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न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान
मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE
HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

JOTI JOURNAL FEBRUARY - 2010

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FROM THE PEN OF THE EDITOR

J.P. Gupta
Director, JOTRI

A Very Happy and Prosperous New Year, 2010 to all of you!

The year 2010 has already dawned in and I hope this year will be better than the previous one, bringing with it more success and joy. With this issue we have entered the sixteenth year of this Journal.

Year 2009 was a historic year for the Judiciary of Madhya Pradesh as it witnessed many changes. The first and foremost being the elevation of Hon'ble Shri Justice Deepak Verma, Chief Justice of High Court of Rajasthan High Court, who is originally from Madhya Pradesh, as Judge of the Supreme Court of India followed by the elevation of Hon'ble Shri Justice A.K. Patnaik, Chief Justice of High Court of Madhya Pradesh as Judge of the Supreme Court of India. The other glorious moments for our judiciary were when Hon'ble Shri Justice Syed Rafat Alam, Senior Judge of Allahabad High Court, originally from Patna High Court, adorned the chair of the Chief Justice of Madhya Pradesh High Court and appointment of Hon'ble Shri Justice Dipak Misra as Chief Justice of Patna High Court.

As I said earlier, this year must be better than the year gone by. Let us not repeat those mistakes that were made in the past. We are called to serve humanity by administering justice according to Constitutional Values. We should as far as possible make every endeavour to administer justice excellently and this can be achieved by constantly improving our work. Inspiration in this regard can be taken by the age old saying *"Man must work just as the bird must fly"*.

In other words, to achieve the above goal it requires tremendous faith in oneself. It means hard and relentless labour. It is our responsibility to develop our potential to the optimum level. Simultaneously, we cannot achieve anything in this field without having enthusiasm and zealousness as they also play an important role in achieving our goal.

Success requires hard work accompanied by objective application of analytical knowledge on the subject. We should keep our mind open to acquire knowledge and also to learn new things. We can give good results in our field

which is very vast only by continuous learning and by increasing our knowledge base. Wisdom comes with knowledge. The knowledge acquired by us during the process of learning will be meaningful only when we skillfully apply this in our action i.e. day to day Court working.

This Journal is a small step for the Judicial Officers to plunge into the vast ocean of knowledge and has in its modest way tried to help each and every Judicial Officer in some way or the other.

Looking to the fact that a judge may enhance his output to a great extent, by using computer in judicial work the Institute embarked upon imparting computer training to all the Judicial Officers of the State last year. Continuing with this trend, this year also the Institute started its academic activities with the Training Programme on – *Application of Information and Communication Technology to District Judiciary* followed by three more such trainings. A two week *Second Phase Induction Training Programme* for newly appointed Civil Judges Class II was also conducted.

In this issue, Part-I contains bi-monthly articles. Various pronouncements of the Hon'ble Supreme Court and our own High Court have been included in Part II of the journal.

Notification regarding enforcement of Code of Criminal Procedure (Amendment) Act, and some other important notifications find place in Part III. Part IV of the Journal contains the Code of Criminal Procedure (Amendment) Act, 2008.

The Institute is striving to nurture and promote not only innovation in thinking but also taking great strides to keep in pace with the ever increasing technological growth. The Institute is ever eager to extend a helping hand to the Judicial Officers. With these, sublime thoughts I wish all of you an eventful and successful year. Let me conclude the first editorial of this year with the saying of *George Barna:*

> *Anyone can steer the ship, but it takes a real leader to chart the course.*

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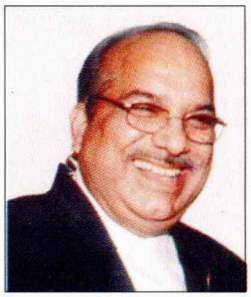
FAREWELL TO HON'BLE THE CHIEF JUSTICE SHRI A.K. PATNAIK



Hon'ble Shri Justice Ananga Kumar Patnaik, who adorned the office of the Chief Justice of High Court of Madhya Pradesh for about four years, has been elevated as Judge of the Supreme Court of India.

Born on 3rd June, 1949, His Lordship had his schooling at Rajkumar College, Raipur. Was awarded prize for the "Best All Round Conduct and Leadership" in School. Had higher education from Delhi University with Honours in Political Science and obtained Law Degree from Madhusudan Law College, Cuttack. His Lordship was selected by the Rotary Foundation in Group Study Exchange Programme in 1976 and went to New Jersey, U.S.A. for study of institutions of America and its people.

His Lordship was enrolled with the State Bar Council of Orissa on 28.3.1974. His Lordship practiced in the High Court, Subordinate Courts and Tribunals in Orissa and also appeared many a times before the Supreme Court of India. His Lordship practiced in different branches of law with specialization in Commercial Law and Constitutional Law. His Lordship was the Standing Counsel for the Orissa State Road Transport Corporation from 02.05.1989 to 01.09.1990 and has been the Senior Standing Counsel for the Commercial Taxes Organization, Government of Orissa from 22.09.1990 to 12.01.1994.

His Lordship was elevated as an Additional Judge of High Court of Orissa on the 13th of January, 1994 and on transfer assumed charge as Additional Judge of Gauhati High Court on 7th of February, 1994. His Lordship became a permanent Judge of the Gauhati High Court in 1995. After rendering valuable services for eight years as a Judge in the Gauhati High Court, His Lordship again assumed charge as a Judge of Orissa High Court on 15.04.2002. His Lordship was the senior most Puisne Judge of the Orissa High Court and was the Executive

Chairman of the Orissa State Legal Services Authority. His Lordship was also the Chairman of Orissa Judicial Academy. His Lordship was appointed as Chief Justice of High Court of Chhattisgarh on March 14, 2005.

On appointment as Chief Justice of Madhya Pradesh High Court, His Lordship was administered oath of office at Raj Bhawan, Bhopal by the Governor of Madhya Pradesh on 2nd October, 2005. His Lordship was accorded welcome ovation on 3rd October, 2005 in the Conference Hall of South Block of the High Court of Madhya Pradesh, Jabalpur. During his tenure as Chief Justice of Madhya Pradesh and in his capacity as Patron of the Judicial Officers' Training & Research Institute, His Lordship took keen interest in the academic activities of the Institute and provided all round motivation, support and guidance for diversifying the Institute's academic activities.

On elevation as Judge of Supreme Court, His Lordship was accorded farewell by the Registry of the High Court of Madhya Pradesh on 27th November, 2009.

We, on behalf of JOTI Journal wish His Lordship a happy and successful tenure.

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A true leader has the confidence to stand alone, the courage to make tough decisions, and the compassion to listen to the needs of others. He does not set out to be a leader, but becomes one by the equality of his actions and the integrity of his intent.

– DOUGLAS McCARTHER

WELCOME TO HON'BLE THE CHIEF JUSTICE SHRI SYED RAFAT ALAM

Hon'ble Shri Justice Syed Rafat Alam has been appointed as the Chief Justice of High Court of Madhya Pradesh.

Born on 8th August, 1950 at Patna. His Lordship obtained his B.A. (Hons.) degree from St. Colamba's College, Hazaribagh and obtained Law Degree from Patna Law College, Patna.

His Lordship was enrolled as Advocate of Patna High Court in the year 1975. His Lordship was appointed as Counsel of Patna University, Magadh University and Bihar State Electricity Board. His Lordship was also part time Lecturer of Law in the faculty of Law, College of Commerce, Patna from 1983 to 1994. His Lordship was appointed as Standing Counsel in 1990. Was Government Pleader of the State of Bihar in the Patna High Court.

His Lordship was elevated as a Judge of Patna High Court on the 8th of November, 1994 and on transfer assumed charge as Judge of Allahabad High Court on 28th of November, 1994. His Lordship rendered valuable services as a Judge in the Allahabad High Court in different capacities as Judge, Senior Judge from 30.12.2004, Member of Administrative Committee, Chairman of the various other Committees of the High Court, Executive Chairman, U.P. State Legal Authority w.e.f. 8th of June 2007. His Lordship was Acting Chief Justice on many occasions, i.e. from 30.12.2004 to 10.01.2005, 16.01.2005 to 16.02.2005, 27.01.2007 to 06.03.2007 and from 09.03.2009 to 18.03.2009. After rendering valuable services for fifteen years, His Lordship was appointed as Chief Justice of High Court of Madhya Pradesh on 20th December, 2009.

On appointment as Chief Justice of Madhya Pradesh High Court, His Lordship was administered oath of office at Raj Bhawan, Bhopal by the Governor of Madhya Pradesh on 20th of December, 2009. His Lordship was accorded welcome ovation on 21st of December, 2009 in the Conference Hall of South Block of the High Court of Madhya Pradesh, Jabalpur.

We, on behalf of JOTI Journal welcome His Lordship and wish him a very happy and successful tenure.

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APPOINTMENT OF HON'BLE SHRI JUSTICE DIPAK MISRA AS CHIEF JUSTICE OF PATNA HIGH COURT

Hon'ble Shri Justice Dipak Misra, who occupied the august office of the Judge of High Court of Madhya Pradesh for more than 12½ years, has been appointed as Chief Justice of Patna High Court.

Born on 03.10.1953. Passed Matriculation in the year 1969. Completed his graduation with Honours in English Literature in the year 1973. Passed Post-graduation in English in 1976. Obtained LL.B. degree in the year 1976. Enrolled as an Advocate on 14.02.1977. Handled matters relating to Constitutional, Civil, Criminal, Revenue, Arbitration, Service, Taxation and other Laws. Was the Member of the Executive Body of the Orissa High Court Bar Association. Was also a Member of the Bar Council of Orissa. Took oath as Additional Judge of the High Court of Orissa on 17.01.1996. Transferred to High Court of Madhya Pradesh and joined at the Main Seat on 03.03.1997. Became a permanent Judge on 19.12.1997. Member of Advisory Board under the National Security Act and other Enactments.

During His Lordship's tenure in the High Court of Madhya Pradesh, he rendered valuable services as Judge, Chairman, High Court Training Committee and also Executive Chairman, M.P. State Legal Services Authority.

His Lordship was accorded farewell ovation on 21.12.2009 in the High Court of Madhya Pradesh, Jabalpur..

We, on behalf of JOTI Journal wish His Lordship a very happy and successful tenure.

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APPOINTMENT OF HON'BLE SHRI JUSTICE ALOK ARADHE AS ADDITIONAL JUDGE OF HIGH COURT OF M.P.

Hon'ble Shri Justice Alok Aradhe has been administered the oath of office by Hon'ble Shri Justice Syed Rafat Alam, Chief Justice, High Court of Madhya Pradesh on 29th December, 2009 as Additional Judge of High Court of Madhya Pradesh in a Swearing-in-Ceremony held in the Conference Hall, South Block of High Court at Jabalpur.

Hon'ble Shri Justice Alok Aradhe was appointed as Additional Judge of the High Court of Madhya Pradesh. Born on 13-4-1964 at Raipur. Paseed B.Sc. and LL.B. Enrolled as Advocate on 12.07.1988. Practiced on Civil and Constitutional, Arbitration and Company matters in the High Court of Madhya Pradesh at Jabalpur.

Took oath as Additional Judge, High Court of Madhya Pradesh on 29.12.2009

We on behalf of JOTI Journal wish His Lordship a very happy and successful tenure.

