer the agricultural holdings by will as per Section 165 prevailing at that time.

Sections 164 and 165 of the M.P. Land Revenue Code were amended with effect from 8.12.1961 and after 8.12.1961 the principles of survivorship by applying the personal laws were made applicable. Similarly, the words "otherwise than by will" were deleted with effect from 8.12.1961 from Section 165. Due to this amendment, Bhumiswami got right to make sale in respect of agricultural land for the first time in Madhya Bharat area.

As regards Mahakaushal region is concerned, I frankly concede that I had no occasion to go through the revenue laws applicable in the Mahakaushal region prior to 1959 and therefore, I am not aware of the legal position existed there.

However, from a reading of Section 164 of the M.P. Land Revenue Code, it is very much clear that interest of Bhumiswami shall devolve on his death, passed by inheritance or surveyorship or bequest, as the case may be, in accordance with the personal laws. Thus, as per this section also, heirs of Bhumiswami can get rights in the property only after death of Bhumiswami and not during his life time. In such circumstances, applying the principles of Hindu Law, particularly, right by birth is not applicable to the agricultural holdings and therefore, applying the principles of old Hindu Law to the agricultural land is contrary to the provisions of M.P. Land Revenue Code and the heirs of a Bhumiswami can get right in the property only after his death.

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It is with words as with sunbeams. The more they are condensed, the deeper they burn.

- Robert Southey

The most valuable of all talents is that of never using two words when one will do.

- Thomas Jefferson

A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts.

- William Strunk, Jr.

'न्याय पथ'

एस. एस. सिसौदिया,
जिला एवं सत्र न्यायाधीश, कटनी

आप व हम सब न्यायक्षेत्र से संबंधित हैं, हम सब एक ही जहाज के पंछी हैं, एक ही पथ (न्याय पथ) के पथिक हैं, एक ही हमारा साध्य है 'न्याय' जिसके साधन व माध्यम हमारे 'कानून' व 'न्यायालय' हैं । न्यायदान के महित्तकार्य में हम सब समान रूप से भागीदार व जवाबदार हैं, इस क्षेत्र का कोई भी पहलू ऐसा नहीं है जिससे आप व हम अनभिज्ञ हों फिर भी हमें उसके दोष दुर्गुणों का चौराहे पर शव परीक्षण नहीं करना है, न ही किन्हीं आरोपों–प्रत्यारोपों में पड़ना है, एक दूसरे की कमियों व कमजोरियों को भी नहीं कोसना है बल्कि उपलब्ध साधनों, संसाधनों, व्यक्तियों एवं परिस्थितियों का ही, एक सकारात्मक व रचनात्मक दृष्टिकोण रखते हुए सर्वोत्तम उपयोग अपनी उत्कृष्ट क्षमता से करना होगा। हमें यह भी सुनिश्चित करना होगा कि कोई निर्दोष पीड़ित न हो व दोषी बचने न पाये अन्यथा अंतिम न्याय तो ऊपर वाला ही करेगा, जहां कहीं हम भी दोषसिद्ध न ठहरा दिये जायें ?

हम पहले 'मनुष्य' हैं फिर और कुछ, इसीलिये 'मानवता' ही हमारा पहला धर्म है, जिसका मूलमंत्र है – जो हमें अपने साथ पसंद नहीं वह व्यवहार दूसरों के साथ न किया जाये, यही 'मनुष्यता' है। इसीलिये वेद कहते हैं – 'मनुर्भव', परन्तु दुर्भाग्य से हम मानव को छोड़कर बाकी सब हैं, इस दुर्भाग्य को सौभाग्य में बदलने के लिये हमें आकृति से ही नहीं प्रकृति से भी मनुष्य बनना होगा अन्यथा यदि सांचा त्रुटिपूर्ण रहेगा तो त्रुटिरहित वस्तु कैसे निर्मित होगी ? कहते हैं सुख बांटने से बढ़ता है व दुख घटता है, इसीलिये सुख बांटो व दुख बटाओ, यही श्रेष्ठ आचार धर्म है। संत और शास्त्र कहते हैं परहित ही धर्म है और परपीड़ा अधर्म, यदि हम परहित नहीं कर सकते तो परपीड़न से तो बच ही सकते हैं, जिसमें हमारा कुछ नहीं जाता, फिर इस पुण्य कार्य से पीछे क्यों हटना है ?

अनुभव बताता है कि 'न्याय मंदिर' ही ऐसा देवालय है जिसकी सीढ़ियां कोई स्वेच्छा से नहीं चढ़ता परन्तु हमारी आजीविका तो इससे जुड़ी है इसलिये हमें तो चढ़ना ही है, सिर्फ यह सावधानी रखनी है कि न्यायालय मूलतः 'न्यायाकांक्षियों' के लिये है एवं हम उन्हीं की सेवा के लिये नियुक्त हैं। यह दैवीय कार्य हमें सौभाग्य से प्राप्त हुआ है इसलिये हमें पेट पालने के साथ न्यायदान में सहायक बनकर पुण्य लाभ कमाने का दोहरा अवसर उपलब्ध है, फिर इस लाभ के सौदे से मुंह क्यों चुराना? अन्य क्षेत्र के पाप उतने गंभीर नहीं होते जितने तीर्थक्षेत्र के एवं न्यायालय हमारे तीर्थ स्थान हैं इसलिये यहां के पाप वज्रलेप बनकर पापी को कभी चैन से नहीं बैठने देंगे। न्यायालय में आने वाले प्रत्येक याचक के रूप में स्वयं भगवान हमारी परीक्षा लेने आते हैं कि हम तथाकथित न्याय के देवता (न्यायाधीशगण) पुजारी (अधिवक्तागण) व सेवक (कर्मचारीगण) अपनी–अपनी भूमिका ठीक से निभा रहे हैं या नहीं? हमें इसकी कसौटी पर खरा उतरना होगा। हमें अपने न्यायधर्म का अनुष्ठान स्वअनुशासन में रहकर इस प्रकार करना होगा कि लोगों के मन में घर कर चुकी यह कुधारणा निर्मूल हो जाये कि – 'यहां से वही कुछ (न्याय या राहत) पा सकता है जिसके पांव लोहे के व हाथ सोने के हों,' इसी में हमारी महिमा व गरिमा है। इसके लिये हमें एक ऐसी नवीन कार्य संस्कृति विकसित करनी होगी जिससे सर्वत्र न्याय का वास्तविक दर्शन हो सके, अन्यथा अपसंस्कृति व अन्याय के चलते कोई भी व्यक्ति व संस्था एवं समाज व राष्ट्र सुरक्षित नहीं रह सकते।

समय की मांग है कि लोकतंत्र की प्रहरी न्यायपालिका और सुदृढ़ व विश्वसनीय बने, चूंकि न्याय विभाग व उससे जुड़ी संस्थायें देश की सुरक्षा, स्वाधीनता व सुख–समृद्धि के महत्वपूर्ण आधार स्तंभ हैं। उनके सदस्य

सामान्यजन के जीवन को सीधे स्पष्ट करते हैं, इसलिये उन्हें ऐसे कृत्यों से बचना चाहिये जिससे उनकी छवि धूमिल होती हो व सर्वसाधारण में गलत संदेश जाता हो। उन्हें धर्म को धंधा व मंदिर को मंडी बनाने वाले विषैले व घातक तत्वों से भी सतर्क रहना होगा तथा सड़ांध पैदा करने वाली मछलियों से यथाशीघ्र मुक्ति पा लेना होगा एवं न्याय के दुश्मनों व बाधकों से कठोरतापूर्वक निपटना होगा। न्याय प्रांगण ही हमारा धर्म क्षेत्र है व कुरू क्षेत्र है, यहां सत्यधर्म पर चलने वाला ही विजयी व यशस्वी होता है। इस धर्मयुद्ध में यदि हमारा अंत भी हो जाता है तो वह भी श्रेयस्कर होगा, क्योंकि अन्यथा भी मरना सुनिश्चित है व खाली हाथ ही जाना है फिर स्वधर्म से पलायन क्यों ? यदि हम ही कर्तव्यच्युत हो गये तो लोग किसकी ओर देखेंगे, आखिर चौकीदार की चौकीदारी कौन करेगा? हमें अपनी सार्थकता व उपयोगिता दर्शित करना ही होगा अन्यथा लोग कूड़ेदान में फेंक देंगे, जो एक गंभीर दुर्घटना होगी।

हमें श्रेय व प्रेय का भागीदार बनाने वाली तथा देश में सुराज स्थापित करने वाली कल्याणकारी शाश्वत संस्था–न्यायालय, का कोई व्यक्ति अपने निहित स्वार्थवश अवमूल्यन करें या उसे क्षतिग्रस्त करें तो यह ठीक नहीं, क्योंकि यदि यह कमजोर व निष्फल हो गई तो देश में जंगलराज व अराजकता की स्थिति बन जायेगी, जिसके लिये हम स्वयं कठघरे में नजर आयेंगे। इसके प्रति लोगों की आस्था व विश्वास बना रहे, कानून का राज्य चलता रहे तथा न्याय की अक्षुण्णता बनी रहे यही हमारा एकमात्र लक्ष्य होना चाहिये। देश को अपराध व विवादमुक्त बनाना ही हमारा न्यायधर्म है, उसके द्वारा पीड़ित का हित संरक्षण व साधन करके ही हम अपने हित सुरक्षित रख सकते हैं। दूसरों को शीघ्र न्याय देकर व दिलवाकर ही हम अपने साथ न्याय की अपेक्षा कर सकते हैं, सबके भले में ही अपना भला है। हम अपने कर्म को ही पूजा मानकर जनता व जनार्दन के प्रिय पात्र बन सकते हैं । न्यायधर्म के अनुरूप ही हमारा चिंतन, चरित्र व कार्य एवं व्यवहार हो इसी में हमारी व न्याय प्रशासन की प्रतिष्ठा है। हर कोई न्याय पर चलना व हक की रोटी खाना सीख ले तो किसी के साथ अन्याय होने का प्रश्न ही शेष न रहे, हमारे अधिकार तो हमारे कर्तव्यों के अंतर्गत सर्वदा ही सुरक्षित हैं।

कथनी से ज्यादा करनी प्रभावी होती है एवं आज हम अपने अथक प्रयासों के बावजूद इतने निष्प्रभावी क्यों हो रहे हैं, इसका उत्तर हमें ही खोजना होगा। कर्मप्रधान विश्व में जैसा बोयेंगे वैसा ही काटेंगे। इसीलिये सर्वप्रथम हमें अपने अंदर झांकना होगा तथा अपने सत्कर्मों द्वारा अपने आलोचकों को अनुकूल उत्तर देना होगा अन्यथा समय रहते नहीं चेते तो यह एक आत्मघाती कदम होगा। हम दूसरों के सुधार की प्रत्याभूति नहीं ले सकते परन्तु स्वयं की तो ले ही सकते हैं एवं कोई भी सुधारवादी कार्यक्रम स्वयं से व अपने घर से प्रारंभ करना ही सुनीति है।

अतएव हमें नीति व न्याय पर चलते हुये लोगों को शीघ्र, सस्ता, सरल, स्वच्छ व कल्याणकारी न्याय सुलभ करना ही होगा। यदि हम अपना कार्य नेकनियत से यथासमय, निष्पक्षता, निर्लिप्तता व निष्ठापूर्वक पूरे मन व लगन से, ईमानदारी पूर्वक करेंगे तो कोई कारण नहीं कि व्यवस्था में गुणात्मक सुधार न हो। हमें निश्चितता व निर्भयतापूर्वक अपनी–अपनी सीमा व मर्यादा में रहकर अपनी पूर्ण क्षमता व सामर्थ्य से समस्याओं के समाधान व मामलों के निराकरण में लगना ही होगा अन्यथा वर्तमान दुरावस्था व भावी दुर्दशा के लिये भविष्य हमें कभी माफ नहीं करेगा। क्या हम ऐसा चाहेगें ? यदि नहीं तो फिर आज से व अभी से शुभ व सुखद परिणाम हेतु अपने–अपने मोर्चे पर प्राण प्रण से डट जाना होगा, यही एकमात्र विकल्प व उपाय है इस संसार रूपी न्यायालय से ससम्मान दोषमुक्त होने का।

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OFFENCE UNDER SECTION 138 N.I. ACT AND PROVISIONS OF M.P. MONEY LENDERS ACT, 1934

J.P. Gupta
Additional Registrar, Judicial
High Court of M.P., Jabalpur

At present, a lot of complaints u/s 138 Negotiable Instruments Act are being filed in the court of Judicial Magistrates. In such complaint cases, a number of complainants are money lenders. As such, on the defence side on behalf of the accused, a legal question is being raised about the maintainability of the complaint on the ground of provision of M.P. Money Lenders Act, 1934. In other words, they are raising the question to the effect that the money lenders are recovering loans by filing complaints under Section 138 Negotiable Instruments Act before the Magistrate instead of filing civil suits for recovery as per the provisions of M.P. Money Lenders Act, 1934. By adopting this procedure, they are effecting recovery of loan illegally and thus frustrating the object of M.P. Money Lenders Act, 1934 and at the same time they are also evading Court Fee. Apart from it, the loan secured by advance cheques of repayment is not a legal transaction under Section 138 of Negotiable Instruments Act. Hence, looking to the provisions of aforesaid Act, the complaints are not maintainable.

Undoubtedly, the object of M.P. Money Lenders Act, 1934 is to provide protection to the needy and helpless borrowers from the greedy money lenders by regulating transactions of money lending in M.P. Under the aforesaid Act, for recovery of the loan defined under Section 2(vii), a money lender is required to fulfill certain conditions, for example, he should have got himself registered as a money lender before the registering authority. He has to maintain account and supply the statements of accounts to the debtors and at the time of repayment he has to forthwith give a receipt therefor.

The provision under Section 2(vii) of the Money Lenders Act regarding the definition of loan is as follows:

(vii) "loan"(means an actual advance made within twelve years from the date of the last transaction) whether of money or in kind at interest and shall include any transaction, which the court finds to be in substance a loan, but it shall not include –

(a) a deposit of money or other property in a Government post office, bank or any other bank or in a company or with a cooperative society,

(b) a loan to or by or a deposit with any society, or association registered under the Societies Registration Act, 1860, (XXI of 1860) or under any other enactment,

(c) a loan advanced by any Government or by any local authority authorized by any Government,

(d) a loan advanced by a bank, as co-operative society or a company whose accounts are subject to audit by a certificated auditor under the Companies Act, 1913 (VII of 1913),

(e) an advance made on the basis of a negotiable instrument, as defined in the Negotiable Instruments Act, 1881 (XXVI of 1881), other than a promissory note,

(f) a transaction which is a charge created by operation of law on, or is in substance a sale of, immovable property,

(g) a loan advanced to an agricultural labourer by his employer."

It is obvious that a transaction of a loan in which advance is made by a cheque which is a negotiable instrument, is not covered under the aforesaid definition of loan. The object of the aforesaid provision is to make it clear that the loan transaction made by advancing the amount by the negotiable instrument i.e. cheque stands excluded from the application of the provision of M.P. Money Lenders Act, 1934.

Under the provisions of Money Lenders Act, 1934, money lenders are not required to fulfill any condition before initiating any legal action for recovery of the loan, which does not come within the purview of loan, defined under Section 2(vii) of the Money Lenders Act. There is also no provision in the Act under which such loan may be declared illegal loan or non-recoverable loan.

There is nothing in this provision that shows or indicates that any loan advance made on the basis of negotiable instruments as well as the transaction which comes under the purview of definition of loan and secured by a cheque for repayment of the loan will be illegal or not recoverable.

The object of the provision of the Money Lenders Act, 1934 and the object of provisions of Section 138 of Negotiable Instruments Act are different but not contradictory. The object of Money Lenders Act, as stated earlier, is to regularize and control the transactions of money lending whereas the object of Section 138 of Negotiable Instruments Act, 1881 is to inculcate the faith in the efficacy of banking operations and give the creditability to negotiate any business transaction. It is intended to discourage the people from not honouring their commitment by way of payment through cheques.

If a debtor in order to repay a loan issues a cheque in favour of money lender and the cheque is dishonoured by the bank due to non-availability of fund in his account, the money lender being a holder of the cheque has a right to file a complaint against such debtor for committing offence under Section 138 of Negotiable Instruments Act. In such a situation, it cannot be said that such complaint has been made for recovery of the loan amount, as primary

object is to get the debtor punished for the offence committed under Section 138 of Negotiable Instruments Act. Simultaneously, he has a right to make a prayer for compensation and this prayer may be considered by the court under Section 357 of Cr.P.C. Ordinarily in such cases, the court directs payment of compensation to the cheque holder by making order of payment out of the fine amount but the Court is not bound to make such order in each case and in case the fine is not deposited or not imposed by the court, the complainant would not receive any amount.

Apart from it, in various cases, the remedies under civil law and criminal law are available simultaneously. In such cases, a person cannot be compelled to choose any specific remedy because he has right to choose anyone.

It is found that money lenders in order to recover the loans, instead of going for a civil action under the civil law are preferring action u/s 138 of the Negotiable Instruments Act. This undoubtedly is adversely effecting the State revenue by way of loss of Court Fee. To avoid loss to the State revenue in this respect, if found necessary, relevant provisions of law can be suitably amended. However, under existing provisions of law, practice of filing complaints u/s 138 cannot be restricted because it results in loss of revenue to the State.

Therefore, at present, in legal terms, it cannot be said that money lenders are misusing the provisions of Section 138 Negotiable Instruments Act in order to recover loan amounts or are contravening the provisions of M.P. Money Lenders Act, 1934. Simultaneously, it cannot be said that by entertaining the complaints, the courts are facilitating the money lenders in recovery of the loan amount or are indirectly helping them in frustrating the object of M.P. Money Lenders Act.

Though, in the matter, one aspect requires attention of the court concerned that in a complaint case under Section 138 of Negotiable Instruments Act, if it is established by the debtor/accused that in the amount of cheque (under question) is also included the interest and the amount of interest is greater than the Principal amount then the amount of interest in-excess of the principle amount is not legally recoverable. In this regard, provision of Section 10 of M.P. Money Lenders Act, 1934 is as follows :

> **"Section 10. Power of court to limit interest to the extent of principal of loan.** - No court shall, in respect of any loan made after this Act comes into force, decree on account of arrears of interest a sum greater than the principal of the loan."

In the aforesaid situation, offence under Section 138 Negotiable Instruments Act would not be made out as the cheque amount will not be an amount legally recoverable, which is the essential ingredient of the aforesaid offence.

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CRIMINAL JUSTICE AND PLEA BARGAINING

Ved Prakash
Director, JOTRI

The concept of Plea bargaining ultimately finds its way into the Criminal Justice System of our country, though after considerable debate and discussions. By way of Criminal Law (Amendment) Act, 2005, Chapter 21A (Section 265-A to 265-L) entitled 'Plea Bargaining' has been inserted in the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code'). The amendment has come into force w.e.f. 5th July, 2006. The tool of Plea Bargaining had been successfully used in USA for past more than a century and has proved quite effective in expeditious resolution of criminal cases. As this is a new concept for us therefore, it is necessary to examine its various facets so that it can be applied in an effective and intelligent manner to resolve cases and to reduce the burden of criminal justice system which is extremely over-burdened with around twenty million cases pending before the Courts. It requires understanding the concept, definition, methodology and utility of this latest tool of dispute resolution. At the same time it is necessary that those who have a role in the application of Plea Bargaining mechanism should have an open approach and adequate sensitization about its utility in the contemporary set-up.

DEFINITION

Expression 'Plea Bargaining' as such has not been defined in Chapter XXI-A of the 'Code'. In criminal cases it refers to pre-trial negotiations between accused and prosecution during which the accused may agree to plead guilt in exchange for certain concession by prosecutor.

In Black's Law Dictionary (Eighth Edition) the expression 'Plea Bargaining' has been defined as 'a negotiated agreement between a prosecutor and a criminal defendant (accused) whereby the defendant pleads guilty to a lesser offence or to one of multiple charges in exchange for some concession by the prosecutor, usually, a more lenient sentence or a dismissal of the other charges'. According to Wikipedia Encyclopedia 'Plea Bargaining' is an agreement in which a defendant (accused) pleads guilty to a lesser charge and the prosecutor in return drops more serious charges. In precise terms, it is a process through which an accused pleads guilt to a criminal charge with the expectation of receiving some lenient consideration from the State.

CONCEPT

Plea bargain basically is a tool between prosecutor and the accused in which there may be an explicit or implicit permission to be lenient in sentence or to go for less serious charge. Considerable objections have been raised against the nomenclature 'plea bargain' on the ground that it implies that justice could be purchased at the bargaining table. In order to avoid the criticism there has been a move to use relatively more neutral expressions such as 'plea discussions', 'plea negotiation', 'plea agreements' and 'mutually satisfactory disposition', a term used in Chapter XXI-A of the 'Code'. To call it by whichever name, it cannot be denied that the scheme involves a process whereby

prosecution, victim and an informed accused openly discuss a criminal case for its mutually agreeable disposition which may result in reasonable advancement of administration of justice.

TYPES OF PLEA BARGAINING

Though it is said that plea bargaining may include fact bargain, charge bargain, sentence bargain but in general it is of two types:

(i) charge bargain

(ii) sentence bargain

Apart that, we also come across expressions like 'Alford Plea' and 'nolo contendere'. A guilty plea by an accused as part of a plea bargain, without actually admitting guilt is referred as 'Alford Plea'. The principle got its approval after decision of U.S. Supreme Court in North Carolina v. Alford, 4000 U.S. 25. 'Nolo contendere' simply means 'I do not wish to contend' meaning thereby a plea by the accused that he will not contest.

CHARGE BARGAIN

Plea bargain in which a prosecutor agrees to drop charges on some of the counts or reduce the charge to a less serious offence by the accused is commonly referred to as charge bargain. It may include:

- The reduction of charge to a lesser or included offence;
- The withdrawal or stay of other charges;
- An agreement by the prosecutor not to proceed on a charge;
- An agreement to reduce multiple charges to one all-inclusive charge;

For example, an accused charged with drunk driving and driving with license suspended may be offered the opportunity to plead guilty to just the drunk driving charge.

Sentence Bargain

A 'sentence bargain' occurs when an accused is told in advance what will be his reduced sentence if he pleads guilty. Sentence bargain may allow the prosecutor to obtain a conviction to the most serious charge, while assuring the accused of an acceptable sentence. Sentence bargain may include the following:

- A recommendation by a prosecutor for a certain range of sentence or for a specific sentence;
- A joint recommendation by a prosecutor and defence counsel for a range of sentence or for a specific sentence;
- An agreement by a prosecutor not to oppose a sentence recommendation by defence counsel;
- An agreement by a prosecutor not to seek additional/optional sanctions, such as prohibition and forfeiture orders;
- An agreement by a prosecutor not to seek more severe punishment.

In most of the jurisdictions sentence bargain generally can only be granted on being approved by the trial Judge. Many jurisdictions severely limit sentence bargain.

PLEA BARGAIN – WHY?

The scheme of plea bargain is not a matter of choice rather it is a situation out of compulsion. With the sharp increase in the institution of criminal cases almost all the criminal jurisdictions over the world find it difficult to cope up with the arrears of cases. Disposition of cases through the scheme of plea bargaining, no doubt, may not be equivalent to a full-fledged fair trail but docket explosion makes it imperative to go for plea bargaining which has following two distinct features:

Avoids uncertainty of trial

In most cases, the plea bargain is to avoid uncertainty of trial and the risk of undesirable result to other side. Obviously, the scheme provides both, prosecution and defence, with some control over the outcome of the cases. The accused is left to choose between certainty of accepting sentencing for a less serious charge or the uncertainty of trial in which he might be found not guilty, but which also carries the risk of being found guilty of the original, more serious charges.

Expedition

As criminal Courts become more and more crowded, there is an increased pressure to resolve the cases as quickly as possible. Regular trials can take months, years or even decades. Resolution of a case through plea bargain can be arranged in a couple of days, thus reducing the time consumed in resolution of a case. It affords total guarantee for expeditious disposal of a case.

ADVANTAGES:

Incentives to Accused

Plea bargain may have following specific incentives for an accused:

(i) Less time :

The first and foremost incentive is that the accused is not required to wait for long.

(ii) Less expenses :

Another fairly obvious benefit that accused can reap from plea bargaining is that they can save a lot of money on account of counsel's fee. Just imagine what may be total cost of defending a case when accused has to face a trial for a decade or so regarding a charge u/s 324 or 325 IPC?

(iii) Less efforts :

It always takes more time and effort to bring a case to trial than to negotiate and handle a plea bargain, thus it requires less efforts.

(iv) Less sentence :

Receiving a lighter sentence for less severe charge than might result in taking the case to trial and losing it is also an obvious advantage. For those who are held in custody and who does not qualify for release on bail or cannot arrange for bail may get out of jail comparatively sooner.

(v) Less tarnished record :

Pleading guilty in exchange for a reduction in the number of charges or the seriousness of the offences will definitely reflect in a better manner on an accused's record than the convictions that might result following trial for all charges.

(vi) Less Adverse Publicity :

A quick disposition of the cases reduces the length of adverse publicity against accused and his family and thus can save him from a lot of embarrassment. At the same time some of the persons can view it as an act of remorse on the part of accused having a sympathetic approach for him.

Incentives for Judges

Crowded calendars and loaded daises have made the job of Judges quite cumbersome. The scheme of plea bargaining can prove a bonanza in this respect because pretty good number of cases can be resolved without lengthy examination, cross-examination of witnesses and long arguments. Time so saved can definitely be utilized for imparting qualitative justice in more serious cases. This can ultimately enhance the prestige of the judiciary as well as the faith of common man in the efficacy of the system.

Incentives for Prosecutors

Like a Judge, Prosecutor with the clogged calendar and a long cause list always finds it difficult to prepare each case ideally for being presented before the Court. This may not be humanly possible as well. Plea bargaining, being much quicker and requiring less time, tends to lighten the burden of the prosecutor, affording him an opportunity to do justice to more serious cases by preparing them in an effective manner.

Another benefit to the prosecutor is in the form of assured conviction. Despite long, expensive and valiant battle, the prosecution may lose the case but then plea bargaining provides him with a respite in the shape of conviction for a lesser charge or reduced sentence.

Plea bargain also provides flexibility to the prosecutor in the sense that the prosecutor can offer a deal to someone whom, though guilty, has given testimony about co-accused or helped in resolution of a ticklish case.

Benefits to the Victim/Witnesses

The sufferance of victim/witnesses in the present set up are well known to each and every functionary of Criminal Justice System. Victim and witnesses feel marginalized and forgotten, something which cannot be disputed. Plea bargain provides a victim the central role. Apart that, plea bargain may help those witnesses who find it inconvenient and embarrassing to depose before a Court and earn some sort of ill-will of the other party.

Benefits to the Criminal Justice System

Criminal Justice System may also have certain distinct advantages. Apart from the fact that some less serious cases can be disposed of quickly providing

room for some more serious cases to be taken seriously, the scheme of plea bargaining has the potentiality of reducing the costs involved in the criminal justice set up. As per the available statistics in a small country like Canada the cost of justice system including expenditure on police, prosecution, Courts, legal aid and prisons is close to 12 billion dollars, i.e. 600 billion rupees.

As far as India is concerned, so far we do have any empirical study to examine about cost of criminal justice system, but then, as per a news report the cost incurred by the State Exchequer in processing a criminal case relating to defalcation of Rs. 19,000/-, which remains pending for about 33 years, was found to be around one crore rupees. (Refer – 142nd Report of the Law Commission of India, Ch. II para 2.10)

Integrating the scheme of plea bargaining with the criminal justice system may considerably reduce the expenditure involved in criminal justice system. At the same time resolving a case through plea bargain and thus reducing the length of trial, reduces the need for judicial resources and Court facilities and decreases all the other incidental expenses connected with the prolonged regular trial.

EMERGENCE OF THE CONCEPT

The significance of plea bargain lies in the fact that in USA around 1839 while only 25% cases could be disposed of through plea bargaining, by the middle of 19th century there were guilty pleas in 50% cases. Presently, about 90% criminal cases in U.S.A are being resolved through this process. So much so in U.S. Criminal Justice System plea bargaining is a replica rather than an exception. In Canada vast majority of cases are disposed of through plea bargaining. As per a study, in 1998 within the province of Ontario (Canada) 91.3% cases were resolved without going for trial. It is said that without the practice of plea bargain the criminal justice system could not have been operated efficiently in Canada and might have collapsed.

The concept of plea bargaining once almost forbidden in Europe and technically banned in Japan, has steadily crept into many countries' systems during the past few decades. Italy went to pass federal legislation to formally legalise it followed by India.

CRITICISM

The practice of plea bargaining is criticized mainly on the following five grounds:

(i) It undermines Constitutional and procedural guarantee for the accused.

(ii) Effaces criminal law of its deterrence and effect.

(iii) Facilitates manipulation of the system.

(iv) Hurts the innocent and may induce him to plead guilt.

(v) Unreasonable classification regarding sentencing for those pleading guilty and not pleading guilty.

The first and foremost attack on the scheme of plea bargaining is made on the ground that the practice subverts many of the basic values of jurisprudence relating to criminal justice like –

- Presumption of innocence;
- Right against self incrimination;
- Right to fair and free public hearing.

It is argued that the scheme is antithesis of Constitutional guarantee of free and fair trial because it allow circumvention of rigorous standards of 'due process' and proof imposed during criminal trials.

Another potent criticism is that the practice allows the offenders to receive lenient sentences which in turn undermines the deterrent effect of criminal sanctions and perpetuates the image that offenders can evade the law with light sentence provided they are willing to bargain. The undeserved leniency regarding sentence may indirectly encourage them to indulge in criminal activities.

It has also been said that the process of plea bargaining suffers from the element of unfairness and may facilitate the manipulation of the system because things can be bargained across the table. This undermines the importance of legal process which is not so prone to manipulative practices.

Again it is argued that discount in sentence or charge for pleading guilty hurts the innocent. It penalizes those who exercise the right to presumption of innocence and there may be possibility that an accused who is in fact innocent may be induced to plead guilty. This again is against the basic values of criminal justice system.

Lastly, it is said that the basic rule of sentencing is the rule of proportionality. Simply because the conviction is based on the plea of guilty, that cannot be a ground to make a distinction so as to compromise the principle of proportionality in sentencing

The aforesaid criticism against the concept of plea bargaining is not well based. The concept of fair trial and the principle relating to presumption about innocence of the accused may not be violated because in regular trials also the plea of guilt is recorded and convictions are recorded on the basis of such plea. The procedure stipulated in Chapter XXI-A of the Code takes care of any extraneous pressure by providing that voluntariness of the accused to enter into plea bargain should be examined by the Judge by examining him in camera. It is well known that presently 70 to 80% cases result into acquittal. Such acquittals indeed may not have any deterrent effect, but when a person pleads guilty then not only some sort of remorse is there on his part but also to some extent he has to suffer for his act or conduct. Therefore, it cannot be said that the scheme of plea bargaining dilutes the theory of deterrence or principle of proportionality of sentence. Again, as pointed out by the Law Commission of India, even illiterate persons with their commonsense are capable of realizing the consequences of making recourse to the scheme of plea bargaining. Therefore, it cannot be said that innocent persons will be tempted to plead guilty in plea bargaining.

The Commission has been of the view that on weighing the pros and cons of the matter the scheme is found to be quite useful for the criminal justice system of our country. The overall supervision by the Judge can take care of any misuse of the process and its proneness to alleged interpolations.

SOME FAMOUS CASES

The earliest recorded case decided through plea bargaining is that of famous scientist Galileo, who openly advocated the principle propounded by Copernicus that earth revolves round the sun and not vice versa. Being a proposition totally against the then theological concept that sun revolves round the earth, Galileo has to face inquisition and could escape with house arrest only by agreeing to recent Copernican principle.

In 1969 James Earl Ray, accused of assassinating Martin Luther King Jr. known as Gandhi of America, pleaded guilty to avoid a trial conviction and death penalty and was sentenced for 99 years imprisonment.

In 1973 Spiro Agnew, the 39th Vice President of USA, pleaded no contest to the charge of failing to report income and he could escape with fine of 10,000 dollars and 3 years probation term.

EMERGENCE IN INDIA

In the year 1991 Law Commission of India under the Chairmanship of Justice M.P. Thakkar in its 142nd Report after an elaborate study came out with a strong recommendation that in order to deal with the problem of increasing arrears and consequential delay in dispensation of justice, high rate of acquittals and the problem of over-crowded jails we have no option but to go for inclusion of the scheme of plea bargaining into our system. For long this recommendation could not make any head way. In 1996 in its 154th Report the Law Commission of India again strongly recommended that plea bargaining should be made an essential component of administration of criminal justice. The Committee of Home Affairs in its 85th Report also favoured the idea of inclusion of the scheme of plea bargaining. Similar was the view taken by the Committee on Reforms of Criminal Justice system. Ultimately, a bill was moved in the Parliament in 2003. It was passed by the Parliament in its winter session of 2005 in the form of Criminal Law (Amendment) Act, 2005 whereby Chapater XXI-A has been introduced in Cr.P.C.

SALIENT FEATURES

Under the provisions of Chapter XXI-A of the Code, plea bargaining is applicable in respect of the offences punishable with imprisonment up to a period of 7 years excluding offences affecting socio-economic condition of the country or committed against a woman or a child below the age of 14 years. Unlike USA where the process of plea bargaining can be initiated at the instance of prosecution and defence; in India it can be initiated u/s 265-B only at the instance of accused by way of an application supported with an affidavit. Again, the scheme is not applicable if the accused had previously been convicted for the same offence. A Judge before proceeding with the application has to ensure that the application is voluntary. If the Court is satisfied that the accused has

voluntarily moved the application The Investigating Officer, the accused and the prosecutor are noticed for a meeting to workout a mutually disposition of the case including quantum of compensation payable to the victim and the expenses incurred by him during the case. If in such a meeting parties agree to mutually satisfactory diposition then the Court has to dispose of the case as per Section 265-C of the Act which provides that the Court may resort to the provisions of Probation Law if the same are applicable or may sentence the accused to imprisonment which may not be more than quarter of the sentence prescribed under law. In case of offences for which minimum sentence is prescribed under law, the sentence is half of the minimum. The scheme of plea bargaining differs from compounding. Compounding of an offence results in acquittal while plea bargaining results in conviction of the accused.

The success or failure of the newly introduced scheme of plea bargaining to a considerable extent depends upon the role of various functionaries of criminal justice system including prosecution and lawyers. In view of the advantages, which may be there all concerned are required to make earnest efforts to apply the scheme. However, it is the duty of the Court to ensure that the plea of guilty is a free and voluntary act of the accused, untainted by any threats to induce the accused to go for pleading guilty.

ROLE OF THE JUDGE DURING MUTUALLY SATISFACTORY DISPOSITION

A Judge though required to supervise the process should remain impartial. He should not become involved in the process of preparing any party to change his position. He is expected to act as neutral guide and may bring to the notice of the parties the salient point of the case and direct the discussion to important issues. While deciding the quantum of sentence the Judge may keep in mind that a guilty plea generally indicates general remorse on the part of offender and this may be considered as mitigating factor as far as sentence is concerned but then sentence that will ultimately be imposed is within the discretion of the Judge.

ROLE OF PROSECUTOR & LAWYER

The Prosecutor should also execute his duty with fairness, openness and accuracy keeping in mind the over-all public interest. It is important to ensure that the courtroom proceedings that follow serve to verify the propriety of the discussions, and to enhance the public's understanding of both the nature and limits of the latter. Counsel are required to advise the court that a resolution agreement has been made, and the circumstances that led to it must almost always be fully disclosed in open court.

CONCLUSION

An examination of various factors having a bearing on the scheme of plea bargaining clearly indicates that the scheme if applied carefully may save our criminal justice system from collapse and instill a new hope in the society about the efficacy of the system.

Therefore, we must devote ourselves to the implementation of this scheme with an open mind.

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ACADEMIC ACTIVITIES OF J.O.T.R.I. - AN ANNUAL REPORT OF THE YEAR 2006

Shailendra Shukla
Additional Director, JOTRI

In the year 2006, thirty five courses were organized by Judicial Officers' Training and Research Institute, High Court of Madhya Pradesh, Jabalpur. In continuance of the practice of last year, this year also marked involvement of Officers of other departments such as Health and Electricity etc. so as to apprise them of the intricacies involved at the investigational and 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 :

JANUARY :

The month of January was marked by four training sessions and workshops. The first session was a five days' workshop-cum-training session at JOTRI on - *Judicial Ethics, Norms of Behaviour and Temperamental Moderation from 6th* January, 2006 to 10th January, 2006 in which 45 Judicial Officers participated. It was considered important to hold this workshop as moderation and modulation of behaviour is as important an asset as the intellect and wisdom of a Judge.

The second session was for training District Prosecution Officers. Forty five Prosecution Officers attended the *Advance Course* held from 16th to 20th January, 2006. This training was considered important from the point of view of removing flaws during trial inadvertently committed by the Prosecution Officers.

The issue of female foeticide, a social evil was raised by holding a workshop on - *PC and PNDT Act, 1994 on 27th* and *28th January, 2006* at JOTRI in which 25 Chief Medical Officers participated. Issues pertaining to female foeticide and skewed sex ratio were discussed at length and the participants were made aware regarding the provisions of the Act and duties assigned to them under the Act. It was also decided to hold similar workshops in future as follow-up exercise.

The fourth course was the *Refresher Course for Civil Judges Class II-2002 batch.* In the year 2005, induction training course of 2002 batch of Civil Judge Class II had been completed and they were posted in various districts of the State. After having gathered some work experience, they were bound to face some practical difficulties. Therefore, Refresher Course was envisaged and it was decided that 2002 batch of Civil Judge Class II shall be called in groups of 40 Judges each. The first Refresher Course of 2002 batch of Civil Judge Class II was held for 10 days at JOTRI from 30th January, 2006 to 8th February, 2006 with a plan to hold similar such batches in the forthcoming months.

FEBRUARY :

From 1st to 8th *February, 2006 the Refresher Course of 2002 batch of Civil Judge Class II* continued.

The second course was a workshop on - *Co-operative Laws - Judicial Procedure and Judgment Writing on 16th and 17th* February, 2006 in which 20 Officers of the rank of Deputy Registrars and Assistant Registrars of Co-operative Societies participated. This workshop was in continuance of policy to help officers other than from judicial department to discharge their judicial and quasi-judicial functions more effectively.

MARCH :

The month of March was marked by having three courses on varying issues. The first workshop was of two days held on 3rd and 4th of March, 2006 at JOTRI in which 30 Judges of the rank of ADJs participated on - *Offences against Married Women and Domestic Violence.* Holding this workshop was considered important as Domestic Violence Act was about to be promulgated and also since cases involving offences against married women were on the rise and were being instituted in large numbers in various Courts.

The second workshop was a one day workshop on - *Dishonour of Cheque* on 14th March, 2006 in which thirty Judicial Magistrates and Additional Chief Judicial Magistrates participated. This was considered important as cases relating to dishonour of cheque were being instituted in great numbers in various Courts.

The second *Refresher Course of 2002 batch of Civil Judge Class II* began on 20th March to 29th March, 2006 (10 days) in which forty Judicial Officers participated.

APRIL :

The month of April saw four courses being held at JOTRI. The first course was a workshop on - *Prevention of Corruption Act, 1988* involving forty Special Judges trying cases under Prevention of Corruption Act, 1988. The workshop was held on 3rd and 4th April, 2006.

The second course was a workshop on - *Scheduled Castes Scheduled Tribes (Prevention of Atrocities) Act, 1989* in which thirty Special Judges appointed under the Scheduled Castes Scheduled Tribes (Prevention of Atrocities) Act, 1989 participated. Holding workshops on specified Acts were thought to result in considering various aspects involved in the Act from all the possible angles and that is why the above two workshops were held.

Refresher Course for the third batch of *Civil Judge Class II - 2002 Batch* commenced on 17th April 2006. Forty Judicial Officers participated in the Refresher Course.

MAY & JUNE :

Looking to the fact that summer vacation were to ensue in the second fortnight, training programmes were squeezed into the first half of the month and a ten day *Refresher Course* for the fourth batch of *Civil Judges Class II (2002 batch)* was organized on 8th May to 17th May, 2006.

This Refresher Course was almost immediately followed by another workshop on - *PC & PNDT Act, 1994.* This workshop was held in hotel Satya Ashoka on 19th and 20th May, 2006 in which 25 CMOs of various districts participated. This was second such workshop. The first being already held in the month of January. Through these two workshops all the CMOs throughout the State were made conversant with the provisions of the Act.

No course could be organized in the first fortnight of June due to summer vacation. On the opening session post summer vacation, *Advance Course Training for Additional District Judges (Fast Track Courts)* was held for five days i.e. from 26th June to 30th June, 2006 at JOTRI.

JULY :

The new technique of dispute resolution commonly known as ADR is the buzzword in legal arena and the Courts are being encouraged to adopt such techniques in a big way so as to accelerate liquidation of mounting arrears. In consonance with this policy, *Foundation Training in Mediation Procedures* was held on 8th and 9th July, 2006 in which participants were drawn from Lawyers and Judicial Officers, the total number being thirty. In this training, the participants performed role plays in which fictitious cases were resolved through mediation techniques. It is pertinent to note that a mediation centre was established in the premises of High Court on or about the same time the training was held at JOTRI thus unfurling a new chapter in adopting dispute resolution methods.

The second course in the month of July was a workshop on - *Consumer Protection Act, 1986* participated by 22 Presiding Officers of District Consumer Foras. Various aspects relating to Consumer Protection Act were discussed threadbare in this workshop.

During past some years a number of irrigation projects have been taken up in various parts of the State and this process has led to relocation and awarding compensation to the occupants whose lands have been acquired by the State. This process has given rise to litigation in a big way in Courts situated in these areas. Thus it was considered important to organize a workshop on Land Acquisition Act so as to bring about clarity as regards various provisions of the Act. Therefore, a workshop on - *References under Land Acquisition Act - Law, Process and Procedures* was held on 3st July and 1st August, 2006 in which 40 Additional District Judges participated. The participants were selected on the basis of the number of cases under Land Acquisition Act pending in their Courts.

AUGUST :

It was seen that hundreds of cases pertaining to cheque bounce were being filed throughout the State particularly in the metro cities. It was considered proper to hold a workshop on the related provisions in Negotiable Instruments Act so as to help the Judicial Officers tide over difficulties faced by them in disposing of such cases. A one day workshop on - *Cases u/s 138 N.I. Act* was held at Indore on 5th August 2006 in which forty Judicial Magistrates First Class participated.

On the very next day another workshop on - *ADR and Mediation* was held again at Indore in which almost all the Judicial Officers posted in the district of Indore (fifty in number) participated. This was in continuation of the policy to imbue the spirit of resolution of disputes through ADR Techniques amongst Judicial Officers.

Issues pertaining to cases against juveniles longed to be discussed at length. Amongst them, issues relating to determination of age, investigation techniques, rehabilitation of juveniles and the adoption procedures were some features which though existing in the texts, were not being put to practice. Therefore, a comprehensive four days workshop on - *Juvenile Justice (Care & Protection of Children) Act, 2000* was held at JOTRI, Jabalpur on 21st to 24th August in which those Judicial Officers were called to participate who were about to be assigned as Presiding Officers of the Juvenile Courts.

A more humane judiciary which is also litigant friendly is the norm of the present times as against the sterner and strait jacketed system prevailing erstwhile. With the view gaining ground that the aspects of personal liberty of accused and litigants could not be underscored, a workshop on *Protection of Human Rights - Role of District Judiciary* was organized for two days on 30th and 31st August at JOTRI. The participants were forty in number and all of them were of the rank of Principal District & Sessions Judges. The philosophy pertaining to Human Rights was expected to percolate down to junior officers through these participants.

SEPTEMBER :

The month of September was marked by holding two training sessions. The first one was the *Advance Course Training for Fast Track Judges* held from 11th to 16th September (6 days) in which fifty Fast Track Judges were imparted job specific training. This was followed by workshop on - *Foundation Training in Counselling Skills* held at JOTRI from 25th to 29th September (5 days) in which thirty Counsellors participated. This training was held because of the newly assigned role of counselors in Family Courts as per the M.P. Family Court Rules, 2002.

OCTOBER :

The first workshop in October was a two day workshop on -*Emerging Cyber Jurisprudence* held at JOTRI on 9th and 10th October in which forty Judicial Officers of the rank of ACJM participated. Computer related crimes such as fraud, obscenity, etc. are new challenges before the Judges and in order to try the offenders more effectively, in-depth training in investigational aspects of such crimes alongwith methods of proving such offences was of utmost importance, hence this workshop. The resource persons involved in this workshop were persons having specialized knowledge in cyber crimes who have already cracked number of such cases. This workshop was followed by a course on *Basic Training in Office Administration* which was held for Class II and Class III employees of establishment of High Court. This training was imparted on 14th and 15th October, 2006 (2 days) in which there were fifty participants.

The newly incorporated provision of *Plea Bargaining* in the Criminal Procedure Code is all set to become a revolutionary tool in the liquidation of criminal cases pertaining to offences which are not serious in nature. Being a new concept, it was considered necessary that maximum number of Judicial Officers be made conversant with this new mode and the issues involved in tackling cases through it. Judicial Officers apart, Public Prosecutors and lawyers were also involved in these workshops so that a comprehensive knowledge base is created in all the three wings involved in the justice dispensation process. A comprehensive plan was drawn up and ten workshops were planned to be held in the successive months of October, November and December, 2006. The first two of such workshops out of these ten were held at Jabalpur on 28th and 29th October, 2006.

NOVEMBER & DECEMBER :

The months of November and December were totally devoted for holding workshops on Plea Bargaining. The 3rd and 4th workshops on Plea bargaining were held at Gwalior on 11th and 12th November, 2006. In the month of December rest of these workshops were held. The 5th and 6th workshops were held at Rewa on 2nd and 3rd December. Next two workshops were held at Bhopal on 9th and 10th December, 2006 and the last two workshops were held at Indore on 16th and 17th December, 2006. Holding workshops in these metro towns prevented dislocation of Judicial Officers, thereby preventing loss of their precious time. Through these ten workshops, approximately 300 Judicial Officers of the rank of JMFC and CJM/ACJM, 100 Defence Counsels and 100 Public Prosecutors were made conversant with the principles involved in the concept of Plea Bargaining.

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QUESTIONNAIRE OF BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent by this Institute for discussion in the bi-monthly district level meeting of August, 2006. The Institute has received articles from various districts. Articles regarding topic no. 2, 3, 4 & 5 respectively, from Betul, Indore, Guna & Dewas are being included in this issue. As we have not received worth publishing article regarding topic no. 1 the Institute is publishing its own article on this topic:

1. Whether in a reference u/s 28-A of L.A. Act, 1894 the compensation can be granted at a rate higher than that fixed by the Reference Court in the award which is being used as the basis for re-determination?

   क्या धारा 28–ए भू अर्जन अधिनियम, 1894 के अन्तर्गत रिफरेंस में प्रतिकर की राशि की दर रिफरेंस न्यायालय द्वारा दिये गये अवार्ड में निर्धारित उस दर से, जो कि पुननिर्धारण का आधार है, अधिक निर्धारित की जा सकती है?

2. Whether the sentence contemplated u/s 125 (3) Cr.P.C. can be imposed without issuing warrant for levying the amount due?

   क्या धारा 125 (3) दण्ड प्रक्रिया संहिता के अन्तर्गत प्रावधानित दण्डाता शोध्य राशि की वसूली के लिये वारंट जारी किये बिना भी अधिरोपित की जा सकती है?

3. Whether S.12 (6) M.P. Accommodation Control Act, 1961 is applicable when a decree is passed on more than one ground u/s 12 of the Act, one of the grounds being the ground under S.12 (1) (e) or (f)

   क्या म.प्र. स्थान नियंत्रण अधिनियम, 1961 की धारा 12 (6) उस दशा में भी प्रयोज्य होगी जब आज्ञप्ति अधिनियम की धारा 12 (1) (ई) या 12 (1) (एफ) अधिक आधारों पर पारित की गई है, के साथ–साथ धारा 12 में किये अन्य आधार पर भी प्रदान की गयी हो?

4. Whether in a case instituted on a Police report an accused charged for an offence u/s 353 IPC can be convicted u/s 186 IPC?

   क्या पुलिस रिपोर्ट के आधार पर संस्थित प्रकरण में धारा 353 भारतीय दण्ड संहिता के आरोप के विषय के अन्तर्गत दोषसिद्ध किया जा सकता है?

5. What should be the appropriate procedure for applying provisions of Sections 3 and 4 of Probation of Offender's Act, 1958?

   अपराधी परीवीक्षा अधिनियम, 1958 की धारा 3 एवं 4 के प्रावधानों की प्रयोज्यता हेतु उचित प्रक्रिया क्या है?

POSSIBILITY OF FIXING COMPENSATION IN A REFERENCE U/S 28-A OF LAND ACQUISITION ACT, 1894 AT A RATE HIGHER THAN THAT FIXED BY THE REFERENCE COURT U/S 18 OF THE ACT

Institutional Article

Shailendra Shukla
Additional Director, JOTRI

The provision of Section 28-A Land Acquisition Act is meant to provide redressal to those persons who could not avail the opportunity of getting enhanced compensation from the Court u/s 18 of the Act which was availed of by other persons by making an application for reference before the Court. This Section was inserted by Land Acquisition (Amendment) Act (68 of 1984) on 24.09.1984. The Section is reproduced as below :

> **28-A. Re-determination of the amount of compensation on the basis of the award of the Court.**
>
> (1) where in an award under this part, the court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under section 11, the persons interested in all the other land covered by the same notification under section 4, sub-section (1) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application to the Collector under section 18, by written application to the Collector within three months from the date of the award of the Court require that the amount of compensation payable to them may be re-determined on the basis of the amount of compensation awarded by the court:
>
> Provided that in computing the period of three months within which an application to the Collector shall be made under this sub-section, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded.
>
> (2) the Collector shall, on receipt of an application under sub-section (1), conduct an inquiry after giving notice to all the persons interested and giving them a reasonable opportunity of being heard, and make an award determining the amount of compensation payable to the applicants.
>
> (3) any person who has not accepted the award under sub-section (2) may, by written application to the Collector, require that the matter be referred by the Collector for the

determination of the Court and the provisions of sections 18 to 28 shall, so far as may be, apply to such reference as they apply to a reference under section 18.

The above provision underlines the following pre-requisites for its operation:

1. The land in relation to which an award was passed u/s 18 must be covered by the same notification u/s 4 (1).
2. An application u/s 28-A may be filed only when the award passed u/s 18 exceeds the amount awarded by the Collector u/s 11.
3. Application u/s 28-A must be filed within three months from the date of the award of the Court.
4. Collector is required to conduct an enquiry for re-determining the amount.
5. Re-determination of amount should be on the basis of the amount of compensation awarded by the Court.
6. Person not satisfied with the award of the Collector may require that the matter be referred by the Collector for the determination of the Court.
7. The Court while re-determining the amount shall follow provisions of Sections 18 to 28.

On receipt of an application u/s 28-A, the Collector is required to conduct an enquiry and pass the award after re-determining the amount of compensation payable to the applicant. The applicant, if not satisfied with the award passed by the Collector, may require that the matter be referred for the determination of the Court and provisions of Sections 18 to 28 shall, so far as may be, apply to such reference as they apply to a reference u/s 18.

A bare perusal of Section 28-A shows that re-determination by Collector should be done on the basis of amount of compensation awarded by the Court. As per the Rules of Statutory Interpretation the words used in Section must be understood to have conveyed the same meaning as they exist unless it can be shown that the legal context in which the words are used requires a different meaning. This principle is known as the *'rule of literal construction'* (Readers are expected to go through the *'rule of literal construction'* which is contained at page 72 in the *'Principles of Statutory Interpretations'* 8th Edition 2001 authored by former Chief Justice Hon'ble Shri Justice G.P. Singh.) This view is further reiterated by the Apex Court judgment in *Scheduled Caste Co-operative Land Owning Society Ltd., Bhatinda v. Union of India, (1991) 1 SCC 174* in which it was held that redetermination by the Collector is required to be done on the basis of compensation awarded by the Court in a reference u/s 18 of the Act. It is to be noted that the word used in Section 28-A is 'amount' and not 'rate'. Therefore the scope for any variance between the amount as determined by way of re-determination and the amount as determined by the Reference Court gets nullified.

The only question now remains is whether the amount so re-determined u/s 28-A shall be influenced by the order of the appellate Court which seeks to enhance or decrease the amount earlier fixed by the Reference Court u/s 18 of the Act? There are divergent opinions on this issue. A two Judge bench of the Apex Court in *Smt. Bhagti (deceased) through LRs., Jagdish Ram Sharma v. State of Haryana, AIR 1997 SC 1793* has held that re-determination of compensation can be made only on the basis of amount determined by Reference Court u/s 18 and not that by High Court, whereas another two Judge Bench of the Apex Court in *Union of India v. Munshi Ram (dead) by L.Rs. and others, (2006) 4 SCC 538* has held that the redetermined amount must be the same as the amount 'finally' payable to those who had sought such a reference on the basis of decree passed by Reference Court, as modified in appeal by superior Court and not on the basis of decree as originally passed by the Reference Court. Thus as per the later view, if the Appellate Court seeks to lower the amount of compensation, then the amount re-determined u/s 28-A shall not exceed the amount so finally determined by the Appellate Court. As far as the question of adherence to one of the above views is concerned, it is well settled that the pronouncement of law by a Division Bench is binding on a later Division Bench comprising of the same or smaller number of Judges. This has been very specifically laid down by a Full Bench in the case of *Union of India v. Raghuvir Singh (dead) by LRs., AIR 1989 SC 1933.* In view of this principle the ratio in *Smt. Bhagti's* case (supra), will have to be relied upon as against the view expressed in *Munshiram's case* (supra), more so, because the Apex Court in *Munshiram's case* (supra) has not taken into account the view expressed in *Smt. Bhagti's* case (supra). There can be an argument that an appeal is the continuance of the suit and therefore, what has been decided in the appeal would be understood to have been decided in the original proceedings (i.e. proceeding u/s 18 of the Act in this case). This argument has been accounted for by the Full Bench judgment of Apex Court in *Raghuvir Singh's* case (supra) in which it has been held that the general principle, that the appeal is the continuation of the proceedings initiated before the Court by way of a reference u/s 18 must yield to the limiting terms of the statutory provisions itself, and in the case before us it has been specifically stated that the basis of re-determination of the amount by the Collector is the amount of compensation awarded by the Reference Court and after reading Section 28-A, it gets clear that the word 'Court' signifies 'Reference Court' and not 'Appellate Court'. Thus the position which finally emerges is that it can be stated with certainty that the amount re-determined u/s 28-A can not exceed the amount which had been determined by way of reference u/s 18 by the Court irrespective of the amount finally determined by the Appellate Court.

IMPOSITION OF SENTENCE CONTEMPLATED U/S 125 (3) CR.P.C. WITHOUT ISSUING WARRANT FOR LEVYING THE AMOUNT DUE – WHETHER POSSIBLE ?

Judicial Officers
District Betul

Section 125 (3) of the Code of Criminal Procedure, 1973 deals with the procedure for enforcement of order of maintenance. It provides:

> "If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made."

The aforesaid provision speaks that if any person fails without sufficient cause to comply with the order of maintenance, levy warrant should be issued for recovery of amount due.

Imprisonment can be ordered only if distress warrant has been issued and it remains ineffective. So, the normal rule is that Magistrate can not straight away issue warrant of arrest. It is only for the whole or part of each month's allowance that remains unpaid after the execution of levy warrant that imprisonment may be awarded. So, in the first instance warrant of attachment of the property to satisfy the demand of arrears should be issued and if the whole or any part of it remains unpaid after execution of warrant then imprisonment may be awarded. The issue of warrant of attachment and sale is a condition precedent to the issue of a warrant for imprisonment.

The object of maintenance proceedings is not to punish a parent or husband for his past neglect, but to prevent vagrancy by compelling them to make provision for maintenance. Section 125 (3) has been enacted with the object of enabling discarded wives, helpless and deserted children and parents to secure the needful relief and it serves a special purpose of human society. It provides remedy of preventive nature, but certainly not punitive.

Section 125 (3) Cr.P.C. says, "If any person so ordered fails without sufficient cause to comply with the order" only then warrant for levying the amount due, can be issued. So, Magistrate has to satisfy himself first before issuing the warrant for levying the amount due, that the defaulter has no sufficient cause for non-payment.

Such a course will enable the opposite party to show sufficient cause as to why the order should not be enforced. Apart this, the proviso of Section 125

(3) Cr.P.C. also gives an opportunity to husband, even in the course of execution of maintenance order, to make bonafide offer to maintain his wife. If such offer is made by husband, then Magistrate must enquire from the wife why she is unwilling to go and live with her husband. If arrest warrant is directly issued, non-applicant will not get any opportunity to explain sufficient cause for non-compliance of the order, as provided by Section 125 (3) Cr.P.C.

So real intention of legislature u/s 125 (3) Cr.P.C. is that first of all a show cause notice should be issued to enable the husband to make an offer to maintain his wife by keeping her with him. It is also consistent with the principles of natural justice that a notice should be issued before drastic steps are taken against any person. If warrant of arrest is issued directly before issuing a show cause notice and warrant of levy, the defaulter will not get opportunity to explain the circumstances constituting sufficient cause for non-compliance of the order. The consequences of issuance of arrest warrant are far-reaching and of penal nature. It deprives a person of his personal liberty. So there is need of affording reasonable opportunity to non-applicant before issuing warrant of arrest. For the purpose of enforcement of a maintenance order, the Magistrate is required to follow the procedure prescribed in Section 421 Cr.P.C. The liability can be satisfied only by making actual payment of arrears.

The observations made by Division Bench of our own High Court in *Durga Singh Lodhi v. Prembai and others, 1990 JLJ 307,* which are reproduced hereunder, are pertinent in this respect:

> "Where a person under such obligation to pay maintenance allowance fails, without sufficient cause, to comply with the order granting maintenance, a warrant for the recovery of the amount may be issued on an application made to the Court to levy such amount within a period of one year from the date on which it became due. If, despite such a warrant, the maintenance allowance is not paid, the person may even be sentenced to imprisonment for a term which may extend to one month or until payment, if sooner made."

In *Smt. Kuldip Kumar v. Surindar Singh and another, AIR 1989 SC 232* Hon'ble the Supreme Court has held that the scheme of the provision u/s 125 (3) Cr.P.C. is for effecting actual recovery of the amount of monthly allowance, which has fallen in arrears. A person who has been ordered to pay monthly allowance can be sent to jail only if he fails to pay monthly allowance without sufficient cause to comply with the order. No useful purpose would be served by sending a person to jail, who is liable to pay, instead of providing the sum due to wife or children as the case may be. The liability cannot be taken to have been discharged by sending the person liable to pay the monthly allowance, to jail.

So it is crystal clear that all possible efforts should be made for actual recovery of arrears before sending the person liable to pay, to jail. But the liability of a person under the scheme will not come to an end, merely because he prefers to go to jail.

In *Jagannath Patra v. Purnamasi Saraf and another, AIR 1968 Orissa 35,* it has been held that order issuing simultaneously warrant for attachment and arrest warrant is not in accordance with law. Similar view has also been expressed in *Karnail Singh v. Gurdial Kaur, 1974 Cr.L.J. 38 (P & H) and K. Nityanandan v. B. Radhamani, 1980 Cr.L.J. 1191 (Ker).*

In case of *Ajab Rao v. Rekha Bai and another, 2005 (4) MPLJ 579,* it has been held that '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. Where the applicant persistently evaded payment of maintenance, the action of sentencing him for delay in non-payment of maintenance after issuing distress warrant is justified. As provision u/s 125 of Cr.P.C. is a social legislation, obstacles have to be overcome and technicalities ignored in order to implement it.'

So, for the enforcement of the order of maintenance, the normal rule is to issue a distress warrant in the manner provided in Section 421 Cr.P.C. for levying fines. But this rule is not invariable. Even warrant of arrest can be issued before levy warrant considering the circumstances of a particular case. If the defaulter flatly denies to make any payment and it seems that his denial is not bonafide, then in such case warrant of arrest can be issued even without issuing levy warrant. In *Bhyogi Ram v. Bhagwati Bai, 1989 MPWN 200* it has been held that if husband is knowingly evading payment of maintenance, technicalities have to be ignored for meeting aim of social purpose and warrant of arrest should be issued.

In case of *Bhure v. Gomati Bai, 1981 Cr.L.J. 789 (MP HC)* it was held that where a husband has flatly refused to make a payment to wife the huge arrears of maintenance amount and persistently behaved in irresponsible manner during the court proceedings, the order sentencing the defaulting husband to imprisonment was justified, even though a distress warrant was not issued in first instance.

So in the light of real spirit of provision of Section 125 (3) Cr.P.C. and above mentioned reasons, the general rule can be said to be that u/s 125 (3) Cr.P.C. sentence can not be imposed without issuing warrant for levying the amount due. But in exceptional circumstances, sentence can be imposed, ignoring technicalities of levy warrant, for the ends of social justice.

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SCOPE AND APPLICABILITY OF SECTION 12 (6) OF THE M.P. ACCOMMODATION CONTROL ACT, 1961

Judicial Officers
District Indore

Section 12 (1) of the M.P. Accommodation Control Act, 1961 in clauses (a) to (p) provides 16 grounds for eviction of a tenant. Decrees passed on some of the grounds are absolute but in case of decrees passed on the grounds mentioned in clauses (e), (f), (g) and (h), some further restrictions have been placed by the Act. A decree passed on other grounds mentioned in Section 12 (1) is absolute and no further benefit has been given to the tenant and no restriction placed on the landlord in the matter of execution of the decree.

The ground u/s 12 (1) (e) relates to the bona fide need of the landlord for residence, by proving which he can obtain vacant possession of the residential accommodation in possession of a tenant. When a decree is passed on this ground, Section 12 (5) puts a restriction in the matter of execution of the decree that the landlord is not entitled to possession before expiration of two months from the date of the decree. So far as decree passed on ground contemplated u/s 12 (1) (f) of the Act is concerned, Section 12 (5) is not applicable, as it is applicable only for the ground under Section 12 (1).

The ground u/s 12 (1) (f) relates to the need of the landlord for business by proving which he can obtain non-residential accommodation in possession of a tenant. When a decree is passed on this ground, Section 12 (6) puts certain restrictions in the matter of execution of the decree. These restrictions, briefly stated, are that the landlord is not entitled to possession before expiration of two months from the date of the decree and if the accommodation is situated in the specified cities, until he pays certain amount as compensation to the tenant.

The language employed in Section 12 (6) is silent as to whether this provision is also applicable where decree has been passed on more than one ground, one of the grounds being under clause (f) of Section 12 (1). The language being not explicit, it is open to adopt the construction that Section 12 (6) does not apply when the decree is passed on one or more of the other grounds specified in Section 12 (1), which entitled the landlord to obtain absolute decree, although it is also passed on the ground specified in clause (f) of Section 12 (1). In *Dindayal v. Vimalchand and another, 1973 MPLJ 465,* it was observed that the above construction must be preferred as it is more in harmony with the scheme of the section read as a whole and has also the merit of avoiding unreasonable and anomalous result that flow from the alternative construction. Following this principle, the High Court, while passing decree under both clauses (b) & (f), did not apply the provision of Section 12 (6).

Thus, when an eviction decree has been passed on two or more grounds, one out of which happens to be u/s 12 (1) (f), then Section 12 (6) would not apply because sub-section 6 of Section 12 cannot be read in isolation. Reading Section 12 (6) as a whole, it becomes quite clear that its provisions apply when the decree has been passed under clause (f) and not on any other ground provided in other clauses of Section 12 (1), which entitle the landlord to get an absolute decree.

The issue was also considered by a Division Bench of Hon'ble M.P. High Court in *Omprakash Kanhaiyyalal v. Ramchandra Hiralal, 1977 MPLJ 819.* It has been observed therein that the restriction as enacted in sub-section (6) is imposed only on the decree for eviction under clause (f), but not on a decree on any other grounds specified in other clauses of sub-section (1). Therefore, where a decree is passed on any ground specified in any other clause of sub-section (1) of Section 12, the landlord cannot be prevented from obtaining possession by imposing restrictions contained in sub-section (6). That being the position, it cannot be said that if the landlord has obtained a decree on a ground u/s 12 (1) (f) alongwith any other ground provided u/s 12 (1), such decree shall be subject to the restrictions contained in sub-section (6). The landlord who has obtained a decree on the grounds specified in any other clauses cannot be placed in a disadvantageous position because of the fact that the decree is also on the ground specified in clause (f). This will obviously be anomalous.

It has also been observed in the aforesaid case that the decree for eviction is good and operative even on one of the grounds contained in sub-section (1). Therefore, the restrictions imposed in sub-section (6) cannot come in the way of the landlord who has to obtain possession on a ground other than that specified in clause (f). In the ultimate analysis, it must be held that sub-section (6) comes into play only when the decree for eviction is passed on the sole ground specified in clause (f). However, if the decree for eviction is made also on a ground other than specified in clause (f), the restrictions imposed in sub-section (6) will not apply although the decree is also under clause (f). (Also see *Satyanarayan v. Premlata, 1979 MPRCJ NOC 132, Mohan Singh v. Ghanshyamdas, 1980 MPRCJ NOC 109 and Vishandas v. Kalawati Bai, 1983 MPWN Note No. 337)*

In view of above discussion, it is crystal clear that when a decree for eviction has been passed on a ground specified in clause (f) of Section 12 (1) and also on a ground specified in another clause of Section 12 (1), the restrictions contained in sub-section (6) of Section 12 shall not apply as it would defeat the right of a landlord to get an absolute decree provided under other clauses of Section 12 (1). The landlord is entitled to obtain possession under the other ground/grounds as if the decree on the ground specified in clause (f) was not passed.

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CONVICTING AN ACCUSED CHARGED U/S 353 IPC TO ONE U/S 186 IPC

Judicial Officers
District Guna

Section 222 (1) of the Code of Criminal Procedure provides that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

The issue whether in a case instituted on a police report, an accused charged for an offence u/s 353 IPC can be convicted u/s 186 IPC emerges from the background of the aforesaid provisions of Section 222 (1) and requires to be examined in the light of provisions contained in Section 195 (1)(a)(i) and clause 4 of Section 222 of the Code which run respectively as under:

Section.195 (1) (a) (i) :

> **"Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.-** (1) No Court shall take cognizance, -
>
> (a) (i) of any offence punishable under Sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860)"
>
> except on the complaint in writing of that Court, or of some other Court to which that court is subordinate.

Section 222 (4):

> "Nothing in this section shall be deemed to authorize a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied."

Sections 186 and 353 IPC, which are in the center of our discussion are also reproduced hereunder:-

> **"Section 186. Obstructing public servant in discharge of public functions.** – Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment of either description for a term which may extend to three months, or with five which may extend to five hundred rupees, or with both."
>
> **"Section 353. Assault or criminal force to deter public servant from discharge of his duty.** – Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence

of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

Sections 186 & 353 of the IPC relate to two distinct offences. Section 186 IPC is applicable to case where the accused voluntarily obstructs the public servant in discharging his public function, whereas in Section 353 IPC the ingredient of assault or use of criminal force, while the public servant is performing his duty as such is necessary. The nature of the two offences is also different. Section 186 IPC deals with contempt of the lawful authorities of public servant, whereas Section 353 IPC deals with offences which effect the human body.

Section 195 Cr.P.C. does not bar the trial of the accused for the distinct offence u/s 353 though it is practically based on the same facts but the prosecution u/s 186 IPC is barred for want of necessary sanction u/s 195 Cr.P.C. (Durga Charan, AIR 1966 SC 1775). Section 195 Cr.P.C. provides prosecution for contempt of lawful authority of public servant, for offence against public justice in which the rider has been applied on the courts that cognizance of any offence punishable u/Ss 177 to 188 (both inclusive) of the IPC be not taken except on the complaint in writing by the public servant or through some other to which that public servant is subordinate.

Therefore, for trial of offence u/s 186 IPC the filing of the complaint by the prescribed person or authority is mandatory. Without the regular complaint by the public officer concerned, cognizance cannot be taken u/s 186 IPC. However, there is no such embargo imposed for trial of offence u/s 353 IPC.

Thus, the complaint in writing of the public servant concerned or some public servant to whom he is subordinate is required for cognizance and trial of offence u/s 186 IPC, whereas no such requirement is necessary for trial of offence u/s 353 IPC.

If the charge is framed u/s 353 IPC, a person cannot be convicted u/s 186 IPC, though it is a cognate offence since the rider u/s 195 Cr.P.C. is operative. The ratio of *Durgacharan's case* (supra) has been followed in *Oduvil Devakiamma & another v. State of Kerala, 1982 Cr.L.J. NOC 11 (Ker)* in which it was reiterated that in a complaint alleging commission of offence u/s 353 I.P.C., if ingredients u/s 186 I.P.C. are disclosed instead of those u/s 353 I.P.C., prosecution against accused could not be continued in absence of written complaint as contemplated by sec. 195 (1) (a) Cr.P.C.

Whereupon the facts of the commission of several offences is disclosed, some of which require a complaint under Section 195 Cr.P.C. and others do not, it is open to prosecute in respect of the latter offences only.

Provision of section 222 Cr.P.C. also provide conviction on the charge different from the original charge provided accused is not in any manner prejudiced. This section applies to cases where the charge is of an offence consisting of several particulars, some of which when combined and proved form a complete minor offence, accused may be convicted of the minor offence thought not charged. When offence proved is included in offence charged, the accused can be convicted for the minor offence as provided u/s 222 Cr.P.C. But condition imposed under sub section (4) of Section 222 Cr.P.C. is also to be kept in mind, in which it is provided that this section does not authorize a conviction of any minor offence where the conditions requisite for the initiation of proceeding in respect of the minor offence have not been satisfied.

Therefore, though section 186 IPC is the minor offence and if its ingredient are proved in a case where the person is charged for an offence u/s 353 IPC, the accused can only be convicted u/s 186, if a complaint has been made by the public servant concerned. In other words such conviction can be made only when provision of section 195 Cr.P.C. has been complied with.

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The chains of habit are generally too small to be felt until they are too strong to be broken.

- Samuel Johnson

The second half of a man's life is made up of nothing but the habits he has acquired during the first half.