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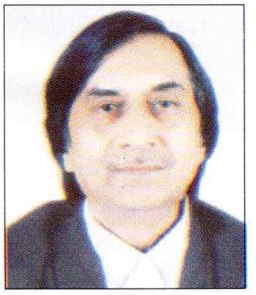
HON'BLE SHRI JUSTICE A.P. SHRIVASTAVA, HON'BLE SHRI JUSTICE SUBHASH SAMVATSAR & HON'BLE SHRI JUSTICE S.A. NAQVI DEMIT OFFICE



Hon'ble Shri Justice Anil Prakash Shrivastava demitted office on His Lordship's attaining superannuation. Was born on 26.11.1947. Joined Judicial Service on 17.07.1972. Worked in different capacities as Civil Judge Class I, C.J.M., Deputy and Additional Secretary, Law Department, Bhopal Presiding Officer, Special Court (SC/ST Act) and as District & Sessions Judge, Raigarh. Was posted as Registrar, Office of the Welfare Commissioner, Bhopal Gas Victims, Bhopal prior to his elevation. Elevated as Additional Judge of M.P. High Court on 25.11.2005. Became Permanent Judge on 25.11.2008. Was

accorded farewell ovation on 25.11.2009 in the High Court of Madhya Pradesh, Bench Gwalior.

Hon'ble Shri Justice Subhash Samvatsar demitted office on His Lordship's attaining superannuation. Was born on 20.12.1947. After obtaining LL.B. degree joined the Bar in 1972. Was appointed as Deputy Government Advocate in March 1988 and Government Advocate in March 1989. Elevated as Additional Judge of the High Court of Madhya Pradesh on 01.04. 2002. Became Permanent Judge on 21.03.2003. Was accorded farewell ovation on 20.12.2009 in the High Court of Madhya Pradesh, Bench Gwalior.

Hon'ble Shri Justice S.A. Naqvi demitted office on His Lordship's attaining superannuation. Was born on 24.12.1947. He joined Judicial Service as Civil Judge Class-II on 09.09.1970. Worked in different capacities as Civil Judge Class I, C.J.M., Additional Registrar, High Court of M.P., Bench Gwalior and as District Judge of Sidhi, Chhindwara and Jabalpur. Was posted as Director, Prosecution, Bhopal prior to his elevation. Elevated as Additional Judge of M.P. High Court on 18.10.2005. Became Permanent Judge on 26.02.2008. Was accorded farewell ovation on 23.12.2009 in the High Court of Madhya Pradesh, Jabalpur.

We, on behalf of JOTI Journal wish Their Lordships a healthy, happy and prosperous life.

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PART - I

POWER OF SESSIONS JUDGE TO TRANSFER/WITHDRAWAL OF CRIMINAL CASES AND APPEALS

Judicial Officers
District Chhindwara*

Chapter XXXI of the Code of Criminal Procedure, 1973 deals with transfer of criminal cases. It stretches from Section 406 to Section 412 and enumerates the power of Supreme Court, High Court, Sessions Court, Chief Judicial Magistrate and that of Executive Magistrate. Section 408 Cr.P.C. relates to transfer of case from one criminal court to another within the same sessions division while Section 409 Cr.P.C. empowers the Sessions Judge, subject to the provisions of sub-section (2) of Section 409 Cr.P.C, to withdraw or recall cases and appeals which have made over to any Additional Sessions Judge, Assistant Sessions Judge or the Chief Judicial Magistrate and try or hear the case himself or make it over to other court.

Section 408 – Power of Sessions Judge to transfer cases and appeals.-

(1) Whenever it is made to appear to a Sessions Judge that an order under this sub-section is expedient for the ends of justice, he may order that any particular case be transferred from one Criminal Court to another Criminal Court in his sessions division.

(2) The Sessions Judge may act either on the report of the lower Court, or on the application of the party interested, or on his own initiative.

(3) The provisions of sub-sections (3), (4), (5), (6), (7) and (9) of section 407 shall apply in relation to an application to the Sessions Judge for an order under sub-section (1) as they apply in relation to an application to the High Court for an order under sub-section (1) of Section 407, except that sub-section (7) of that section shall so apply as if for the words "one thousand rupees" occurring therein, the words "two hundred and fifty rupees" were substituted.

Section 409 – Withdrawal of cases and appeals by Sessions Judges.-

(1) A Sessions Judge may withdraw any case or appeal from, or appeal from, or recall any case or appeal which he has made over to, any Assistant Sessions Judge or Chief Judicial Magistrate subordinate to him.

(2) At any time before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge, a Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge.

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* The article received from District Chhindwara has been substantially edited by the Institute

(3) Where a Sessions Judge withdraws or recalls a case or appeal under sub-section (I) or sub-section (2), he may either try the case in his own Court or hear the appeal himself, or make it over in accordance with the provisions of this Code to another Court for trial or hearing as the case may be.

Section 408 empowers a Sessions Judge to transfer any criminal case from one court to another within his Sessions Division. The grounds on which the application can be moved are the same which are specified in sub-section (1) of Section 407. In *Pratinga v State, 1958 Cr.L.J. 1349* it was held that one of the main reasons for enacting Section 408 is the provision appended to sub-section (2) of Section 407, wherein it is provided that if a case within one Sessions divisions is to be transferred from one court to another an application before High Court will lie only when the Sessions Judge has rejected it. Though, the Court of Additional Sessions Judge is part of the Court of Sessions Judge, for the purposes of Section 408 it can be treated as separate Court. The power to transfer a case is given to Sessions Judge and not to Court of Sessions. Therefore, the power u/s 408(1) is the judicial power and is not subject to the power imposed u/s 409(2). Therefore u/s 408 the Sessions Judge has the power to transfer the criminal case or the appeal from the court of an Additional Sessions Judge to another competent Court within his Sessions division. This power is applicable to part heard cases. A part-heard case pending before the Additional Sessions Judge whose designation has been changed and who still remains in the same district neither Section 408 nor Section 409 applies and the case shall continue to be heard by the same Judge (*Malik Ram v. State of U.P., (1984) 2 Crimes 147*). Before the implementation of Code of Criminal Procedure, 1973 the Sessions Judge has no power to transfer the case *suo motu*. In *Dharma Ram v. Ramkaran, 1970 Cr.L.J. 984* it was held that u/s 408 the case or appeal can be transferred at any stage if it is expedient to meet the ends of justice.

Section 409 deals with the power of Sessions Judge to withdraw or recall cases and appeal from Assistant Sessions Judge and Chief Judicial Magistrate. Section 409(2) says that before the trial or hearing of the case has commenced before the Additional Sessions Judge, the Sessions Judge may withdraw or recall any case or appeal from that court.

In *Radheshyam v. State of U.P., 1984 Allahabad Law Journal 666* the Full Bench of Hon'ble Allahabad High Court held that the power conferred by section 408 (1) Cr.P.C. on the Sessions Judge to transfer a case from one Criminal Court to another Criminal Court in his sessions division if it is expedient for the ends of justice and similar power conferred on the High Court under Section 407 (1) Cr.P.C. on an application of a party interested, is judicial and not administrative, as sub-sections (3), (4), (5),(6),(7) and (9) of Section 407 Cr.P.C. are applicable to both the Sessions Judge as well as the High Court. It is clear from the aforesaid sub-sections that the transfer of a case from one Additional Sessions Judge to another Additional Sessions Judge in the same sessions division by the Sessions Judge as well as the High Court is not done

administratively in connection with the distribution of business but judicially if it is expedient in the interest of justice after hearing the parties.

The power conferred on the Sessions Judge under Section 408 (1) Cr.P.C. to transfer a case or an appeal pending in the Court of an Additional Sessions Judge to another Additional Sessions Judge in his sessions division whether its hearing has commenced or not, is thus an independent judicial power which is not subject to the bar imposed by Section 409 (2) Cr.P.C. on the administrative power of the Sessions Judge of recalling a case or an appeal from an Additional Sessions Judge after the trial of the case or hearing of the appeal has commenced.

The proviso to sub-section (2) of Section 407 Cr.P.C. which bars an application to the High Court for the transfer of a part-heard trial or an appeal from one Additional Sessions Judge to another Additional Sessions Judge in the same sessions division unless such an application has been made to the Sessions Judge and rejected by him, is also not subject to the bar imposed on the power of the Sessions Judge by Section 409 (2) Cr.P.C. to recall a case from an Additional Sessions Judge after the trial of the case or the hearing of an appeal has commenced, which, as said earlier, is purely administrative whereas the power to transfer a part-heard trial or an appeal from one Additional Sessions Judge to another Additional Sessions Judge in the same sessions division on an application of a party interested by the Sessions Judge and also by the High Court is judicial and is to be exercised if it is expedient for the ends of justice.

In *Ahmed Koya v. State, 1991 (2) Crimes 418* it has been held that the restriction u/s 409 (2) will not prevent withdrawal or recall of cases and appeal from Assistant Sessions Judge or CJM. However, the restriction of Section 409 (2) will not apply where the Additional Sessions Judge who has started the hearing of a case or an appeal has been transferred from that Sessions Division or has retired or has resigned, or has died or the court has become vacant.

In *Deepchand and others v. State of M.P.,1998(2) MPLJ 670,* the learned Single Judge of the High Court explained the difference between Sections 408 and 409. The Court opined that both these sections are different in their scope while Section 408 relates to transfer of a case from one criminal Court to another criminal Court within the same Session division. Section 409 empowers the Sessions Judge, subject to the limitation contained in sub-section (2), to withdraw any case or appeal which he had made over to any Additional Sessions Judge, Assistant Sessions Judge or Chief Judicial Magistrate either to try the case or hear the appeal himself or make it over to another Court for trial or hearing. These provisions are clearly intended to deal with two different situations. Section 409 obviously deals with a case or an appeal, which though originally instituted in the Court of Sessions, has been made over by the Sessions Judge to an Additional Sessions Judge or Assistant Sessions Judge or Chief Judicial Magistrate and which in the opinion of the Sessions Judge is for any reason administrative or judicial, required to be tried or heard either by himself or by

some other Court. Transfer of all other cases from one criminal court to another criminal Court in the same sessions division are to be regulated by Section 408. The Additional Sessions Judge or Assistant Sessions Judge does not constitute a separate court but as provided under section 9 of Cr.P.C., they exercise jurisdiction in the Sessions Court itself which is presided by a Sessions Judge. They should try such cases and hear such appeals as may be made over to them by general or special order of Sessions Judge. So transfer of a case deals with the withdrawal or recall of cases or appeals from an Additional Sessions judge while putting a restriction that any such withdrawal can be made only before the trial of the case or hearing of appeal has commenced. Looking to the provisions of Section 194 Cr.P.C, an Additional or Assistant Sessions Judge handles cases only on transfer from the Sessions Judge. Section 408 has no application when a Sessions Judge transfers a case from one Additional or Assistant Sessions Judge to another Additional Sessions or Assistant Sessions Judge in the same sessions division.

Thus, there are divergent views in regard to the power of a Sessions judge to recall and make over the cases to some other Additional Sessions Judge. In *Reference by District and Sessions Judge Jabalpur (M.Cr.C.No. 1242 of 2002,* following *Deepchand case* (supra) the learned Single Judge of the Hon'ble High Court held that once a part-heard case is to be transferred from one Additional Sessions Judge to another, Section 408 will have no application in view of the restriction placed by sub-section (2) of section 409 and such cases can be transferred only by the High Court in exercise of powers under Section 407(1). Similar view was taken in *State of M.P. v. Raja, 1994 (II)MPWN 18,* wherein it was held that even where the Presiding Officer is absent, the Sessions Judge will not have jurisdiction to recall a case where the trial has commenced having regard to the bar u/s 409 (2).