- Feoder Dostoevski

अपराधी परिवीक्षा अधिनियम, 1958 की धारा 3 एवं 4 के प्रावधानों की प्रयोज्यता हेतु उचित प्रक्रिया

न्यायिक अधिकारीगण
जिला देवास

1. अपराधी परिवीक्षा अधिनियम की उद्देशिका यह स्पष्ट करती है कि यह खण्डित अधिनियम नहीं है, अपितु समेकित अधिनियम है, जिसके द्वारा इस अधिनियम के पूर्व परिवीक्षा संबंधी सभी नियम, उपबंध आदि निरस्त कर दिये गये हैं। अपराधी परिवीक्षा अधिनियम, 1958 की धारा 19 के उपबंध के अनुसार दण्ड प्रक्रिया संहिता की धारा 360 के उपबंध निरसित हो गये हैं। इस संबंध में न्याय दृष्टांत *दयालुदास विरूद्ध म.प्र. राज्य तथा अन्य, 1998 (1) विधि भास्वर 297* उल्लेखनीय है जिसमें यह मत व्यक्त किया गया है कि अपराधी परिवीक्षा अधिनियम के प्रवर्तन के पश्चात दं. प्र. सं. की धारा 360 के उपबंध मध्यप्रदेश राज्य में प्रवर्तनीय नहीं है।

2. इस अधिनियम में अपराधी को दण्डित करने के बजाय उसे स्वतंत्र रखकर ही सुधार करने का प्रयास करने के आधुनिक दृष्टिकोण की परिकल्पना की गई है, जिसका उद्देश्य युवा अपराधियों को, कारावास भोग रहे परिपक्व आयु के तथा अनुभवी अपराधियों के संसर्ग में आने से रोककर, उनसे प्रभावित होने से बचाकर उनमें सुधार करने का प्रयास करना है। यही कारण है कि अपराधी को परिवीक्षा पर छोड़ने का विवेकाधिकार न्यायालयों पर छोड़ा गया है, ताकि वे सभी परिस्थितियों को ध्यान में रखकर इस संबंध में उचित निर्णय ले सकें। इस अधिनियम के वे प्रयोजन जो अपराधी के सुधार संबंधित हैं, तकनीकी दृष्टि से व्यापक हैं, इसका निर्वचन इस प्रकार किया जाना चाहिए जो व्यापक हो। अधिनियम के शब्द को सीमित अर्थ में समझना उचित नहीं होगा, इस संबंध में न्याय दृष्टांत *दौलतराम विरूद्ध हरियाणा राज्य, ए.आई.आर. 1972 सु.को., 2334, वेदप्रकाश विरूद्ध हरियाणा राज्य, ए. आई. आर. 1981 सु.को. 643, मुसाखान विरूद्ध महाराष्ट्र राज्य, ए.आई.आर. 1976 सु.को. 2566 एवं जुगलकिशोर विरूद्ध बिहार राज्य, ए.आई.आर. 1972 सु. को. 2522* उल्लेखनीय हैं।

3. वस्तुतः परिवीक्षा अधिनियम की धारा 3 और 4 के उपबंध दं. प्र. सं. की धारा 360 के उपबंधों के समतुल्य ही हैं । परिवीक्षा अधिनियम की धारा 3 के अनुसार –

> जब कोई व्यक्ति भा. दं. सं. की धारा 379 या 380 या धारा 404 या 420 के अधीन दण्डनीय कोई अपराध अथवा भारतीय दण्ड संहिता या किसी अन्य विधि के अधीन दो वर्ष से अनधिक के लिए कारावास या जुर्माने अथवा दोनों से दण्डनीय कोई अपराध करने का दोषी पाया जाता है उसकी यह राय है कि मामले के परिस्थितियों को, जिनके अन्तर्गत अपराध की प्रकृति और अपराधी का चरित्र भी है, ध्यान रखते हुए ऐसा करना समीचीन है, तब तत्समय प्रवृत्त किसी अन्य विधि में किसी बात के होते हुए भी वह न्यायालय उसे दण्डित करने या धारा 4 के अधीन सदाचरण की परिवीक्षा पर छोड़ने के बजाय उसे सम्यक् भर्त्सना के पश्चात् छोड़ सकेगा।

स्पष्टीकरण – इस धारा के प्रयोजन के लिए किसी व्यक्ति के विरूद्ध पूर्व दोषसिद्ध के अन्तर्गत इस धारा या धारा 4 के अधीन उसके विरूद्ध किया गया कोई पूर्व आदेश भी है।

4. इसी प्रकार धारा 4 में यह प्रावधान किया गया है कि –

(1) जब कोई व्यक्ति ऐसा अपराध करने का दोषी पाया जाता है जो मृत्यु या आजीवन कारावास से दण्डनीय नहीं है और जिस न्यायालय ने उस व्यक्ति को दोषी पाया है, उसकी यह राय है कि मामले की परिस्थितियों को, जिनके अन्तर्गत अपराध की प्रकृति और अपराधी का चरित्र भी है, ध्यान में रखते हुए उसे सदाचरण की परिवीक्षा पर छोड़ देना समीचीन है, तब तत्समय प्रवृत्त किसी अन्य विधि में किसी बात के होते हुए भी वह न्यायालय उसे तुरन्त दण्डित करने के बजाय निर्देश दे सकेगा कि उसे, प्रतिभुओं के सहित या उसके बिना, उसके द्वारा ऐसा बन्धपत्र देने पर छोड़ दिया जाए कि वह तीन वर्ष से अनधिक की ऐसी कालावधि के दौरान, जैसा न्यायालय निर्दिष्ट करे, आहूत किये जाने पर उपस्थित होगा और दण्डादेश प्राप्त करेगा और इसी बीच परिशान्ति कायम रखेगा और सदाचारी रहेगा।

परन्तु न्यायालय किसी अपराधी को ऐसे छोड़ दिये जाने का निर्देश तब तक नहीं देगा जब तक उसका समाधान नहीं हो जाता कि अपराधी या उसके प्रतिभू का, यदि कोई हो, नियत निवास स्थान या उस स्थान में नियमित उपजीविका है, जिस पर वह न्यायालय अधिकारिता का प्रयोग करता है या जिसमें अपराधी के उस कालावधि के दौरान रहने की सम्भाव्यता है, जिसके लिए वह बन्धपत्र देता है।

(2) उपधारा (1) के अधीन कोई आदेश करने के पूर्व न्यायालय, मामले के बारे में सम्बन्धित परिवीक्षा अधिकारी के प्रतिवेदन पर, यदि कोई हो, विचार करेगा।

(3) जब धारा (2) के अधीन आदेश दिया जाता है तब यदि न्यायालय की यह राय है कि अपराधी और जनता के हित में ऐसा करना समीचीन है, तो वह उसके अतिरिक्त एक पर्यवेक्षण आदेश पारित कर सकेगा, जिसमें यह निर्देश होगा कि अपराधी आदेश में नामित किसी परिवीक्षा अधिकारी के पर्यवेक्षण के अधीन एक वर्ष से कम न होने वाली ऐसी कालावधि के दौरान रहेगा जो उसमें विनिर्दिष्ट हो और ऐसे पर्यवेक्षण आदेश में ऐसी शर्त अधिरोपित कर सकेगा जैसी वह अपराधी के सम्यक् पर्यवेक्षण के लिए आवश्यक समझता है।

(4) उपधारा (3) के अधीन पर्यवेक्षण आदेश करने वाला न्यायालय अपराधी से अपेक्षा करेगा कि छोड़े जाने से पूर्व वह ऐसे आदेश में विनिर्दिष्ट शर्तों का और निवास स्थान, मादक पदार्थों से प्रवरित या किसी अन्य बात के बारे में ऐसी अतिरिक्त शर्तों का, जैसी न्यायालय विनिर्दिष्ट परिस्थितियों का ध्यान रखते हुए, उसी अपराध की पुनरावृत्ति को या अपराधी द्वारा अन्य अपराधों के किये जाने को रोकने के लिए अधिरोपित करना ठीक समझे, पालन करने के लिए प्रतिभुओं के सहित या बिना एक बन्धपत्र दे।

(5) उपधारा (3) के अधीन पर्यवेक्षण आदेश करने वाला न्यायालय आदेश के निबन्धों और शर्तों को अपराधी को समझायेगा और प्रत्येक अपराधी, प्रतिभू यदि कोई हो, और संबंधित परिवीक्षा अधिकारी को तुरन्त पर्यवेक्षण आदेश की एक प्रति देगा।

उपरोक्त अधिनियमित प्रावधानों को यदि सूक्ष्मता से देखा जाय तो उनकी प्रयोज्यता हेतु उचित प्रक्रिया उसी में सन्निहित है।

5. उपरोक्त दोनों प्रावधानों में स्पष्ट है कि जब कोई व्यक्ति अपराध करने का दोषी पाया जाता है तब न्यायालय उसे तुरन्त दण्डित करने के बजाय अपराध की प्रकृति, मामले की परिस्थिति, अपराधी के चरित्र आदि पर विचार करते हुए यदि यह पाता है कि उपरोक्त प्रावधान एवं प्रकरण की परिस्थितियों के परिप्रेक्ष्य में अपराधी को दण्डित करना समीचीन नहीं होगा तब वह उसे धारा 3 के प्रावधान के परिप्रेक्ष्य में सम्यक् भर्त्सना के बाद छोड़ सकेगा या धारा 4 के प्रावधान के परिप्रेक्ष्य में सदाचरण की परिवीक्षा पर छोड़ सकता है। इससे स्पष्ट है कि इस प्रावधान का उपयोग अपराधी को दण्डित करने के पूर्व किया जाना चाहिए और न्यायालय को इस बिन्दु पर उपरोक्त प्रावधानों के परिप्रेक्ष्य में विचार करना चाहिए।

6. धारा 3 अपराधी परिवीक्षा अधिनियम के प्रावधान की प्रयोज्यता हेतु यह स्पष्ट है कि अपराधी जिस अपराधों में दण्डित किया गया है, वह दो वर्ष से अनधिक कारावास या जुर्माना या दोनों से दण्डनीय कोई अपराध करने का दोषी पाया गया हो और उसका अपवाद यह है कि यदि कोई व्यक्ति धारा 379, 380, 382, 404, एवं 420 भां. दं. सं. के आरोप में दोषसिद्ध हो तो भी इस अपराध में दो वर्ष से अधिक के कारावास की सजा होने पर भी अपराधी परिवीक्षा अधिनियम की धारा 3 के तहत् सम्यक् भर्त्सना या चेतावनी देकर छोड़ा जा सकता है। लेकिन अधिनियम की धारा 3 का लाभ देने की आवश्यक शर्त यह है कि, अपराधी के विरूद्ध कोई पूर्ववर्ती दोषसिद्धि प्रमाणित न हो।

7. यहाँ यह उल्लेखनीय है कि इस धारा के प्रयोजन के लिए किसी व्यक्ति के विरूद्ध पूर्व दोषसिद्धि के अन्तर्गत धारा 3 या धारा 4 के अधीन उसके विरूद्ध किया गया पूर्व आदेश भी सम्मिलित है। किन्तु धारा 3 अपराधी परिवीक्षा अधिनियम के बिन्दु पर विचार करने के पूर्व परिवीक्षा अधिकारी का प्रतिवेदन वांछनीय नहीं है क्योंकि धारा 3 अपराधी परिवीक्षा अधिनियम के उपरोक्त प्रावधानों में कहीं पर भी परिवीक्षा अधिकारी का प्रतिवेदन माँगा जाना आवश्यक या आज्ञापक नहीं बताया गया है।

8. अपराधी परिवीक्षा अधिनियम की धारा 4 के उपबन्ध ऐसे अपराधों में दोषसिद्ध व्यक्ति के संबंध में प्रयोज्य हैं जो मृत्यु या आजीवन कारावास के दण्डनीय आरोप में दोषसिद्ध नहीं है। उपरोक्त प्रावधान से यह स्पष्ट है कि धारा 4 का लाभ प्रदान करते समय प्रकरण की परिस्थितियाँ, अपराध की प्रकृति और अभियुक्त के चरित्र पर विचार करते हुए दोषसिद्ध अभियुक्त को तत्काल दण्डित करने की अपेक्षा उसे प्रतिभूति सहित या रहित उसके द्वारा ऐसा बन्धपत्र निष्पादित करने पर कि, वह तीन वर्ष से अनधिक कालावधि के दौरान जैसी न्यायालय निर्दिष्ट करे, आहुत किये जाने पर उपस्थित होगा और दण्डादेश प्राप्त करेगा तथा इस बीच परिशान्ति कायम

रखेगा और सदाचार बनाये रखेगा। उपरोक्त परिस्थिति में किसी अपराधी को ऐसे छोड़ दिये जाने का निर्देश तब तक नहीं दिया जायेगा जब तक की न्यायालय का यह समाधान न हो जाय कि अपराधी या उसके प्रतिभू का, यदि कोई हो, नियम निवास स्थान या व्यवसाय उस न्यायालय के स्थानीय क्षेत्राधिकार की सीमा में है।

9. धारा 4 (2) के प्रावधान को देखते हुए यह स्पष्ट है कि अपराधी परिवीक्षा अधिनियम का लाभ देने के पूर्व न्यायालय उस मामले के बारे में सम्बन्धित परिवीक्षा अधिकारी के प्रतिवेदन पर, यदि कोई हो, विचार करेगा । इस सम्बन्ध में माननीय उच्चतम न्यायालय ने न्याय दृष्टांत *एम.सी.डी. विरूद्ध देहली राज्य व अन्य (2005) 4 एस. सी. सी. 605* में यह सिद्धांत प्रतिपादित किया है कि उपरोक्त प्रावधान के परिप्रेक्ष्य में विचार करने के पूर्व परिवीक्षा अधिकारी से प्रतिवेदन माँगा जाना आवश्यक है और यह एक आज्ञापक प्रावधान है किन्तु इसी न्याय दृष्टांत में माननीय उच्चतम न्यायालय ने यह भी उल्लेखित किया है – ''यदि किन्हीं कारणों से परिवीक्षा अधिकारी का प्रतिवेदन उपलब्ध नहीं है या नहीं माँगा जा सकता है, तो ऐसी परिस्थिति में न्यायालय को प्रकरण में उपलब्ध तथ्यों के आधार पर उक्त बिन्दु पर विचार करना चाहिए। धारा 4 की उपधारा (2) में भी यह स्पष्ट प्रावधान है कि परिवीक्षा अधिकारी का प्रतिवेदन यदि कोई हो, पर न्यायालय विचार करेगा। इससे स्पष्ट है कि यद्यपि परिवीक्षा अधिकारी का प्रतिवेदन माँगा जाना और उस पर विचार करना एक आज्ञापक प्रावधान है, किन्तु यदि ऐसा प्रतिवेदन किन्हीं कारणों से उपलब्ध नहीं है, तो मात्र उक्त आधार पर अभियुक्त को धारा 4 अपराधी परिवीक्षा अधिनियम के उक्त लाभों से वंचित नहीं किया जा सकता।

10. अपराधी परिवीक्षा अधिनियम की धारा 9 में बन्धपत्र की शर्तों के अनुपालन में असफल होने की दशा में निम्नलिखित प्रक्रिया निर्धारित की गई है :–

> (1) यदि उस न्यायालय के पास जो किसी अपराधी के सम्बन्ध में धारा 4 के अधीन कोई आदेश पारित करता है या किसी न्यायालय के पास जो उस अपराधी के बाबत् उसके मूल अपराध के सम्बन्ध में कार्यवाही कर सकता था, परिवीक्षा अधिकारी के प्रतिवेदन पर या अन्यथा यह विश्वास करने का कारण है कि अपराधी अपने द्वारा दिये गये बन्धपत्र या बन्धपत्रों की शर्तों में से किसी का अनुपालन करने में असफल हुआ है, तो वह उसकी गिफ्तारी के लिए वारण्ट जारी कर सकेगा या यदि वह ठीक समझता है तो उसके या प्रतिभुओं के, यदि कोई हों, नाम समन निकाल सकेगा जिसमें उससे यह अपेक्षा की जायेगी कि उस समय पर जो समन में विर्निदिष्ट हो, उनके समक्ष उपस्थित हो।
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> (2) न्यायालय जिसके समक्ष अपराधी इस प्रकार लाया जाता है या उपस्थित होता है या तो उसे मामले की समाप्ति तक के लिए अभिरक्षा में प्रतिप्रेषित कर सकेगा या उस तारीख को जो वह सुनवाई के लिए नियत करें, उपस्थित होने के लिए उसे प्रतिभू के सहित या बिना, प्रतिभूति स्वीकार कर सकेगा।

(3) यदि मामले की सुनवाई के पश्चात् न्यायालय का समाधान हो जाता है कि अपराधी अपने द्वारा दिये गये बन्धपत्र की शर्तों में से किसी का अनुपालन करने में असफल हुआ है, तो वह तत्काल–

(क) उसे मूल अपराध के लिए दण्डित कर सकेगा, या

(ख) जहाँ असफलता प्रथम बार होती है, वहाँ बन्धपत्र के प्रवृत्त रहने पर प्रतिकूल प्रभाव डाले बिना उस पर पचास रूपये से अनधिक की शस्ति अधिरोपित कर सकेगा।

(4) यदि उपधारा (3) के खण्ड (ख) के अधीन अधिरोपित शास्ति ऐसी कालावधि के भीतर जैसी न्यायालय नियत करे, संदत्त नहीं की जाती है तो न्यायालय अपराधी को मूल अपराध के लिए दण्डित कर सकेगा।

11. अपराधी परिवीक्षा अधिनियम की धारा 4 के उपबन्ध 3 के अनुसार जब धारा 9 के अधीन आदेश दिया जाता है तब अपराधी और जनता के हितों में न्यायालय पर्यवेक्षण आदेश पारित कर सकता है, जिसमें यह निर्देश होगा कि अपराधी आदेश में नामित किसी परिवीक्षा अधिकारी के पर्यवेक्षण के अधीन एक वर्ष से कम न होने वाली ऐसी कालावधि के दौरान रहेगा जो उसमें विर्निदिष्ट हो और उक्त धारा 4 के अधीन पर्यवेक्षण आदेश करने वाला न्यायालय अपराधी से अपेक्षा करेगा कि वह छोड़े जाने के पूर्व आदेश में विर्निदिष्ट शर्तों का पालन करने के लिए प्रतिभुओं के सहित या बिना बन्धपत्र दे और इसी प्रकार उपधारा 3 के अधीन पर्यवेक्षण आदेश करने वाला न्यायालय आदेश के निबन्धनों और शर्तों को अपराधी को समझायेगा और सम्बन्धित परिवीक्षा अधिकारी को तुरन्त पर्यवेक्षण आदेश की एक प्रति भी देय होगी।

(12) अपराधी परिवीक्षा अधिनियम की धारा 11 के अनुसार अधिनियम का लाभ अपील और पुनरीक्षण न्यायालय द्वारा भी प्रदान किया जा सकता है। अपील न्यायालय को भी उसी प्रकार सभी शक्तियाँ प्राप्त है जो विचारण न्यायालय को धारा 3 परिवीक्षा अधिनियम के अन्तर्गत प्राप्त हैं।

(13) अपराधी परिवीक्षा अधिनियम की धारा 18 के अनुसार, जो कतिपय अधिनियमों पर इस अधिनियम के प्रवर्तन को अपवर्जित करती है, अपराधी परिवीक्षा अधिनियम, 1958 की कोई बात सुधार विद्यालय अधिनियम, 1897 की धारा 31 या भ्रष्टाचार निवारण अधिनियम अथवा किशोर अपराधियों या बोर्स्टल स्कूलों से सम्बन्धित किसी राज्य में प्रवृत्त किसी विधि के उपबन्धों को प्रभावित नहीं करेगी। धारा 18 के उपरोक्त उपबन्धों से यह स्पष्ट हो जाता है कि सुधार विद्यालय अधिनियम, भ्रष्टाचार निवारण अधिनियम अथवा किशोर अपराधियों या बोर्स्टल स्कूलों से सम्बन्धित विधि से सम्बन्धित अपराधियों या कार्यवाहियों पर परिवीक्षा अधिनियम की धारा 3 अथवा 4 के उपबन्ध प्रभावशील नहीं हैं।

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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 न्यायादान में विलम्ब की सम्भावना बढ़ जाती है अपितु न्याय के हनन का खतरा भी आसन्न रहता है। फरवरी 2006 अंक के साथ प्रारंभ इस स्तम्भ के माध्यम से हम ऐसी कुछ महत्वपूर्ण समस्याओं के विषय में नियमित रूप से विचार विमर्श करते रहेंगे। प्रयास यह होगा कि समस्या के सम्यक समाधान के विषय में विश्लेषणात्मक दृष्टिकोण अपनाया जावे)

व्यवहार मामलों में लोक प्रलेख साक्ष्य में आहूत् किए जाने संबंध में विधिक स्थिति क्या है?

लोक प्रलेख को भारतीय साक्ष्य अधिनियम, 1872 की धारा 74 में परिभाषित किया गया है। साक्ष्य अधिनियम की धारा 77 लोक प्रलेख की प्रमाणित प्रतिलिपि को साक्ष्य में ग्राह्य होना अनुज्ञात करती हैं। सामान्यतः मूल लोक प्रलेख को साक्ष्य में आहूत् करने के बजाय उसकी प्रमाणित प्रतिलिपि ही न्यायालय में प्रस्तुत की जानी चाहिए। नियम एवं आदेश (सिविल) के नियम 104 में यह निर्दिष्ट किया गया है कि लोक प्रलेखों को आहूत् किए जाने के बारे में आदेश 13 नियम 10 (2) व्यवहार प्रक्रिया संहिता के प्रावधानों का उपयोग किया जाना चाहिए जो यह निर्दिष्ट करते हैं कि किसी न्यायालयीन प्रलेख को आहूत् कराए जाने के लिए संबंधित व्यक्ति को, जिसने ऐसी याचना की है, इस आशय का शपथ पत्र प्रस्तुत करना चाहिए कि ऐसा प्रलेख न केवल मूलतः बुलाया जाना आवश्यक है अपितु अयुक्तियुक्त विलंब या व्यय के बिना उसकी प्रमाणित प्रतिलिपि प्राप्त करना संभव नहीं है। नियम एवं आदेश (सिविल) का नियम 105 स्पष्ट रूप से यह निर्दिष्ट करता है कि सामान्यतः एवं अन्यथा प्रावधित न होने की दशा में मूल लोक प्रलेख तथा नगरपालिक (Municipal) प्रलेख आहूत करने की बजाय ऐसे प्रलेखों की यथा विधि अभिप्रमाणित प्रतिलिपि के द्वारा संबंधित तथ्य को प्रमाणित किया जाना चाहिए।

यदि अपवाद की स्थिति में मूल प्रलेख आहूत् किया भी जाता है तो नियम 107 के अनुसार उसे अविलंब वापस किया जाना चाहिए तथा आहूत्कर्ता के व्यय पर ऐसे प्रलेख की प्रतिलिपि तैयार कर अभिलेख में रखी जानी चाहिए।

उक्त प्रावधानों का यदि सावधानी पूर्वक पालन किया जाए तो न केवल लोक प्रलेखों को साक्ष्य में आहूत् करने में होने वाले विलंब को निवारित किया जा सकता है अपितु लोक प्रलेखों को न्यायालय के समक्ष प्रस्तुत करने में शासकीय मशीनरी पर पड़ने वाले भार को भी कम किया जा सकता है।

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अपील योग्य प्रकरणों एवं अपील अयोग्य प्रकरणों में मुख्य परीक्षण शपथ पत्र पर प्रस्तुत करने विषयक प्रक्रिया क्या होनी चाहिये?

सिविल प्रक्रिया संहिता, 1908 (एतत्मिन पश्चात् मात्र 'संहिता') में दिनांक 01.07.02 से लागू हुए संशोधन उपरांत संहिता के आदेश 18 नियम 4 (1) द्वारा उपबंधित किया गया है कि साक्षी का मुख्य परीक्षण शपथ पत्र पर ही होगा तथा उक्त प्रावधान के पठन से यह ज्ञात होता है कि अपील योग्य एवं अपील अयोग्य

प्रकरणों में कोई अन्तर नहीं रखा गया है जबकि संशोधन पूर्व संपूर्ण साक्ष्य न्यायालय के ही समक्ष प्रस्तुत किए जाना आवश्यक था।

माननीय सर्वोच्च न्यायालय द्वारा न्यायदृष्टांत *अमीर ट्रेडिंग कार्पोरेशन लिमिटेड विरूद्ध शापूरजी डाटा प्रोसेसिंग लिमिटेड, (2004) 1 एस.एस.सी. 702 = ए. आई. आर. 2004 एस. सी. 355* में यह प्रतिपादित किया गया है कि सभी प्रकरणों अर्थात अपील योग्य प्रकरणों एवं अपील अयोग्य प्रकरणों में वादी, प्रतिवादी और उनके साक्षियों का मुख्य परीक्षण शपथ पत्र पर ही होगा किन्तु दोनों मामलों में अपनायी जाने वाली प्रक्रिया में तात्विक भिन्नता है।

अपील अयोग्य प्रकरणों में शपथपत्र पर मुख्य परीक्षण अंकित कर प्रस्तुत करने मात्र पर न्यायालय उसे अभिलेख पर लेने हेतु सक्षम है एवं न्यायालय को मात्र शपथ पत्र प्रस्तुति का ज्ञापन अंकित करना होता है जबकि अपील योग्य प्रकरणों में न्यायालय के लिये यह आवश्यक है कि *नियम 5 में दर्शायी गई प्रक्रिया के अनुसार ऐसे प्रत्येक साक्षी को, जिसका शपथ पत्र पर मुख्य परीक्षण प्रस्तुत हुआ है, न्यायालय में आहूत् कर उसके शपथ पर कथन के माध्यम से यह सुनिश्चित करे कि प्रस्तुत शपथ पत्र की अर्न्तवस्तु उसके कहे अनुसार है एवं शपथ पत्र पर उसके हस्ताक्षर अंकित है। (सन्दर्भ अमीर ट्रेडिंग कार्पोरेशन, उपरोक्तानुसार)*

तदानुसार अपील योग्य प्रकरणों में मुख्य परीक्षण शपथ पत्र पर प्राप्त करने पर विचारण न्यायालय के लिये यह आवश्यक है कि उक्तानुसार प्रक्रिया का पालन करें ताकि भविष्य में उत्पन्न हो सकने वाली जटिलता से बचा जा सके।

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क्या भाड़ाक्रय करार (**Hire Purchase Agreement**) के अंतर्गत वाहन की खरीद किये जाने एवं किश्तों की राशि का नियमित भुगतान न करने पर धारा 406, 420 भारतीय दण्ड संहिता के अंतर्गत आपराधिक प्रकरण पंजीबद्ध किया जाना उचित होगा?

संविदा के प्रतिबंधों का पालन न किया जाना व्यवहारिक दायित्व का उल्लंघन है एवं उल्लंघन करने वाले पक्ष के विरूद्ध अपराधिक प्रकरण कायम किया जाना तब तक उचित नहीं होगा जब तक कि परिवादी द्वारा प्रथम दृष्टया यह न दर्शा दिया जाए कि दूसरे पक्ष द्वारा कपट पूर्ण तरीके से पीड़ित पक्ष को संपत्ति प्रदान करने हेतु प्रलोभित किया गया था। इस प्रकार जानबूझकर किए गए मिथ्या निरूपण के अवयव प्रथम दृष्टया पाए जाने पर ही उस पक्षकार के विरूद्ध अपराधिक प्रकरण पंजीबद्ध किया जा सकेगा जिसने भाड़ाक्रय की संविदा के प्रतिबंधों का उल्लंघन किया था। उक्त आशय का मत माननीय सर्वोच्च न्यायालय द्वारा *एल्पिक फायनेंस लिमिटेड विरूद्ध पी. सदाशिवन एवं अन्य, 2001 सी.आर.एल.जे. 217 में (सु.को.)* अभिव्यक्त किया गया है।

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क्या न्यायालय आपराधिक प्रकरण में निर्णय लेखन के समय चिकित्सकीय पुस्तकों के आधार पर प्रकरण में प्रस्तुत चिकित्सकीय साक्ष्य से विपरीत निष्कर्ष निकाल सकता है?

अनेकों बार यह देखा जाता है कि निर्णय लेखन के समय प्रकरण में उपलब्ध चिकित्सकीय राय को न मानते हुए भेषज विधि विज्ञान की पुस्तकों में दी गई राय को मान्यता दी जाती है एवं उसी के अनुसार प्रकरण

का निराकरण किया जाता है। माननीय सर्वोच्च न्यायालय ने अपने न्यायिक दृष्टांत *सुंदरलाल विरूद्ध मध्यप्रदेश राज्य, ए.आई.आर. 1954 सु. को. 28 एवं भगवान विरूद्ध राजस्थान राज्य, ए.आई.आर. 1957 सु. को. 589* में यह स्पष्ट अभिमत व्यक्त किया है कि भेषज विधि विज्ञान की पुस्तकों का हवाला निर्णय में लेने के पूर्व वांछित अंशों का सामना चिकित्सक से उसके साक्ष्य के दौरान कराया जाना चाहिए। इस प्रकार यह स्पष्ट है कि भेषज विधि विज्ञान की पुस्तकों का हवाला सीधे निर्णय में देकर चिकित्सक की साक्ष्य का खण्डन किया जाना उचित नहीं होगा एवं ऐसी पुस्तकों का उपयोग चिकित्सक साक्षी से उन अंशों का सामना कराया जाकर किया जा सकता है जो न्यायाधीश के मत में सही एवं तात्विक प्रतीत होते हैं।

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क्या न्यायालय पुलिस द्वारा किसी अपराध के संबंध में किये जा रहे अनुसंधान में हस्तक्षेप कर न्यायालय के मतानुसार प्रतिवेदन प्रस्तुत करने के निर्देश दे सकता है ? एवं क्या न्यायालय पुलिस को किसी व्यक्ति को गिरफ्तार करने के निर्देश दे सकता है?

किसी संज्ञेय अपराध के संबंध में पुलिस को अनुसंधान की विधिक अधिकारिता होती है एवं अन्वेषाधीन प्रकरण में वांछित अभियुक्त को गिरफ्तार करने के संबंध में भी पुलिस को विवेकाधिकार प्राप्त होता है।

न्यायालय को किसी अपराध के संबंध में पुलिस द्वारा किये जा रहे अनुसंधान में हस्तक्षेप करने की आधिकारिता प्राप्त नहीं है और न ही न्यायालय किसी अनुसंधानकर्ता अभिकरण (Investigating agency) को यह निर्देश दे सकता है कि वह न्यायालय के मतानुसार अपना प्रतिवेदन प्रस्तुत करे या प्रकरण समाप्त कर दे। इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा न्याय दृष्टांत *बिहार राज्य एवं अन्य विरूद्ध जे. ए. सलदाना एवं अन्य, ए.आई.आर. 1980 सु. को. 326* एवं *एम. सी. अब्राहम एवं अन्य विरूद्ध महाराष्ट्र राज्य एवं अन्य, 2003 एस.सी.सी. (क्रि.) 628* तथा माननीय मध्यप्रदेश उच्च न्यायालय द्वारा न्याय दृष्टांत *गिरराज शर्मा विरूद्ध मध्यप्रदेश राज्य एवं अन्य, 2006 (3) एम.पी.एच.टी. 4 (एन.ओ.सी.)* में प्रतिपादित विधिक सिद्धान्त अवलोकनीय है।

इसी प्रकार न्यायालय अन्वेषण के दौरान किसी अभियुक्त को गिरफ्तार करने का निर्देश भी नहीं दे सकता है और ऐसा करना अनुसंधान में अनुचित हस्तक्षेप करने के समान होगा क्योंकि गिरफ्तार करने की शक्ति अनुसंधान कर्ता अभिकरण के विवेकाधिकार के अंतर्गत आती है। (देखिये *एम. सी. अब्राहम – उपरोक्तानुसार)*

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नोटः– स्तंम्भ 'समस्या एवं समाधान' के लिये न्यायिक अधिकारी अपनी विधिक समस्याएं संस्थान को भेज सकते हैं। चयनित समस्याओं के समाधान आगामी अंकों में प्रकाशित किये जाएंगे– संचालक

PART - II

NOTES ON IMPORTANT JUDGMENTS

1. **SERVICE LAW :**
Disciplinary authority, power of while dealing with departmental appeal against order passed in D.E. – Appellate authority should consider the grounds raised by delinquent and to pass reasoned order – Law explained.
Ram Prasad Mandal v. Regional Manager, Central Bank of India Shahdol and others
Reported in 2006 (4) MPLJ 216

Held:

In regard to the challenge to the order of the appellate authority on the ground that the order being a non-speaking order is not sustainable, I find that appellate authority without adverting to the various grounds raised by the petitioner to challenge the enquiry proceedings, the order of enquiry officer and the order of disciplinary authority, has dismissed the petitioner's appeal merely by observing that in his view the disciplinary authority has applied its mind and has properly analysed all the facts brought in the enquiry and has arrived at the correct conclusion. In my view the appellate authority while considering the appeal against the order of dismissal is required to consider the grounds raised by the delinquent employee and is required to pass a reasoned order. The order of the appellate authority does not satisfy the aforesaid test, the order being passed mechanically without appreciating and considering the grounds raised by the petitioner is liable to be quashed.

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2. **EVIDENCE ACT, 1872 – Section 32 (1)**
Dying declaration – Whether statement of the deceased recorded u/s 161 Cr.P.C. and FIR recorded u/s 154 Cr.P.C. at his instance can be treated as dying declaration on his death? Held, Yes – Further held, police officer recording F.I.R. need not obtain certificate as to the mental fitness of the author.
Sharif Khan v. State of M.P.
Reported in 2006 (4) MPLJ 236

Held:

Having heard the learned counsel for parties and after perusing the entire record, we are of the considered view that the learned trial Court has not committed any illegality in relying upon Ex. P.1, FIR, Ex. P. 7, M.L.C. Report and Ex. P. 25, statement of the deceased as dying declarations of the deceased because the contents of all these three documents are admissible under section 32(1) of the Evidence Act which reads as under:–

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

In view of the aforesaid provision, since statements of the deceased mentioned in all the three documents are relating to cause of his death and the circumstances of the transaction which resulted in his death, therefore, these documents have been rightly considered as dying declaration of the deceased.

We are not impressed by the argument advanced by the learned counsel for appellant that at the time of recording of FIR (Ex. P.1), In vestigating Officer Shri Tambe (PW. 15) should have obtained certificate of fit state of mind of the deceased as the FIR was recorded in the hospital. For recording FIR, the provisions of section 154 of the Criminal Procedure Code are applicable which nowhere prescribed that when the FIR is recorded at the instance of the injured person, the police officer must obtain certificate of mental fitness of the author, to lodge FIR...

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3. SERVICE LAW :

Dismissal of employee for misappropriation, dishonesty or gross negligence, justifiability of – Held, dismissal in such situation justified.

Lal Saheb Singh v. M.P. Electricity Board, Rampur and another
Reported in 2006 (4) MPLJ 243

Held:

The Hon'ble Supreme Court of India in the case of *Divisional Controller, KSRTC (NWKRTC) vs. A.T. Mane, (2005)3 SCC 254,* was dealing with an employee's case who was found guilty of misappropriation. The Supreme Court held in paragraph 12 as under:–

> "Coming to the question of quantum of punishment, one should bear in mind the fact that it is not the amount of money misappropriated that becomes a primary factor for awarding punishment; on the contrary, it is the loss of confidence which is the primary factor to be taken into consideration. In our opinion, when a person is found guilty of misappropriating the corporation's funds, there is nothing wrong in the corporation losing confidence or faith in such a person and awarding a punishment of dismissal."