Another view was taken by the Single Bench of Hon'ble High Court *In Re. District and Sessions Judge Guna (M.Cr.C.No. 3417 of 2002).* It was held that the part-heard cases can be transferred whether the court is vacant due to transfer of Presiding Officer or where the presiding officer is dead. It was felt that it was not a mere commencement of trial but the commencement of it before a particular situation which attracts the provision of section 409(2). It clearly contemplates the presence of the Additional Sessions Judge to continue the case. If the particular Additional Sessions Judge before whom the case had commenced has either been transferred outside the Sessions Division or has died, resigned or suspended, the restriction imposed by sub-section (2) of Section 409 would not come into play.

Recently, *In Re District and Sessions Judge, Raisen, 2005(3) MPLJ 26,* Hon'ble Division Bench of our own High Court has tried to resolve this conflicting situation by considering the following two points:

(i) Whether the power under sub-section (1) of Section 408 can be exercised by the Sessions Judge to transfer a case from one Additional Sessions Judge to another Additional Sessions Judge in his Sessions Division, even if the trial has commenced?

(ii) Whether sub-section (2) of Section 409 bars a Sessions Judge from recalling any case which he had made over to an Additional Sessions Judge, where the trial has commenced, even in the event of transfer, retirement or death of such Additional Sessions Judge?

While replying the first question Hon'ble Division Bench took note of the case laws of *Deepchand v. State of M.P.,1998(2) MPLJ 670, State of Kerala v. Reny George, 1981 Cr.L.J. 1352, Avinash Chander v. The State, 1983 Cr.L.J. 595(Delhi),* and *Radhey Shyam v. State of U.P., 1984 Allahabad Law Journal 666* and thereafter expressed as under:

> "It is clear from the above that the power to be exercised under Sections 406, 407 and 408 is judicial power to be invoked and exercised in the manner stated therein. On the other hand, the power of withdrawing or recalling of cases under Sections 409, 410 and 411 is an administrative power, complementary to the administrative power of making over cases vested in the Chief Judicial Magistrate/ Magistrate and the Sessions Judge under Sections 192 and 194 of the Code.
>
> It is also clear that the power conferred in the Sessions Judge under Section 408 is on the same level as the power conferred in the High Court under Section 407 and the power under the two sections is identical (except for two matters which are not relevant for our purposes – the first is while the power of the High Court extends over all Criminal Courts sub-ordinate to its authority, the power of Sessions Judge is confined to Courts within its own Sessions Division; and the second is in regard to the limit of compensation awardable for frivolous applications). Therefore, if High Court has the power to transfer 'part heard' cases under Section 407, the Sessions Court also will have the power to transfer 'part heard cases', as the wording of the two sections are the same. In fact, sub-section (2) of Section 407 places an embargo on an application for transfer being filed before the High Court unless an application for such transfer has been made to the Sessions Judge under Section 408 and rejected by him.
>
> The view taken in *Deepchand* (supra) is that Section 409 deals with withdrawal/recalling of those matters

originally instituted in the Court of Session and made over by the Sessions Judge to Additional Sessions Judge, Assistant Sessions Judge or Chief Judicial Magistrate, whereas Section 408 deals with transfer of other cases (which were not instituted in the Court of Sessions) from one Criminal Court to another. This would have the effect of restricting the term 'Criminal Court' used in Section 408 to only Criminal Courts other than Additional Sessions Judges and Assistant Sessions Judges. Such an interpretation is unwarranted. Section 6 of the code classifies Criminal Courts as Courts of Sessions, Judicial Magistrates of the First class/Metropolitan Magistrates, Judicial Magistrates of the Second Class and Executive Magistrates. When Section 408 states that a Sessions Judge may transfer a case from one Criminal Court to another Criminal court in his Sessions Division, it would certainly include the Additional Sessions Judges and Assistant Sessions Judges also, as they fall under 'Courts of Sessions'. Therefore, there is no impediment for a Sessions Judge to transfer any case from the Court of any Additional Sessions Judge in his Sessions Division to any other Additional Sessions Judge in his Sessions Division. For exercise of power under Section 408, the question whether the trial has commenced in the case or not is irrelevant.

We are, therefore, in respectful agreement with the view expressed by the Delhi High Court in *Avinash Chander* and the Allahabad High Court in *Radhey Shyam* and consequently over-rule the decision of the learned Single Judge of this Court in *Deepchand*. The first point is therefore answered in the affirmative."

While replying the second question Hon'ble Division Bench took note of the case laws of *In Reference by District & Sessions Judge, Jabalpur (M.Cr.C. No. 1242 of 2002, State of M.P. v. Raja, 1994 (II) MPWN 18, In Ref. by District & Sessions Judge, Guna (M.Cr.C. No. 3417 of 2002, decided on 29.10.2002, Abdul Hamid v. State of U.P., 1982 Allahabad Law Journal 1448, Virendra Singh v. Awdhesh Kumar, 1984 Allahabad Law Journal 283* and expressed as under:

"Legislative intent behind Section 409 (2) is that where the trial of the case has commenced or hearing of an appeal has commenced (for convenience 'becomes part-heard'), the case or the appeal should be continued to be tried or heard by the same Judge before whom the trial of the case or hearing of the appeal has commenced and there should be no interference with the progress of the case or appeal

and, therefore, the administrative power of recalling should not be exercised. This salutary principle is to ensure speedy trial and hearing. But when the Additional Sessions Judge trying the case retires or resigns or dies or is transferred out of the Sessions Division and the Court becomes vacant, the case or appeal ceases to be a part-heard case. A case or appeal can be said to be part-heard only when the trial of the case or hearing of the appeal is capable of being continued by the Judge before whom the trial or hearing has commenced. Where the Judge before whom the matter is part-heard, ceases to be a Judge or the Court falls vacant, the matter ceases to be part-heard matter before that Judge and the bar relating to recalling of part-heard matters, ceases to apply. It is clear from the context in which sub-section (2) has been enacted, that it applies only to cases where trial of the case or hearing of the appeal has commenced before a particular Additional Sessions Judge and such Judge continues to preside over the same Court or continues in the same Sessions Division. If the Additional Sessions Judge is transferred to some other Sessions Division or ceases to be a Judge on account of resignation, retirement or death resulting in the Court becoming vacant, the restriction placed on the power under sub-section (2) of Section 409 will cease to apply and as a consequence the Sessions Judge can recall the case or appeal under Section 409 (2). But where the Additional Sessions Judge is transferred within the Sessions Division or is on leave or under suspension, the restriction over the administrative power under Section 409 (2) may continue to exist.

We are, therefore, of the view that the decision rendered by Dixit, J. in *M.Cr.C. No.3417 of 2002, dated on 29-10-2002* states the correct position of law. Consequently, we over-rule the decision of Narain Singh Azad, J. rendered in *M.Cr.C. No.1242 of 2002 and the decision in Raja (1994 II MPWN 18).*"

Hon'ble Court summarized the provisions as under:-

(a) A Sessions Judge in exercise of judicial power u/s 408 of the Code may transfer any case pending before any Criminal Court to any other Criminal Court in his Sessions Division. That would mean that he can transfer even those cases where the trial has commenced from one Additional Sessions Judge in his sessions division to another Additional Sessions Judge in his Sessions Division. The transfer of a case u/s 408 of the Code being in exercise of a judicial power, it should be preceded by a hearing to the parties interested. Further, the reason why it is expedient for the ends of justice to transfer the case has to be recorded.

(b) The judicial power u/s 408 (I) and the administrative power u/s 409 (I) and (2) are distinct and different and Section 408 is not controlled by Section 409 (2). A Sessions Judge in exercise of his administrative power under Section 409 may:

(i) withdraw any case or appeal from any Assistant Sessions Judge or Chief Judicial Magistrate subordinate to him.

(ii) recall any case or appeal which he has made over to any Assistant Sessions Judge or Chief Judicial Magistrate Subordinate to him;

(iii) recall any case or appeal which he has made over to any Additional Sessions Judge, before trial of such case or hearing of such appeal has commenced before such Judge.

and try the case or hear the appeal himself or make it over to another Court for trial or hearing. No hearing need be granted to anyone before exercising such power. But the reason therefore shall have to be recorded having regard to Section 412.

(c) A Sessions Judge in exercise of his administrative power u/s 409, may also recall any case where trial of the case or hearing of an appeal has commenced before an Additional Sessions Judge (for the purpose of trying/hearing it himself or for being made over to another Additional Sessions Judge) if such Judge before whom it became part-heard has retired, resigned, died or is transferred outside the Sessions Division. No hearing need be given for such recalling though the reason should be recorded. It is not necessary to refer such matters to the High Court for transferring them by exercise of power u/s 407 of the Code.

CONCLUSION :

The prevailing controversy has, thus been set at rest. The lucid revelation by the High Court narrated the subtle difference between the two resembling provisions. Sessions Judge's power under Sec. 408 is the general power to be exercised for the ends of justice while under Sec. 409 the power is more of administrative in nature and the limitations imposed under Section 409 (2) are not applicable in exercise of the powers of transfer conferred under Section 408 of Cr.P.C.

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EXTENT OF CRIMINAL LIABILITY IN THE CASE OF MEDICAL NEGLIGENCE

Judicial Officers
Districts Jabalpur & Damoh*

In recent times, there has been a spurt in cases of Medical Professionals being accused of negligence in treatment resulting in death or serious injury to the patient. There is no need of reminding ourselves that medical profession is a noble profession rendering a very important and indispensable service to the society. One should keep in mind while dealing with the case of medical negligence that it involves very complex situation because human body is one of the complicated machine designed by God. Uncertainty is always involve in medical practice. Sometimes a doctor, needs to be inventive and has to take snap decisions especially in the course of performing surgery when some unexpected problems crop up. If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason, neither can a surgeon successfully wield his life saving scalper to perform an essential surgery, nor can a physician successfully administer the life saving dose of medicine. Such timidity forced upon a doctor would be a disservice to society. In this background, Court has to struck a balance between "an error of judgment" and "negligence", as the subject of criminal liability for medical negligence is of much significance warranting careful thought of the court.

As suggested by Justice G.P. Singh in *Law of Tort (Ratanlal & Dhirajlal – 24th Edition, 2002)* negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing the same, by which the plaintiff has suffered injury to his person or property. The definition involves three constituents of negligence: (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty; (2) breach of the said duty; and (3) consequential damage. Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort.

The criminal law has invariably placed the medical professionals on a pedestal different from ordinary mortals. The Indian Penal Code,1860 sets out a few vocal examples. Section 88 in the Chapter on General Exceptions provides exemption for acts not intended to cause death, done by consent in good faith for person's benefit. Section 92 provides for exemption for acts done in good faith for the benefit of a person without his consent though the acts cause harm

* The original Articles received from Jabalpur & Damoh have been substantially edited by the Institute.

to a person and that person has not consented to suffer such harm. Section 93 saves from criminality certain communications made in good faith. The rationale behind these provisions is that no man can so conduct himself as to make it absolutely certain that he shall not be so unfortunate so to cause the death of a fellow-creature. The utmost that he can do is to abstain from everything which is at all likely to cause death. Therefore, the liability of medical professionals must be clearly demarcated and a punitive sting must be adopted in deserving cases. This more so when the most sacrosanct right to life or personal liberty is at stake. A professional including medical professional may be held liable for negligence on one of two findings; either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess.

Negligence has three meanings. They are: (i) a state of mind, in which it is opposed to intention; (ii) careless conduct; and (iii) the breach of duty to take care that is imposed by either common or statute law. All three meanings are applicable in different circumstances but anyone of them does not necessarily exclude the other meanings. The essential components of negligence, as recognized, are three: "duty", "breach" and "resulting damage".