Earlier also, the Hon'ble Supreme Court in the case of *Karnataka State Road Transport Corpn. vs. B. S. Hullikatti, (2001) 2 SCC 574,* has held that the

act of the employee was dishonest or was so grossly negligent that the respondent therein was not fit to be retained as conductor. It also held that in such cases there is no place for generosity or misplaced sympathy on the part of the judicial forums and interfering therefor with the quantum of punishment.

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4. CRIMINAL TRIAL :
Appreciation of Evidence – Explanation of the injuries on the body of the accused – Where injuries are minor/superficial/simple or where evidence is clear and cogent, explanation not necessary.
Munna @ Ramnarayan and another v. State of M.P.
Reported in 2006 (4) MPLJ 248

Held:

We have gone through the entire judgment passed in case of *Laxmi Singh and ors. vs. State of Bihar, AIR 1976 SC 2263* and in this judgment, it is not the only ratio descidendi that if the prosecution is not explaining the injuries on the accused persons sustained in the same incident, the only irrefutable presumption against the prosecution would be that accused persons acted in right of private defence of their person. The Supreme Court has pointed out three inferences which can be drawn if the injuries were not explained by the prosecution; (1) the prosecution has suppressed the genesis and the origin of the occurrence; (2) denial of the witnesses about presence of injuries on the person of accused would be considered that they are not giving the true story of the incident, therefore, unreliable and (3) is that if defence gives a version which competes in probability with that of the prosecution, then, the benefit should be given to the accused. In this judgment, the Supreme Court has considered the earlier judgments reported in *AIR 1975 SC 1478, 1674 and AIR 1968 SC 1281.* The Supreme Court has also considered and held that *where the injuries sustained by the accused are minor and superficial or where the evidence is so clear or cogent, under such circumstance mere non-explanation of injuries by the prosecution would not affect its case".*

The total outcome of the Supreme Court judgment in *Laxmi Singh's case* (supra) is that if accused persons have suffered serious injuries and defence version also explained it, under that circumstance, the non-explanation of injury by the prosecution would be fatal and not in every case where the accused suffered minor and superficial injuries. We have mentioned the injuries suffered by appellants Khemchand and Harish and their injuries are minor and superficial whereas in the case of *Laxmisingh* (supra), one accused Moharrai sustained 13 injuries and Bharatrai sustained 14 injuries. They sustained incised injuries and punctured wound including other injuries and incident occurred in day time at 4 p.m. The appellants also specifically pleaded acting in right of private defence of their person (see para four of the judgment).

In the case at hand, incident occurred in night time. The appellants have not pleaded causing of injuries to deceased and the witnesses in exercise of right of private defence of their person and both the appellants sustained minor and superficial simple injuries on their person whereas deceased sustained as many as 40 injuries caused by hard and sharp object and also hard and blunt object (contused abrasions, incised wounds and stab wounds) and both the eye witnesses have also sustained injuries. Sonu (PW.11) has stated that appellant Khemchand @ Guddu was having *choori* having wooden handle, therefore, the injuries could be caused by hard and blunt object i.e. wooden handle also. *Now the settled legal position is that when accused suffers minor, superficial and simple injuries and same is not explained by the prosecution, it would not cause any damage to the prosecution case. [See (2004) 12 SCC 543, AIR 2004 SC 742, AIR 2004 SC 2688 and 4967).*

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5. LAND ACQUISITION ACT, 1894 – Section 28-A
Limitation u/s 28-A, computation of – Period should be computed from the date of award passed by the Court u/s 18 and not from the date of judgment by appellate court.
Harkrishna Pathak and others v. State of M.P.
Reported in 2006 (4) MPLJ 268

Held:

At this stage, we think it proper to clarify the issue that the limitation under section 28A has to be computed from the date of passing of the award by the 'Court' on a reference under section 18 and cannot be permitted to be computed from the date of the judgment passed by the Appellate Court in appeal i.e. High Court in the present case as per the law as laid down by several judgments of the Supreme Court and ultimately summarised in the case of *State of Tripura and another vs. Rupchand Das and others, (2003) 1 SCC 421* in paragraphs 5 and 6 which read as under:–

> "5. The principles laid down by a Bench of three learned Judges of this Court in *Pradeep Kumari, (1995) 2 SCC 736* were also followed in yet another decision of a Bench of three learned Judges in *Jose Aantonio Cruz Dos R. Rodriguese vs. Land Acquisition Collector, (1996) 6 SCC 746* observing as hereunder : (SCC pp. 749-50, para 4)
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> > "4. We may now refer to the case-law. A two-Judge bench of this Court in *Babua Ram vs. State of U.P., (1995) 2 SCC 689* dealt with this precise question and held that the period of limitation begins to run from the date of the first award made on a reference under section 18 of the Act, and successive awards cannot save the period of limitation; vide paragraphs 19 and 20 of the reporter. This view was reiterated by the same Bench in *Union of India vs. Karnail Singh, (1995) 2 SCC 728* wherein this Court held that the limitation of three months for an application for re-determination

of compensation must be computed from the date of the earliest award made by a Civil Court, and not the judgment rendered by an Appellate Court. This was followed by the decision of a three Judge Bench in *Union of India vs. Pradeep Kumari, (1995) 2 SCC 736* wherein it was held that the benefit under section 28A can be had within three months from the date of the award of the Reference Court on the basis whereof re determination is sought. The earlier two decisions in the case of *Babua Ram vs. State of U.P., (1995)2 SCC 689* and *Union of India vs. Karnail Singh, (1995) 2 SCC 728* were overruled on the limited question that they sought to confine the right to seek re-determination to the earliest award made by the Court under section 18 of the Act after the introduction of section 28-A into the Act. *There is, however, no doubt that the period of limitation has to be computed from the date of the Court's award under section 18 on the basis whereof re-determination is sought.* Admittedly, in both the cases at hand, the applications for re-determination of compensation under section 28-A were made long after the expiry of three months from the date of the award of the Court which constituted the basis for seeking re-determination. We are, therefore, of the opinion that the High Court was right in taking the view that both the applications were time-barred." (emphasis supplied)

6. The correctness of *Pradeep Kumari* case on this aspect when sought to be raised before the Constitution Bench in the batch of cases, including the appeals before us in *Union of India vs. Hansoli Devi, (2002) 7 SCC 273* it was observed : (SCC p. 283, para 12) "But since that question has neither been referred to us under the order of reference made in the present case nor does it arise in the case in hand, we refrain from answering the same." A review petition filed by the appellants herein before the Constitution Bench in these appeals viz RPs(C) Nos. 1437-38 of 2002, has also been dismissed. In the light of the above, we see no merit in the challenge made to the orders of the High Court. The appeals, consequently, fail and shall stand dismissed. No costs."

In view of the law as laid down by the Apex Court, we are of the considered opinion that the application filed by the applicants on 27-4-1998 under section 28A seeking re-determination of compensation after judgment of the High Court in the First Appeal and after a lapse of 17 years from the date of the passing of the award on 30.7.1981 is not entertainable and was rightly rejected by the authorities.

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6. **MOTOR VEHICLES ACT, 1988 – Sections 128 and 166**
Motor accident – Driving the motor cycle with two pillion riders – Head-on collusion between motor cycle and truck – Death of the driver of the motor cycle – Whether it is a case of contributory negligence on the part of motor cycle driver ? Held, Yes.
Kanti Devi Sikarwar and other v. Om Prakash and others
Reported in 2006 (4) MPLJ 291

Held:

It is admitted position on record that it is a case of head on collision and the deceased was driving the motorcycle with two pillion riders on the vehicle at the time of the accident. It is pointed out during the course of the arguments that section 128 of the Motor Vehicles Act provides about the safety measures for drivers and pillion riders, according to which no driver of a two-wheeled motorcycle shall carry more than one person in addition to himself on the motor-cycle and no such person shall be carried otherwise than sitting on a proper seat securely fixed to the motorcycle behind the driver's seat with appropriate safety measures. Therefore, it is clear that section 128 bars the riding of more than one pillion rider on the motorcycle. Thus, in this case it can be held that the deceased, who was driving the motorcycle in violation of the provisions of law, has also contributed to the negligence. Now the question is what should be the percentage of the aforesaid negligence. In the case of *Madhya Pradesh State Road Transport Corporation vs. Kumar Singh alias Kamal Singh, 2005 (2) T.A.C. 159 (M.P.)* in the similar circumstances this Court apportioned the responsibility at 70:30 between the driver of the bus and motorcyclist respectively. It was a case when the motorcyclist tried to overtake a jeep, an M.P. S.R.T.C. bus came and dashed against him. In this case also the offending truck was coming from the opposite side and dashed the motorcycle. In the similar circumstances in *M.A. 107/01, National Insurance Company vs. Smt. Uma Tiwari and others,* decided on *11.7.2006* we have also considered the ratio of negligence as 70:30 of the driver of the bus and motorcyclist. Therefore, considering the ratio decided in the aforesaid two cases and looking to the facts of this case that there was head on collision between the truck and motorcycle, we are of the opinion that the similar ratio of 70:30 should be applied in this case, as the facts of the cases are similar. When the deceased himself contributed to the negligence by making breach of law, it cannot be held that he was not liable for any negligence.

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7. **CRIMINAL PROCEDURE CODE, 1973 – Section 125**
Maintenance, grant of – Quantum of maintenance, factors to be considered – Amount whether payable from the date of order or from the date of application? Law explained.
Manju Raghuvanshi v. Dilip Singh Raghuvanshi
Reported in 2006 (4) MPLJ 302

Held:

Having held so, the next question would be as to at what rate the maintenance is to be granted to the petitioner. In the case of *Smt. Archana Tiwari v. Yogendra Mohan Tiwari, 1994 MPLJ 285* it has been held by a Bench of this Court that for granting maintenance allowance pendente lite several facts have to be taken into consideration. It has been held by the learned Judge that no hard and fast rule should be applied for allowing 1/5, 1/4 and 1/3 of the husband's income as maintenance. It is indicated in the aforesaid judgment that reasonable discretion should be exercised by the Court in the facts and circumstances of each case and no fixed rule can be applied in such manner. It has been indicated by the learned Judge that while awarding alimony under section 24 of the Hindu Marriage Act, the Court must keep in view that one cannot live like a lord and the other like a maid nor one can live like a princess and the other like a servant. It has been indicated that there must be some balance. It is clear from the aforesaid judgment that while granting relief of maintenance a balance has to be struck and the status of the husband and wife has to be taken note of. In the case of *Chitra Sen Gupta vs. Dhruba Jyoti Sengupta, AIR 1988 Calcutta 98* it is held that the amount which can be regarded to be sufficient to support the wife would depend on the status of the husband, the word "Income sufficient for her support" indicated under section 24 it has been held is that such amount which would be sufficient for the wife to meet out the expenditure for existence in a substantial level, keeping in view her status to which she is entitled. Similarly, in the case of *Nirmala Tiwari v. Shobharam Tiwari, 1986 (II) MPWN 118* it has been held by this Court that the maintenance is to be granted after taking note of the income of the husband and in this case it has been held that the wife is entitled for maintenance at the rate of 1/2 of the husband's income. The principle on the basis of the aforesaid judgment clearly indicates that maintenance is to be granted, not only based upon the income of the husband but it is also corelated to the social status of the parties.

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The Full Bench of this Court in the case of *Saroj Bai (Smt.) vs. Jai Kumar Jain, 1994 MPLJ (F.B.) 928=1994 JLJ 725 (Full Bench)* has considered the question of granting maintenance from a particular date and in para 15 of the aforesaid judgment after considering various judgments it has been held by the Court as under :–

> *"Even in a civil suit for future maintenance, the Court is required to pass decree for maintenance from the date of the suit. Ordinarily, Courts look to the state of affairs, prevailing on the date of the suit, where a litigation is prolonged unduly, either on account of the conduct of the opposite party, or on account of the heavy docket in Court or for other unavoidable reasons, it would be unjust and contrary to the very purpose of the provision to postpone the effectuation of the order to the date of the order. Such postponement deprives the claimant of the benefit of the fruits of a decree which he or she could have obtained through a*

Civil Court. Looking at the matter from this perspective also, there is justification to say that ordinarily the claimant who seeks an order for maintenance under section 125 of the Code shall obtain the relief from the date when she or he approached the Court i.e., the date of application and only where there are circumstances justifying a contrary view, it can be postponed to the date of the order."

It is clear from the aforesaid judgment that when litigation is prolonged unduly on account of conduct of the opposite party or on account to unavoidable reason, benefit cannot be denied to the claimant...

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8. CONTRACT ACT, 1872 – Section 8
Offer, acceptance of – Acceptance by conduct – Offer encashing the cheque sent by the offeror – Whether it amounts to acceptance by conduct? Held, Yes.
Bhagwati Prasad Pawan Kumar v. Union of India
Reported in 2006 (4) MPLJ 328

Held:

Section 8 of the Contract Act provides for acceptance by performing conditions of a proposal. In the instant case, the Railways made an offer to the appellant laying down the condition that if the offer was not acceptable the cheque should be returned forthwith, failing which it would be deemed that the appellant accepted the offer in full and final satisfaction of its claim. This was further clarified by providing that the retention of the cheque and/or encashment thereof will automatically amount to satisfaction in full and final settlement of the claim. Thus, if the appellant accepted the cheques and encashed them without anything more, it would amount to an acceptance of the offer made in the letters of the Railways dated 7.4.1993. The offer prescribed the mode of acceptance, and by conduct the appellant must be held to have accepted the offer and, therefore, could not make a claim later. However, if the appellant had not encashed the cheques and protested to the Railways calling upon them to pay the balance amount, and expressed its inability to accept the cheques remitted to it, the controversy would have acquired a different complexion. In that event, in view of the express non-acceptance of the offer, the appellant could not be presumed to have accepted the offer. What, however, is significant is that the protest and non-acceptance must be conveyed before the cheques are encashed. If the cheques are encahed without protest, then it must be held that the offer stood unequivocally accepted. An "offeree" cannot be permitted to change his mind after the unequivocal acceptance of the offer.

It is well settled that an offer may be accepted by conduct. But conduct would only amount to acceptance if it is clear that the offeree did the act which the intention (actual or apparent) of accepting the offer. The decisions which we have noticed above also proceed on this principle...

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9. TRANSFER OF PROPERTY ACT, 1882 – Section 54
Sale, validity of – Delivery of possession an essential ingredient of sale – Seller retaining the possession – Held, sale incomplete.
Dayawanti v. Smt. Sarula Bai and others
Reported in 2006 (4) MPLJ 346

Held:

Single Bench of this Court in the case of *Sujan Singh vs. Lalsahab and another, 1993 JLJ 552* has held that crucial element of "sale" evidently, is "ownership" to be transferred. It was further held that if the possession remains with the vendor and the price is not paid, it cannot be said to be sale of any immovable property and it will be open to show that sale was not intended. I am of the view that if the consideration was not paid or was not intended to be paid and the seller had retained possession of the property to enjoy the same, it cannot be said that ownership is passed on the execution of the document of sale-deed. On going through the judgment of the first Appellant Court it is gathered that there is categorical finding of fact that Parasram remained in possession of the suit property...

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10. CRIMINAL TRIAL :
WORDS AND PHRASES :
Sentencing – Minimum sentence – Imposition of less than minimum sentence for special reasons – "Special Reasons", meaning of.
State of M.P. v. Kalyan Singh
Reported in 2006 (4) MPLJ 350

Held :

Supreme Court repeatedly has held that in such circumstances only on recording adequate and special reasons for imposing sentence less than minimum prescribed sentence, which is ten yeas, can only be awarded, otherwise not. In the case of *Kamal Kishore vs. State of H.P., (2000) 4 SCC 502,* the age of the girl was 12 years and the accused was aged 25 years. The Supreme Court has held that the reasoning is given by the High Court for imposing lessor sentence of three years R.I. and fine of Rs. 10,000/- on the ground that since the offence took place ten years ago, the accused might have settled in life discarded and held that the same did not amount to adequate and special reasons under the provision and enhanced the sentence to 7 years imprisonment. Supreme Court placed reliance on the decision in the case of *State of Karnataka vs. Krishnappa, (2000) 4 SCC 75.* In that case the High Court had reduced the sentence of imprisonment to four years. Dr. A.S. Anand, C.J.I., as he then was, who authored the judgment of the Bench had stated thus :

> "The High Court justified the reduction of sentence on the ground that the accused-respondent was 'unsophisticated and illiterate citizen belonging to a weaker section of the society', that he was a chronic

addict to drinking and had committed rape on the girl while in a state of 'intoxication' and that his family comprising of 'an old mother, wife and children' were dependent upon him. These factors, in our opinion, did not justify recourse to the proviso to section 376 (2), Indian Penal Code to impose a sentence less that the prescribed minimum. These reasons are neither special nor adequate. The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. The socio/economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing Courts are expected to consider all relevant facts and a sentence bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence.

"There are no extenuating or mitigating circumstances available on the record which may justify imposing of any sentence less than the prescribed minimum on the respondent."

Supreme Court has further held in para 22 as under :–

"The expression "adequate and special reasons" indicates that it is not enough to have special reasons, nor adequate reasons disjunctively. There should be a conjunction of both for enabling the Court to invoke the discretion. Reasons which are general or common in many cases cannot be regarded as special reasons. What the Division Bench of the High Court mentioned (i.e. occurrence took place 10 years ago and the accused might have settled in life) are not special to the accused in this case or to the situation in this case. Such reasons can be noticed in many other cases and hence they cannot be regarded as special reasons. No catalogue can be prescribed for adequacy of reasons nor instances can be cited regarding special reasons, as they may differ from case to case.

Again in the case of *Dinesh alias Buddha vs. State of Rajasthan, (2006) 3 SCC 771, Om Prakash vs. State of Uttar Pradesh, 2006 AIR SCW 2814 and in the case of State of Madhya Pradesh vs. Santosh Kumar, 2006 AIR SCW 3608,* the question of imposition of proper sentence where the child was below the age of 12 years came up for consideration before the Supreme Court and in all the cases speaking for the Bench Hon'ble Justice Pasayat held that sentence must depend on the conduct of the accused, the state of and age of the victim and the gravity of the Criminal Act. Socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations. Crimes of

violence upon women need to be severely dealt with. Object of law to protect the society and deter the criminal to be achieved by imposing an appropriate sentence. Court to impose proper sentence commensurate with gravity of crime. When the rape was committed with the minor, there are no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum and the plea of leniency was wholly misplaced. The Court has further held:

> "Sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity – it degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person of a woman, it is a crime against the entire society. It destroys, as noted by this Court in *Bodhisatwa Gautam vs. Subhra Chakroborty,* the entire psychology of a woman and pushes her into deep emotional crises, it is a crime against basic human rights, and is also violative of the victim's most cherished fundamental right, namely, the right to life contained in Article 21 of the Constitution. The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized Judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisions."
>
> "The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable- Judicial response to human rights cannot be blunted by legal jugglery."
>
> "The Measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the Criminal Act. Crimes of violence upon women need to be severely dealt with. The Socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing Courts

are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The Courts must hear the loud cry for justice by society in cases of the heinous crime of rape on innocent helpless girls of tender years, as in this case, and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court. There are no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum on the respondent. To show mercy in the case of such a heinous crime would be a travesty of justice and the plea for leniency is wholly misplaced."

In the case of *Santosh Kumar* (supra), the age of the prosecutrix was under 12 years. The High Court reduced the sentence indicating the reason that he was of the young age and the fact that he belongs to the Scheduled Tribes and the Supreme Court has held that the same can by no stretch of imagination be considered either adequate or special reason. Requirement of law is cumulative and set aside the judgment of the High Court and restored the order of the trial Court.

In this case too no doubt the age of victim is five years. She is below 12 years of age. The age of the appellant was more than 26 years. He was a fully grown up man. He was fully knowing the consequences of committing the offence with a minor and immature child of five years. When the child was found under the tree her condition was very critical. In the opinion of both the lady doctors, it was a case in which rape was committed with the child. She remain hospitalized and even was unable to give statement before the Court. She was having only five plus five milk teeth. The trial Court has only assigned the reason that he was a young man and could not restrain himself from the sexual lust and therefore committed the offence. This reason cannot be said to be adequate and special reason for reducing the sentence...

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11. STAMP ACT, 1899 – Section 11 (b)
M.P. STAMP RULES, 1942 – Rule 17
Promissory note, stamping of – Whether pronote with adhesive stamp bearing inscription 'revenue' is valid? Held, Yes.
Premraj v. Suresh Chandra Jain
Reported in 2006 (4) MPLJ 356

Held:

In the case of *Ismail Khan v. Ram Prakash Verma, 2000 (2) MPLJ 104* a Bench of this Court has considered the provisions of section 11(b) of the Stamp Act, 1899 along with requirements of Rule 17 of the Madhya Pradesh Stamp Rules, 1942 and after considering the aforesaid statutory provision and taking note of certain decision rendered by this Court vide order dated 30th September,

1992 in *C.R. No. 392 of 1971, Kailash Chandra and others vs. Lakhmichand and another, in paragraph 9,* it has been held by the learned Court as under:

> "Considering the facts of the case, it is settled position that no adhesive stamp can be affixed on the pro notes executed within the territory of India and only adhesive stamps bearing inscription "Revenue" should be used."

The aforesaid finding is recorded on the basis of the observations and finding recorded by this Court in the case of *Kailash Chandra and others* (supra) wherein the learned Court has observed as under:

> "....On the contrary, if Rules 13 (f) and 17 are read together, it is quite clear that on pro-notes only adhesive stamps bearing inscription "revenue" should be used. I do not, therefore, find any substance in the contention of the petitioners that the pro-note in question was not properly stamped. I may note here that Rule 3 has been subsequently amended so as to include revenue stamps issued by Government of India amongst the stamps that can be validly used. There is no controversy on this point."

It is clear from the aforesaid enunciation of law laid down by this Court in the case of *Ismail Khan (supra),* so also, *Kailash Chandra and others* (supra) that in a promissory note the only adhesive stamp bearing inscription "revenue" can be used. It is also indicated that after amendment to Rule 3, the revenue stamp issued by the Government of India can also be validly used. The question, therefore, now is what is the nature of the stamp used in the promissory note in question, Exhibit P/3. A perusal of the promissory note in question, Exhibit P/3 indicates that five adhesive stamps issued by the Government of India with a mark "revenue" were affixed on the promissory note. Once it is seen that the promissory note is executed by using adhesive stamps with the inscription "revenue" the same is in conformity with the requirements of the law laid down by this Court in the case of *Ismail Khan (supra)* and *Kailash Chandra and others (supra)....*

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12. EVIDENCE ACT, 1872 – Section 68
Will, proof of – Law explained.
Keshav Prasad and another v. Smt. Bhuwani Bai and another
Reported in 2006 (4) MPHT 338

Held:

The Supreme Court in the case of *Girja Datt Singh vs. Gangotri Datt Singh, AIR 1955 SC 346,* has held in Para 14 that in order to prove the due attestation of the Will the propounder of Will has to prove by examining attesting witnesses that the attesting witnesses saw the testator signing the Will and they themselves signed the same in the presence of the testator. Since it has not come in the testimony of the attesting witnesses that they have signed the Will in presence

of testator Kaushalya Bai, I am of the view that the Will and its attestation is not duly proved. The Supreme Court in another decision, *Kashibai vs. Parwatibai, 1995 AIR SCW 4631,* has reiterated the same principle which has been laid down by the Apex Court earlier in the case of *Girja Datt Singh* (supra) Shri A.K. Mathur, Chief Justice of this Court (as His Lordship then was) in the case of *Mannudas vs. Govindas and others, 1997 (2) Vidhi Bhasvar 199,* by following the decision laid down by Supreme Court in the case of *Kashibai* (supra), has held that the attestation of the Will should be duly proved and it should come in the evidence in the attesting witnesses that not only the testator has put his/her thumb impression in presence of the attesting witnesses but the attesting witnesses have also signed the Will in presence of the testator. Since the attesting witnesses, Ramnath Pathak (D.W. 3) and Ramnarayan (D.W. 4) have at all not stated that they also signed the Will in presence of the testator, the due attestation of the Will has not at all been proved.

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13. LIMITATION ACT, 1963 – Section 5
Condonation of delay – Delay in filing appeal due to impersonal State machinery and bureaucratic delay – Court should give certain amount of latitude for these factors while considering prayer for condonation – Law explained.
State of M.P. and others v. Rajiv Gupta and another
Reported in 2006 (4) MPHT 377

Held :

The Supreme Court in case of *G. Ramegowda, Major vs. Special Land Acquisition. Officer, AIR 1988 SC 897* has held thus:-

> "The law of limitation is, no doubt, the same for a private citizen as for Governmental authorities. Government, like any other litigant must take responsibility for the acts or omissions of its officer. But a somewhat different complexion is imparted to the matter where Government makes out a case where public interest was shown to have suffered owing to acts of fraud or bad faith on the part of its officers or agents and where the officers were clearly at cross-purposes with it. Therefore, in assessing what, in a particular case, constitutes 'sufficient cause' for purposes of Section 5 it might, perhaps, be somewhat unrealistic to exclude from the considerations that go into the judicial verdict, these factors which are peculiar to and characteristic of the functioning of the Government. Governmental decisions are proverbially slow encumbered, as they are, by a considerable degree of procedural-red-tape in the process of their making. A certain amount of latitude is, therefore, not impermissible."

In yet another case of *State of Haryana vs. Chandra Mani, AIR 1996 SC 1623,* it has been held thus:–

"When the State is an applicant, praying for condonation of delay, it is common knowledge that on account of impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file pushing, and passing-on-the buck ethos, delay on the part of the State is less difficult to understand though more difficult to approve, but the State represents collective cause of the community. It is axiomatic that decisions are taken by officers/agencies proverbially at slow pace and encumbered process of pushing the files from table to table and keeping it on table for considerable time causing delay intentional or otherwise is a routine. Considerable delay or procedural red tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression "sufficient cause" should, therefore, be considered with pragmatism in justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of the Governmental conditions would be cognizant to and requires adoption of pragmatic approach in justice-oriented process. The Court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State *vis-a-vis* private litigant could be laid to prove strict standards of sufficient cause. The Government at appropriate level should constitute legal cells to examine the cases whether any legal principles are involved for decision by the Courts or whether cases require adjustment and should authorise the officers take a decision or give appropriate permission for settlement. In the event of decision to file appeal needed prompt action should be pursued by the officer responsible to file the appeal and he should be made personally responsible for lapses, if any. Equally, the State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or application since he is a person legally injured while State is an impersonal machinery working through its officers or servants.

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14. FAMILY COURTS ACT, 1984 – Section 18
Decree for restitution of conjugal rights, execution of – Reasonable cause to live separately because of bitter relations – Court can refuse to execute decree.
Shailendra Koshti v. Smt. Kavita Koshti
Reported in 2006 (4) MPHT 391

Held:

Decree of restitution of conjugal rights can be executed as against the property of party refusing to comply with it without there being reasonable cause. The Apex Court in *Smt. Saroj Rani vs. Sudarshan Kumar Chadha, AIR 1984 SC 1562* held thus:–

> "17. It is significant to note that unlike a decree of specific performance of contract, for restitution of conjugal rights, the sanction is provided by Court where the disobedience to such a decree is wilful, i.e. is deliberate, in spite of the opportunities and there are no other impediments, might be enforced by attachment of property. So the only sanction is by attachment of property against disobedience of a decree for restitution of conjugal rights where the disobedience follows as a result of a wilful conduct, i.e., where conditions are there for a wife or a husband to obey the decree for restitution of conjugal rights but disobeys the same in spite of such conditions, then only financial sanction, provided he or she has properties to be attached, is provided for. This is so as an inducement by the Court in appropriate case when the Court has decreed restitution for conjugal rights and that the Court can only decree if there is no just reason for not passing decree for restitution of conjugal rights to offer inducement for the husband or wife to live together in order to give them an opportunity to settle up the matter amicably. It serves as social purpose as an aid to the prevention of break up of marriage. It cannot be viewed in the manner the learned Single Judge of Andhra Pradesh High Court has viewed it and we are therefore, unable to accept the position that Section 9 of the said Act is violative of Art. 14 or Art. 21 of the Constitution if the purpose of the decree for restitution of conjugal rights in the said Act is understood in its proper perspective and if the method of its execution in cases of disobedience is kept in view."

In view of the aforesaid dictum, it is clear that in case there is reasonable cause not to live together after restitution of conjugal rights decree, parties cannot be forced to live together and execution of the decree can be declined. In the instant case, when facts are considered, case of dowry prohibition has reached the advance stage against the petitioner, his parents and brother, evidence has already been recorded, yet another case under Section 306 of IPC is pending consideration against husband and husband has also filed case under Sections 420, 467 and 468 against the wife and case for divorce filed by wife is also pending. Thus, in the circumstances it cannot be said that refusal to live together is not based on reasonable cause. There is reasonable cause to live separately, hence the learned Family Court is right in not executing the decree, thus I find no merit in this petition...

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15. CRIMINAL TRIAL :

Appreciation of evidence – Principle of *falsus in uno falsus in omnibus*, applicability of – Whether a sound rule of evidence and applicable in India? Held, No – Law explained.

Syed Ibrahim v. State of Andhra Pradesh

Reported in 2006 (2) ANJ (SC) 372

Held:

Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by P.W. 1 to a large extent to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of false us in uno falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient, or to be note wholly credible. Falsity of material particular would not ruin it from the beginning to end. The maxim *"falsus in uno falsus in omnibus"* has no application in India and the witness or witnesses cannot be branded as liar (s). The maxim *"falsus in uno falsus in omnibus"* has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence' (See: *Nisar Ali vs.The State of Uttar Pradesh [AIR 1957 SC 366]*). In a given case, it is always open to a Court to differentiate accused who had been acquitted from those who were convicted where there are number of accused persons. (See: *Gurucharan Singh and Anr. vs. State of Punjab [AIR 1956 SC 460]*. The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be shifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See: *Sohrab S/o Beli Nayata and Anr. vs. The State of Madhya Pradesh [1972 (3) SCC 751]* and *Ugar Ahir and Ors. vs. The State of Bihar [AIR 1965 SC 277]*). An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where

it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See: *Zwinglee Ariel vs. State of Madhya Pradesh [AIR 1954 SC 15] and Balaka Singh* and *Ors. vs. The State of Punjab [1975 (4) SCC 511]*). As observed by this Court in *State of Rajasthan vs. Smt. Kalki and Anr. [1981 (2) SCC 752]*, normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted in *Krishna Mochi and Ors. vs. State of Bihar etc. [2002 (6) SCC 81] and in Sucha Singh vs. State of Punjab [2003 (7) SCC 643]*. It was further illuminated in the *Zahira H. Sheikh vs. State of Gujarat [2004 (4) SCC 158], Ram Udgar Singh vs. State of Bihar [2004 (10) SCC 443], Gorle S. Naidu vs. State of Andhra Pradesh [2003 (12) SCC 449] and in Gubbala Venugopalswamy vs. State of Andhra Pradesh [2004 (1) SCC 120]*.

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16. INDIAN PENAL CODE, 1860 – Section 376
Rape – Necessary ingredients to constitute rape – Absence of injury on victim's private parts does not belie her testimony – Law explained.
State of Tamil Nadu v. Ravi @ Nehru
Reported in 2006 (2) ANJ (SC) (NOC) 132

Held:

In the case of *Madan Gopal Kakkad vs. Naval Dubey, (1992) 3 SCC 204*, the accused was charged with the rape of minor girl of eight years. This Court held that even slightest penetration of penis into vagina without rupturing the hymen would constitute rape.

We may also notice the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty First Edition) at page 369 which reads thus:

> "Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative

facts in his report, but should not give his opinion that no rape had been committed. Rape, is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one".

In Parikh's Textbook of Medical Jurisprudence and toxicology, the following passage is found:

> "Sexual intercourse: In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

In Encyclopaedia of Crime and Justice (Vol. 4) at page 1356, it is stated:

".... even slight penetration is sufficient and emission is unnecessary."

It is now well-accepted principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. It is also well accepted principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence. The woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion treating her as if she were an accomplice. [See *State of Punjab vs. Gurmit Singh (1996) 2 SCC 384*].

So also in the case of *Ranjit Hazarika vs. State of Assam, (1998) 8 SCC 635,* this Court observed that non-rupture of hymen or absence of injury on victim's private parts does not belie the testimony of the prosecutrix.

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17. INDIAN PENAL CODE, 1860 – Section 374
CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986
Unlawful compulsory labour – Employment of child aged about 13 years for domestic labour professedly under agreement – Held, child being minor, agreement regarding his employment totally void apart from being violative of Act of 1986.
State of M.P. v. Sumitrabai & Ors
Reported in 2006 (2) ANJ (MP) 404

Held:

... Even under the provisions of Child Labour (Prohibition and Regulation) Act, 1986, employment of children below 14-15 years has been prohibited by the aforesaid Act as well as under various other Acts. The age of the child has been defined under the aforesaid Act as a person who has not completed

fourteen years of age. Though, the provisions of the said Act are not applicable in this case, but for forced domestic labour provisions of S. 374, IPC will be applicable. Admittedly, at the time of incident, victim Prakash was a minor and was below 14 years. Even under general law, a contract or agreement with a minor is void. Therefore, acquittal of respondents on the ground that there was an agreement between respondents and Prakash for domestic work prima facie appears to be illegal. Even his father could not have entered into such kind of agreement or contract for minor. It is nobody's case that Prakash had not worked or he was not sent to Delhi to work forcibly. Sufficient and reliable evidence is available on record against the respondent for unlawfully taking compulsory labour from minor Prakash. Even Bhanwar Singh (D.W. 1) has admitted in his cross-examination that Prakash was working in the house of respondent No.1– Sumitrabai and he is the son of Ramcharan. Ramcharan had taken money from Sumitrabai and some money was due from Ramcharan. Therefore, even from the evidence of Bhanwar singh (D.W.1), it is found proved that money was due and from the prosecution evidence it is also found proved that Prakash was unlawfully compelled to work as a forced and compulsory labourer in lieu of some money which was taken by his father. If minor Prakash was forcefully compelled to work or labour it constitute an offence punishable under S.374 IPC.

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18. CRIMINAL PROCEDURE CODE, 1973 – Section 438
Open ended order of anticipatory bail, duration of – Such order in absence of any conditions restricting the liberty of the accused remains in force till the trial is concluded – Law explained.
Golu Rajak and another v. State of M.P.
Reported in 2006 (III) MPWN 58

Held:

Learned counsel for the appellants submits that the appellants in compliance of the order furnished bail before the concerned police but when they appeared before the Learned Magistrate at the time when the police filed the charge sheet, it was observed by the Learned Magistrate that the aforesaid order for grant of anticipatory bail was not meant for the Court, though for some technical reasons the charge sheet was returned, therefore, the appellants were not taken into custody.

In the aforesaid circumstances, the applicants have moved the present application for modification/clarification of the bail order dated 9.3.2006. In the present context it is made clear that since the order directing release of the applicants on anticipatory bail was unconditional and was not an interim order, it is to be deemed that the bail order shall continue till the end of the trial. In fact when the accused is enlarged on bail under section 438 CrPC, though the order is passed in anticipation of arrest, but it takes effect only after the accused is arrested. Therefore, in the absence of any conditions restricting the liberty of

the accused, it is to be deemed that the order granting bail shall remain in force even after filing of the charge sheet and till the trial as concluded unless it is cancelled under section 437 (5) & 439 (2) of the Code of Criminal Procedure.

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19. CIVIL PROCEDURE CODE, 1908 – Order XXVI Rule 9
Commissioner, appointment of for spot inspection – Though Commissioner cannot be deputed to collect evidence but it can be for elucidating any matter in dispute by local investigation.
Suryabhan Singh v. State of M.P.
Reported in 2006 (III) MPWN 42

Held:

The counsel for the petitioner stated that since the dispute pertaining to Khasra No. 538/3, 539/1 owned by the petitioner plaintiff Suryabhan Singh who claimed to be in possession of the same, respondent No.2 Rambahore Singh challenged the possession in his written statement as well as the ownership and some portions of the said Khasra. Hence the petitioner filed an application for appointment of Commissioner which was essential under the circumstances to resolve the dispute. Relying on Nagpur L.J. 1953 Note 230, as well as Hari *Charan v. Ghanshyam Das [MPWN 1988 (2) 23 and Vimla Devi (Smt.) v. Smt. Shanti Bai (MPWN 1999 (1) 193]* whereby this Court has held that when there was controversy raised regarding the plaint map and not resolved, interference could be made by the Court and when there was no agreed map filed, identity of disputed land, encroachment also denied the appointment of the local Commissioner was essential. Counsel also relied on *Basanta Kumar Swain v. Baidya Kumar Parida and others [AIR 1989 Orissa 118]* and stated that the appointment of a Commissioner by the trial Court in exercise of its power cannot be made to assist a party to collect the evidence where it can get the evidence itself. The object however is for elucidating any matter in dispute by local investigation at the spot. Where on the evidence of experts on record, the Court is satisfied that for appreciating the opinion of expert evidence, it should appoint an expert as Commissioner.

Counsel for the respondents on the other hand has stated that *Basanta Kumar* (supra) itself cautions that where the Court is Satisfied with the material available on record the power should not be exercised to create evidence. Whether a party is able to produce the desired evidence or not is dependent on the facts of each case. Relying on *Chunnilal v. Ramchandra (MPWN 2002 (I), 105]* whereby this Court has held that a commission cannot be issued to ascertain actual possession after disputed property, evidence cannot be collected by issuance of commission, that such an issue can be decided by the Court itself on the basis of evidence and further relied on another case *Babu Khan v. Kaptan Singh [1980 (2) MPWN 261]* where the Court had observed thus:

> "The Court cannot delegate to the Commissioner the trial of any material issue which it is itself bound to try. In other words a Judge

cannot depute to a Commissioner the functions which he can and should discharge himself. When the Court is faced with the problem as to who is in possession of the disputed immovable property, the problem has to be solved by the Court on the basis of the evidence on record."

And the Court had set aside the order appointing the Commissioner.

This Court has also consistently taken the view that appointment of Commissioner is to the discretion of the trial Court. Relying on *Laxman v. Ramsingh [MPWN 1982 255]* whereby this Court held that the relief claimed was discretionary and if the Court below had exercised jurisdiction then by exercising that discretion it could not be said that the Court had committed error of jurisdiction by rejecting that application. Considering Rule 9 of Order 26 CPC the language itself is very equivocal in its terms as it states that any suit in which the *Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute,* the Court may issue a commission to such person as it thinks fit directing him to make such investigation and report thereon to the Court. Thus, since the nature of the relief is purely discretionary in nature and then when the Court below was satisfied that the appointment of the Commissioner was not necessary under the circumstances and the application was an after thought to collect evidence then such an order cannot be interfered with.

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20. MOTOR VEHICLES ACT, 1988 – Section 149
Vehicle (jeep) insured for private purpose being used for carrying passengers – Jeep colliding with another vehicle (Maruti van) – Whether insurer of Jeep exonerated from liability in respect of the person travelling in Maruti? Held, Yes – Further held, Insurance Company should make good the award and recover the amount from owner of the jeep.
Krishnapal Singh v. Gulzar Singh and others
Reported in 2006 (III) MPWN 47

Held:

Next issue that arises for consideration is whether the Tribunal has correctly absolved the insurance company. Submission of Mr. Lalwani is that there has been no breach of policy. It is noteworthy to mention here that the policy was taken for the purpose of private use. The permit was obtained from the RTA to ply the vehicle from Tilwara to Gaur Nadi as 'Nagar Vahan Seva'. Two aspects have emerged, as is perceivable from the award. The insurance policy was in vogue at the time of accident and second, the policy clearly stipulated that the policy was for private use. In addition, the permit was granted to ply the vehicle from Tilwara to Gaur Nadi but the accident occurred at National Highway, village Bheda near Sleemnabad. Thus, the route was not covered by the permit. In the case of *National Insurance Co. Ltd. v. Kusum Rai and others [2006 (II) MPWN*

129 = 2006 AIR SCW 1649] a two-Judge Bench of the Apex Court came to hold that where a driver was holding the licence to drive light motor vehicle and not possessing any licence to drive commercial vehicle there was breach of condition of contract of insurance. Their Lordships referred to section 149 of the Act and thereafter in paragraph 10 of the judgment held thus:

> "10. In has not been disputed before us that the vehicle was being used as a taxi. It was, therefore, a commercial vehicle. The driver of the said vehicle, thus, was required to hold an appropriate licence therefor. Ram Lal, who allegedly was driving the said vehicle at the relevant time, as noticed hereinbefore, was holder of a licence to drive a Light Motor Vehicle only. He did not possess any licence to drive a commercial vehicle. Evidently, therefore, there was a breach of condition of the contract of insurance. The appellant, therefore, could raise the said defence."

Though the aforesaid decision was delivered in a different context, yet the same can be treated to be applicable to the obtaining factual matrix of the present case inasmuch as there has been two violations, carrying passengers in a route in respect of which there was no permit and further the vehicle was insured for the purpose of private use but being used for commercial purpose. The said fact was not made known to the insurance company and the insurance was not taken in that regard. In view of the aforesaid, we have no hesitation in our mind that there has been breach of contract of insurance and the insurance company has rightly taken defence and the Tribunal has correctly absolved the insurance company.

The next aspect that arises for consideration whether a direction can be issued to the insurance company to pay and recover. Submission of Ms. Asgari Khan is that there has been violation of policy and hence, direction should not be given to pay and recover. This Court in MA No. 79/2002 (*Oriental Insurance Company Limited v. Harish Kumar and others)* after taking note of the decisions rendered in the cases of *United India Insurance Co. Ltd. v. Tilak Singh and others (2006 AIR SCW 1822), Jay Rai and another v. Kalu Ram and others (2005 (2) DMP 105 (MP)] Shanti and others v. Awadh Narayan Jaiswal (MP No. 1239/ 2000)* and *Promod Kumar Agrawal and another v. Mushtari Begum (Smt.) and another [(2004) 8 SCC 667], National Insurance Company Ltd. v. Chinnamma and others [(2004 8 SCC 697], National Insurance Co. Ltd. v. Bommithi Subbhamma and others [2005 ACJ 721], National Insurance Co. Ltd. v. Kusum Rai and others [2006 AIR SCW 1649]* expressed the view that the law laid down in the cases *of Baljit Kaur (supra) and Pramod Kumar Agrawal* (supra) shall still hold the field. Therefore, we are inclined to direct the insurer to make good the award and thereafter proceed to recover the amount from the owner as per law.

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21. PREVENTION OF CORRUPTION ACT, 1988 – Section 49
Sanction to prosecute, proof of – Being public document, it can be proved in terms of Ss. 76 to 78 of Evidence Act.
State v. K. Narasimhachary
Reported in AIR 2006 SC 628

Held:

A bare perusal of the order of sanction shows that the allegation as against the Respondent herein for taking into consideration that the Government of Andhra Pradesh, who was the competent authority to remove the said Sri K. Narasimha Chari, Mandal Revenue Inspector, Cuddapah, from the Government Service, after fully and carefully examining the material placed before them in respect of the said allegations and having regard to the circumstances of the case considered that the Respondent should be prosecuted in the court of law where upon the order of sanction was issued in the name of the Governor. Shri N. Madanmohan Reddy Secretary to the Government, merely authenticated the said order of sanctions, which was issued in the name of the Governor of Andhra Pradesh. The order of sanction was, thus, issued by the State in discharge of its statutory functions in terms of Section 19 of the Act. The order of sanction was authenticated. The said order of sanction was an executive action of a State having been issued in the name of the Governor. It was authenticated in the manner specified in the Rules of Executive Business. The authenticity of the said order has not been questioned. It was, therefore, a public document within the meaning of Section 74 of the Indian Evidence Act. PW-6 proved the signature of Shri N. Madanmohan Reddy. He identified his signature. He was not cross-examined on the premise that he did not know the signature of Shri N. Madanmohan Reddy. In answer to the only question put to him he stated "By the time the secretary signed in Ex p. 17, I was in G.A.D."

Nothing was, thus, elicited in the cross-examination of the said witness to show that he was not a competent witness to identify the signature of Shri Madanmohan Reddy.

The Respondent, therefore, allowed the said document to be exhibited without any demur. He did not question the admissibility of the said document before the Trial Court, either when the same was exhibited or at the final hearing before the trial Court. He, therefore, could not be permitted to question the admissibility of the said document for the first time before the appellate court. [See *Ranvir Singh and another v. Union of India, 2005 AIR SCW 4565; 2005 (7) SCALE 238*].

A public document can be proved in terms of Sections 76 to 78 of the Evidence Act. A public document can be proved otherwise also. The High Court, therefore, was not correct in invoking the provisions of Sectior 47 of the Indian Evidence Act in the instant case as it was not called upon to form an opinion as to by whom the said order of sanction was written and signed.

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22. PREVENTION OF FOOD ADULTERATION ACT, 1954 – Section 13 (2) Sending copy of Public Analyst's report to accused, effect of non-compliance of S.13 (2) – Law explained.
Kiran Kumar v. State of M.P.
2006 (III) MPWN 75

Held :

Hon'ble Supreme Court in the case of *T.V. Usman v. Food Inspector, Tellicherry Municipality, Tellicherry* [AIR 1994 SC 1818], considered the effect of non-compliance of provision of section 13 (2) of the Act. In paragraph 14 of the judgment Hon'ble Supreme Court laid down the law on this point as under:

> "No doubt, sub-section (2) of section 13 of the Act confers valuable right on the accused under which provision the accused can make an application to the Court within a period of 10 days from the receipt of copy of the report of Public Analyst to get the samples of food analysed in the Central Food Laboratory and in case the sample is found by the said Central Food Laboratory unfit for analysis due to decomposition by passage of time or for any other reasons attributable to the lapses on the side of prosecution, that valuable right would stand denied. This would constitute prejudice to the accused entitling him to acquittal but mere delay as such will not per see be fatal to prosecution case even in cases where the sample continues to remain fit for analysis inspite of the delay because the accused is in no way prejudiced on the merits of the case in respect of such delay. Therefore it must be shown that the delay has led to the denial of right conferred under section 13 (2) and that depends on the facts of each case and violation of the time limit given in sub-rule (3) of rule 7 by itself cannot be a ground for the prosecution case being thrown out."

Hon'ble Supreme Court clearly laid down that non-supply of copy of report of Public Analyst under section 13 (2) of the Act constitute prejudice to the accused then entitled him acquittal. In the case of *Rameshwar Dayal v. State of U.P.* [1996 (2) PFA page 197] it has been again held that non-supply of the report of Public Analyst to the accused caused him serious prejudice. In the case of *State of Orrisa v. Gouranga Sahu* [2002 FAJ page 490] in paragraph 4 again it has been held that mere dispatch of the report is not enough and that the prosecution is further obliged to prove that the letter so dispatched had reached the addressee accused. It has been observed that forwarding a copy of the report is not only a ritual, but a statutory requirement to be mandatorily observed in all the cases. Dispatch of such a report it is intended to inform the accused of his valuable right to get the other sample analyzed from the Central Food Laboratory.

Therefore, on the basis of law laid down by the Supreme Court it is held that it was the duty of the prosecution to prove that the report along with notice under section 13 (2) has really been reached to the office or residence of the applicant accused and without any proof of service or any material regarding

such service it cannot be held that the notice along with copy of the report was served upon the applicant....

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23. INDIAN PENAL CODE, 1860 – Section 420
Cheating – Ingredients of offence of cheating – Law explained.
Bank of Rajasthan v. Panama Chemical Works and others
Reported in 2006 (III) MPWN 85

Held :

In the matter of *Ram Narain Poply v. Central Bureau of Investigation (2003 CrLJ 480)* in para 366, the apex court has held that, "the offence of cheating is made of two ingredients. Deception of any person and fraudulently or dishonestly inducing that person to deliver any property to any person or to consent that any person shall retain any property. To put it differently, the ingredients of the offence are that the person deceived delivers to someone a valuable security or property, that the person so deceived was induced to do so, that such person acted on such inducement in consequence of his having been deceived by the accused and that the accused acted fraudulently or dishonestly when so inducing the person. To constitute the offence of cheating, it is not necessary that the deception should be by express words, but it may be by conduct or implied in the nature of the transaction itself."

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24. EVIDENCE ACT, 1872 – Section 25
Statement made to Narcotics Officer – Whether inadmissible because of the provisions of S.25? – Held, No.
Mangilal v. Central Narcotics Bureau, Neemuch
Reported in 2006 (III) MPWN 90

Held:

Statements of appellant Mangilal and co-accused Om Prakash were also recorded on the spot. Appellant Mangilal in his statement Ex. P-15, which was recorded by Rajendra Kumar Rajak PW 6, has stated that the he was carrying the opium along with co-accused Om Prakash for its delivery to one Sherukhan R/o Bhilwada. The statement has been proved by witness Rajendra Rajak and is admissible and not being confessional statement given to a police officer and being a statement recorded by officer of Narcotics Department. As held by Hon'ble Supreme Court in the case of *Raj Kumar Karwal v. Union of India and others [AIR 1991 SC 45]* that "because Narcotics Officer does not possess all the powers of a police officers and he is not a police officer within the meaning of section 25 of the Evidence Act hence confession to such officer does not hit by section 25 of the Evidence Act and can be read in evidence."

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25. MOTOR VEHICLES ACT, 1988 – Sections 166 and 168
Whether widow having her own income is disentitled to claim reasonable compensation for death of her husband? Held, No – Law explained.
Chanda Devi (Smt.) and others v. Pradeep Kumar and others
Reported in 2006 (III) MPWN 122

Held:

At the outset, we are constrained to hold that we do not agree to the absurd reasoning recorded by the Tribunal while declining to award any compensation to the claimants on the ground that firstly, they are not dependent on the deceased and secondly, they have their own income. To say the least, the reasoning is perverse. Admittedly, the claimants are none other than the widow and minor children of deceased who died at such young age of 40. Apart from the fact that claimants are the real legal representatives of deceased under the Succession Act, they are equally dependent upon their sole bread earner. Merely, because the wife had some income does not disentitle her to claim reasonable compensation for the death of her husband who died in vehicle accident. We, therefore, upset the finding of Tribunal recorded in para 17 of the impugned award.

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26. CRIMINAL PROCEDURE CODE, 1973 – Section 321
Withdrawal from prosecution – Discretion to withdraw is that of Public Prosecutor and none else – Law explained.
Ghanshyam v. State of M.P. & others
Reported in 2006 (3) JLJ 336 (SC)

Held:

The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to any one. The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant factors as well in order to further the broad ends of justice, public order, peace and tranquillity. The High Court while deciding the revision petition clearly observed that the material already available on record was insufficient to warrant conviction. The flow of facts and the possible result thereof as noticed by the Public Prosecutor and appreciated by the Courts below, constituted the public interest in the withdrawal of the said prosecution. The High Court clearly came to the conclusion that the application for withdrawal of the prosecution and grant of consent were not based on extraneous considerations.

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27. **HIGH COURT OF MADHYA PRADESH RULES – Rule 11**
Judges composing Division Bench differing on point of law – Procedure to be followed – Point of difference to be formulated by the Division Bench and be placed before the Chief Justice for consideration – Chief Justice may nominate either one Judge or more Judges to deal with the issue – Law explained.
Smt. Savita Devi v. Smt. Sukhvinder Kaur & Ors.
Reported in 2006 (III) MPJR 301 (FB)

Held :

... Under Rule 11 of Section 1, Chapter 1 of the High Court Rules, when any appeal or civil matter is heard by a Bench of two Judges and the Judges composing the Bench differ on a point of law and state the point on which they differ, the proceedings shall be placed before the Chief Justice for the purpose of nominating one or more of the other Judges to deal with the matter. This provision in Rule 11 Section 1 Chapter 1 of the High Court Rules came up for interpretation before a learned single Judge of this Court in *Laxminarayan vs. Ramjidas, 2001 (3) MPLJ 410* and the learned single Judge held that the said provision in Rule 11 of Section 1, Chapter 1 of the High Court Rules provides that the Division Bench must formulate the point of law on which the two Judges composing the Division Bench differ and must also state the said point on which they differ and thereafter the matter is to be placed before the Chief Justice for the purpose of nominating one or more of the other Judges to deal with the matter. The learned single Judge further held in the aforesaid case of *Laxminarayan vs. Ramjidas* that in the absence of formulation of point of law by the Division Bench on which the two Judges differ, it is neither possible nor permissible to the third Judge/nominated Judge to cull out from the conflicting separate judgments rendered by the Judges constituting the Division Bench the point of law on which they have differed. In the said judgment in the case *Laxminarayan vs. Ramjidas,* the learned single Judge further held that the key to unlock a situation of this kind is to place the matter before a larger Bench which can effectively deal with the situation as it will not be under any inhibition to hear the case. It is on account of the aforesaid view taken by the learned single Judge of this Court in *Laxminarayan vs. Ramjidas* that the present matter arising out of the aforesaid difference of opinion of the two Judges of the Gwalior Bench of this Court in this appeal has been placed before us.

We have examined the provisions of Rule 11 of Section 1, Chapter 1 of the High Court Rules and we find that it is provided in Rule 7 of the said Section 1, Chapter 1 of the High Court Rules that a Full Bench shall ordinarily be constituted of three judges but may be constituted of more than three Judges in pursuance of an order in writing by the Chief Justice. It is further provided in Rule 8 of Section 1, Chapter 1 of the High Court Rules that the Chief Justice shall nominate the Judges constituting a Full Bench. Thus, the Chief Justice has the exclusive power to constitute a Full Bench of three or more Judges and also to nominate the Judges of Full Bench.

Rule 10 of Section 1, Chpater 1 of the High Court Rules provides for referring of matters for consideration by two or more Judges and Rule 11 of Section 1, Chapter 1 of the High Court Rules provides for referring of a matter to one or more of the other Judges where there is a difference between the Judges composing of the Division Bench on a point of law. The said two Rules 10 and 11 of Section 1, Chapter 1 of the High Court Rules & Orders are quoted herein below:

> "10. If a Judge sitting alone considers that the decision of the proceedings pending before him involves reconsideration of a decision of two or more judges he may refer it to the Chief Justice with the recommendation that it be placed before the Full Bench for a decision on a stated question or question. The referring Judge shall dispose of the proceedings in accordance with the decision of the Bench on the question or questions referred to it.
>
> 11. When in any appeal or civil matter heard by a Bench of two Judges, the Judges composing the Bench differ on a point of law and state the point on which they differ the proceedings shall be placed before the Chief Justice for the purpose of nominating one or more of the other Judges to deal with the matter."

It will be clear from the provision of Rule 10 of Section 1, Chapter 1 of the High Court Rules quoted above that if a Judge sitting alone considers that the decision of the proceedings pending before him involves reconsideration of a decision of two or more Judges, he may refer it to the Chief Justice with a recommendation that it be placed before a Full Bench for a decision on a stated question or questions. Hence, it is only in a case where reconsideration of decision of two or more Judges is thought necessary that a reference may be made to the Chief Justice with the recommendation that it be placed before the two or more Judges. But the said provision in Rule 10 of Section 1, Chapter 1 of the High Court Rules does not contemplate reference to a Full Bench where two Judges composing of Division Bench differ on a point of law but have not stated the point on which they differ.

Rule 11 of Section 1, Chapter 1 of the High Court Rules quoted above provides that where a Bench of two Judges differ on a point of law and state the point on which they differ, the proceedings shall be placed before the Chief Justice for the purpose of nominating one or more of the other Judges to deal with the matter. The aforesaid provision, therefore, confers a discretion on the Chief Justice to nominate either one Judge or more Judges to deal with the matter in case of a difference on a point of law between the two Judges composing the Division Bench. The aforesaid Rules nowhere provide that in a case where the judges composing the Division Bench do not state the point of law on which they differ, the case has to be referred to a larger Bench for decision. In such cases also, the matter has to be placed before the Chief Justice for an appropriate order.

For the aforesaid reasons, we over-rule the decision of the learned single Judge in *Laxminarayan vs. Ramjidas* (supra)....

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28. MEDICAL TERMINATION OF PREGNANCY ACT, 1971 – Section 3 Unwanted pregnancy – Pregnancy due to failure of Family Planning Operation – It amounts to unwanted pregnancy constituting grave injury to the mental health of the pregnant woman – Can be terminated under Act of 1971 – Couple opting to bear the child – Child ceases to be unwanted child – Couple cannot seek compensation for failure of operation and for upbringing of the child – Law explained.
State of M.P. & Ors. v. Smt. Parvati Bai
Reported in 2006 (III) MPJR 312

Held:

Section 3 of the Medical Termination of Pregnancy Act, 1971 permits termination of pregnancy by registered medical practitioner notwithstanding anything contained in the Indian Penal Code, 1860 in certain circumstances and within a period of 20 weeks of the length of pregnancy. Explanation-II appended to subsection (2) of Section 3 provides that-where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman and that provides, under the law, a valid and legal ground for termination of pregnancy. If the woman has suffered an unwanted pregnancy, it can be terminated and this is legal and permissible under the Medical Termination of Pregnancy Act, 1971.

In the facts and circumstances of the case when the operation took place on 21.1.98 and the respondent delivered a she baby on 30.9.2000, therefore, it can be safely presumed that conception took place somewhere in the beginning of the year 2000 and even after having gathered the knowledge of conception inspite of having undergone sterilization operation, if the couple opts for bearing the child, it ceases to be unwanted child. Compensation for maintenance and upbringing of such a child cannot be claimed.

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29. CIVIL PROCEDURE CODE, 1908 – Order III Rules 1 & 2 Power of attorney holder to act on behalf of the Principal, extent of – Power does not extend to depose regarding acts done by the Principal – Law explained.
Mohd. Mansur Ali Khan v. Saifa Education Society, Bhopal and others
Reported in 2006 (4) MPLJ 428

Held :

Relying on *Janki Vashdeo Bhojwani and another vs. Indusind Bank Limited and others*, reported in *2005 (1) MPLJ (S.C.) 421= AIR 2005 SC 439*, the Apex

Court while considering the matter of attachment of house property in recovery proceedings and the objections by the appellants, wife of the debtors, had considered the question whether the wives could be examined and who claimed themselves to be co-purchasers of the house property and had no documentary evidence to show the source from independent income of the appellants, then the Court held that the wives would have to be examined in person. Referring to para 13 of the said judgment, the Apex Court held thus:

> "13. Order III, Rules 1 and 2, Civil Procedure Code, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2, Civil Procedure Code, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder had rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined."

Further, on the diverse views expressed by the High Courts, the Apex Court has dealt with the controversy in paras 17, 18, 20 and 21:

> "17. On the question of power of attorney, the High Courts have divergent views. In the case of *Shambhu Dutt Shastri vs. State of Rajasthan, 1986(2) WLL 713*, it was held that a general power of attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity in witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.
>
> 18. The aforesaid judgment was quoted with the approval in the case of *Ram Prasad vs. Hari Narain and Ors., AIR 1998 Raj. 185.* It was held that the word "acts" used in Rule 2 of Order III of the Civil Procedure Code does not include the act of power of attorneyholder to appear as a witness on behalf of a party. Power of attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. *It the plaintiff is unable to appear in the Court, a Commissioner for recording his evidence may be issued under the relevant provisions of the Civil Procedure Code." (Emphasis mine)*

However, in the case of *Humberto Luis and anr. vs. Floriano Armando Luis and anr.*, reported in 2000 (1) MhLJ 690= 2002 (2) Bom, C.R. 754 on which the reliance has been placed by the Tribunal in the present case, the High Court took a dissenting view and held that the provisions contained in Order III, Rule 2 of Civil Procedure Code cannot be construed to disentitle the power of attorney holder to depose on behalf of his principal. The High Court further held that the word "act" appearing in Order III, Rule 2 of Civil Procedure Code takes within its sweep "depose". We are unable to agree with this view taken by the Bombay High Court in *Floriano Armando* (supra).

21. We hold that the view taken by the Rajasthan High Court in the case of *Shambhu Dutt Shastri* (supra) followed and reiterated in the case of *Ram Prasad* (supra) is the correct view. The view taken in the case of *Floriano Armando Luis (supra)* cannot be said to have laid down a correct law and is accordingly overruled."

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30. MOTOR VEHICLES ACT, 1988 – Section 147
Insurance Company, liability of in case of dishonour of cheque issued regarding premium amount – Intimation of dishonour sent to the owner after cancellation of policy – Insurance company not liable for payment.
Oriental Insurance Co. Ltd. v. Vaikunthi Bai and others
Reported in 2006 (4) MPLJ 432

Held:

We have considered the rival contention of the learned counsel for the parties and perused the judgment cited by the learned counsel for the parties in the case of *Oriental Insurance Company Limited vs. Inderjit Kaur and others, (1998) ACJ 123 (SC), New India Assurance Company Limited vs. Rula, (2000) ACJ 630 (SC),* the decision of Division Bench of Allahabad High Court in the case of *Oriental Insurance Company Limited vs. Upendra Babu Dubey, (2002) ACJ 1842* and Division Bench decision of this High Court in the case of *National Insurance Company Limited vs. Smt. Uma Tiwari and others. M.A. No. 107/01,* decided on 10-7-2006 and a recent decision of Division Bench of this High Court in the case of *National Insurance Company Limited vs. Smt. Khelli Bai and others. 2000 (2) MPJR 281.* It is true that under section 147 read with section 149 of the Motor Vehicles Act, it is the duty of the Insurance Company to satisfy the claim of the third party risk. So far as the question of liability of the Insurance Company is concerned, if the cheque is dishonoured and even after giving intimation if the amount of premium is not deposited by the owner of the vehicle, after cancellation of the policy, Insurance Company would not be liable for the payment of amount of compensation and there is no dispute about this principle of law as has been decided recently by the Division Bench of this Court in the case of *Smt. Khelli Bai* (supra),...

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31. **ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 (1) (f) and 12 (1) (h)**
Whether suit on both the grounds contemplated u/Ss 12 (1) (f) and 12 (1) (h) simultaneously maintainable? Held, Yes – Law explained.
Ghasiram Garewal through L.Rs. v. Sharifa Bai and others
Reported in 2006 (4) MPLJ 460

Held:

So far first substantial question of law is concerned, I am of the considered view that suit under both the grounds sections 12(1)(f) and 12(1)(h) of the Act can be filed by the landlord/plaintiff simultaneously in one suit. The said view is fortified by law laid down by the Division Bench of this Court in the matter of *T.R. Shah vs. Smt. Kundan Kaur and others in Second Appeal No. 478/96 vide order dated 25-8-2005, [2006(1) MPLJ 41]* in which held as under:

> "12. The answer of the question of law formed in the order of reference is as under:
>
> When a suit is filed by a landlord under section 12(1) (e) and 12(1)(h), pleading that he requires the accommodation for his own use and also states that he wants to demolish and reconstruct the building and he establishes a case for eviction under section 12(1)(e), he will be entitled to an order under section 12(1)(e) and the averments relating to demolition and reconstruction will be construed as a part of ground under section 12(1)(e), In such an event, it will be immaterial whether he demolishes the building or not. When a Court grants an eviction under Clause (e), it shall dispose of the claim under Clause (h) as having become infructuous or rendered redundant. When granting a decree under section 12(1)(e) the question of applying section 12(7) or 18 does not arise. On the other hand if the ground under section 12(1)(e) is rejected, then the Court may consider the ground under section 12(1)(h) independently subject to section 12(7) and section 18.
>
> 13. The question of law on which the petition was admitted, is answered thus : Mere invoking the ground under section 12(1)(h) or filing the case under section 12(1)(h) in addition to the ground under section 12(1)(e) will not invalidate the claim for eviction under Clause 12(1)(e). Where the bona fide requirement of the landlord under section 12(1)(e) of the Act is proved, the claim can be allowed under section 12(1)(e), ignoring the ground under section 12(1)(h).
>
> 14. In this case, as already noticed, the plaint did not even refer to Clause (g) or (h) in the suit. After pleading that he required the premises bona fide for occupation of himself and his family, he also stated that the premises was in a damaged condition and required repairs. Therefore, the averments relating to dismantling the roof and

reconstructed it is not an independent ground but a part of the ground under Clause (e). As a consequence, the concurrent finding that the landlord has made out a case for eviction under section 12(1)(e) of the Act does not call for interference. The Second Appeal is therefore dismissed with costs."

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32. CIVIL PROCEDURE CODE, 1908 – Section 9
Jurisdiction of Civil Court, ouster of by agreement of the parties – When two Courts have concurrent jurisdiction regarding subject matter, parties can agree to confer jurisdiction on one Court and oust jurisdiction of the other – Law explained.
Fittijee Ltd., New Delhi v. Sandeep Gupta and others
Reported in 2006 (4) MPLJ 518

Held:

In the case of *Hakam Singh vs. M/s Gammon (India) Ltd., AIR 1971 SC 740* the Apex Court has held that where two Courts have under the Code of Civil Procedure jurisdiction to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in one of such Courts is not contrary to public policy. Such an agreement does not contravene section 28 of the Contract Act.

In the case of *A.B.C. Laminart (P) Ltd. v. A.P. Agencies, (1989) 2 SCC 163* it was held as under:

> "When the Court has to decide the question of jurisdiction pursuant to an ouster clause it is necessary to construe the ousting expression or clause properly. Often the stipulation is that the contract shall be deemed to have been made at a particular place. This would provide the connecting factor for jurisdiction to the Courts of that place in the matter of any dispute on or arising out of the contract. It would not, however, ipso facto take away jurisdiction of other Courts. Where an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other Courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other Courts should avoid exercising jurisdiction. As regards construction of ouster clause when words like "alone", "only", "exclusive" and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim *"expression unius est. exclusio alterius'* – expression of one is the exclusion of another – may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed."

This view has been reiterated in *Anglie Insulation vs. Davy Ashmore India Ltd., (1995) 4 SCC 153.*

In the case of *Shriram City Union Finance Corporation Ltd., vs. Rama Mishra, (2002) 9 SCC 613* held that it is open for a party for his convenience to fix the jurisdiction of any competent Courts to have their dispute adjudicated by that Court alone. In other words if one or more Courts have the jurisdiction to try any suit, it is open for the parties to choose any one of the two competent Court to decide their disputes. In case parties under their own agreement expressly agree that their dispute shall be tried by only one of them then the parties can only file the suit in that Court alone to which they have so agreed.

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33. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
Demand notice u/s 138 – The complainant must prove sending of demand notice by submitting postal receipt or other evidence – Law explained.
N.K. Sabarwal v. Rauf Khan
Reported in 2006 (4) MPLJ 545

Held:

Having heard learned counsel for the applicant, I have gone through the record and I have not found any postal receipt for sending the demand notice to the respondent. So in the absence of such receipt no presumption can be drawn in favour of the applicant for sending the said notice through registered post either under section 3(c) of Post Office Act, 1898 or under section 114(c) of the Evidence Act or under section 27 of the General Clauses Act, 1897. It was the duty of the applicant to prove by reliable evidence that notice was sent through registered post and this would have been proved only by submitting postal receipt or by calling the record of Post office but no evidence was led by the applicant in this regard.

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34. MOTOR VEHICLES ACT, 1988 – Section 166
SUCCESSION ACT, 1925 – Section 306
LEGAL REPRESENTATIVES SUITS ACT, 1855 – Section 1
Whether application for compensation regarding personal injury can be filed by the L.Rs of the injured, whose death was not due to accident? Held, No.
Bhagwati Bai and another v. Bablu @ Mukund and others
Reported in 2006 (4) MPLJ 579 (FB)

Held:

A reading of sub-section (1)(a) of section 166 of the Motor Vehicles Act, 1988, would show that only a person who has sustained the injury, can file an application for compensation. Further a reading of sub-section (1)(d) of section 166 would show that any agent duly authorised by the person injured can also

file such application for compensation for injury suffered by such person. Sub-section (1)(c) of section 166 provides that where death has resulted from the accident, all or any of the legal representatives of the deceased can file an application for compensation and sub-section (1) (d) of section 166 provides that a legal representative of the deceased can also file claim where death has resulted from the accident. Thus, in a case of personal injury not resulting in death the legal representative of such person who was injured and who dies subsequently not on account of accident but for some other reason cannot maintain an application for compensation for personal injury sustained in an accident under sub-section (1) of section 166 of the Motor Vehicles Act, 1988. Hence the contention of Mr. Choubey, learned counsel appearing for the appellants, that under Section 161 (1) of the Motor Vehicles Act, 1988 an application for compensation for personal injury can be filed also by the legal representatives of the deceased whose death was not as a result of accident but for some other reason is not correct.

Section 306 of the Indian Succession Act, 1925, on which reliance has been placed by Mr. Bansal, learned counsel appearing for the respondent No./ Insurance Company, is quoted hereinbelow:

> *"Section 306. Demands and rights of action of or against deceased survive to and against executor or administrator,–*
>
> All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault as defined in the Indian Penal Code, 1860 (45 of 1860) or other persoal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

The aforesaid section inter alia provides that all rights to prosecute any action or special proceeding existing in favour of a person at the time of his death, survive to his executors or administrators, except causes of action for personal injuries not causing the death of the party. Thus, under section 306 of the Indian Succession Act, 1925, the executors or administrators of a deceased will have a right to prosecute or continue any action or special proceeding existing in favour of the deceased at the time of his death, except causes of action for personal injury not causing death of the party. Therefore, where the accident does not cause death of a party but only causes personal injury to him, his executors or administrators will not have a right to prosecute or continue to prosecute an application for compensation for personal injury suffered by the party in a motor accident.

In *Melepurath Sankunni Ezhuthassan vs. Thekittil Geopalankutty Nair, 1986 ACJ 440 = AIR 1986 SC 411,* the Supreme Court observed that the principle contained in section 306 of the Indian Succession Act, 1925, will apply not only

to executors or administrators but also to other legal representatives. Paragraph 8 of the judgment of the Supreme Court in *Melepurath Sankunni Ezhuthassan vs. Thekittil Geopalankutty Nair* (supra) as reported in the AIR, is quoted hereinbelow:

> *"Section 306 further speaks only of executors and administrators but on principle the same position must necessarily prevail in the case of other legal representatives, for such legal representatives cannot in law be in better or worse position than executors and administrators and what applies to executors and administrators will apply to other legal representatives also."*

Hence by virtue of the principle in section 306 of the Indian Succession Act, 1925, the legal representatives of a deceased, who suffers personal injury in a motor accident and who dies subsequently for some other reason, cannot prosecute or continue to prosecute an application for compensation under sub-section (1) of section 166 of the Motor Vehicles Act, 1988.