A person is said to be a negligent one who inadvertently commits an act of omission and violates a positive duty. A person is said to be rash who knows the consequences but foolishly thinks that it will not occur as a result of his act. A reckless person knows the consequences but does not care whether or not they result from his act. Doctors by profession are in the category of persons professing special skills. Any man practicing a profession requires particular level of learning, which impliedly assures a person dealing with him, that he possesses such requisite knowledge, expertise and will profess his skill with reasonable degree of care and caution. Persons who offer medical advice and treatment implicitly state that they have the skill and knowledge to do so, that they have the skill to decide whether to take a case, to decide the treatment, and to administer that treatment. We can say it an "implied undertaking" on the part of a medical professional.

It is a degree of negligence, which makes a difference between criminal negligence and civil negligence. It is very difficult to make any arithmetical formula to measure the degree of negligence. Generally speaking, in tort, the determinative factor of the extent of liability is the amount of damages incurred; but in criminal law, the amount and degree of negligence is the determinative factor. The factor of grossness or degree does assume significance while drawing distinction in negligence actionable in tort and negligence punishable as a crime. In case of punishable negligence, the negligence has to be gross or of high decree. For civil liability it may be enough for the complainant to prove that the doctor did not exercise reasonable care in accordance with the principles mentioned above, but for convicting a doctor in a criminal case, it must also be proved that this negligence was so gross or amounting to recklessness.

Sections 336 to 338 and 304-A of the Indian Penal Code deal with rash or negligent acts resulting in injury to health, safety and life of human beings. Most of the cases of criminal liability in medical negligence, come within the purview of Sec 304-A IPC Therefore, this is the main penal provision as to the cases of Medical Negligence. In *Ghanshyamdas Bhagwandas v. State of M.P. 1977, MPLJ 165* it was emphasized that for liability under Section 304-A IPC, there must be direct nexus between death and the rash or negligent act. A remote nexus is not enough.

For the purpose of criminal law, very high degree of negligence is required to be proved for culpability under Section 304-A IPC Criminal rashness means hazarding a dangerous act with knowledge that it is so and that it may cause an injury. What may be called a negligent act in Civil Proceedings is not necessarily so in criminal case. Criminal Negligence is gross and culpable neglect, that is to say, a failure to exercise that care and failure to take the precaution which having regard to the circumstances it was imperative duty of the individual to take.

As propounded by the Apex Court in *Mohd Ayannuddian @ Mian v. State of A.P., AIR 2000 SC 2511,* culpable rashness lies in running the risk of doing an act with recklessness and with indifference as to the consequences. Criminal negligence is the failure to exercise duty with reasonable and proper care and precaution.

In *Juggan Khan v. State of M.P., AIR 1965 SC 831,* a Homeopath administering poisonous medicine to patient without studying the effects of such medicines was held liable under Section 304-A IPC it was held that it is a rash and negligent act to prescribe poisonous medicine without studying their probable effect.

Similarly in *Dr. Khusaldas Pammandas v. State of Madhya Pradesh, AIR 1960 M.P. 50,* it was held that the fact that person totally ignorant of the science of medicine or practice of surgery undertakes a treatment or performs an operation is very material in showing his gross ignorance from which an inference about his gross rashness and negligence in undertaking the treatment can be inferred. In this case the accused, Hakim, who had no knowledge of Penicillin injection treatment gave Procaine Penicillin injection to the deceased. It was held to be clearly rash and negligent act within the meaning of Section 304-A of IPC

But if a qualified medical professional acts with due care and caution as expected of a professional possessing ordinary skills in the field, he cannot be held liable simply because that the treatment failed or undesired results accrued due to chance or misfortune.

In *Ghanshyamdas Bhagwandas case (supra)* the deceased was an old patient of Bronchial Asthama. The accused injected Coramine and thereafter patient expired. In the absence of any evidence to establish direct nexus between the death of the patient and the coramine injection, the criminal liability of the accused was not established.

In *State of Gujarat v. Dr. Maltiben Valjibhai Shah, 1994 (1) ACJ 375,* the deceased went to the clinic of the accused for treatment of sinusitis and hypertension. The accused gave a test dose to the deceased and then she was given injection Gistrepen half gram. After giving the injection the deceased immediately complained of giddiness, pain in chest, perspiration and her pulse was rapid. Noticing the reaction the accused gave a number of injections to counter the reaction. The High Court of Gujarat acquitted the accused of the charge under Section 304-A IPC on the grounds that the deceased did not react to the test dose of procaine penicillin injection, and that the accused after noticing reaction of the regular dose of injection immediately got anti-reaction treatment.

Criminal liability in Medical Practice has been discussed in great etail in *Dr. Krishna Prasad v. State of Karnataka, 1989(1) ACJ 393.* In this case the patient was admitted for a delivery. The doctor decided caesarean operation under spinal anaesthesia. The blood pressure began to fall soon after administering spinal anaesthesia and ultimately the patient died. The criminal proceedings against the anaesthetist were started on the allegation that he was not an anaesthetic expert and the test dose of the spinal zylocaine injection was not given. The Karnataka High Court quashed the proceedings on the grounds that the doctor holding degrees like MBBS, FRCS and DGO is qualified to administer anaesthesia and that the omission to give test dose of spinal Zylocaine does not amount to negligence.

In *Kurban Hussein Mohamedalli Rangawalla v. State of Maharashtra, AIR 1965 SC 1616* it has been laid down that to impose criminal liability under Section 304-A, Indian Penal Code it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans*; it is not enough that it may have been the causa *sine qua non*. The mere fact that the appellant allowed the burners to be used in the same room in which varnish and turpentine were stored, even though it might be a negligent act, would not be enough to make the appellant responsible for the fire which broke out. The cause of the fire was not merely the presence of burners in the room in which varnish and turpentine were stored, though this circumstance was indirectly responsible for the fire which broke out. But what Section 304-A requires is causing of death by doing any rash or negligent act, and this means that death must be the direct or proximate result of the rash or negligent act. It appears that the direct or proximate cause of the fire which resulted in seven deaths was the act of Hatim. It seems to us clear that Hatim was apparently in a hurry and, therefore, he did not perhaps allow the rosin to cool down sufficiently and poured turpentine too quickly. The evidence of the expert is that the process of adding turpentine to melted rosin is a hazardous process and the proportion of froth would depend upon the quantity of turpentine added. The expert also stated that if turpentine is not slowly added to bitumen and rosin before it is cooled down to certain temperature, such fire is likely to break out. It seems, therefore, that as turpentine was being added at

about closing time, Hatim was not as careful as he should have been and probably did not wait sufficiently for bitumen or rosin to cool down and added turpentine too quickly.

The mere fact that the fire would not have taken place if the appellant had not allowed burners to be put in the same room in which turpentine and varnish were stored, would not be enough to make him liable under Section 304-A IPC, for the fire would not have taken place, with the result that seven persons were burnt to death, without the negligence of Hatim. The death in this case was, therefore, in our opinion not directly the result of a rash or negligent act on the part of the appellant and was not the proximate and efficient cause without the intervention of another's negligence.

In cases of medical negligence even higher degree of negligence is required to be proved. In *Dr. Lakshmanan Prakash v. The State and another, 1999 Cri.L.J. 2348 (Madras High Court)* it has been held that where the patient died while performing operation of his fractured injuries sustained on his leg in road accident and the reason for the death was found to be lung shock and acute respiratory failure, a sequelae to spinal anaesthesia administration and there was failure on part of Anaesthetist to check up during the pre-operative anaesthesia test as to whether the patient would withstand 3 ml. local anaesthesia drug which was administered through spinal cord to the patient, especially when he had sustained injuries both on the head and leg, it would amount to criminal negligence on part of Anaesthetist. His conviction under Section 304-A is proper. Further failure on part of Ortho Surgeons to check up performance of medical formalities through Anaesthetist before commencing operation might reflect negligence which may attract civil law and not criminal law. Thus, quashing of proceedings under Section 304-A IPC against them would not preclude father of the deceased from approaching proper forum to claim damages by invoking civil law.

In *Dr. Suresh Gupta v. Govt of N.C.T. of Delhi, AIR 2004 SC 4091,* the Apex Court propounded that criminal liability on Medical Professional under Section 304-A IPC prosecution has to come out with a case of high degree of negligence. For fixing criminal liability upon a doctor or a surgeon, the standard of negligence required to be proved should be so high as could be described as gross negligence or recklessness. Where a patient's death results merely from an error of judgement or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but will not suffice to hold him criminally liable. it is not merely a lack of necessary care, attention and skill. Every careless act of the medical man cannot be termed criminal. It could be termed criminal only when the medical man exhibits gross loss of competence or inaction and wanton indifference to the patients safety and which is found to have arisen from ignorance or gross negligence.

Finally, in the case of *Dr. Jacob Mathew v. State of Punjab, AIR 2005 SC 3180,* the Supreme Court elucidated the law as to the extent of criminal liability in cases of medical negligence as under:

(1) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(2) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(3) The test for determining medical negligence as laid down in *Bolam's case (1957) 1 WLR 582, 586* holds good in its applicability in India.

(4) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence,

the element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(5) The word 'gross' has not been used in Section 304-A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304-A of the IPC has to be read as qualified by the word 'grossly'.

(6) To prosecute a medical professional for negligence under criminal law, it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(7) *Res ipsa loquitur* is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining *per se* the liability for negligence within the domain of criminal law. *Res ipsa loquitur* has, if at all, a limited application in trial on a charge of criminal negligence.

In this case the Supreme Court, has also drawn attention to the probable harmful consequences of the fear psychosis among the medical professionals generated by the unwanted prosecutions. It has underlined the need for instilling the confidence among the medical professionals. The Supreme Court realizing that the doctors have to be protected from frivolous complaints of medical negligence, has laid down following guidelines :-

(1) A private complaint should not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of negligence.

(2) In police cases also, the investigating officer should obtain an independent and competent medical opinion, preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial opinion applying the *Bolam's test.*

(3) A doctor accused of medical negligence should not be arrested in a routine manner; this may be done only if it is necessary for furthering investigation, or collecting evidence, or if the investigating officer fears that the accused will abscond.

In the recent case of *Martin F D'souza v. Mohd Ishfaq, AIR 2009 SC 2049* the Supreme Court has reiterated the law as laid down in *Jacob Mathew's case* and further cautioned the Consumer Forum and Criminal Courts as well as warned the police and held thus:

> 117. We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the Criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the concerned doctor/hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in *Jacob Mathew's case* (supra), otherwise the policemen will themselves have to face legal action.

In para 123 of the judgment, Their Lordships further cautioned the Courts and Forum that :

> "The courts and Consumer Fora are not experts in medical science, and must not substitute their own views over that of specialists."

CONCLUSION

Thus, on the basis of aforesaid analysis, it can be concluded that though doctors like other citizens are subject to the penal laws of the land, however, certain special protection in respect of the standard of proof required to prove charge of negligence has been given to them as a safeguard against unnecessary harassment as laid down by the Apex Court, particularly in the cases of *Dr. Jacob Mathew* (supra) and *Martin F D'souza* (supra) as enunciated above.

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SCOPE OF SUSPENSION OF SENTENCE UNDER SECTION 389(3) CR.P.C. WHERE THE ACCUSED IS CONVICTED AT ONE TRIAL OF TWO OR MORE OFFENCES AND SENTENCED WITH IMPRISONMENT FOR A TERM OF 3 YEARS IN EACH OFFENCE

Judicial Officers
District Damoh & Dhar

The issue relating to exercise of jurisdiction by the Trial Court u/s 389(3) Code of Criminal Procedure Code, 1973 (in short 'the Code') has to be examined in the background of pertinent provisions. Section 389 of the Code finds place in Chapter XXIX of the Code which reads as under :

> **"389. Suspension of sentence pending the appeal ; release of appellant on bail.**-(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond:
>
> Provided that the Appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release :
>
> Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail.
>
> (2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.
>
> (3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall -
>
> (i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or
>
> (ii) where the offence of which such person has been convicted is a bailable one, and he is on bail,
>
> order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1), and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

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(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced."