Section 1 of the Legal Representatives Suits Act, 1855, confers rights on the executors, administrators or representatives of any person deceased to maintain an action for any wrong committed in the lifetime of a deceased person. The said section 1 of the Legal Representatives Suits Act, 1855, is quoted hereinbelow:

> *"Section 1. – Executors may sue and be sued in certain cases for wrongs committed in lifetime of deceased,* – An action may be maintained by the executors, administrators or representatives of any person deceased, for any wrong committed in the lifetime of such person, which has occasioned pecuniary loss to his estate, for which wrong an action might have been maintained by such person, so as such wrong shall have been committed within one year before his death and the damages when recovered shall be part of the personal estate of such person;
>
> and further, an action may be maintained against the executors or administrators or heirs or representatives of any person deceased for any wrong committed by him in his lifetime for which he would have been subject to an action, so as such wrong shall have been committed within one year before such person's death and the damages to be recovered in such action shall, if recovered against an executor or administrator bound to administer according to the English Law, be payable in like order of administrator as the simple contract debts of such person."

It will be clear from section 1 of the Legal Representatives Suits Act, 1855, quoted above that the legal representatives of any deceased person can maintain an action for any wrong committed in the lifetime of such deceased person, which has occasioned pecuniary loss to his estate, for which wrong an action might have been maintained by such person, so as such wrong shall have been

committed within one year before his death and the damages when recovered shall be part of the personal estate of such person. It is by virtue of this provision in section 1 of the Legal Representatives Suits Act, 1855 that the legal representatives of the deceased person can also maintain or continue to maintain an application for compensation for personal injury suffered in the lifetime of such person in a motor accident which has occasioned pecuniary loss to the estate for which such person might have filed an application for compensation under section 166(1) of the Motor Vehicles Act, 1988. But where a personal injury suffered by a person during lifetime in a motor accident has not occasioned pecuniary loss to the estate of such person, the legal representatives of the deceased person cannot maintain or continue to maintain an application for compensation under sub-section (1) of section 166 of the Motor Vehicles Act, 1988.

Further, under section 1 of the Legal Representatives Suits Act, 1855, an application for compensation for personal injury suffered by a person during lifetime in a motor accident can be maintained and continued by the representatives of the deceased person for the pecuniary loss occasioned to the estate of the deceased person so long as the accident has been caused within one year before his death. Moreover, the accident may have occasioned pecuniary loss to the estate of a person in many ways and it is for the Tribunal or the Court to decide the loss which has been occasioned to the estate of the person who had suffered personal injury in a motor accident depending on the pleadings and proof before the Court in each case. In paragraph 21 of the judgment of the Division Bench of this Court in *Umedchand Golcha vs. Dayaram and others, 2002 (1) MPLJ 249,* the Division Bench of this Court had held:

> "Further the question is which items can form loss to the estate of the deceased. Of course, exhaustive list of these items cannot be given, since it would depend upon pleadings and proof brought before the Court by the claimant/legal representatives. But it can be held that loss of accretion to the estate through savings or otherwise caused on account of accident permanently or temporarily can be worked out on giving facts or assessing the loss to the estate. Further the existing state of estate may suffer loss by application towards medical expenses, expenditure on diet, expenditure on travelling, expenditure on attendant, expenditure on Doctor's fee, reasonable monthly/annual accretion to the estate for certain period etc. The claimant does not keep separate amount for such unforeseen expenditures during his lifetime. His income is at the most divided in three parts, namely, expenditure on himself, expenditure on family and the savings to the estate. Therefore, he has to meet such expenditure from out of his estate. There may be circumstances where it is born by his legal representatives. Therefore, it is held that the legal representatives can ask for loss to the estate of these items by production of

satisfactory evidence unless Court is able to draw lifetime conclusion about such expenditures from out of the estate, from the facts and circumstances and on the basis of experience."

In the result, we are of the considered opinion that a claim for personal injury filed under section 166 of the Motor Vehicles, Act, 1988 would abate on the death of the claimant and would not survive to his legal representatives except as regards the claim for pecuniary loss to the estate of the claimant...

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35. CIVIL PROCEDURE CODE, 1908 – Section 151 and Order XXXIX Rules 1 & 2

(i) Whether temporary injunction can be issued against the person not a party in the suit? Held, Yes – It can be issued against a person present before the Court and in the opinion of the Court causes interference and obstruction in the exercise of lawful rights of the plaintiff – Law explained.

(ii) Whether Court can take cognizance of breach of temporary injunction under O.39 R.2 (a) when the temporary injunction was granted u/s 151 CPC? Held, Yes.

Chhagan Lal Jaiswal through LRs Pooran Chand Jaiswal and others v. Kamal Chand Jain through LRs Gulab Bai and others
Reported in 2006 (4) MPLJ 595

Held:

(i) It is true that an order of temporary injunction is to be normally issued against the parties to the suit. However, power of the Court to issue temporary injunction is not confined merely against the plaintiff or the defendant alone. Such an order may be made against any person who is present before the Court and is, in the opinion of the Court, causes interference/obstruction in the exercise of lawful rights of the plaintiff. This Court in the case of *Sitaram Sharma (Dr.) vs. Kishna,* reported as *1984 MPWN 28* has upheld an order of temporary injunction against the person sought to be impleaded as defendant. It has been held by this Court that such a person is not stranger to the suit and injunction can be issued against him. The revisionist is, admittedly, stated to be a purchaser from a party to Civil Suit No. 71A/60. He was present through his counsel Shri Y.M. Sharma when the order of temporary injunction was made against him on 18-12-1974. He was expressly and specifically restrained till disposal of the suit from entering into the possession of the accommodation held by and to be vacated by Punjab National Bank, Khandwa either personally or through others on vacation thereof. This order was also challenged by the revisionist in Civil Misc. Appeal No. 2/75 which was dismissed on 15-7-1980 as not maintainable. The revisionist did not challenge the order of temporary injunction though, the same was passed against him in specific language, that too, in his presence. Considering the aforesaid, the revisionist cannot be said to be stranger and the

order of temporary injunction having been passed in his presence is obviously binding on him.

Next contention of the revisionist that the order of temporary injunction was passed under section 151, Civil Procedure Code and its breach could not have been taken cognizance of under Order 39, Rule 2-A of Civil Procedure Code is without any force. For the convenience, the said provision is reproduced below:–

> *"2-A Consequence of disobedience or breach of injunction* – (1) In the case of disobedience of any injunction granted or other order made under Rule 1 or Rule 2 or breach of any of the terms on which the injunction was granted or the order made, the Court granting the injunction or making the order, or any Court to which the suit or proceedings is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Court directs his release.
>
> (2) No attachment made under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the Court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto."

(ii) From the perusal of the aforesaid, it is clear that the Court is well empowered to take cognizance of disobedience or breach of any injunction granted or other order made under Rule 1 or Rule 2 or breach of any of the terms on which the injunction is granted which obviously included an order of temporary injunction granted under section 151 of Civil Procedure Code. My this view finds support from the decision of Rajasthan High Court in the case of *Rattu vs. Mala and another,* reported as *AIR 1968 Rajasthan 212* wherein it has been held that :–

> "It is settled law that disobedience of an order of injunction is punishable under Rule 2(3) of Order 39 whether injunction is granted under Rule 1 or Rule 2 of Order 39 or under section 151, Civil Procedure Code."

Sub-rules (3) and (4) of Rule 2 of Order 39, Civil Procedure Code have been omitted by Amendment Act, 1976. The insertion of Rule 2-A is intended to seek provision of disobedience or breach of injunction which were earlier available under sub-rules (3) and (4) of Rule 2 of Order 39, Civil Procedure Code. Thus, it is not correct to say that the breach of an order of injunction issued under section 151, Civil Procedure Code cannot be taken into cognizance under Order 39, Rule 2-A, Civil Procedure Code...

Lastly, it is contended by Shri Kotecha, learned counsel for the revisionist that the original revisionist who is stated to have committed breach has already died and the proceedings for breach of temporary injunction cannot be continued

against his legal representatives. This submission, too, is fallacious because Chhagan Lal, the original revisionst is proved to have taken forcible possession in contravention of the order of temporary injunction. In spite of proceedings for breach of injunction order he did not choose to restore the possession to the plaintiffs. After his death, his estate is being represented by the present L.Rs. who have been substituted in his place. They have been continuing in the possession of the disputed property which was forcibly occupied by their predecessor in contravention of the order of temporary injunction. Since, the legal representatives did not hand over back the possession of the disputed property in pursuance of the order of temporary injunction and thereafter of the impugned order, the disobedience/breach will be treated to have continued and the provisions contained in Order 39, Rule 2-A, Civil Procedure Code can well be invoked against them. Thus, the breach and/or disobedience has been continued and the legal representatives of the original revisionist would remain liable unless they restore the possession of the disputed property to the plaintiff in pursuance of the order of temporary injunction. A contrary construction O.39, R.2-A, Civil Procedure Code would open the flood gates by to encouraging the wrong doers to defeat the proceedings about breach of injunction order by taking shelter of the death of wrong doers and would allow them to reap the fruits of breach....

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36. CIVIL PROCEDURE CODE, 1908 – Order XXIII Rule 1
Withdrawal of suit and bar against filing another suit on same cause of action – Claim petition filed against one set of parties withdrawn – Later on claim filed against another set of parties – Whether claim barred? Held, No – Law explained.
Shubhra Saxena and others v. Ashok Kumar and another
Reported in 2006 (4) MPLJ 603

Held:

The trial Court relied on the decision in the case of *Dayachand vs. Kerabai,* reported in *2000 (II) MPWN 31.* Learned counsel for the appellants submits that the facts in the case of *Dayachand* (Supra) are quite different and distinct to the facts in the present case. He submitted that in that case, reliefs, which they already wanted to claim, have already been granted to them and, therefore, the Court dismissed their suit in exercise of power under Order 23 Rule 1 of Civil Procedure Code without making any comments. In the instant case, though the claim petition was filed in respect of the same cause of action, but against the Maruti owner and different Insurance Co.; whereas, the earlier claim petition was filed against the Auto Rickshaw and different Insurance Com. and earlier claim was dismissed as not pressed and no proceedings were instituted in the earlier suits and, therefore, the trial Court committed an error in holding that the second suit is barred by reasons for provisions of Order 23 Rule 1 of Civil Procedure Code. He placed reliance to the decision of Calcutta High Court in the case of *Mrs. L.A. Saunders vs. Land Corporation of Bengal Ltd.,* reported in

AIR 1955 Calcutta 169, wherein it was held that the earlier suit was not withdrawn, but was dismissed for default under Order 9 Rule 9, Civil Procedure Code and, therefore, it was impossible to treat it as withdrawal under Order 23 Rule (1) (3). He also placed reliance on the decision of the Orissa High Court in the case of *Bhagabat Jena and others vs. Gobardhan Patnaik and others, AIR 1983 Orissa 50,* in which the Orissa High Court has held that under Order 23 Rule 1, the plaintiff has a right to withdraw his suit at any stage, but, that right is limited to the extent that it does not result in defeating a right which has already vested in the defendant. The object of Order 23 Rule 1, Civil Procedure Code is not to enable a plaintiff after the rights of the parties have been adjudicated, to obtain an opportunity of commencing a fresh litigation in order to avoid the result of his previous suit.

In the instant case, the claim was filed against the autorickshaw owner and the Insurance Co. where the said authorickshaw was insured. It appears that the accident was not caused by the said autorickshaw, but has been caused by Maruti car and, therefore, the claimant withdraw the aforesaid claim petition and filed the claim against the Maruti car owner and the Insurance Company with whom the car was insured. Thus, the parties against whom the claim earlier was filed was different and the claim which has been filed arises out of a cause against the Maruti car owner and the Insurance Company. The bar under Order 23 Rule 1, Civil Procedure Code applies only if the second claim petition is between the same parties as the first claim petition. Where the second claim is against a different respondent it is not barred under this rule (See *AIR 1959 Cal 715, AIR 1927 Bombay 87 and AIR 1928 All 689*).

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37. CONSTITUTION OF INDIA – Article 227

Power of superintendence, exercise of under Article 227 – Independence of judiciary part of the basic structure of the Constitution which includes independence of subordinate Courts – Independence of subordinate Judiciary should be protected effectively so as to ensure its independence.

Jasbir Singh v. State of Punjab

Judgment dated 11.10.2006 passed by the Supreme Court in Criminal Appeal No. 1039 of 2006, reported in (2006) 8 SCC 294

Held:

So, even while invoking the provisions of Article 227 of the Constitution, it is provided that the High Court would exercise such powers most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority. The power of superintendence exercised over the subordinate courts and tribunals does not imply that the High Court can intervene in the judicial funtions of the lower judiciary. The independence of the subordinate courts in the discharge of their judicial functions is of paramount

importance, just as the independence of the superior courts in the discharge of their judicial functions. It is the members of the subordinate judiciary who directly interact with the parties in the course of proceedings of the case and therefore it is no less important that their independence should be protected effectively to the satisfaction of the litigants. The indenpendence of the judiciary has been considered as a part of the basic structure of the Constitution and such independence is postulated not only from the executive, but also from all other sources of pressure. In *S.P. Gupta v. Union of India, 1981 Supp. SCC 87* speaking on the independence of the judiciary, a Bench of seven Judges observed as under at p. 223: (SCC para 27)

> "The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. ... But it is necessary to remind ourselves that the concept of independence of the judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices. It has many dimensions, namely, fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the judges belong."

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38. EDUCATION :

Students Union election for the University/Colleges – Need to ensure security to academic community involved in the process of election – Directions issued.

University of Kerala (1) v. Council, Principles' Colleges, Kerala and others

Judgment dated 22.09.2006 passed by the Supreme Court in SLP (C) No. 24295 of 2004, reported in (2006) 8 SCC 304

Held:

During the course of hearing of the petition, Mr. Gopal Subramanium, learned Additional Solicitor General brought to our notice the need for a direction to provide security to the academic community who are involved in the process of students union elections in the universities and the colleges. It was suggested that to ensure protection to them, the Superintendent of Police, in charge of the area shall provide enough police protection and shall ensure that no untoward incident takes place by providing adequate number of police personnel to be posted near the place of elections. The suggestions appear to be wholesome. We direct that the suggestions given be implemented as and when the necessity so arises. It is made clear that the recommendations made, which we have accepted to be adopted as an interim measure, shall be followed in all college/ university elections, to be held hereinafter, until further orders.

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39. TRANSFER OF PROPERTY ACT, 1882 – Section 58(c)
Mortgage with 'conditional sale' and 'sale with condition of repurchase', distinction between.
Tulsi and others v. Chandrika Prasad and others
Judgment dated 24.08.2006 passed by the Supreme Court in Civil Appeal No. 3631 of 2006, reported in (2006) 8 SCC 322

Held:

Before we consider the stipulations contained in the deed dated 30-12-1968, it may be noticed that in terms of Section 58(c) of the Transfer of Property Act a transaction may be held to be a mortgage with conditional sale if it is evidenced by one document. The condition precedent for arriving at a finding that the transaction involves mortgage by way of conditional sale is that there must be an ostensible sale. It must contain a condition that on default of payment of mortgage money on a certain date, the sale shall become absolute or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller.

A disfinction exists between a mortgage by way of conditional sale and a sale with condition of purchase. In the former the debt subsists and a right to redeem remains with the debtor but in case of the latter the transaction does not evidence an arrangement of lending and borrowing and, thus, right to redeem in not reserved thereby.

The proviso appended to Section 58 (c) of the Transfer of Property Act was added by Act 20 of 1929 for resolution of the conflict in decisions on the question whether the condition relating to reconveyance contained in a separate document could be taken into consideration in finding out whether a mortgage was intended to be created by the principal deed.

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40. LEGAL SERVICES AUTHORITIES ACT, 1987 – Sections 20(3) & 20 (5)
Lok Adalat – Jurisdiction of Lok Adalat to dispose of a case – Unless there is compromise or settlement between parties which requires bilateral involvement, the case cannot be disposed of by Lok Adalat – Law explained.
State of Punjab and others v. Ganpat Raj
Judgment dated 12.09.2006 passed by the Supreme Court in Civil Appeal No. 4089 of 2006. reported in (2006) 8 SCC 364

Held:

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

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

(i) (a) the parties thereof agree; or

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

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

the court shall refer the case to the Lok Adalat;

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

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

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

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

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

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

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

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

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

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41. CODE OF CIVIL PROCEDURE, 1908 – Order XXXIX Rules 1 & 2 Temporary injunction, grant of – Conditiions necessary – Temporary injunction in the form of *prima facie* case, balance of convenience and irreparable injury – *Prima facie* case, meaning of – Law explaned. M. Gurudas and others v. Rasaranjan and others Judgment dated 13.09.2006 passed by the Supreme Court in Civil Appeal No. 4101 of 2006, reported in (2006) 8 SCC 367

Held:

While considering an application for injunction, it is well settled, the courts would pass an order thereupon having regard to:

(i) Prima facie case

(ii) Balance of conveience

(iii) Irreparable injury.

A finding on "prima facie case" would be a finding of fact. However, while arriving at such a finding of fact, the court not only must arrive at a conclusion that a case for trial has been made out but also other factors requisite for grant of injunction exist. There may be a debate as has been sought to be raised by Dr. Rajeev Dhavan that the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd. (1975) 1 AII ER 504* would have no application in a case of this nature as was opined by this Court in *Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1 and S.M. Dyechem Ltd. v. Cadbury (India) Ltd., (2000) 5 SCC 573* but we are not persuaded to delve thereinto.

We may only notice that the decisions of this Court in *Colgate Palmolive* (supra) and S.M. Dyechem Ltd. (supra) relate to intellectual property rights.

The question, however, has been taken into consideration by a Bench of this Court in *Transmission Corpn. of A.P. Ltd., v. Lanco Kondapalli Power (P) Ltd., (2006) 1 SCC 540* stating: *(SCC pp. 552-53, paras 36-40)*

> "36. The respondent, therefore, has raised triable issues. What would constitute triable issues has succinctly been dealt with by the House of Lords in its well-known decision in *American Cyanamid Co. v. Ethicon Ltd. (supra)* holding: *(All ER p. 510c-d)*
>
> 'Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as "a probability", "a prima facie case", or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolvous or *vexations; in other words,* that there is a serious question to be tried.'

It was further observed : (All ER 511*b-c* & 511j)

> 'Where other factors appear to be evenly balanced it is a counsel of purdence to take such measures as are calcutated to preserve the *status quo.* If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.
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> ★ ★ ★
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> The factors which he took into consideration and in my view properly, were that Ethicon's sutures XLG were not yet on the market; so that had no business which would be brought to a stop by the injunction; no factories would be closed and no workpeople would be thrown out of work. They held a dominant position in the United Kingdom market for absorbable surgical sutures and adopted an aggressive sales policy.'

We are, however, not oblivious of the subsequent development of law both in England as well as in this jurisdiction. The *Chancery Division in Series Software v. Clarke, (1996) 1 All ER 853 (Ch D)* opined: (All ER p. 864c-e)

> 'In many cases before *American Cyanamid* (supra) the prospect of success was one of the important factors taken into account in assessing the balance of convenience. The courts would be less willing to subject the plaintiff to the risk of irrecoverable loss which would befall him if an interlocutory injunction was refused in those cases

where it thought he was likely to win at the trial than in those cases where it thought he was likely to lose. The assessment of the prospects of success therefore was an important factor in deciding whether the court should exercise its discretion to grant interlocutory relief. It is this consideration which *American Cyanamid* (supra) is said to have prohibited in all but the most exceptional case. So it is necessary to consider with some care what was said in the House of Lords on this issue.'

In *Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.* (supra) this Court observed that Laddie, J. in *Series 5 Softwere* (Supra) had been able to resolve the issue without any departure from the true perspecive of the judgment in *American Cyanamid* (supra). In that case, however, this Court was considering a matter under the Monopalies and Restrictive Trade Practices Act, 1969.

In *S.M. Dyechem Ltd., Cadbury (India) Ltd.* (supra) Jagannadha Rao, J. in a case arising under Trade and Merchandise Marks Act, 1958 reiterated the same principle stating that even the comparative strength and weaknesses of the parties may be a subject matter of consideration for the purpose of grant of injunction in trade mark matters stating: (SCC p. 591, para 21)

> '21... Therefore, in trade mark matters, it is now necessary to go into the question of "comparable strength" of the cases of either party, apart from balance of convenience. Point 4 is decided accordingly.'

The said decisions were noticed yet again in a case involving infringement of trade mark in *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd., (2001) 5 SCC 73"*

While considering the question of granting an order of injunction one way or the other, evidently, the court, apart from finding out a prima facie case, would consider the question in regard to the balance of convenience of the parties as also irreparable injury which might be suffered by the plaintiffs if the prayer for injunction is to be refused. The contention of the plaintiffs must be bona fide. The question sought to be tried must be a serious question and not only a mere triable issue. (See, *Dorab Cawasji Warden v. Coomi Sorab Warden, (1990) 2 SCC 117, Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719, United Commerical Bank v. Bank of India, (1981) 2 SCC 766, Gujarat Bottling Co. Ltd., v. Coca Cola Co., (1995) 5 SCC 545 Bina Murlidhar Hemdev v. Kanhaiyalal Lokram Hemdev and Transmission Corpn. of A.P. Ltd.* (supra)

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42. JURISPRUDENCE:

Doctrine of 'legitimate expectation' – Expression 'legitimate expectation', meaning and connotation of – Law explained.

Confederation of Ex-servicemen Associations and others v. Union of India and others

Judgment dated 22.08.2006 passed by the Supreme Court in Writ Petition (C) No. 210 of 1999, reported in (2006) 8 SCC 399

Held:

... The doctrine of "legitimate expectation" is a "latest recruit" to a long list of concepts fashioned by the courts for review of administrative actions. No doubt, the doctrine has an important place in the development of administrative law and particularly law relating to "judicial review". Under the said doctrine, a person may have reasonable or legitimate expectation of being treated in a certain way by an administrative authority even though he has no right in a law to receive the benefit. In such a situation, if a decision is taken by an administrative authority adversely affecting his interests, he may have justifiable grievance in the light of the fact of continuous receipt of the benefit, legitimate expectation to receive the benefit or privilege which he has enjoyed all throughout. Such expectation may arise either from the express promise or from consistent practice which the applicant may reasonably expect to continue.

The expression "legitimate expectation" appears to have been originated by Lord Denning, M.R. in the leading decision of *Schmidt v. Secy. of State, (1969) 1 All ER 904.* In *Attorney General of Hong Kong v. Ng Yuen Shiu, (1983) 2 All ER 346* Lord Fraser referring to *Schmidt* (supra) stated: (All ER p. 350h-j)

> "The expectations may be based on some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, *if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry."*

In such cases, therefore, the Court may not instist an administrative authority to act *judicially* but may still insist it to act *fairly.* The doctrine is based on the principle that good administration demands observanceof reasonableness and where it has adopted a particular practice for a long time even in the absence of a provision of law, it should adhere to such practice without depriving its citizens of the benefit enjoyed or privilege exercised.

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43. LAND ACQUISITION ACT, 1894 – Sections 23 (1), 28 and 34
CIVIL PROCEDURE CODE, 1908 – Order XXI Rule 1 (3) (c)
Rule of appropriation, true meaning of – Whether normal rule of appropriation contained on O.XXI R.1 CPC regarding execution of money decree and mortgage decrees excluded by Ss. 28 and 34 of LA Act? Law explained.
Gurpreet Singh v. Union of India
Judgment dated 19.10.2006 passed by the Supreme Court in Civil Appeal No. 4570 of 2006, reported in (2006) 8 SCC 457

Held:

... the question that requires, to be answered is whether the rule, of what may be called the different stages of appropriation, set out in *Prem Nath Kapur v. National Fertilizers Corpn. of India Ltd., (1996) 2 SCC 71* is correct or whether

the rule requires to be restated on the scheme of the Land Acquisition Act understood in the context of the general rules relating to appropriation and the rules relating to appropriation in execution of money decrees and mortgage decrees.

The rule of appropriation as applied in India was summed up by T.L. Venkatarama Aiyar, J. (as he then was) in the Full Bench decision of the Madras High Court in *Garimella Suryanarayana v. Gada Venkataramana Rao, AIR 1953 Mad 458.* His Lordship stated: (AIR pp. 459-60, para 5)

> "5. The principles governing appropriation of payments made by a debtor are under the general law well settled. When a debtor makes a payment, he has a right to have it appropriated in such manner as he decides and if the creditor aceepts the payment, he is bound to make the appropriation in accordance with the directions of the debtor. This is what is known in England as the rule in *(1816) 1 MER 572, Clayton case* and it is embodied in Section 59, Contract Act. But when the debtor has not himself made any appropriation, the right devolves on the creditor who can exercise it at any time. *vide Cory Bros. & Co. v. Owners of the Turkish Steamship 'Mecca', (1897) AC 286* and even at the time of the trial: vide *Seymour v. Pickett, (1905) 1 KB 715.* That is, Section 60, Contract Act. It is only when there is no appropriation either by the debtor or the creditor that the Court appropriates the payments as provided in Section 61, Contract Act."

It has to be noted that Sections 59 to 61 of the Contract Act get attracted only when more than one debt is due from a debtor to the creditor. The sections would not get attracted when there is only one debt due. Nor have they any direct application in a case where the debt due has merged in a decree and the applicable rule then would be what is provided in the decree itself or the general rule applicable in execution of money decrees.

... This Court made a detailed survey of the relevant provisions of the Land Acquisition Act and after summing up the position held: (*Prem Nath Kapur case,* (supra) SCC p. 76, para 8)

> "8. A reading of the above provisions would establish that the award consists of (a) the compensation determined under Section 23(1), (b) solatium on the market value determined under Section 23(2), as additional sum for compulsory nature of acquisition, and (c) payment of interest on the amount of compensation under Section 11, on excess or part thereof under Section 26 awarded by court from the date of taking possession till date of payment or deposit into the court at the rates specified under the respective provisions of Sections 34 and 28. Under Section 23 (1-A), additional amount at 12 per centum per annum shall be paid or deposited from the date of notification under Section 4(1) till date of award or taking possession of land, whichever is earlier. The additional amount under Section 23(1-A)

and solatium under Section 23(2) are in addition to the compensation under Section 11 and excess amount determined under Section 23(1) read with Section 26 or Section 54. Equally, under Section 26 of the Act award is deemed to be a decree under Section 2(2) CPC for the excess amount determined by the court; this would be so proprio vigore, when the appellate court under Section 54 has further enhanced the compensation."

Section 34 of the Act fastens liability on the Collector to pay interest on the amount of compensation determined under Section 23(1) with interest from the date of taking possession till date of payment or deposit into the court to which reference under Section 18 would be made. On determination of the excess amount of compensation, Section 28 empowers the court, if it was enhancing the compensation awarded by the Collector, to award interest on the sum in excess of what the Collector had awarded as compensation. The award of the court may also direct the Collector to pay interest on such excess or part thereof from the date on which he took possession of the land to the date of payment of such excess into court at the rates specified thereunder. The Court stated: (*Prem Nath Kapur Case* (supra) *SCC p. 77, para 10*)

> "In other words, Sections 34 and 28 fasten the liability on the State to pay interest on the amount of compensation or on excess compensation under Section 28 from the date of the award and decree but the liability to pay interest on the excess amount of compensation determined by the Court relates back to the date of taking possession of the land to the date of the payment of such excess 'into the court'.

The Court concluded: (*Prem Nath Kapur case*, (supra) SCC p. 78, para 12)

> "12. It is clear from the scheme of the Act ad the express language used in Sections 23(1) and (2), 34 and 28 and now Section 23(1-A) of the Act that each component is a distinct and separate one. When compensation is determined under Section 23(1), its quanfitication, though made at different levels, the liability to pay interest thereon arises from the date on which the quantification was so made but, as stated earlier, it relates back to the date of taking possession of the land till the date of deposit of interest on such excess compensation into the court... The liability to pay interest is only on the excess amount of compensation determined under Section 23(1) and not on the amount already determined by the Land Acquisition Officer under Section 11 and paid to the party or deposited into the court or determined under Section 26 or Section 54 and deposited into the court or on solatium under Section 23 (2) and additional amount under Section 23 (1-A)."

This Court ultimately held that the right to make appropriation is indicated by necessary implication, by the award itself as the award or decree clearly

mentions each of the items. When the deposit is made towards the specified amounts, the decree-holder is not entitled to deduct from the amount of compensation towards costs, interest, additional amount under Section 23(1-A) with interest and then to claim the total balance amount with further interest. Referring to *Meghraj v. Bayabai, (1969) 2 SCC 274* this Court held that the ratio of that decision was inapplicable to a case of execution under the Land Acquisition Act since the provisions of the Act were inconsistent with Order 21 Rule 1. Referring to *Mathunni Mathai v. Hindustan Organic Chemicals Ltd., (1995) 4 SCC 76* this Court noticed that the provisions of the Act were not brought to the attention of the Court and a decision invited thereon and hence the observations made therein could not govern a case of execution of an award-decree under the Land Acquisition Act.

In the scheme of the Act, the above conclusions, with respect, are justified. But, it is argued that when a Reference Court or the appellate court awards enhanced compensation, the operative award is that of the court and going by the doctrine of merger also, the operative decree is that of the appellate court. Thus, the award of the ultimate court, in the given case, would be the amount payable for acquisition and it is open to the decree-holder to proceed to calculate the amount due to him on that basis and seek a reappropriation based on such a calculation and reckoning the payment or payments already made. In other words, it is contended that a recalculation and adjustment would be called for everytime there is an enhancement. In answer, it is contended that the Act provides for determination of compensation at different stages, the stage of the award, the stage of reference and the stage of appeal and provides for payment of interest and solatium based on the award and thereafter, only on the excess compensation awarded and in such a situation, a reopening of the satisfaction recorded at the earlier stage is not contemplated or warranted. It is submitted that the ratio of *Prem Nath Kapur v. National Fertilizers Corpn. of India Ltd.,* (supra) also supports this position and that in the context of the relevant provisions, the position adopted in that decision on this aspect deserves acceptance.

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44. HINDU LAW :

Family arrangement, bindingness of – Bona fide disputes settled by bona fide family arrangement is final and binding on the parties to settlement – Law explained.

Hansa Industries (P) Ltd. and others v. Kidarsons Industries (P) Ltd. Judgment dated 13.10.2006 passed by the Supreme Court in Civil Appeal No. 1682 of 1999, reported in (2006) 8 SCC 531

Held:

This Court held that the courts have leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the courts find that the family arrangement suffers from a legal lacuna or a

formal defect the rule of estoppel is pressed into service and is applied to shut out the plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits. The principles were concretised and succinctly reduced to the following propositions: *Kala v. Dy. Director of Consolidation, (1976) 3 SCC 119 of pg. 126-27 para-10)*

"10. (1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;

(3) The family arrangement may be even oral in which case no registration is necessary;

(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made *under the document* and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) (sic) (Section 17(1)(b)?) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement."

(emphasis in original)

The aforesaid judgment of this Court refers to many other decisions to which we need not advert to in this case but some of those decisions do take the view that a compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledge and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognising the rights of the

others, as they had previously asserted it, to the portions allotted to them respectively. That explains why no conveyance is required in these cases to pass the title from the one in whom it resides to the person receiving it under the family arrangement. It is assumed that the title claimed by the person receiving the property under the arrangement had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary.

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45. CRIMINAL PROCEDURE CODE, 1973 – Section 222
INDIAN PENAL CODE, 1860 – Sections 354, 366 and 376/511
Accused prosecuted for committing attempt to rape and charged accordingly – Charge not found proved – Allegation that he took away prosecutrix, a girl of 12/14 years to his *gumti* found proved – Whether he can be convicted u/Ss. 366 & 354 IPC without there being an independent charge with the help of S.222 Cr. P.C.? Law explained.
Tarkeshwar Sahu v. State of Bihar (Now Jharkhand)
Judgment dated 29.09.2006 passed by the Supreme Court in Criminal Appeal No. 1036 of 2005, reported in (2006) 8 SCC 560

Held:

In the instant case, the accused has been charged with Sections 376/511 IPC only. In the absence of charge under any other section, the question now arises – whether the accused should be acquitted; or whether he should be convicted for committing any other offence pertaining to forcibly outraging the modesty of a girl. In a situation like this, we would like to invoke Section 222 of the Code of Criminal Procedure, which provides that in a case where the accused is charged with a major offence and the said charge is not proved, the accused may be convicted of the minor offence, though he was not charged with it. Section 222 CrPC reads as under:

> *"222. When offence proved included in offence charged.* – (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.
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> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.
>
> (3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.
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> (4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the

initiation of proceedings in respect of that minor offence have not been satisfied."

In this section, two illustrations have been given which would amply describe that when an accused is charged with a major offence and the ingredients of the major offence are missing and ingredients of minor offence are made out then he may be convicted for the minor offence even though he was not charged with it. Both the illustrations given in the said section read as under :

> "(a) A is charged, under Section 407 of the Penal Code (45 of 1860), with criminal breach of trust in respect of property entrusted to him as a carrier. It appears, that he did commit criminal breach of trust under Section 406 of that Code in respect of the property, but that it was not entrusted to him as carrier. He may be convicted of criminal breach of trust under the said Section 406.
>
> (b) A is charged, under Section 325 of the Penal Code (45 of 1860), with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under Section 335 of that Code."

In *Lakhjit Singh v. State of Punjab, (1994) Supp (1) SCC 173* this Court had on occasion to examine the similar question of law. In this case, the accused was charged and tried under Section 302 of the Penal Code but the ingredients of Section 302 were missing but the ingredients of Section 306 were present, therefore, the Court deemed it proper to convent the conviction of the appellant from Section 302 to Section 306 IPC. In this case, it was urged that the accused cannot be tried under Section 306 IPC because the accused were not put to notice to meet a charge under Section 306 IPC and, therefore, they are prejudiced by not framing a charge under Section 306 IPC; therefore, presumption under Section 113-A of the Evidence Act cannot be drawn and consequently a conviction under Section 306 IPC cannot be awarded, According to this Court, in the facts and circumstances, Section 306 was attracted and the appellants' conviction under Section 302 IPC was set aside and instead they were convicted under Section 306 IPC.

A three-Judge Bench of this Court in *Shamnsaheb M. Multtani v. State of Karnataka, (2001) 2 SCC 577* had an occasion to deal with Section 222 of the Code of Criminal Procedure. The Court came to the conclusion that when an accused is charged with a major offence and if the ingredients of major offence are not proved, the accused can be convicted for minor offence, if ingredients of minor offence are available. The relevant discussion is in paras 16, 17 and 18 of the judgment, which read as under: (SCC p. 584)

> "16. What is meant by "a minor offence' for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section would bring the

above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-a-vis the other offence.

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In this view of the matter, it has become imperative to examine the legal position whether the offence of the appellant falls within the four corners of other provisions incorporated in the Penal Code relating to outraging the modesty of a woman/girl under Sections 366 and 354. Section 366 is set out as under:

> *"366. Kidnapping, abducting or inducing woman to compel her marriage, etc.* – Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid."

The essential ingredient of the offence punishable under Section 366 IPC is that when a person has forcibly taken a minor girl with the intention as specified in that section, then the offence is clearly made out. In the instant case, the appellant at about 1.30 a.m. has forcibly taken the prosecutrix/victim to his gumti with the intention of committing illicit intercourse then the offence committed by the appellant would fall within the four forecorners of Section 366 IPC. In our considered view, the essential ingredients of the offence punishable under Section 366 IPC are clearly present in this case.

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46. HINDU SUCCESSION ACT, 1956 – Sections 6 & 8
Section 6 governs succession on the death of co-parcenor having only male descendents – Proviso to S.6 creates an exception.
Sheela Devi and others v. Lal Chand and another
Judgment dated 29.09.2006 passed by the Supreme Court in Civil Appeal No. 4326 of 2006, reported in (2006) 8 SCC 581

Held:

The Act indisputably would prevail over the old Hindu law. We may notice that Parliament, with a view to confer right upon the female heirs, even in relation to the joint family property, enacted the Hindu Succession Act, 2005. Such a provision was enacted as far back in 1987 by the State of Andhra Pradesh. The

succession having opened in 1989, evidently, the provisions of the Amendment Act, 2005 would have no application. Sub-section (1) of Section 6 of the Act governs the law relating to succession on the death of a coparcener in the event the heirs are only male descendants. But, the proviso appended to sub-section (1) of Section 5 of the Act creates an exception. First son of *Babu Lal viz. Lal Chand*, was, thus, a coparcener. Section 6 is an exception to the general rules. It was, therefore, obligatory on the part of the respondent-plaintiffs to show that apart from Lal Chand, Sohan Lal will also derive the benefit thereof. So far as the second son, Sohan Lal is concerned, no evidence has been brought on record to show that he was born prior to coming into force of the Hindu Succession Act, 1956.

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47. ELECTRICITY :

Electricity, theft of – Theft of electricity being increasing in alarming proportion causing loss to State revenue; Court should impose heavy fine rendering theft a non-profitable venture.

Jagmodhan Mehatabsing Gujaral and others v. State of Maharashtra Judgment dated 02.11.2006 passed by the Supreme Court in Criminal Appeal No. 1113 of 2006, reported in (2006) 8 SCC 629

Held:

Large-scale theft of electricity is a very alarming problem faced by all the State Electricity Boards in our country, which is causing loss to the State revenue running in hundreds of corers of rupees every year. In our considered view, after proper adjudication of the cases of all those who are found to be guilty of the offence of committing theft of electricity; apart from the sentence of conviction, the court should invariably impose heavy fine making theft of electricity a wholly non-profitable venture. The most effective step to curb this tendency perhaps could to be discontinue the supply of electricity to those consumers temporarily or permanently who have been caught abstracting electricity in a clandestine manner on more than one occasion. The legislature may consider incorporating this suggestion as a form of punishment by amending Section 39 of the Electricity Act, 1910.

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48. CORRUPTION :

Corruption in public life – Corruption like cancerous lymph nodes is corroding the vital veins of body politics and social fabric of efficiency in public service.

State of M.P. v. Shambhu Dayal Nagar

Judgment dated 02.11.2006 passed by the Supreme Court in Criminal Appeal No. 261 of 2004, reported in (2006) 8 SCC 693

Held:

It is difficult to accept the prayer of the respondent that a lenient view be

taken in this case. The corruption by public servants has become a gigantic problem. It has spread everywhere. No facet of public activity has been left unaffected by the stink of corruption. It has deep and pervasive impact on the functioning of the entire country. Large-scale corruption retards the nation-building activities and everyone has to suffer on that count. As has been aptly observed in *Swatantar Singh v. State of Haryana, (1997) 4 SCC 14 : 1997 SCC (L&S) 909* corruption is corroding, like cancerous lymph nodes, the vital veins of the body politics, social fabric of efficiency in the public service and demoralising the honest officers. The efficiency in public service would improve only when the public servant devotes his sincere attention and does performance of the duties of his post. The reputation of corrupt would gather thick and unchaseable clouds around the conduct of the officer and gain notoriety much faster than the smoke.

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49. INTELLECTUAL PROPERTY RIGHTS :

Passing off, action for – Doctrine of 'passing off', meaning and concept of – Law explained.

Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel and others

Judgment dated 29.08.2006 passed by the Supreme Court in Civil Appeal No. 8817 of 2003, reported in (2006) 8 SCC 726

Held:

In a case of this nature, the test for determination of the dispute would be the same where a cause of action for passing-off arises. The depectively similar test, thus, would be applicable herein.

The doctrine of passing-off is a common law remedy whereby a person is prevented from trying to wrongfully utilise the reputation and goodwill of another by trying to deceive the public through "passing-off" his goods.

In *Kerly's Law of Trade Marks and Trade Names,* supplement pp. 42 and 43, para 16-02, the concept of passing-off is stated as under:

> "The law or passing-off can be summarised in one short general proposition that no man may pass off his goods as those of another. More specifically, it may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. These are three in number.
>
> Firstly, he must establish a goodwill or reputation attached to the goods or services which he supplies in the minds of the purchasing public by association with the identifying 'get-up' (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive, specifically of the plaintiff's goods or services.

Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to a belief that the goods or services offered by him are the goods or services of the plaintiff.

Thirdly, he must demonstrate that he suffers or, in a quick time action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or service is the same as the source of those offered by the plaintiff..."

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50. NATURAL JUSTICE :

Principles of natural justice, applicability of – Principles of natural justice cannot be put in a strait jacket formula – It must be seen in circumstantial flexibility – The approach of Court must be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than presidential – Law explained.

P.D. Agrawal v. State Bank of India and others

Judgment dated 28.04.2006 passed by the Supreme Court in Civil Appeal No.7686 of 2004, reported in (2006) 8 SCC 776

Held:

The principles of natural justice cannot be put in a straitjacket formula. It must be seen in circumstantial flexibility. It has separate facets. It has in recent time also undergone a sea change.

In *Ajit Kumar Nag v. G.M. (PJ), Indian Oil Corpn. Ltd., (2005) 7 SCC 764* a three-Judge Bench of this Court opined: (SCC pp. 785-86, para 44)

> "44. We are aware of the normal rule that a person must have a fair trial and a fair appeal and he cannot be asked to be satisfied with an unfair trial and a fair appeal. We are also conscious of the general principle that pre-decisional hearing is better and should always be preferred to post-decisional hearing. We are further aware that it has been stated that apart from laws of men, laws of God also observe the rule of *audi alteram partem*. It has been stated that the first hearing in human history was given in the Garden of Eden. God did not pass sentence upon Adam and Eve before giving an opportunity to show cause as to why they had eaten the forbidden fruit. (See *R. v. University of Cambridge, (1723) 1Str 557*). But we are also aware that the principles of natural justice are not rigid or immutable and hence they cannot be imprisoned in a straitjacket. They must yield to and change with exigencies of situations. They must be confined within their limits and cannot be allowed to run wild. It has been stated: ' "To do a great right" after all, it is permissible sometimes "to do a little wrong", ' [Per Mukharji, C.J. in *Charan Lal Sahu v. Union of India, (1990) 1 SCC 613*

(Bhopal Gas Disaster), SCC p. 705, para 124.] While interpreting legal provisions, a court of law cannot be unmindful of the hard realities of life. In our opinion, the approach of the court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than 'precedential'."

In *Canara Bank v. Debasis Das, (2003) 4 SCC 557* this Court referred to the prejudice doctrine stating: (SCC p. 576, para 24)

> Additionally, there was no material placed by the employee to show as to how he has been prejudiced. Though in all cases the post-decisional hearing cannot be a substitute for pre-decisional hearing, in the case at hand the position is different."

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51. INDIAN PENAL CODE, 1860 – Section 307

Attempt to murder – To constitute offence u/s 307, it is not essential that bodily injury capable of causing death should have been inflicted, requisite intention coupled with overt act sufficient to cause offence – Law explained.

Bipin Bihari v. State of M.P.

Judgment dated 20.09.2006 passed by the Supreme Court in Criminal Appeal No. 986 of 2006, reported in (2006) 8 SCC 799

Held:

Section 307 IPC reads as follows:

> 307. *Attempt to murder.* – Whoever does any act with such intention or knowledge, and under such circumstances that, it he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned."

It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between the act of the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

In *Sarju Prasad v. State of Bihar, AIR 1965 SC 843* it was observed that the mere fact that the injury actually inflicted by the accused did not cut any vital organ of the victim, is not itself sufficient to take the act out of purview of Section 307 IPC.

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52. SERVICE LAW :

Disciplinary proceedings – Power of judicial review, extent of – Power of judicial review to interfere with finding of fact of the disciplinary authority – No interference with the finding unless it suffers from procedural impropriety or is unreasonable or not supported by any material – Law explained.

U.O.I. & ors. v. K.K. Kamtaria

Reported in 2006 (III) MPJR 186

Held:

It will appear from the aforesaid findings of the Tribunal that the Tribunal has sat over the order of the Revisional Authority as if it was sitting in appeal. The Tribunal failed to appreciate that in a matter relating to the disciplinary proceedings the Court or the Tribunal does not act as an Appellate Authority and it has limited scope to interfere while exercising power of judicial review. In exercise of the power of judicial review, the Court or the Tribunal cannot substitute its own views for that of the Revisional Authority and will interfere in the order of the Revisional Authority only on limited grounds.

In *Union of India and another vs. K.G. Soni, (2006) 6 SCC 389*, the Supreme Court, after considering its earlier decisions in the cases of *B.C. Chaturvedi vs. Union of India* and *others, (1995) 6 SCC 749, Union of India* and *another vs. G. Ganayutham, (1997) 7 SCC 463* and *Damoh Panna Sagar Rural Regional Bank and others v. Munna Lal Jain, (2005) 10 SCC 84* has held;

> "14. The common thread running through in all these decisions is that the Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in the *Wednesbury's case* (supra) the Court would not go into the correctness of the choice made by the administrator open to him and the court should not substitute its decision to that of the administrator; The scope of judicial review is limited to the deficiency in decision-making process and not the decision.
>
> 15. To put differently, unless the punishment imposed by the Disciplinary Authority or the Appellate Authority shocks the conscience of the Court/Tribunal, there is no scope for interference. Further to shorten litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support

thereof. In a normal course if the punishment imposed is shockingly disproportionate, it would be appropriate to direct the Disciplinary Authority or the Appellate Authority to reconsider the penalty imposed."

It will be clear from the aforesaid paras of the judgment of the Supreme Court in the case of *Union of India and another vs. K.G. Soni* (supra) that the Court or the Tribunal in exercise of powers of judicial revíew will interfere in the administrator's decision if it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court and that scope of judicial review is limited to the deficiency in decision-making process and not the decision.

It is also well settled by the Supreme Court in a series of decisions that the High Court or the Tribunal in exercise of power of judicial review will not interfere with the findings of fact of the disciplinary authority so long as the findings are supported by some material on record and this is because it is the disciplinary authority who is empowered to decide as to whether the delinquent employee is guilty of the misconduct or not and the function of the Court or the Tribunal is only to find out as to whether the decision of the disciplinary authority has been arrived at by following the proper procedure and is based on some materials on record. The High Court or the Tribunal can interfere with the findings of fact of the disciplinary authority only if there is absolutely no material in support of such a finding of fact or the finding is such that no reasonable man would have arrived at on the available materials on record. (See *The State of Orissa and another vs. Murlidhar Jena AIR 1963 SC 404 at 405, 408*).

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53. CIVIL PROCEDURE CODE, 1908 – Section 95
Injunction or stay obtained on mala fide grounds – Remedy available to the defendant – Defendant may file an application in the same suit or file a regular suit separately – If application filed in the same suit, regular suit stands barred – Law explained.
Krishi Upaj Mandi Samiti, Kukshi, Distt. Dhar v. Rangnath (Deceased through L.Rs.) & Anr.
Reported in 2006 (III) MPJR 194

Held:

The question on which this appeal is admitted that whether the suit for damages in maintainable in view of Sec. 95 (2) of the C.P.C. as the suit filed by defendant was dismissed by the Court on the cost of Rs. 400/-. Counsel for appellant Shri S.K. Pavnekar urged that in view of Sec. 95 of the Code of Civil Procedure, the regular suit is barred. For appreciating his arguments, Shri Pavnekar submits that it is necessary to refer Sec. 95 of the C.P.C. which reads as under :

> "95. Compensation for obtaining arrest, attachment or injunction or insufficient grounds – (1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last proceeding section,-

(a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or

(b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same, the defendant may apply to the court, and the court may, upon such application, award against the plaintiff by its order such amount, [*not exceeding fifty thousand rupees*], as it deems a reasonable compensation to the defendant for the expense or injury (including injury to reputation) caused to him:

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction."

From the perusal of the language of Sec. 95 it is clear that if an injunction of Order is passed in favour of the person applied for and ultimately it is found that the stay order was obtained mala fide then the defendant in that case may file an application for compensation and in case such an application is filed then regular suit is barred.

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54. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (a) Whether expression 'legally recoverable rent' includes 'time barred rent'? Held, No – Law explained.
Dinesh Kumar Sharma v. Bhagwat Prasad Tiwari
Reported in 2006 (III) MPJR SN 23

Held:

The first contention raised by ..... counsel for the petitioner is that the tenant is not required to deposit time barred rent and if time-barred rent is ignored, he has deposited the entire rent. Suit in the present case was filed on 19-08-2002, hence, rent prior to 19/8/1999 is already barred by limitation. According to him, the tenant is required only to deposit rent which is legally due. For this purpose, he has relied on a Full Bench decision of this Court in the case of *Mankunwarbai vs. Sunderalal Rambharosa Jain, 1978 MPLJ 405* wherein Full Bench of this Court has held that the tenant is not obliged to deposit time barred rent under Section 13(1) and 13(2) of the Act. He has also relied upon another judgment of this Court in the case of *Arun Kumar vs. Krishna Gopal Sharma, 2005 (3) MPHT 391* wherein this Court after following the Full Bench decision in the aforesaid case has held that for getting protection of Section 13(1) of the Act, the tenant is not obliged to deposit time barred rent.

Trial Court while striking out the defence of the present petitioner has relied upon the judgments in the case of *Shyam Bhagwan Dubey vs. Sheikh Nizam* and *others, 1994 JLJ 143* and *Bharosilal vs. Rihan Ahmed, 2002 (1) MPWN 146.* Both these judgment are considered by this Court in the case of *Arun Kumar* (supra) and this Court had held that for getting the protection under Section 13 of the Act, the tenant is not obliged to deposit time barred rent.

Contention of the learned counsel for the respondent in that even if the tenant is not required to deposit time barred rent, in the present case, the defendant has committed default, He has relied on a judgment of this Court in the case of *Suresh Kumar vs. M/s S.P. Sales Agency* (S.A.111/00 decided on 21-1-2004 at Gwalior) wherein Court has held that if no application for extension of time is moved, then defence of the tenant is liable to be struck down if he has not deposited the regular rent.

There is no dispute to the said proposition. However, in the present case, I find that the court below has struck off the defence of the defendant solely on the ground that time barred rent is not deposited by the tenant. Therefore, said order cannot be sustained as the same is contrary to the Full Bench decision of this Court in the case of *Mankunwarbai* (supra).

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55. HINDU MARRIAGE ACT, 1955 – Section 24
Interim alimony u/s 24, grant of – Wife found guilty of administering poison to husband – Whether it can be a ground to refuse interim alimony u/s 24? Held, No – Law explained.
Janki Bai v. Prem Narayan Kushwaha
Reported in 2006 (III) MPJR SN 31

Held:

In the case of *Amarjeet Kaur vs. Harbhajan Singh and another, (2003) 10 SCC 228* their Lordships while dealing with the order of the High Court where a condition was imposed while granting maintenance and litigation expenses directed the court below to order for conducting of the DNA test of the male child which is in custody of the petitioner with the further rider that if the test goes against, the petitioner therein, should not be entitled to get any maintenance pendente lite for her self, but would get maintenance for the girl child which was fixed at Rs. 1,000/- per month. In that context it was contended before the Apex Court that in the matter of grant of maintenance, there is no impediment for the Court to impose a condition of the nature and no exception could be taken to the course adopted by the High Court. Their Lordships in paragraph 8 held as under:

> "8. Section 24 of the Hindu Marriage Act, 1955 empowers the court in any proceeding under the Act, if it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of any one of them order the other party to pay to the petitioner the expenses of the proceeding and monthly maintenance as may seem to be reasonable during the proceeding, having regard to also the income of both the petitioner and the respondent. Once the High Court, in this case, has come to the conclusion that the appellant wife herein has to be provided with the litigation expenses and monthly maintenance, it is beyond comprehension as to how, de hors the criterian laid down in the

statutory provision itself, the Court could have thought of imposing an extraneous condtion, with a default clause which is likely to defeat the very claim which has been sustained by the court itself. Considerations as to the ultimate outcome of the main proceeding after regular trial would be wholly alien to assess the need or necessity for awarding interim maintenance, as long as the marriage, the dissolution of which has been sought, cannot be disputed, and the marital relationship of husband and wife subsisted. As noticed earlier, the relevant statutory consideration being only that either of the parties, who was the petitioner in the application under Section 24 of the Act, has no independent income sufficient for her or his support for the grant of interim maintenance, the same has to be granted and the discretion thereafter left with the court, in our view, is only with reference to reasonableness of the amount that could be awarded and not to impose any condition, which has self-defeating consequence. Therefore, we are unable to approve of the couse adopted by the learned Single Judge, in this case."

From the aforesaid pronouncement, it is evincible that their Lordships while scanning the basic requirement of section 24 of the Act have laid down that the relevant statutory consideration being only that either of the parties who was the petitioner in the application under section 24 of the Act has no independent income sufficient for her or his support for the grant of interim maintenance, the same has to be granted and the discretion therefor left with the Court is only with reference to the reasonableness of the amount that would be awarded and not to impose any condition which has self-defeating consequence. It is worth noting here that in paragraph 9 of the said judgment their Lordships dealt with the condition imposed, i.e., conducting DNA test and expressed no opinion on the legality and propriety of the court undertaking consideration at the appropriate stage. Their Lordships only confined to the limited aspect to the stage of awarding interim maintenance. It may look that imposition of a condition while granting maintenance allowance can affect the provision thereof distinguishing features but a pregnant one, which their Lordships have categorically and unequivocally expressed the opinion with regard to the requirement of statutory conditions. Their Lordships have used the words "the relevant statutory conditions being only..." and in view of the aforesaid I am disposed to think that no other condition can be read into the provision to be added as a futuristic conditional one or a conviction. Their Lordships have restricted the discretion to quantum, not to entitlement if the conditions precedent are proved. The submission made by the learned counsel for the respondent that the conduct is a relevant fact and has to be taken into consideration is *de hors* the provision, as section 25 has been couched in a different language than section 24. Section 25 uses the phraseology ".... conduct of the parties and other circumstances of the case". Such wordings are absent in the provision and in the absence of the same, it would be encroaching in the field of legislation to add the said concepts to it on

the basis that the Court has a discretion, more so, when the Apex Court has expressed the view with regard to the limited discretion the Court has.

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56. CIVIL PROCEDURE CODE, 1908 – Order III Rule 1
Concession made by Advocate on behalf of the party, bindingness of – Such concession is binding unless it amounts to wrong concession on legal question – Law explained.
BSNL and others v. Subash Chandra Kanchan and another
Judgment dated 13.09.2006 passed by the Supreme Court in Civil Appeal No. 4109 of 2006. reported in (2006) 8 SCC 279

Held:

Furthermore, in terms of Order 3 Rule 1 of the Code of Civil Procedure a litigant is represented by an advocate. A concession made by such an advocate is binding on the party whom he represents. If it is binding on the parties, again subject to just exceptions, they cannot at a later stage resile therefrom. The matter may, however, be different if a concession is made on a question of law. A wrong concession on legal question may not be binding upon his client. Here, however, despite the stand taken by the appellant in its written statement before the High Court the learned advocate consented to appointment of a person as an arbitrator by the High Court in exercise of its jurisdiction under Section 11 of the 1996 Act, in our considered view, the same should not be permitted to be resiled from. A person may have a legal right but if the same is waived, enforcement thereof cannot be insisted.

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57. SOCIAL JUSTICE :
Social justice, concept of – It is concerned with distribution of benefits and burdens throughout a society – Concept explained.
M. Nagaraj and others v. Union of India and others
Judgment dated 19.10.2006 passed by the Supreme Court in Writ Petition (C) No. 61 of 2002, reported in (2006) 8 SCC 212

Held:

Social justie is one of the sub-divisions of the concept of justice. It is concerned with the distribution of benefits and burdents throughout a society as it results from social institutions – propety systems, public organisations, etc.

The problem is – what should be the basis of distribution? Writers like Raphael, Mill and Hume define "social justice" in terms of rights. Other writers like Hayek and Spencer define "social justice" in terms of deserts. Socialist writers define "social justice" in terms of need. Therefore, there are three criteria to judge the basis of distribution, namely, rights, deserts or need. These three criteria can be put under two concepts of equality – "formal equality" and "proportional equality". "Formal equlaity" means that law treats everyone equal and does not favour anyone either because he belongs to the advantaged section

of the society or to the disadvantaged section of the society. Concept of "proportional equality" expects the States to take affirmative action in favour of disadvantaged sections of the society within the framework of liberal democracy.

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... Social justice is concerned with the distribution of benefits and burdens. The basis of distribution is the area of conflict between rights, need and means. These three criteria can be put under two concepts of equality, namely, "Formal equality" and "proportional equality". Formal equality means that law treats everyone equal. Concept of egalitarian equality is the concept of proportional equality and it expects the States to take affirmative action in favour of disadvantaged sections of society within the framework of democratic polity. In *Indra Sawhney* all the Judges except Pandian, J. held that the "means test" should be adopted to exclude the creamy layer from the protected group earmarked for reservation.In *Indra Sawhney* (supra) this Court has, therefore, accepted caste as a determinant of backwardness and yet it has struck a balance with the principle of secularism which is the basic feature of the Constitution by bringing in the concept of creamy layer. Views have often been expressed in this Court that caste should not be the determinant of backwardness and that the economic criteria alone should be the determinant of backwardness. As stated above, we are bound by the decision in *Indra Sawhney* (supra). The question as to the "determinant" of backwardness cannot be gone into by us in view of the binding decision. In addition to the above requirements this Court in *Indra Sawhney* (supra) has evolved numerical benchmarks like ceiling limit of 50% based on post-specific roster coupled with the concept of replacement to provide immunity against the charge of discrimination.

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58. MOTOR VEHICLES ACT, 1988 – Section 149
Insurer, liability of – Death of the person while travelling on tractor – Premium paid only regarding driver – No other person allowed to travel on tractor – Whether Insurance Company liable for compensation ? Held, No.
Laxmandas and another v. Raju Thakur and others
Reported in 2007 (1) MPWN 4

Held:

...There is no dispute that as per the policy the premium was only paid for driver of the tractor and even no labour was allowed to travel on tractor and the Insurance Company is not liable for liability of the labour also and in the decision of this High Court in the case of *National Insurance Company v. Jagdish and others* [2004 (I) TAC 165 (M.P.)] it has been held that the tractor driven in violation of condition of policy though the Insurance Company is not liable but can indemnify and recover the amount from the owner of the vehicle.

Admittedly, in this case the vehicle was insured for, agricultural purposes and tractor was driven in violation of the conditions of policy. It has come in the evidence that the deceased was travelling on the tractor may be for agricultural

purposes but his liability is not covered under the policy. Therefore, the Insurance Company cannot be held to be liable to pay compensation as the risk is not covered under the policy. When the premium was paid to cover the risk of the driver only, the risk of other passengers or any of the labourer/worker travelling on the tractor cannot be held to be covered under the policy and the Insurance Company cannot be held to be liable. Even if the driver was having learning licence and was not having regular licence as per the decision of *National Insurance Company v. Swaran Singh (2005 (1) JLJ 85 = (2004) 35 SCC 297)* and in case of breach of policy as per *National Insurance Company v. Jagdish and others [2004 (I) TAC 165 (M.P.)]* it is the Insurance Company, who is liable to pay the amount of compensation and thereafter to recover the same from the owner of the vehicle.

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59. LAND ACQUISITION ACT, 1894 – Sections 4 & 6
Whether Notification u/Ss 4 & 6 can be issued simultaneously? Held, No – Law explained.
Sudarshan Prasad Patel v. State of M.P. and another
Reported in 2007 (I) MPWN 5

Held:

That the legal position has been set at rest by the Apex Court after considering the provisions of sections 4 and 6 of the Act prior to amendment in the 1984 and thereafter. The Apex Court held that prior to amendment of 1984, it was permissible to publish both the notifications simultaneously. But after the amendment, a declaration can only be made 'after the date of publication of the Notification' under section 4. So there must be difference of dates between the date of the publication of the Notification under sections 4 and 6. Hence both the notifications cannot be published on the same date. This act of the respondents is in violation of section 17 (4) of the Act. The expression 'after the date of the publication of the notification' introduced in section 4 can be explained by reading it along with the amendment made in section 4 whereby in different situation in section 4, the last date of publication of the notice has been determined as the date of the publication of the notification and similarly in section 6 a date of the publication of the notice has been provided for. It clearly indicates that declaration under section 6 had to be made after the publication of the notification, meaning thereby subsequent to the date of publication of the notification.

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60. STAMP ACT, 1899 – Article 23 (As amended in M.P.)
Agreement to sell immovable property – Stamp duty on agreement to sell immovable property – Delivery of possession not mentioned in the agreement but possession handed over subsequent to the agreement – Stamp duty is payable as payable for conveyance under Article 23 – Law explained.
Mohd Nazeer v. State of M.P. and others
Reported in 2007 (I) MPWN 7

Held:

The learned counsel for the petitioner has argued that as there is nothing in the instrument of agreement for sale regarding delivery of possession, the trial Court committed an illegality in treating it as conveyance. He also argued that while considering the question of stamp duty payable on the instrument, the instrument alone has to be seen because the duty is on the instrument and not on what the parties intend to do. He placed reliance upon the decision of this Court rendered in the case of *Goel Industries and another v. Om Prakash Mittal* [1994 (1) Vidhi Bhasvar 104 = 1993 MPLJ 137]. The learned counsel for the respondents No. 2 to 3H, on the other hand, defended the validity of the impugned order and relied upon the decision of the Supreme Court in *Veena Hashmukh Jain and another v. State of Maharashtra and others* [AIR 1999 SC 807].

Article 23 of Schedule 1-A to the Indian Stamp Act, 1899 (hereinafter referred to as "the Act") as amended in Madhya Pradesh reads as under:

"23. Conveyance, not being a transfer charged or exempted under (No. 62) irrespective of the market value of the property which is the subject matter of conveyance.	Seven and half percent, of such market value : Provided that if the total amount of the duty payable is not a multiple of fifty paise, it shall be rounded off to the nearest rupee, half of a rupee or over being counted as one rupee and less than half of a rupee being disregarded.

"Explanation. - For the purpose of this article, where in the case of agreement to sell immovable property, the possession of any immovable property is transferred to the purchaser before execution or after execution of such agreement without executing the conveyance in respect thereof then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly :

Provided that, the provision of section 47-A shall apply *mutatis mutandis* to such agreement which is deemed to be a conveyance as aforesaid, as they apply to a conveyance under that section:

Provided further that where subsequently a conveyance is effected in pursuance of such agreement of sale, the stamp duty, if any, already paid and recovered on the agreement of sale which is deemed to be a conveyance shall be adjusted towards the total duty leviable on the conveyance, subject to a minimum of Rs. 10".

This provision is almost identical in terms to Article 25 of the Bombay Stamp Act, 1958 which was construed by the Supreme Court in *Veena Hashmukh Jain and another v. State of Maharashtra and others,* (supra) wherein in para 8 of the order it is observed as follows :

"8. The duty in respect of an agreement covered by the Explanation is leviable as if it is a conveyance. The conditions to be fulfilled are if there is an agreement to sell immovable property and possession of such property is transferred to the purchaser before the execution or at the time of execution or subsequently without executing any conveyance in respect thereof such an agreement to sell is deemed to be a "conveyance". In the event a conveyance is executed in pursuance of such agreement subsequently, the stamp duty already paid and recovered on the agreement of sale which is deemed to (be) a conveyance shall be adjusted towards the total duty leviable on the conveyance."

It is true that the instrument of agreement for sale does not recite that possession has been delivered or will be delivered after its execution to the petitioner. It is also true that the normal rule is that the instrument alone should be construed for deciding the amount of duty payable on it but there are exceptions to this rule. For example in *Somaiya Organics (India) Ltd. v. Board of Revenue* U.P. (AIR 1986 SC 403] where a sale was, on the face of it, free from encumbrance but declarations of the parties made after the execution of the sale deed expressed that this recital was wrong and that the sale was subject to the charge created by the vendor in favour of a bank, the Court held that the amount of the charge became a part of the consideration and the duty was payable on the apparent sale consideration plus the amount of the charge. The explanation in Article 23 of the Act which widens the definition of conveyance does not require for its application that the agreement must recite that possession has been delivered or will be delivered later. As the petitioner not only in the plaint but also in his statement recorded in the trial Court has clearly admitted that possession of the suit land was delivered to him at the time of execution of the agreement for sale, it has to be held that the instrument satisfies the requirement of the explanation in Article 23 of the Act and is deemed to be a conveyance for the purpose of stamp duty...

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61. CIVIL PROCEDURE CODE, 1908 – Order LXI Rule 3-A
Appeal – Whether a time barred appeal not accompanied with application of condonation of delay is incompetent? Held, No – Law explained.
Jayendra Rao (Sardar) v. Om Prakash
Reported in 2007 (I) MPWN 8

Held :

... In the case of State of *M.P. v. Pradeep Kumar [1999 (I) MPWNSN (41)]* it has been held that a time barred appeal not accompained with, by an application for condonation of delay is not competent and similar view is taken

by the Kerala High Court in the case of *Padmawati v. Kalu [AIR 1980 Kerala 173]*. On a perusal of the judgment rendered by Supreme Court in the case of *State of M.P. v. Pradeep Kumar* (supra) it is seen that the proposition laid down in these judgments are no more good law. In para 17 of the judgment rendered by Supreme Court it is indicated that the law laid down in the case of *State of M.P. v. Pradeep Kumar* (supra) have been over ruled after considering the judgment of Kerala High Court, the judgment of Division Bench of Karnataka High Court is also considered and in paras 17, 18 & 19 has observed as under by the Supreme Court :

> "17. A Division Bench of the Kerala High Court has subsequently overruled the dictum laid down by the single Judge in the above case (vide *Maya Devi v. M.K. Krishna Bhattathiri*). The same fate had fallen on the view adopted by the single Judge of the Karnataka High Court in *Madhukar case* when a Division Bench had subsequently overruled it (*State of Karnataka v. Nagappa*). N. Venkatachaliah and S.A. Hakeem, JJ (as they then were) dealt with the background of introducing Rule-3-A in Order 41 of the Code and after discussion held that sub-rule (1) of Rule 3-A is mandatory. However, learned Judges pointed out that sub-rules (2) and (3) have been employed by the legislature for highlighting the purpose of introducing such a new rule. The following passage from the judgment of the Division Bench of the Karnataka High Court can usefully be quoted in this context.
>
> "A combined reading of sub-rules (1) and (2) of Rule 3-A makes it manifest that the purpose of requiring the filing of an application for condonation of delay under sub-rule (1) along with a time barred appeal, is mandatory in the sense that the appellant-cannot, without such application being decided, insist upon the Court to hear his time barred appeal. That was the very purpose sought to be achieved by insertion of sub-rules (1) (2) of Rule 3-A becomes clear from the legislative history of new Rule 3-A to which we have already adverted."
>
> 18. We may also point out that a Division Bench of the Patna High Court has adopted the same view even earlier in *State of Bihar v. Ray Chandi Nath Sahay.*
>
> 19. The subject of enacting Rule 3-A in Order 41 of the Code seems to be two-fold. First is, to inform the appellant himself who filed a time-barred appeal that it would not be entertained unless it is accompanied by an application explaining the delay. Second is, to communicate to the respondent a message that it may not be necessary for him to get ready to meet the grounds taken up in the memorandum of appeal because the Court has to deal with application for condonation of delay as a condition precedent. Barring the above objects, we cannot find out from the Rule that it is intended to operate

as unremediably or irredeemably fatal against the appellant if the memorandum is not accompanied by any such application at the first instance. In our view, the deficiency is a curable defect, and if the required application is filed subsequently the appeal can be treated as presented in accordance with the requirement contained in Rule 3-A Order 41 of the Code."

From the aforesaid it is clear that even if the memorandum of appeal is not accompained by such an application at the first instance the deficiency is curable, it can be rectified...

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62. CRIMINAL PROCEDURE CODE, 1973 – Section 125
Wife not complying with the decree of restitution of conjugal rights whether entitled to maintenance u/s 125? Held, No.
Balakram v. Smt. Durga Bai and others
Reported in 2007 (I) MPWN 10

Held:

Non-appellants No. 1 to 4 filed a petition under section 125 of the CrPC for grant of maintenance against the petitioner. Respondent No. 1 claims herself to be the wife and other respondents claim themselves to be the children of the petitioner. The petition was combated by the petitioner. After trial, the trial Court recorded the findings that the petitioner having sufficient means neglected or refused to maintain his wife and children and granted maintenance @ Rs. 500/- per month to wife and @ Rs. 300/- per month to each of respondents No. 2, 3 and 4.

Being aggrieved by the judgment of the trial Court, petitioner filed a revision before IIIrd Additional Sessions Judge, Chhindwara which was also dismissed.

It is this order of the revisional Court which is the cause of grievance of the petitioner.

The counsel for the petitioner submits that a plea was raised by the petitioner before the trial Court that he is prepared to maintain his wife on condition of her living with him. He also obtained a decree for restitution of conjugal rights vide judgment and decree dated 3.5.1994, passed by District Judge, Chhindwara. Despite this decree respondent No. 1 did not come to live with him. In this view of the matter the orders of both the Courts below are liable to be set aside.

... The petitioner filed a copy of decree for restitution of conjugal rights which was exhibited as document D-1. But this document was not considered at all either by the trial Court or by the revisional Court. Where the decree for restitution of conjugal rights was passed in favour of the applicant and against the wife and despite this decree the wife did not go to live with the husband, the husband was not under an obligation to maintain her (wife)....

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63. **SUCCESSION ACT, 1925 – Sections 57 & 270**
Whether probate necessary to establish a right under a Will by a person residing in M.P. regarding property situated in M.P.? Held, No.
Mayank v. Public in General and others
Reported in 2007 (I) MPWN 14

Held:

Short facts of the case are that deceased was Ms. Renuka Bai w/o Balkrishna, who passed away on 6.11.1998. After her death the appellant filed a petition under section 278 of the Act on 3.8.2000 alleging that the deceased Renuka Bai executed the registered will on 22.8.1995 before her death, whereby the property which is a house bearing municipal No. 70, old 81, now situated at Barabhai, Indore was given to the appellant. Hence, it has prayed that the letter of administration be issued in his favour.

The petition filed by the appellant was opposed by the respondents on various grounds and it was prayed that petition for grant of Probate/Letter of Administration be dismissed. On the basis of the pleadings, the learned Court below framed the issues, recorded the evidence and at the time of passing of order the learned Court below vide order dated 23.10.2003 dismissed the petition on the ground that in State of Madhya Pradesh, petition for grant of Probate/ Letter of Administration relating to immovable property is not maintainable. Being aggrieved by the impugned order the present appeal has been filed.

For just disposal of this petition, relevant sections of Indian Succession Act are necessary, which are reproduced herein below:

> "264. *Jurisdiction of District Judge in granting and revoking probates, etc.* – (1) The District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district.
>
> (2) Except in cases to which section 57 applies, no Court in any local area beyond the limits of the towns of Calcutta, Madras and Bombay, shall, where the deceased is a Hindu, Mohammedan, Buddhist, Sikh or Jaina or an exempted person, receive applications for probate or letters of administration until the State Government has, by a notification in the Official Gazette, authorized it so to do.
>
> 213. *Right as executor or legatee when established.*– No right as executor or legatee can be established in any Court of justice unless a Court of competent jurisdiction in (India) has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.