Sub-section (3) of Section 389 of the Code makes it obligatory upon the Trial Court to grant bail to the person convicted intending presentation of an appeal, if he satisfies the condition laid down in Clauses, (i) and (ii) of Sub-section (3). If such conditions are fulfilled the Court has no option but to grant bail. The conditions to be fulfilled by the accused are :-

1. That the accused being on bail is sentenced to imprisonment for a term up to 3 years.
2. The offence in which the accused has been convicted is bailable and such accused is on bail and
3. The accused intends to present an appeal against the order of conviction.

Mere plain reading of the above provision makes it clear that where the offence of which the accused has been convicted is a bailable one and he is on bail during trial, he shall be released on bail irrespective of the fact that he has been sentenced for more than 3 years.

The question is, where a person is convicted at one trial of two or more offences and the Trial Court has sentenced him to imprisonment for a term of 3 years in each offence, whether the Trial Court can release him on bail under Sub-section (3) of Section 389 of the Code?

Where the offence of which the accused has been convicted is a bailable one and he is on bail during trial the convicted accused can apply for bail before the sentencing Court to grant bail for a limited period pending, filing of appeal and obtaining bail order from the Appellate Court, unless the Trial Court refuses bail for a special reason. This recourse can be adopted irrespective of the term of imprisonment which ever may be, and the Trial Court can suspend the sentence of imprisonment. Also where a person convicted who was on bail during trial and he was sentenced to imprisonment for a term of 3 years in case of non-bailable offence, the provision of Sub-section (3) of Section 389 of the Code can be invoked unless the court refuses bail for special reason. But where a person convicted, though was on bail during the trial, for a non-bailable offence and sentenced to imprisonment for a term exceeding 3 years, such convicted person cannot be, released on bail by the Trial Court. In other words we can say the Trial Court's jurisdiction to release a convicted person on bail depends upon the length of imprisonment for which the accused has been sentenced.

For the above purpose we have to go through Section 31 of the Code which is as under :-

> **"31. Sentence in cases of conviction of several offences at one trial.-**(1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of Section 71 of the Indian Penal Code 1860 (45 of 1860), sentence him for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.
>
> (2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:
>
> Provided that –
>
> (a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years ;
>
> (b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.
>
> (3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence."

It is quite explicit from the above mentioned provision that for the purpose of bail by a convicted person, the aggregate of the consecutive sentences passed against him shall be deemed to be a single sentence. Since Section 389 of the Code finds place in Chapter XXIX of the Code, whereunder the provisions relating to bail have been given, it would be appropriate to follow the provisions of Sub-section (3) of Section 31 of the Code for the interpretation of the words "sentenced to imprisonment for a term not exceeding 3 years" in clause (i) of Sub-section (3) of Section 389 of the Code.

Looking to the provisions of Section 389(3) (i) and Section 31(3) of the Code, it is apposite to conclude that if the Trial Court ordered that when a person is convicted and sentenced for jail at one trial of two or more offences and the Trial Court does not direct that such punishments shall be run concurrently, or it directs that the punishments of imprisonment shall be commenced one after the expiration of the other that mean consecutively, then (for the purpose of bail) the aggregate of the consecutive sentences shall be a single sentence.

Since Section 389 of the Code to which the problem in hand belongs to the Chapter XXIX, where the provisions relating to appeal have been given, in our opinion it would be better to follow the provision of Sub-section (3) of Section 31 which explicitly provides that for the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a 'single sentence' and if such interpretation is given to the phrase 'sentenced to imprisonment for a term not exceeding three years' result will be that if a person is convicted at one trial of two or more offences and the Trial Court has sentenced him to imprisonment for a term of three years in each offence and the Trial Court has not made it concurrent the sentence of such an accused person cannot be suspended under Section 389 (3) of the Code. But where sentences awarded under different offences in one trial have been ordered to run concurrently then he shall be given benefit of Section 389 (3) of the Code, if any special circumstance does not disentitle him for such a benefit.

In the light of above provisions of law, if Trial Court ordered that two or more sentences should run concurrently, then a person is convicted at one trial of two or more offences for a term of three years in each offence, his aggregate sentence imposed in one trial would be three years. In such a case, the Trial Court can invoke power conferred on it under Section 389 (3) (i) of the Code and an application before sentencing Court to grant bail for a limited period pending filing of appeal and obtaining bail order from the Appellate Court, if Trial Court satisfied that the convicted person intends to appeal, the Trial Court shall order that the convicted person be released on bail, unless there are special reasons for refusing bail for such period as well afford him sufficient time to present the appeal and obtain the order of the Appellate Court under Section 389 (1) of the Code and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

When there is omission to specify how separate sentences are to run, it should be held that they should run consecutively. It is only consecutive sentences and not concurrent sentences which can be aggregated for the purpose of appeal. So, if a person convicted in one trial for two or more offences and the Trial Court sentenced him to imprisonment for a term of three years in each case without giving further direction to run the sentence concurrently or with special direction to run consecutively and the aggregate of various sentences imposed in one trial exceeds 3 years, in such case of non-bailable offence, Section 389 (3) (i) of the Code cannot be invoked.

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आपराधिक विचारण में कमीशन पर साक्षियों के परीक्षण का क्षेत्र एवं प्रक्रिया

न्यायिक अधिकारीगण
जिला शिवपुरी एवं जिला रतलाम

आपराधिक विधि का यह सामान्य नियम है कि साक्षी का परीक्षण अभियुक्त की उपस्थिति में न्यायालय में किया जाना चाहिए। धारा 273 दण्ड प्रक्रिया संहिता, 1973 (संक्षेप में – 'संहिता') यह प्रावधान करती है कि अभिव्यक्त रूप से उपबंधित के सिवाय, विचारण एवं अन्य कार्यवाही में सब साक्ष्य अभियुक्त की उपस्थिति में या उसे वैयक्तिक हाजिरी से अभिमुक्त किये जाने पर उसके प्लीडर की उपस्थिति में लिया जायेगा। यह नियम आज्ञापक है। परन्तु संहिता की धारा 284 उक्त प्रावधान का अपवाद है। न्याय के उद्देश्य के लिये आवश्यक प्रतीत होने पर किसी साक्षी की परीक्षा कमीशन पर कराई जा सकती है।

संहिता के अध्याय 23 की धारा 284 से 290 में साक्षियों की परीक्षा के लिये कमीशन जारी करने के संबंध में प्रावधान किये गये है। धारा 284 में वे परिस्थितियाँ है जिनके अधीन किसी साक्षी के लिये कमीशन जारी किया जा सकता है। जबकि धारा 285 से 289 में कमीशन जारी करने की प्रक्रिया विहित की गई है। धारा 290 में विदेशी कमीशन के निष्पादन के संबंध में प्रावधान किया गया है। धारा 284 की उपधारा (1) प्रावधानित करती है कि जहां न्यायालय या मजिस्ट्रेट को प्रतीत होता है कि न्याय के उद्देश्यों के लिए यह आवश्यक है कि किसी साक्षी की परीक्षा की जाए और ऐसे साक्षी की हाजिरी इतने विलम्ब, व्यय या असुविधा के बिना जितनी मामले की परिस्थितियों में अनुचित होगी, नहीं कराई जा सकती है तब न्यायालय या मजिस्ट्रेट ऐसी हाजिरी से अभिमुक्ति दे सकता है और साक्षी की परीक्षा की जाने के लिए इस अध्याय के उपबन्धों के अनुसार कमीशन जारी कर सकता है।

उक्त प्रावधान के अवलोकन से स्पष्ट है कि साक्षियों की परीक्षा कमीशन के माध्यम से किये जाने हेतु निम्न दो आवश्यक शर्तें हैं :

1. संबंधित साक्षी की परीक्षा न्याय के उद्देश्य के लिए आवश्यक हों।
2. ऐसे साक्षी की उपस्थिति इतने विलंब, व्यय या असुविधा के बिना प्राप्त न की जा सकती हो जितना कि मामले की परिस्थितियों में अनुचित हो।

धारा का परन्तुक आज्ञापक स्वरूप का है जिसके अनुसार भारत के राष्ट्रपति, उपराष्ट्रपति या किसी राज्य के राज्यपाल या किसी संघ राज्य क्षेत्र के प्रशासक की साक्षी के रूप में परीक्षा कमीशन पर ही की जायेगी।

धारा 284 की उपधारा (2) न्यायालय को अभियोजन के किसी साक्षी की परीक्षा के लिये कमीशन जारी करते समय, प्लीडर की फीस और अभियुक्त के व्यय की पूर्ति के लिये उचित राशि अभियोजन द्वारा अदा किये जाने का निर्देश देने के लिये सशक्त करती है।

धारा 285 में यह प्रावधान है कि ऐसा कमीशन किसे निर्दिष्ट किया जा सकता है। जहाँ साक्षी संहिता के विस्तार के राज्य क्षेत्र में है वहाँ कमीशन यथा स्थिति, ऐसी स्थानीय अधिकारिता के महानगर मजिस्ट्रेट या मुख्य

न्यायिक मजिस्ट्रेट को जारी किया जायेगा। लेकिन यदि भारत में इस संहिता के विस्तार से परे क्षेत्र का साक्षी है तब कमीशन इसके लिये केन्द्रीय सरकार द्वारा विनिर्दिष्ट न्यायालय या अधिकारी को जारी किया जायेगा। भारत के बाहर के देश के साक्षी के लिये ऐसे देश की सरकार से केन्द्रीय सरकार द्वारा ठहराव होने पर केन्द्रीय सरकार द्वारा अधिसूचित न्यायालय या अधिकारी को कमीशन विनिर्दिष्ट होगा। साथ ही ऐसा कमीशन अधिसूचित प्रारूप में ही जारी किया जायेगा।

धारा 286 कमीशन के निष्पादन के संबंध में प्रावधान करती है जिसके अनुसार मुख्य महानगर मजिस्ट्रेट या मुख्य न्यायिक मजिस्ट्रेट कमीशन प्राप्त होने पर स्वयं साक्षी का परीक्षण कर सकता है जिसके लिए वह साक्षी को अपने समक्ष बुलाने के लिए समन भी कर सकता है और स्वयं भी वहाँ जा सकता है जहां कि साक्षी उपलब्ध है। धारा 286 से यह भी ध्वनित है कि मुख्य न्यायिक मजिस्ट्रेट या महानगर मजिस्ट्रेट अपने क्षेत्राधिकार के न्यायिक मजिस्ट्रेट को भी कमीशन निष्पादन के लिये नियुक्त कर सकते है। दोनों ही स्थिति में कमीशन पर साक्ष्य अभिलिखित करने के लिये संहिता के अधीन वारंट मामलों के विचारण के लिये प्राप्त शक्तियों का प्रयोग किया जा सकता है।

संहिता की धारा 287 के अंतर्गत कार्यवाही के पक्षकारों को लिखित परिप्रश्न भेजने और स्वयं अथवा प्लीडर के द्वारा साक्षी की मुख्य परीक्षा, प्रतिपरीक्षा और पुनः परीक्षा करने का अधिकार दिया गया है। जहाँ कोई पक्षकार लिखित में परिप्रश्न भेजता है वहाँ न्यायालय या मजिस्ट्रेट ऐसे परिप्रश्नों को सुसंगत समझने पर कमीशन के लिये दे सकता है। तब कमीशन निष्पादनकर्ता के लिये यह विधिपूर्ण होगा कि वह ऐसे परिप्रश्नों के आधार पर साक्षी की परीक्षा करें।