(2) This section shall not apply in the case of wills made by Mohammadans (or Indian Christians), and shall not apply -

(i) in the case of will made by any Hindu, Buddhist, Sikh or Jaina where such wills are of the classes specified in clauses (a) and (b) of section 57; and

(ii) in the case of will made by any Parsi dying after the commencement of the Indian Succession (Amendment) Act, 1962 (16 of 1962), where such wills are made within the local limits of the [ordinary original civil jurisdiction] of the High Courts at Calcutta, Madras and Bombay, and where such wills are made outside those limits, in so far as they relate to immovable property situated within those limits]

57. Application of certain provisions of Part to a class of Wills made by Hindus, etc. – The provisions of this part which are set out in a schedule III shall, subject to the restrictions and modifications specified therein, apply –

(a) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of September, 1870 within the territories which at the said date were subject to the Lieutenant- Government of Bengal or within the local limits of the ordinary original civil jurisdiction of High Court of judicature at Madras and Bombay; and

(b) to all such wills and codicils made outside those territories and limits so far as relates to immovable property situated within those territories or limits; [and

(c) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b)]."

In the matter of *Damodarlal v. Gopinath* [AIR 1956 Nagpur 209] Hon'ble Shri Justice Hidayatullah observed that under the notification No. 7988, dated 19.7.1994, issued by the Judicial Commissioner, Central Provinces, the District Judges, were authorized to receive applications for probate and letters of administration even in the cases of Hindu Wills not falling under section 57. That notification must be deemed to continue in force as one under sub section 2 of section 264 of the present Succession Act. The jurisdiction of the District Judge to grant probate is limited under section 270 to the cases of a testator who had a fixed place of abode at the time of his decease or any property movable or immovable within the jurisdiction of the Judge. It was further observed that it is not obligatory for any one to obtain probate in respect of the will of a Hindu in any local area beyond the towns of Calcutta, Madras and Bombay. District Judge, Hoshangabad has jurisdiction to grant or refuse the same if moved for probate. When the requirements in section 270 are satisfied, it cannot be said that the

Court has no jurisdiction in granting the probate. In the matter of *Lachhman Singh v. Smt. Brisbhan Dulari* reported in [1966 MPLJ SN 8] this Court has held that the combined effect of section 213 (2) (i) and section 57 of the Act is that obtaining of a probate of the will is not a condition precedent to the establishment of a right where the will has been made by a person who is a resident of Madhya Pradesh in respect of the property situated in Madhya Pradesh. In the case of *M/s. Kalka Prasad Ramlal v. Rammomal* [AIR 1978 Allahabad 298] Allahabad High Court has held that there was no necessity of a notification in the official gazette empowering the District Judge to entertain petitions for probates and letters of administration and grant the same. It therefore follows that the District Judge has jurisdiction to entertain petitions and grant letters of administration. In the case of *Vidhyaram v. Devilal* reported in [1981 JLJ 203] this Court has observed that there can be no dispute with the proposition that section 213 (1) has no applicability to a will made by a Hindu which falls in clause (c) of section 57 of the Act. Accordingly, a person sets up a will does not fall within clause (a) and (b) of section 57 can establish his right as legates in any Court of justice without obtaining a probate. To put it differently, obtaining of probate in such a case is optional. In the matter of *Madan Gopal v. Ramjiwanibai* reported in [1986 JLJ 806] this Court has held that will falling under section 57 (a) or (b) are exempted from the requirement of being probated in order to establish legatee's right under the will. In the matter of *Balbir Singh Wasu v. Lakhbir Singh* [(2005) 12 SCC 503] the question before Hon'ble Apex Court was that section 213 of Succession Act which requires an executor to obtain probate before establishing his claim under the Will was not applicable outside the Presidency Towns of Calcutta, Madras and Bombay. The Hon'ble Court held that assuming this to be correct, we do not read section 213 as prohibiting the executor from applying for probate as a matter of prudence or conveniences to the Courts in other parts of the country not covered by section 213. Those Courts are competent to entertain such applications if made.

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64. ARBITRATION AND CONCILIATION ACT, 1996 – Section 20 Appointment of Arbitrator – Whether Court is bound by any clause in agreement limiting appointment to a person or class of persons? Held, Yes – Law explained.
Union of India and another v. M.P. Gupta
Judgment dated 05.02.2004 passed by the Supreme Court of India in Civil Appeal No. 2053 of 1999, reported in (2004) 10 SCC 504

Held :

Learned Senior Counsel appearing for the appellants urged that in view of clause 64 of the agreement which provides that only two gazetted railway officers of equal status are to be appointed as arbitrators, no person other than the two

specified persons could be appointed as arbitrator. We find merit in this submission.

3. The relevant part of clause 64 runs as under :

"64 *Demand for arbitration.* –

★ ★ ★

(3)(a)(ii) Two arbitrators who shall be gazetted railway officers of equal status to be appointed in the manner laid in clause 64(3)(b) for all claims of Rs. 5,00,000 (Rupees five lakhs) and above, and for all claims irrespective of the amount or value of such claims if the issues involved are of a complicated nature. The General Manager shall be the sole judge to decide whether the issues involved are of a complicated nature or not. In the event of the two arbitrators being undecided in their opinions, the matter under dispute will be referred to an umpire to be appointed in the manner laid down in sub-clause (3)(b) for his decision.

(3)(a)(iii) It is a term of this contract that no person other than a gazetted railway officer should act as an arbitrator/umpire and if for any reason, that is not possible, the mattter is not to be referred to arbitration at all."

In view of the express provision contained therein that two gazetted railway officers shall be appointed as arbitrators, Justice P.K. Bahri could not be appointed by the High Court as the sole arbitrator.

NOTE – Readers are requested to go through the earlier judgment reported at **Note No. 12 of 2006 (JOTI)** in the line of this pronouncement.

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PART - III

CIRCULARS/NOTIFICATIONS

[15] Notification No. F.No. 22-Estt.-134-06 dated the 2nd May, 2006. *(Published in M.P. (Rajpatra Part I dated 2.6.2006 pages 1191-1192)* –

(1) (i) Shri Vijendra Singh, Under Secretary State Legal Services Authority is designated as a State Public Information Officer u/s 5(1) of the **Right to Information Act, 2005** for Madhya Pradesh State Legal Services Authority (Head Quarter level).

(ii) District Legal Aid Officers working in District Legal Services Authorities are designated as a State Public Information Officer u/s 5 (1) of the Right to Information Act, 2005 for the concerned District Legal Services Authority.

(iii) District Legal Aid Officers working in High Court Legal Services Committee, Jabalpur, Gwalior and Indore are designated as a State Public Information Officer u/s 5 (1) of the Right to Information Act, 2005 for the concerned High Court Legal Services Committee.

(2) Chairman Tehsil/Taluk Legal Services Committees are designated as a State Assistant Public Information Officer u/s 5 (2) of the Right to Information Act, 2005 for the concerned Tehsil/Taluk Legal Services Committee (Sub-division level).

(3) (i) Member Secretary Madhya Pradesh State Legal Services Authority is designated as a Senior Officer (Appellate Officer U/s 19 (1) of the Right to Information Act, 2005.

(ii) District Judge/Chairman District Legal Services Authorities are designated as a Senior Officer (Appellate Officer u/s 19 (1) of the Right to Information Act, 2005 for the concerned District Legal Services Authority.

(iii) Secretary High Court Legal Services Committee, Jabalpur, Gwalior and Indore are, designated as a Senior Officer (Appellate Officer) u/s 19 (1) of the Right to Information Act, 2005 for the concerned High Court Legal Services Committee.

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[97] Notification No. F-17 (E) XXI-B-(II) dated the 20th November, 2006 *[Published in M.P. Rajpatra Part I dated 24-11-2006 Page 2532].*–

In exercise of the powers conferred by Section 9 of the **Legal Services Authority Act, 1987 (No. 39 of 1987) as amended by Legal Services Authorities (Amendment) Act, 1994 (No. 59 of 1994).** The Sate Government in consultation with the Chief Justice of Madhya Pradesh, High Court hereby constitute the District Legal Services Authority for the District Neemuch, Harda, Badwani, Sheopur.

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[30] Notification No. 15-R (J) dated the 19th January, 2006. (published in M.P. Rajpatra Part IV (Ga) dated 17.2.2006 Pages 161-166) – In exercise of the powers conferred by sub-section (1) of Section 28 of the **Right to Information Act, 2005,** the Chief Justice of Madhya Pradesh High Court (Competent Authority), hereby makes the following rules :–

1. Short title and commencement.– (1) These rules shall be called **High Court of Madhya Pradesh (Right to Information) Rules, 2006**

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

2. Definitions.– (1) In these rules, unless the context otherwise requires:–

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

(b) "Appellate Authority" means designated as such by the Chief Justice of High Court of Madhya Pradesh.

(c) "Authorized person" means Public Information Officers and Assistant Public Information Officers designated as such by the Chief Justice of Madhya Pradesh High Court.

(d) "Form" means the Form appended to these rules;

(e) "Section" means a Section of the Act.

(2) Words and expressions used but not defined in these rules, shall have the same meaning as assigned to them in the Act.

3. Application for seeking information.– Any person seeking information under the Act shall make an application in Form 'A' to the authorized person and deposit application fee as per rule 8 with the authorized person. The authorized person shall duly acknowledge the application as provided in Form 'B'.

4. Disposal of application by the authorized person.– (1) If the requested information does not fall within the jurisdiction of the authorized person, it shall order return of the application in Form 'C' as soon as soon as practicable, normally within fifteen days and in any case not later than thirty days from the date of receipt of the application, advising the applicant, wherever possible, about the authority concerned to whom the application should be made. The application fee deposited in such cases shall not be refunded.

(2) If the requested information falls within the authorized person's jurisdiction and also in one or more of the categories of restrictions listed in Sections 8 and 9 of the Act, the authorized person on being satisfied, will issue the rejection order in Form D as soon as practicable, normally within fifteen days and in any case not later than thirty days from the date of the receipt of the application. The application fee deposited in such cases shall not be refunded.

(3) If the requested information falls within the authorised person's jurisdiction, but not in one or more of the categories listed in Sections 8 and 9 of the Act the authorized person, on being so satisfied, shall supply the information

to the applicant in Form E, falling within its jurisdiction. In case the information sought is partly outside the jurisdiction of the authorized person or partly falls in categories listed in Sections 8 and 9 of the Act, the authorized person shall supply only such information as is permissible under the Act and is within its own jurisdiction and reject the remaining part giving reasons therefor.

(4) The information shall be supplied as soon as practicable, normally within fifteen days and in any case not later than thirty days from the date of the receipt of the application on deposit of the balance amount, if any, to the authorized person, before collection of the information. A proper 'acknowledgment' shall be obtained from the applicant in token of receipt of information in Form 'F'.

5. Appeal.– (1) Any person–

(a) who fails to get a response in Form C or Form D from the authorized person within thirty days of submission of Form A, or

(b) is aggrieved by the response received within the prescribed period, appeal in Form 'F' to the appellate Authority and deposit fee for appeal as per rule 8 with the appellate authority.

(2) On receipt of the appeal, the Appellate Authority shall acknowledge the receipt of appeal and after giving the applicant an opportunity of being heard, shall endeavor to dispose it of within thirty days from the date on which it is presented and send a copy of the decision to the authorized person concerned.

(3) In case the appeal is allowed, the information shall be supplied to the applicant by the authorized person within such period as ordered by the Appellate Authority. This period shall not exceed thirty days from the date of the receipt of the order.

6. Suo motu publication of Information by public authorities.– (1) The public authority may *suo motu* publish information as per sub-section (1) of Section 4 of the Act by publishing booklets and/or folders and/or pamphlets and up date these publications every year as required by sub-section (1) of Section 4 of the Act.

(2) Such information may also be made available to the public through information counters, medium of internet and display on notice board at conspicuous places in the office of the authorized person and the appellate authority.

7. Charging of Fee.– (1) The authorized person shall charge, the fee at the following rates, namely :–

(A) Application Fee :

(i)	Information relating to tenders Documents/ bids/quotation/business Contract :	Five hundred Rupees per application
(ii)	Information other than (i) above	Fifty Rupees per application.

(B) Other Fees :

S. No.	Description of Information	Price/Fee in Rupees
1.	Where the information is available in the form of a priced publication.	Price of the publication so fixed.
2.	For other than priced publication.	Cost of the medium or print cost price.

(2) The appellate authority shall charge a fee of fifty rupees per appeal.

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Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 111, dated 31st January, 2002.

No. S.O. 131 (E), dated 31st January, 2002. – In exercise of the powers conferred by sub-section (2) of Section 1 of the Explosive Substances (Amendment) Act, 2001 (54 of 2001), the Central Government hereby appointed the 1st day of Febryary, 2002, as the date on which the said Act shall come into force.

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Notification No. 10-Legal-Food-8-2005-8595, dated the 22nd June, 2006. *(Published in M.P. Rajpatra Part I dated 14-7-2006 page 1524)* - The order of this Administration bearing No. 3-Food-DGHS-2-128-98, dated 24th June 2000, which was published in the "Gazette of Madhya Pradesh" on 7th July 2000, whereby the sale, distribution, storage, exhibition or sale of the preparation containing "Tobacco" which is commonly known as "Gutka" or be it called by any other name, was prohibited within 100 meters from the periphery of any Schools, Colleges, Universities and other Educational Institutions, Government or Semi-Government Offices, Offices of Government owned or controlled Corporation or Office of Local Bodies in the State of Madhya Pradesh was made effective vide order No. 10-Legal-Food-8-2005-16671, Bhopal dated 11th July 2005 till 31st May 2006 is now further extended till 31st May, 2007.

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No. A-3883-II-15-50-87. – In exercise of the powers conferred by Sections 122, 126 read with Section 127 and 128 of the Code of Civil Procedure, 1908 (No. 5 of 1908) hereinafter referred to as the Code), the High Court of Madhya Pradesh, with the previous approval of the State Government, hereby makes the following rules in regard to case flow management in the Trial Courts and First Appellate Subordinate Courts (Civil) and the same have been previously Published in the Madhya Pradesh Gazette, dated 10th August, 2006 *vide* this Registry Memo No. C-3099-II-15-50-87, dated 25th July 2006 as required by Section 127 of the Code, namely :–

RULES

1. Short title and commencement – (1) These rules may be called the Madhya Pradesh Case Flow Management in the Trial Courts and First Appellate Subordinate Courts (Civil) Rules, 2006.

(2) These rules shall come into force from the date of their publication in the Madhya Pradesh Gazettee.

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

(a) "Code" means the Code of Civil Procedure, 1908 (No. 5 of 1908);

(b) Words and expressions used but not defined in these rules, shall have the same meaning as assigned to them in the Code.

3.1. Division of Civil Suits and Appeals into Tracks. – (1) Based on the nature of dispute, the quantum of evidence to be recorded and the time likely to be taken for the completion of suit, the suits shall be channelled into different tracks. Track 1 may include suits for maintenance, divorce and child custody and visitation rights, grant of letters of administration and succession certificate and simple suits for rent or for eviction (upon notice under Section 106 of Transfer of Property Act). Track 2 may consists of money suits and suits based solely on negotiable instruments. Track 3 may include suits concerning partition and like property disputes, trademarks, copyrights and others intellectual property matters. Track 4 may relate to other matters. All efforts shall be taken to complete the suits in Track 1 within a period of 9 months, track 2 within 12 months and suits in tracks 3 and 4 within 24 months.

This categorization is illustrative and it will be for the High Court to make appropriate categorization. It will be for the judge concerned to make an appropriate assessment as to which track any case can be assigned.

(2) Once in a month, the registry/administrative staff of each Court will prepare a report as to the stage and progress of cases which are proposed to be listed in next month and place the report before the Court. When the matters are listed on each day, the judge concerned may take such decision as he may deem fit in the presence of counsel/parties in regard to each case for removing any obstacles in service of summons, completion of pleadings etc. with a view to make the case ready for disposal.

(3) The judge referred to in clause (2) above, may shift a case from one track to another, depending upon the complexity and other circumstances of the case.

(4) Where computerization is available, the monthly data will be fed into the computer in such a manner that the judge referred to in clause (2) above will be able to ascertain the position and the stage of every case in every track from the computer screen. Over a period, all cases pending in his Court will be covered. Where computerization is not available, the monitoring must be done manually.

(5) The Judge referred to in clause (2) above, shall monitor and control the flow or progress of every case, either from the computer or from the register or data placed before him in the above manner or in some other manner he may innovate.

II. Original Suit. –

1. Fixation of time limits while issuing notice:

(a) Wherever notice is issued in a suit, the notice should indicate that the Code prescribes a maximum of 30 days for filing written statement (which for special reasons may be extended upto 90 days) and, therefore, the defendants may prepare the written statement expeditiously and that the matter will be listed for that purpose on the expiry of eight weeks from the date of issue of notice (so that it can be a definite date). After the written statement is filed, the replication (if any, proposed and permitted), should be filed within six weeks of receipt of the written statement. If there are more than one defendant, each one of the defendant should comply with this requirement within the time-limit.

(b) The notice referred to in clause (a) shall be accompanied by a complete copy of the plaint and all its annexures/ enclosures and copies of the interlocutory application if any.

(c) If interlocutory applications are filed along with the plaint, and if an ex parte interim order is not passed and the Court is desirous of hearing the respondent, it may, while sending the notice along with the plaint, fix an earlier date for the hearing of the application (than the date for filling written statement) depending upon the urgency for interim relief.

2. Service of sommons/notice and completion of pleadings:

(a) Summons may be served as indicated in clause (3) of Rule 9 of Order V.

(b) In the case of service of summons by the plaintiff or a courier where a return is filed that the defendant has refused notice, the return will be accompained by an undertaking that the plaintiff or the courier, as the case may be, is aware that if the return is found to be false, he

can be punished for perjury or summarily dealt with for contempt of Court for abuse of the provisions of the Code. Where the plaintiff comes forward with a return of 'refusal' the provisions of Order 9A Rule 4 will be followed by re-issue of summons through Court.

(c) If it has not been possible to effect service of summons under Rule 9 of Order V, the provisions of Rule 17 of Order V shall apply and the plaintiff shall within 7 days from the date of its inability to serve the summons, to request the Court to permit substituted service. The dates for filing the written statement and replication, if any, shall accordingly stand extended.

3. Calling of Cases (Hajri or Call) (Work or Roll Call) :

The present practice of the Court-master or Bench-clerk calling all the cases listed on a particular day at the beginning of the day in order to confirm whether counsels ready, whether parties are present or whether various steps in the suit or proceeding has been taken, is consuming a lot of time of the Court, sometimes almost two hours of the best part of the day when the judge is fresh. After such work, the Court is left with very limited time to deal with cases listed before it. Formal listing should be first before a nominated senior officer of the registry, one or two days before the listing in Court. He may give dates in routine matters for compliance with earlier orders of Court. Cases will be listed before Court only where an order of the Court is necessary or where an order prescribing the consequences of default or where a pre-emptory order or an order as to costs is required to be passed on the judicial side. Cases which have to be adjourned, as a matter of routine for taking steps in the suit or proceeding should not be unnecessarily listed before Court. Where parties/counsel are not attending before the Court-officer or are defiant or negligent, their cases may be placed before the Court. Listing of cases on any day before a Court should be based on a reasonable estimate of time and number of cases that can be disposed of by the Court in a particular day. The Courts shall, therefore, dispense with the practice of calling all the cases listed adjourned to any particular day. Cases will be first listed before a nominated senior officer of the Court, nominated for the purpose.

4. Procedure on the grant of interim orders:

(a) If an interim order is granted at the first hearing by the Court, the defendants would have the option of moving appropriate applications for vacating the interim order even before the returnable date indicated in the notice and if such an application is filed, it shall be listed as soon as possible even before the returnable date.

(b) If the Court passes an ad-interim ex parte order in an interlocutory application, and the reply by the defendants is filed, and if, thereafter, the plaintiff fails to file the rejoinder (if any) without good reason for the delay, the Court has to consider whether the stay or interim order passed by the court should be vacated and shall list the case with that purpose. This is meant to prevent parties taking adjournment with a view to have undue benefit of the ad-interim orders. The plaintiff may, if he so chooses, also waive his right to file a rejoinder. Communication of option by the plaintiff not to file a rejoinder, made to the registry will be deemed to be the completion of pleadings in the interlocutory application.

5. Referral to Alternate Dispute Resolution :

(In the hearing before the Court, after completion of pleadings, time limit for discovery and inspection, and admission and denials, of documents shall be fixed, preferably restricted to 4 weeks each).

After the completion of admission and denial of documents by the parties, the suit shall be listed before the Court (for examination of parties under Order X of the Civil Procedure Code. A joint statement of admitted facts shall be filed before the said date.) The court shall thereafter, follow the procedure prescribed under the Alternate Dispute Resolution and Mediation Rules, 2002.

6. Procedure on the failure of Alternate Dispute Resolution:

On the filing of report by the Mediator under the Mediation Rules that efforts at Mediation have failed, or a report by the Conciliator under the provisions of the Arbitration and Conciliation Act, 1996 or a report of no settlement in the Lok Adalat under the provisions of the Legal Services Authority Act, 1987, the suit shall be listed before the registry within a period of 14 days. At the said hearing before the registry, all the parties shall submit the draft issues proposed by them. The suit shall be listed before the Court thereafter for framing of issues.

When the suit is listed after failure of the attempts at conciliation, arbitration or Lok Adalat, the Judge may merely inquire whether it is still possible for the parties to resolve the dispute. This should invariably be done by the Judge at the first hearing when the matter comes back on failure of conciliation, mediation or Lok Adalat.

If the parties are not keen about settlement, the Court shall frame the issues and direct the plaintiff to start examining his witnesses. The procedure of each witness filing his examination in chief and being examined in cross or re-examination will continue, one after the other. After completion of evidence on the plaintiff's side, the defendants shall lead evidence likewise witness after witness, the chief examination of each witness being by affidavit and the witness being then cross-examined or re-examined. The parties shall keep the affidavit in chief-examination ready whenever the witness's

examination is taken up. As far as possible, evidence must be taken up day by day as stated in clause (a) of proviso to Rule 2 of Order XVII. The parties shall also indicate the likely duration for the evidence to be completed, and for the arguments to be thereafter heard. The Judge shall ascertain the availability of time of the Court and will list the matter for trial on a date when the trial can go on from day to day and conclude the evidence. The possibility of further negotiation and settlement should be kept open and if such a settlement takes place, it should be open to the parties to move the registry for getting the matter listed at an earlier date for disposal.

7. Referral to Commissioner for recording of evidence:

(a) The High Court shall conduct an examination on the subjects of the Code of Civil Procedure and Evidence Act. Only those advocates who have passed an examination conducted by the High Court on the subjects of 'Code of Civil Procedure' and 'Evidence Act', shall be appointed as Commissioners for recording evidence. They shall be ranked according to the marks secured by them.

(b) It is not necessary that in every case the Court should appoint a Commissioner for recording evidence. Only if the recording of evidence is likely to take a long time, or there are any other special grounds, should the Court consider appointing a Commissioner for recording the evidence. The Court should direct that the matter be listed for arguments fifteen days after the Commissioner files his report with the evidence.

The Court may initially fix a specific period for the completion of the recording of the evidence by the Commissioner and direct the matter to be listed on the date of expiry of the period, so that Court may know whether the parties are co-operating with the Commissioner and whether the recording of evidence is getting unnecessarily prolonged.

(c) Commissioners should file an undertaking in Court upon their appointment that they will keep the records handed over to them and those that may be filed before them, safe and shall not allow any party to inspect them in the absence of the opposite party/counsel. If there is delay of more than one month in the dates fixed for recording evidence, it is advisable for them to return the file to the Court and take it back on the eve of the adjourned date.

8. Costs :

So far as awarding of costs at the time of judgment is concerned, awarding of costs must be treated generally as mandatory in as much as the liberal attitude of the Court in directing the parties to bear their own costs had led parties to file a number of frivolous cases in the Courts or to raise frivolous and unnecessary issues. Costs should invariably follow the event. Where a party succeeds ultimately on one issue or

point but loses on number of other issues or points which were unnecessarily raised, costs must be appropriately apportioned. Special reasons must be assigned if costs are not being awarded. Costs should be assessed according to rules in force. If any of the parties has unreasonably protracted the proceedings, the Judge should consider exercising discretion to impose exemplary costs after taking into account the expense incurred for the purpose of attendance on the adjourned dates.

9. Proceedings for Perjury :

If the trial Judge, while delivering the Judgement, is of the view that any of the parties or witnesses have willfully and deliberately uttered blatant falsehoods, he shall consider (atleast in some grave cases) whether it is a fit case where prosecution should be initiated for perjury and order prosecution accordingly.

10. Adjournments :

The amendments to the Code have restricted the number of adjournments to three in the course of hearing of the suit, on reasonable cause being shown. When a suit is listed before a Court and any party seeks adjournment, the Court shall have to verify whether the party is seeking adjournment due to circumstance beyond the control of the party, as required by clause (b) of proviso to Rule 2 of Order XVII. The Court shall impose costs as specified in Rule 2 of Order XVII.

11. Miscellaneous Applications:

The proceedings in a suit shall not be stayed merely because of the filing of Miscellaneous Applications in the course of suit unless the court in its discretion expressly thinks it necessary to stay the proceedings in the suit.

III. First Appeals to Subordinate Courts :

1. Service of Notice of Appeal:

First Appeals being appeals on question of fact and law, Courts are generally inclined to admit the appeal and it is only in exceptional cases that the appeal is rejected at the admission stage under Rule 11 of Order XLI. In view of the amended CPC, a copy of the memorandum of appeal is required to be filed in the sobordinate Court. It has been clarified by the Supreme Court that the requirement of filing a copy of appeal memorandum in the subordinate Court does not mean that appeal memorandum cannot be filed in the Appellate Court immediately for obtaining interim orders.

Advance notice should simultaneously be given by the counsel for the party who is proposing to file the appeal, to the counsel for the opposite party who appeared in the subordinate Court so as to enable the respondents to appear if they so choose, even at the first hearing stage.

2. **Essential Documents to be filed with the Memorandum of Appeal :**

The Appellant shall, as far as possible, file, alongwith the appeal, copies of essential documents marked in the suit, for the purpose of enabling the appellate Court to understand the points raised or for purpose of passing interim orders.

3. **Fixation of time limits in interlocutory matters :**

Whenever notice is issued by the appellate Court in interlocutory matters, the notice should indicate the date by which the reply should be filed. The rejoinder, if any, should be filed within four weeks of receipt of the reply. If there are more parties than one who are Respondents, each one of the Respondent should comply with this requirement within the time limit and the rejoinder may be filed within four weeks from the receipt of the last reply.

4. **Steps for completion of all formalities (Call Work) (Hajri) :**

The appeal shall be listed before the registry for completion of all formalities necessary before the appeal is taken up for final hearing. The procedure indicated above of listing the case before a senior officer of the appellate Court registry for giving dates in routine matters must be followed to reduce the 'call work' (Hajri) and only where judicial orders are necessary, such cases should be listed before Court.

5. **Procedure on grant of interim-orders:**

If an interim order is granted at the first hearing by the Court, the Respondents would have the option of moving appropriate applications for vacating the interim order even before the returnable date indicated in the notice and if such an application is filed, it shall be listed as soon as possible even before the returnable date.

If the Court passes an ad-interim ex parte order, and if the reply is filed by the Respondents and if, without good reason, the appellant fails to file the rejoinder, Court shall consider whether it is a fit case for vacating the stay or interim order and list the case for that purpose. This is intended to see that those who have obtained ad interim orders do not procrastinate in filing replies. The appellant may also waive his right to file the rejoinder. Such choice shall be conveyed to the Registry or before the date fixed for filing of rejoinder. Such communication of option by the applicant to the registry will be deemed to be completion of pleadings.

6. **Filing of Written submissions :**

Both the appellants and the respondents shall be required to submit their written submission two weeks before the commencement of the arguments in the appeal. The cause list should indicate if written submissions have been filed or not. Wherever they have not been filed, the Court must insist on their being filed within a particular period

to be fixed by the Court and each party must serve a copy thereof on the opposite side before the date of commencement of arguments. There is no question of parties filing replies to each others written submissions.

The Court may consider having a caution List/alternative list to take care of eventualities when a case does not go on before a Court, and those cases may be listed before a Court where for any reason, the scheduled cases are not taken up for hearing.

7. Costs :

Awarding of costs must be treated generally as mandatory in as much as it is the liberal attitude of the Courts in not awarding costs that has led to frivolous points being raised in appeals or frivolous appeals being filed in the courts. Courts should invariably follow the event and reasons must be assigned by the appellate Court for not awarding costs. If any of the parties have unreasonably protracted the proceedings, the judge shall have the discretion to impose exemplary costs after taking into account the costs that may have been imposed at the time of adjournments.

IV. Application/Petition under Special Acts :

This chapter deals with applications/petitions filed under Special Acts like the Industrial Disputes Act, Hindu Marriage Act, Indian Succession Act etc.

The Practise directions in regard to original suits should *mutatis mutandis* apply in respect of such applications/petitions.

V. Notice issued under S. 80 of Code of Civil Procedure :

Every public authority shall appoint an officer responsible to take appropriate action on a notice issued under S.80 of the Code of Civil Procedure. Every such officer shall take appropriate action on receipt of such notice. If the Court finds that the concerned officer, on receipt of the notice, failed to take necessary action or was negligent in taking the necessary steps, the Court shall hold such officer responsible and recommend appropriate disciplinary action by the concerned authority.

VI. Note :

Whenever there is any inconsistency between these rules and the provisions of the Code of Civil Procedure, 1908, or any other statute, the provisions of such Code or statute shall prevail.

By order of the High Court of Madhya Pradesh,
GAURI SHANKAR DUBEY, Addl. Registrar (D.E.).

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PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE STATE EMBLEM OF INDIA (PROHIBITION OF IMPROPER USE) ACT, 2005

NO. 50 OF 2005 (Received the assent of the President on the 20th December, 2005)

[20th December, 2005.]

An Act to prohibit the improper use of State Emblem of India for professional and commerical purposes and for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Fifty-sixth Year of the Republic of India as follows:-

1. Short title, extent, application and commencement.–(1) This Act may be called the State Emblem of India (Prohibition of Improper Use) Act, 2005.

(2) It extends to the whole of India, and also applies to citizens of India outside India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.– In this Act, unless the context otherwise requires,-

(a) "competent authority" means any authority competent under any law for the time being in force to register any company, firm, other body of persons or any trade mark or design or to grant a patent;

(b) "emblem" means the State Emblem of India as described and specified in the Schedule to be used as an official seal of the Government.

3. Prohibition of improper use of emblem.– Notwithstanding anything contained in any other law for the time being in force, no person shall use the emblem or any colourable imitation thereof in any manner which tends to create an impression that it relates to the Government or that it is an offical document of the Central Government or, as the case may be, the State Government, without the previous permission of the Central Government or of such officer of that Government as may be authorised by it in this behalf.

Explanation.– For the purposes of this section, "person" includes a former functionary of the Central Government or the State Governments.

4. Prohibition of use of emblem for wrongful gain.– No person shall use the emblem for the purpose of any trade, business, calling or profession or in the title of any patent, or in any trade mark or design, except in such cases and under such conditions as may be prescribed.

5. Prohibition of registration of certain companies, etc.– (1) Notwithstanding anything contained in any other law for the time being in force, no competent authority shall,–

(a) register a trade mark or design which bears the emblem, or

(b) grant a patent in respect of an invention which bears a title containing the emblem.

(2) If any question arises before a competent authority whether any emblem is an emblem specified in the Schedule or a colourable imitation thereof, the competent authority shall refer the question to the Central Government and the decision of the Central Government thereon shall be final.

6. General powers of Central Government to regulate use of emblem.– (1)The Central Government may make such provision by rules as appears to it to be necessary, to regulate the use of the emblem in official seal that is used in offices of the Central Government and the State Government and their organisations including diplomatic missions abroad, subject to such restrictions and conditions as may be prescribed.

(2) Subject to the provisions of this Act, the Central Government shall have powers –

(a) to notify the use of emblem on stationery, the method of printing or embossing it on demi-official stationery by the constitutional authorities, Ministers, Members of Parliament, Members of Legislative Assemblies, officers of the Central Government and the State Governments;

(b) to specify the design of the official seal consisting of the emblem;

(c) to restrict the dispaly of emblem on vehicles of constitutional authorities, foreign dignitaries, Ministers of the Central Government and the State Governments;

(d) to provide for guidelines for display of emblem on public buildings in India, the diplomatic missions and on the buildings occupied by the India's consulates abroad;

(e) to specify conditions for the use of emblem for various other purposes including the use for educational purposes and the armed forces personnel;

(f) to do all such things (including the specification of design of the emblem and its use in the manner whatsoever) as the Central Government considers necessary or expedient for the exercise of the foregoing powers.

7. Penalty.-(1) Any person who contravenes the provisions of section 3 shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees, or with both, or if having been previously convicted of an offence under this section, is again convicted of any such offence, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which shall not be less than six months, which may extend to two years and with fine which may extend to five thousand rupees.

(2) Any person who contravenes the provisions of section 4 for any wrongful gain shall be punishable for such offence with imprisonment for a term which shall not be less than six months, which may extend to two years and with fine which may extend to five thousand rupees.

8. Previous sanction for prosecution.-No prosecution for any offence punishable under this Act shall be instituted, except with the previous sanction of the Central Government or of any officer authorised in this behalf by general or special order of the Central Government.

9. Savings.-Nothing in this Act shall exempt any person from any suit or other proceedings which might be brought against him under any other law for the time being in force.

10. Act to have overriding effect.-The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other enactment or instrument having effect by virtue of such enactment.

11. Power to make rules.-(1) The Central Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:-

(a) cases and conditions regulating the use of emblem under section 4;

(b) making rules to regulate the use of the emblem in official seal of the Government and specifying restrictions and conditions relating thereto under sub-section (1) of section 6;

(c) the use of emblem on stationery, design of official seal consisting of emblem and other matters under sub-section (2) of section 6;

(d) authorising officer by general or special order for giving previous sanction for instituting prosecution under section 8; and

(e) any other matter which is required to be, or may be, prescribed.

(3) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both houses agree in making any modification in the rule or both houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

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THE CONTEMPT OF COURTS (AMENDMENT) ACT, 2006

No. 6 of 2006

(Received the assent of the President on 17th March, 2006 and Act published in the Gazette of India (Extraordinary) Part II Section 1 dated 29-3-2006 pages 1-2)

An Act further to amend the Contempt of Courts Act, 1971.

Be it enacted by Parliament in Fifty-seventh Year of the Republic of India as follows:–

1. Short title.– This Act may be called the Contempt of Courts (Amendment) Act, 2006.

2. Substitution of new Section for Section 13.– In the Contempt of Courts Act, 1971 (70 of 1971), for section 13, the following section shall be substituted, namely:–

"**13. Contempts not punishable in certain cases.-** Notwithstanding anything contained in any law for the time being in force, –

(a) no court shall impose a sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a natu that it substantially interferes, or tends substantially to interfere with the due course of justice;

(b) the court may permit, in any proceeding for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is *bona fide*.