धारा 288 के अनुसार, कमीशन के सम्यक रूप से निष्पादित किए जाने के पश्चात् वह उसके अधीन परीक्षित साक्षियों के अभिभाक्ष्य सहित उस न्यायालय या मजिस्ट्रेट को, जिसने कमीशन जारी किया था, लौटाया जाएगा और वह कमीशन, उससे संबद्ध विवरणी और अभिसाक्ष्य सब उचित समयों पर पक्षकारों के निरीक्षण के लिए प्राप्य होंगे, और सब न्यायसंगत अपवादों के अधीन रहते हुए, किसी पक्षकार द्वारा मामले में साक्ष्य पढ़े जा सकेंगे और अभिलेख का भाग होंगे। कमीशन पर अभिलिखित ऐसी साक्ष्य किसी अन्य न्यायालय के समक्ष भी मामले के किसी पश्चात्वर्ती प्रक्रम में साक्ष्य में उपयोग में लाई जा सकती है लेकिन तब जबकि कमीशन पर लिया गया ऐसा अभिसाक्ष्य, भारतीय साक्ष्य अधिनियम, 1872 की धारा 33 में विहित शर्तों को पूरा करता हो।

धारा 289 जांच, विचारण या अन्य कार्यवाही को ऐसे विनिर्दिष्ट समय तक के लिए, जो कमीशन के निष्पादन और लौटाए जाने के लिए उचित रूप से पर्याप्त है, स्थगित किये जा सकने का प्रावधान करती है।

संहिता कि धारा 290 के अनुसार, धारा 286 के उपबन्ध और धारा 287 और धारा 288 के उतने भाग के उपबन्ध, जितना कमीशन का निष्पादन किए जाने और उसके लौटाए जाने से संबंधित है, भारत के ऐसे क्षेत्र के अंदर, जिस पर इस संहिता का विस्तार नहीं है, अधिकारिता का प्रयोग करने वाला ऐसा न्यायालय, न्यायाधीश या मजिस्ट्रेट जिसे केन्द्रीय सरकार, अधिसूचना द्वारा इस निमित्त विनिर्दिष्ट करें, तथा

भारत से बाहर के किसी ऐसे देश या स्थान में, जिसे केन्द्रीय सरकार, अधिसूचना द्वारा, इस निमित्त विनिर्दिष्ट करे, अधिकारिता का प्रयोग करने वाला और उस देश का स्थान में प्रवृत्त विधि के अधीन आपराधिक मामलों के संबंध में साक्षियों की परीक्षा के लिए कमीशन जारी करने का प्राधिकार रखने वाला न्यायालय, न्यायाधीश या मजिस्ट्रेट द्वारा जारी किए गए कमीशनों के बारे में वैसे ही लागू होंगे जैसे वे धारा 284 द.प्र.सं. के अधीन जारी किए गए कमीशनों को लागू होते हैं। अर्थात विदेशी कमीशनों के निष्पादन कि प्रक्रिया सारतः वही है जो भारत में न्यायालय या मजिस्ट्रेट द्वारा कमीशन के निष्पादन के लिये है।

महत्वपूर्ण बिन्दु यह है कि किन परिस्थितियों में आपराधिक मामलों में किसी साक्षी की परीक्षा कमीशन पर कराई जा सकती है। आपराधिक विचारण में साक्षी का कमीशन पर परीक्षण किया जाना अपवाद है इसलिये निश्चित ही जब तक ऐसी परिस्थितियाँ न हो जिनमें साक्षी का कमीशन पर परीक्षण किया जाना अपरिहार्य हो, कमीशन जारी नहीं किया जाना चाहिये। विभिन्न न्यायदृष्टांतों के प्रकाश में उन परिस्थितियों को समझा जा सकता है जिनमें किसी साक्षी का परीक्षण कमीशन पर कराया जा सके।

न्यायदृष्टांत *धर्मानंद पंथ विरूद्ध स्टेट ऑफ यू.पी., ए.आई.आर. 1957 सुप्रीम कोर्ट 594* में माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित किया गया है कि आपराधिक मामलों में महत्वपूर्ण साक्षियों के कथन कमीशन पर अंकित नहीं किया जाना चाहिए जब तक कि विलम्ब, व्यय या असुविधा का इतना असाधारण मामला न हो। अपरिहार्य परिस्थितियों में ही साक्षी का कथन कमीशन पर कराया जाने के लिए ही कमीशन जारी किया जाना चाहिए। साक्षी का कमीशन पर परीक्षण नियम नहीं है बल्कि एक अपवाद है जिसका प्रयोग न्यायालय को अपने विवेकानुसार यदाकदा ही करना चाहिए एवं ऐसे विवेक का प्रयोग हल्केपन के साथ अथवा निरकुंशता के साथ नहीं किया जाना चाहिए। न्यायदृष्टांत *गुलाबराव विरूद्ध एस.डी.राजे, 1973 क्रि. लॉ जनरल 948 (बम्बई)* में भी ऐसा ही मत व्यक्त किया गया है।

न्यायदृष्टांत *स्टेट ऑफ गुजरात विरूद्ध ललित मोहन, 1990 क्रि. लॉ जनरल 234* में माननीय गुजरात उच्च न्यायालय ने प्रतिपादित किया है कि न्याय के उद्देश्य की पूर्ति के लिये तथा साक्षी की अनुपस्थिति के कारण मामले के निराकरण में अनावश्यक विलंब न हो और समय पर साक्षी का परीक्षण किया जा सके, इस प्रयोजन से कमीशन पर साक्षी की परीक्षा की जानी चाहिये।

साक्षी के परीक्षण के लिए कमीशन जारी किया जाना चाहिए या नहीं यह प्रत्येक मामले के तथ्यों और परिस्थितियों पर निर्भर करता है। क्योंकि कमीशन जारी करना नियम नहीं वरन् अपवाद है, जो न्यायालय के विवेक पर निर्भर करता है। महत्वपूर्ण साक्षियों का परीक्षण, जिनकी परिसाक्ष्य के आधार पर अभियुक्त के विरूद्ध मामला प्रमाणित होना है, अभियुक्त की उपस्थिति में न्यायालय के समक्ष ही किया जाना चाहिए और औपचारिक साक्षियों की परीक्षा कमीशन पर अंकित किये जाने की अनुमति प्रदान की जानी चाहिए जिनकी उपस्थिति विलम्ब, व्यय या असुविधा के बिना शीघ्र सुनिश्चित न की जा सकती हो। जैसा कि न्यायदृष्टांत *मोहम्मद शफीक विरूद्ध एम्पेरर, ए.आई.आर. 1932 पटना 242* में प्रतिपादित किया गया है।

न्याय दृष्टांत *ओमप्रकाश वि. राज्य, 1964 (2) क्रि. लॉ. जनरल 579* में माननीय राजस्थान उच्च न्यायालय द्वारा पुरानी दंड प्रक्रिया संहिता की धारा 503 के परिप्रेक्ष्य में यह अभिनिर्धारित किया गया है कि "असुविधा" शब्द के अंतर्गत केवल पक्षकारों की असुविधा नहीं आती है बल्कि साक्षियों की असुविधा भी आती है।

इसी संदर्भ में माननीय छत्तीसगढ़ उच्च न्यायालय द्वारा न्याय दृष्टांत *श्रीनाथ वि. छत्तीसगढ़ राज्य, 2004 (4) एम.पी.एच.टी. 1* में यह अभिनिर्धारित किया गया है कि यदि चिकित्सक साक्षी को न्यायालय में उपस्थित होने में असुविधा होती है, वह प्रतिदिन 70–80 रोगियों को देखते हैं और उनके मुख्यालय छोड़ने के कारण उनके अति गंभीर मरीजों को अत्यधिक असुविधा हो सकती है, तो ऐसी स्थिति में उक्त चिकित्सक साक्षी का कमीशन पर परीक्षण किया जाना उचित है।

न्यायदृष्टांत गुलाबराव (पूर्वोक्त) में यह भी प्रतिपादित किया गया है कि जब मामला मानहानि से संबंधित हो और परिवाद पेश किया गया हो तब परिवादी प्रत्येक तथ्य के लिए परिवादी रहता है और उसके कथन अंकित किये जाने के लिए कमीशन जारी नहीं किया जाना चाहिए और न ही इस आधार पर कमीशन जारी किया जा सकता है कि परिवादी मंत्री (मिनिस्टर) है।

न्यायदृष्टांत *स्टेट ऑफ कर्नाटक विरूद्ध वायारप्पा, 2006 क्रि. लॉ जनरल 4290* के मामले में आरोपी पति द्वारा उसकी पत्नी पर चौपर जैसे घातक हथियार से उसके पैर और हाथ में गंभीर उपहति कारित की गई जिसे उपचार के लिए अस्पताल में भर्ती कराया गया था जिससे उसकी उपस्थिति बिना बिलम्ब यानि जब तक वह ठीक नहीं हो सकती थी तब तक न्यायालय में सुनिश्चित करना अभियोजन पक्ष के लिए संभव नहीं था तब इस तथ्य पर विचार करते हुए कि ऐसे साक्षी का कथन महत्वपूर्ण है, साथ ही साथ चिकित्सक साक्षी का कथन भी महत्वपूर्ण है तब ऐसी परिस्थितियों में यह निर्देश दिया गया कि घायल महिला साक्षी और चिकित्सक साक्षी का कथन न्याय के उद्देश्यों की पूर्ति के लिए अभियोजन के व्यय पर कमीशन के माध्यम से अंकित किये जायें।

जहाँ कोई साक्षी सुरक्षा के बिना न्यायालय में उपस्थित होने में असमर्थ हो वहाँ साक्षी की सुरक्षा के तथ्य को देखते हुये उसका परीक्षण करने के लिये कमीशन जारी किया जा सकता है। जैसा कि *धनकुंवर वि. स्टेट, 1958 जे.एल.जे. 38* में अवधारित किया गया है।

संहिता में साक्षी का पर्दानसीन महिला होना उसका कमीशन पर परीक्षण करने का आधार नहीं है और न ही पर्दानसीन महिला साक्षी को न्यायालय में उपसंजात होने से अभिमुक्ति दी गई है इसलिये पर्दानसीन महिला साक्षी के परीक्षण के लिए कमीशन जारी करने का अधिकार पूर्वक दावा नहीं किया जा सकता है। लेकिन उपयुक्त मामले में न्यायालय अपने विवेकाधीन ऐसा कमीशन जारी कर सकता है जैसा कि *राज्य विरूद्ध दुर्गा प्रसाद, 1957 एम.पी.एल.जे. नोट 65* में प्रतिपादित किया गया है।

विदेश में रहने वाले साक्षियों के परीक्षण के लिए भी कमीशन जारी किया जा सकता है जैसा कि न्यायदृष्टांत *रंन्तीलाल बी. मैथानी विरूद्ध स्टेट ऑफ महाराष्ट्र, ए.आई.आर. 1972 सुप्रीमकोर्ट*

1567 में यह विधिक स्थिति प्रतिपादित की गई है कि यदि न्यायालय को यह प्रतीत होता है कि उपरोक्त साक्षी का कथन मामले के लिए अत्यन्त आवश्यक है और इस तथ्य के लिए भी पूर्णतः सन्तुष्ट होना चाहिए कि जारी किए गए कमीशन को प्रभावी ढंग से निष्पादित कराया जा सकता है और भारत एवं ऐसे अन्य देश के साथ कमीशन पर साक्षी के परीक्षण के लिए संधि है तभी कमीशन जारी किया जायेगा अन्यथा नहीं किया जायेगा।

माननीय सर्वोच्च न्यायालय द्वारा न्याय दृष्टांत *महाराष्ट्र राज्य विरूद्ध प्रफुल्ल बी. देसाई, ए.आई. आर. 2003 सुप्रीम कोर्ट 2053 = 2003 क्रि.लॉ. जनरल 2033* में यह अभिनिर्धारित किया गया है कि विदेश में निवास करने वाले साक्षी की साक्ष्य वीडियो कॉफ्रेंसिंग के माध्यम से अभिलिखित करने के लिए कमीशन तभी जारी किया जा सकता है जबकि वह साक्षी ऐसे देश में हो जिससे कि भारत की प्रत्यर्पण संधि हो और जहां की विधि के अनुसार न्यायालय की अवमानना तथा मिथ्या साक्ष्य दिया जाना दंडनीय अपराध हो। इसके अतिरिक्त वीडियो कोन्फ्रेन्सिग के माध्यम से साक्ष्य तभी अभिलिखित की जा सकती है जबकि साक्षी स्वयं कथन देने की इच्छा रखता हो। माननीय सर्वोच्च न्यायालय द्वारा यह भी अभिनिर्धारित किया गया है कि सामान्यतः भारत से बाहर निवास करने वाले साक्षी की साक्ष्य वहीं अभिलिखित होनी चाहिए जहां कि साक्षी निवास करता है, और इसके लिये साक्षी की उपस्थिति सुनिश्चित किया जाना भी आवश्यक है, इसलिये धारा 285 दं.प्र.सं. यह प्रावधान करती है कि कमीशन किसे निर्देशित किया जावेगा। किन्तु यदि साक्षी स्वयं अपना कथन देने के लिए तैयार है तो न्यायालय उसकी साक्ष्य वीडियो कॉन्फ्रेन्सिंग के माध्यम से अभिलिखित करने के लिए कमीशन जारी कर सकता है। वीडियो कॉन्फ्रेन्सिंग के द्वारा साक्ष्य अभिलिखित करने हेतु मान. सर्वोच्च न्यायालय द्वारा यह प्रक्रिया निर्धारित की गई है कि, मुंबई स्थित न्यायालय द्वारा चीफ मेट्रोपोलीटन मजिस्ट्रेट के नाम से कमीशन जारी किया जा सकता है और चीफ मेट्रोपोलीटन मजिस्ट्रेट मुंबई के द्वारा एक जिम्मेदार अधिकारी (जो कि यथासंभव न्यायिक अधिकारी हो) की नियुक्ति साक्ष्य अभिलिखित करने के लिए की जा सकती है और उसके द्वारा संबंधित वी.एस.एन.एल. अधिकारियों से संपर्क करके ऐसे हॉल या कक्ष में साक्ष्य लेख की जा सकती है, जहां वीडियो कॉन्फ्रेन्सिंग की सुविधा उपलब्ध हो। साक्ष्य अभिलिखित करने हेतु नियुक्त अधिकारी यह भी सुनिश्चित करेगा कि अभियुक्त और उसके अधिवक्ता साक्ष्य अभिलिखित किए जाने के समय उपस्थित हों और साक्षी की भावभंगिमायें देख सके और उसका कथन सुन सके तथा उससे प्रतिपरीक्षण भी कर सके किन्तु यह प्रक्रिया तब तक संभव नहीं हो सकेगी जब तक कि साक्षी स्वयं कथन देने के लिए इच्छुक न हो।

माननीय गुजरात उच्च न्यायालय ने हाल ही में दिये एक निर्णय *स्टेट ऑफ गुजरात वि. रावजी मनुभाई पवार, 2009 क्रि. लॉ जनरल 1085, में विदेश (दुबई)* में रहने वाले साक्षी का मामले की गंभीरता को देखते हुये परीक्षण आवश्यक होने से तथा भारत सरकार एवं संयुक्त अरब अमीरात सरकार के बीच आपराधिक मामलों में सहयोग की संधि होने से साक्षी के परीक्षण के लिये कमीशन जारी करने का निर्देश दिया है।

माननीय सर्वोच्च न्यायालय ने *मो. हुसैन उमर कोचरा वि. के.एस. दलीपसिंहजी, ए.आई.आर. 1970 सुप्रीमकोर्ट 45* के मामले में विदेशी साक्षी का परीक्षण करने के लिये स्विटजरलैंड अथवा यूनाईटेड किंगडम अथवा पाकिस्तान में कमीशन जारी करने के लिये दिये गये आवेदन जिसमें साक्षी का पता भी नहीं दिया

गया था, को निरस्त करते हुये यह अवधारित किया गया कि ऐसा आवेदन पत्र सद्भावी नहीं है और न्यायालय ऐसे आवेदन पत्र के आधार पर किसी भी देश के लिये कमीशन जारी नहीं कर सकता है।

यद्यपि न्यायालय की स्थानीय अधिकारिता के क्षेत्र के साक्षी का कमीशन पर साक्ष्य अंकित करने के संबंध में कोई अभिव्यक्त प्रावधान नहीं है तथापि धारा 284 के प्रावधान स्थानीय अधिकारिता के क्षेत्र के साक्षी का कमीशन पर साक्ष्य अंकित करने के लिये कमीशन जारी करने की शक्ति को अभिव्यक्त या विवक्षित रूप से सीमित नहीं करते है। न्यायदृष्टांत *बहादुर अली विरूद्ध द क्राउन, ए.आई.आर. 1923 लहौर 158* में माननीय उच्च न्यायालय ने अपीलार्थी /अभियुक्त के इस तर्क को कि न्यायालय अपनी ही अधिकारिता के साक्षी की कमीशन पर परीक्षा के लिये कमीशन जारी नहीं कर सकता है, अस्वीकार करते हुये यह अवधारित किया है कि धारा (पुरानी धारा 503) में ऐसी कोई सीमा नहीं दी गई है। तद्नुसार माननीय उच्च न्यायालय ने विचारण न्यायालय द्वारा जारी किया गया कमीशन वैध ठहराया। अतः स्थानीय अधिकारिता के क्षेत्र के साक्षी का कमीशन पर साक्ष्य अंकित करने के लिये कमीशन जारी किया जा सकता है।

किसी अपरिहार्य परिस्थिति के कारण साक्षी की उपस्थिति शीघ्र संभव न हो पा रही हो या जहाँ साक्षी नियोजित है उसके नियोक्ता द्वारा उसे अवकाश प्रदान नहीं किया जा रहा है और यदि साक्षी बिना अवकाश के न्यायालय में कथन हेतु उपस्थित होता है तो उसका नियोजन खतरे में पड़ने की संभावना है अथवा जिस स्थान पर उसका कथन होना है उस स्थान पर आने पर उसका व्यक्तिगत और शारीरिक क्षेम संकटापन्न हो सकता है या उसे आरोपी द्वारा प्रत्यक्ष या परोक्ष रूप से धमकाया गया हो और पर्याप्त सुरक्षा उपलब्ध हो पाना संभव नहीं है या उक्त सुरक्षा के बावजूद भी न्यायालय को प्रतीत होता है कि साक्षी स्वतंत्र रूप से और निर्भीकता से अपना कथन करने में समक्ष नहीं है अथवा कोई व्यक्ति सार्वजनिक नियोजन में, जैसे कि कोई प्रसिद्ध चिकित्सक इस प्रकार से व्यस्त है कि उसका बिना विलम्ब एवं असुविधा के न्यायालय में उपस्थित होना संभव नहीं है तब ऐसी परिस्थितियों में न्यायालय अपने विवेक का प्रयोग करते हुए ऐसे साक्षियों के परीक्षण के लिए कमीशन जारी कर सकता है।

अतएव सारांश में यह कहा जा सकता है कि आपराधिक मामलों में महत्वपूर्ण साक्षियों के कथन, जिनसे कि आरोपी के विरूद्ध आरोप सारवान रूप से प्रमाणित होना है, न्यायालय में ही, आरोपी की उपस्थिति में, उसे प्रतिपरीक्षण का पूर्ण अवसर प्रदान करते हुए ही अंकित किया जाना चाहिए। औपचारिक साक्षियों के कथन कमीशन पर अंकित किये जा सकते हैं अथवा जब व्यय, विलम्ब या असुविधा का कोई असाधारण मामला हो तब साक्षी का कथन अंकित किये जाने के लिए कमीशन जारी किया जाना चाहिए। वर्तमान में इलेक्ट्रोनिक मीडिया में आये महत्वपूर्ण परिवर्तन को दृष्टिगत रखते हुए विलम्ब से बचने के लिए साक्षियों के कथन वीडियो कॉफ्रेंसिंग के माध्यम से अंकित किये जाने के लिए कमीशन जारी किया जा सकता है । जब कमीशन जारी किया जाता है तब आरोपी यदि प्रश्नगत स्थान पर जाकर प्रतिपरीक्षण करना चाहता है या अधिवक्ता नियुक्त करना चाहता है तो उसका उचित व्यय अदा करने के लिए अभियोजन को आदेशित किया जाना चाहिए।

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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 है। ऐसी समस्याओं के विधि सम्मत समाधान के सुस्पष्ट सोच के अभाव में न केवल न्यायदान में विलम्ब की सम्भावना बढ़ जाती है अपितु न्याय के हनन का खतरा भी आसन्न रहता 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 आ रहे हैं। प्रयास यह होगा कि समस्या के सम्यक समाधान के विषय में विश्लेषणात्मक दृष्टिकोण अपनाया जावे)

न्यायालय द्वारा अनुज्ञात संशोधन वाद पत्र एवं लिखित कथन मे समाविष्ट करने की प्रक्रिया क्या होगी?

न्यायालय द्वारा वाद पत्र अथवा लिखित कथन में अनुज्ञात संशोधन किस प्रकार समाविष्ट किये जाएगें? इस संबंध में सिविल प्रक्रिया संहिता, 1908 या म.प्र. सिविल न्यायालय नियम, 1961 में कोई विशिष्ट प्रक्रिया विहित नहीं है तथापि नियम 1961 का नियम 14 मात्र यह प्रावधान करता है कि :–

> "14. (1) अभिवचन अथवा याचिका में की गई कोई शुद्धि अथवा काट–छाँट प्रस्तुतकर्ता पक्षकार अथवा उसके मान्यता प्राप्त अभिकर्त्ता अभिभावक द्वारा तथा न्यायालय के उस अधिकारी, जिसके कि समक्ष वह प्रस्तुत किया जावे, के द्वारा संक्षिप्त हस्ताक्षरित किए जाएँगें। शपथ–पत्र की स्थिति में यह प्रमाणीकरण शपथ दिलाने वाले अधिकारी के संक्षिप्त हस्ताक्षर द्वारा किया जाएगा। संख्या अंकों में लिखी जाएगी तथा जहाँ अभिवचन, याचिका या शपथ–पत्र आदि में भारतीय तिथि अंकित हो, वहाँ उसके तत्सम अंग्रेजी तारीख तथा राष्ट्रीय तिथि पत्र के अनुसार भी दी जाना चाहिए।
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> *टिप्पणी*– सामान्यतः संक्षिप्त हस्ताक्षर अधिकारी द्वारा प्रस्तुति के समय किए जाना चाहिए, किन्तु यदि किसी दिन अधिक संख्या में वादों के प्रस्तुतिकरण के कारण यदि यह संभव न हो तो ऐसे हस्ताक्षर पंजीयन के पूर्व किसी भी समय किये जा सकते हैं।
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> (2) जहाँ कोई अंक में संशोधन किया जाना हो, उस पर रेखा खींचकर उसे इस प्रकार निरस्त किया जाएगा कि वह स्पष्ट रूप से पढ़ने योग्य रहे, उस निरस्त अंक के स्थान पर लिखा जाने वाला अंक उस निरस्त अंक के ऊपर नीचे अथवा बगल में लिखा जाएगा तथा ऐसे परिवर्तन पर परिवर्तन करने वाले व्यक्ति द्वारा संक्षिप्त हस्ताक्षर कर प्रमाणित किया जाएगा। अंकों को संशोधित करने के लिये अंकों को मिटाने, उन्हें अन्य अंकों में परिवर्तित करने तथा बिगाड़ने की प्रथा सर्वत्र वर्जित है।'

सर्वोच्च न्यायालय द्वारा न्याय दृष्टांत *गुरूदयाल सिंह विरूद्ध राज कुमार अनेजा (2002) 2 SCC 445 = AIR 2002 SC 1003* में *Halsbury's Laws of England* (4th Edn., Vol. 36, at pp. 48-49) में एवं Stone and Iyer in Pleadings (2nd Edn.) में अभिवचनों के संशोधन समाविष्ट करने हेतु दी गई विधि पर विचार करते हुए अभिवचनों में संशोधन करने हेतु जो प्रक्रिया प्रतिपादित की गई है वह सारतः निम्नानुसार है :–

(1) सभी संशोधन लिखित रूप में किए जाने चाहिए।

(2) ऐसे संशोधन मूल से सुभिन्न रंग की स्याही से किए जाने चाहिए। प्रथम संशोधन का रंग सामान्यतः लाल होना चाहिए। संशोधन Highlighter द्वारा अथवा लाल स्याही से Underline करते हुए प्रथक से दर्शाना चाहिये।

(3) अनुज्ञात संशोधन न्यायालय की अनुमति से संबंधित पक्षकार द्वारा न्यायालय द्वारा नियत समयावधि में या अन्यथा 14 दिवस की अवधि में, जैसा कि सिविल प्रक्रिया संहिता के आदेश 6 नियम 18 में प्रावधानित है, समाविष्ट करना चाहिए।

(4) जहाँ संशोधनों की संख्या अधिक है और ऐसे संशोधन किए जाने पर वाद पत्र या लिखित कथन की पठनीयता सुविधाजनक नहीं रह जाती है वहाँ ऐसे संशोधनों को समाहित करते हुए उन्हें सुभिन्न रंग की स्याही से या Highlighter से पृथक से दर्शाते हुए नवीन वाद पत्र या लिखित कथन प्रस्तुत किया जाना चाहिए।

(5) समाहित/विलोपित संशोधन का मिलान मूल संशोधन आवेदन एवं वह आदेश, जिसके द्वारा संशोधन आवेदन स्वीकार किया गया है, से न्यायाधीश या प्रवर्तन लिपिक द्वारा किया जाना चाहिए तथा सही पाए जाने की अपने हस्ताक्षर सहित टीप वाद पत्र/लिखित कथन पर अंकित की जानी चाहिए।

(6) संबंधित न्यायाधीश द्वारा ऐसी टीप की जांच कर अपने हस्ताक्षर एवं मुद्रा द्वारा ऐसे संशोधन सत्यापित किए जाने चाहिए।

संशोधन समाविष्ट करने संबंधी शेष प्रक्रिया

(1) आदेश पत्रिका में संशोधन समाविष्ट किए जाने एवं न्यायालय द्वारा सत्यापित किए जाने का तथ्य संबंधित तिथि पर उल्लिखित किया जाना चाहिए।

(2) वाद पत्र में संशोधन की दशा में वाद पत्र की दोनों प्रतियों में संशोधन समाविष्ट किए जाने चाहिए।

(3) संशोधित अभिवचन के समर्थन में सिविल प्रक्रिया संहिता, 1908 के आदेश 6 नियम 15 (4) के अधीन संबंधित पक्षकार का पृथक से शपथ–पत्र अपेक्षित है।

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क्या किसी धन की वसूली से संबंधित आज्ञप्ति के निष्पादन हेतु कार्यवाही के दौरान आज्ञप्ति धारक की मृत्यु होने या निष्पादन कार्यवाही प्रारंभ होने के पहले ही आज्ञप्ति धारक की मृत्यु हो जाने पर उसके विधिक प्रतिनिधियों को कार्यवाही जारी रखने अथवा प्रारंभ करने हेतु उत्तराधिकार प्रमाण–पत्र प्रस्तुत करना होगा ?

इस संबंध में उत्तराधिकार अधिनियम, 1925 की धारा 214 सुसंगत है जो निम्नानुसार है :–

"214. न्यायालय के माध्यम से मृत व्यक्तियों के ऋणियों से ऋणों की वसूली के लिए प्रतिनिधि हक के सबूत का पुरोभाव्य शर्त होना – (1) कोई भी न्यायालय –

(क) मृत व्यक्ति के किसी ऋणी के विरूद्ध, उसके ऋण का संदाय ऐसे व्यक्ति को करने के लिये, जो उत्तराधिकार पर मृत व्यक्ति की चीज–बस्त के लिये या उसके किसी भाग के लिये हकदार होने का दावा करता है, कोई डिक्री केवल वहाँ पारित करेगा,

या

(ख) इस प्रकार हकदार होने का दावा करने वाले किसी व्यक्ति के आवेदन पर ऐसे ऋणी के विरूद्ध, उसके ऋण का संदाय करने के लिए, कोई डिक्री या आदेश निष्पादित करने के लिए केवल वहाँ अग्रसर होगा जहाँ इस प्रकार दावा करने वाला व्यक्ति निम्नलिखित पेश करें, –

(i) वह प्रोबेट या प्रशासन–पत्र जो मृतक की सम्पदा का प्रशासन उसे अनुदत्त करने का साक्ष्य है, या

(ii) वह प्रमाण–पत्र जो महाप्रशासक अधिनियम, 1915 की धारा 31 या धारा 32 के अधीन अनुदत्त किया गया है और जिसमें ऋण वर्णित है, या

(iii) वह उत्तराधिकार प्रमाण–पत्र जो भाग 10 के अधीन अनुदत्त किया गया है और जिसमें ऋण वर्णित है, या

(iv) वह प्रमाण–पत्र जो 1827 के मुम्बई रेगुलेशन संख्यांक 8 के अधीन अनुदत्त किया गया है और यदि वह 1 मई 1889 के पश्चात् अनुदत्त किया गया है तो उसमें ऋण विनिर्दिष्ट है।

(2) उपधारा (1) में, "ऋण" शब्द के अन्तर्गत कृषि प्रयोजनों के लिये उपयोग में लाई गई भूमि के बारे में संदेय भाटक, राजस्व या लाभों के सिवाय कोई ऋण है।'

उक्त धारा में प्रयुक्त पद "ऋण" की व्याख्या, *न्याय दृष्टांत भारत संघ विरूद्ध रमन आयरन फाउन्ड्री, ए.आई.आर. 1974 एस.सी 1265* को अनुसरित करते हुए, म.प्र. उच्च न्यायालय द्वारा *ताराबाई विरूद्ध शिव नारायण, 1997 (2) एम.पी.एल.जे. 290* में करते हुए यह प्रकट किया गया है कि "ऋण" शब्द का व्यापक अर्थ है और उससे ऐसी धनराशि भी अभिप्रेत है जो आज्ञप्ति धारक को भुगतान हेतु देय है और बकाया किराये की राशि भी ऋण की कोटि में आती है।

ताराबाई (उपरोक्त) प्रकरण में म.प्र. उच्च न्यायालय द्वारा न्याय दृष्टांत *तेजराज राजमल मारवाड़ी विरूद्ध राम पंचाटी मारवाड़ी, ए.आई.आर 1938 नागपुर 528* का अवलंबन लेते हुये यह स्पष्ट किया गया है कि संदेय धनराशि की वसूली संबंधी निष्पादन कार्यवाही के दौरान आज्ञप्ति धारक की मृत्यु हो जाने पर उसके विधिक प्रतिनिधियों को कार्यवाही जारी रखने हेतु उत्तराधिकार प्रमाण–पत्र प्रस्तुत करना होगा। इस संबंध में न्याय दृष्टांत *हरिकृष्ण विरूद्ध भारत संघ, 1997 (1) एम.पी.एल.जे. 322* भी अवलोकनीय है।

तदानुसार यह स्पष्ट है कि किसी धन की वसूली से संबंधित आज्ञप्ति के निष्पादन हेतु कार्यवाही के दौरान आज्ञप्तिधारक की मृत्यु होने या निष्पादन कार्यवाही प्रारंभ होने के पहले ही आज्ञप्ति धारक की मृत्यु हो जाने पर उसके विधिक प्रतिनिधियों को कार्यवाही जारी रखने अथवा प्रारंभ करने हेतु उत्तराधिकार प्रमाण–पत्र प्रस्तुत करना होगा।

नोट : स्तंभ 'समस्या एवं समाधान' के लिए न्यायिक अधिकारी अपनी विधिक समस्याएं संस्थान को भेज सकते हैं। चयनित समस्याओं के समाधान आगामी अंकों में प्रकाशित किए जाएंगे – संचालक

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PART - II

NOTES ON IMPORTANT JUDGMENTS

*1. **ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12**
CIVIL PROCEDURE CODE, 1908 – Section 11
TRANSFER OF PROPERTY ACT, 1882 – Section 111(d)
Tenancy and determination of lease – A part of the tenanted premises purchased by one of the legal heirs of tenant – Whether tenancy stood extinguished by merger as postulated under Section 111(d) of T.P. Act due to execution of sale deed? Held, No – Further held, one of the three legal heirs of tenant had purchased part of the property and not all the co-tenants, therefore, tenancy continues – Tenant continues to be tenant for the purposes of the Act of 1961 and can be evicted only in accordance with the Rent Act.
Res judicata **– Conditions for applicability discussed.**

(i) **Where there is a fresh cause of action, interpretation of law in previous suit cannot operate as *res judicata* – A statutory direction cannot be overridden or defeated by a previous judgment between parties.**

(ii) **Principle of *res judicata* will not apply when the entire matter was still in appeal and the matter had not attained finality.**

Hameeda Begum (Smt.) & anr. v. Smt. Champa Bai Jain & ors.
Judgment dated 27.02.2009 passed by the High Court in First Appeal No. 451 of 2003, reported in I.L.R. 2009 MP 2328 (DB)

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*2. **ARBITRATION ACT, 1940 – Section 29**
CIVIL PROCEDURE CODE, 1908 – Section 34
Power of the arbitrator to award interest – Held, it is well settled that Arbitrators have the competence, jurisdiction and power to award interest from the date of award to the date of payment as also for pre-reference, *pendente lite* and post-award – The only caveat is that the amount of interest so awarded is reasonable and the agreement between parties concerned does not prohibit grant of such interest – Further held, the Arbitrators are bound to make award in accordance with law and if there is no embargo or legal hurdle in awarding interest for the aforesaid three stages then there cannot be any justifiable reason to deny the same.

Indian Hume Pipe Company Limited v. State of Rajasthan
Judgment dated 19.10.2009 passed by the Supreme Court in Civil Appeal No. 6971 of 2009, reported in (2009) 10 SCC 187

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3. **ARBITRATION & CONCILIATION ACT, 1996 – Sections 2 (1) (b), 7 and 8**

(i) **Survival of the arbitration agreement – Held, merely because the contract has come to an end by its termination due to breach, the arbitration clause does not perish nor is rendered inoperative, rather it survives for resolution of disputes arising in respect of, or with regard to or under the contract – Legal position reiterated.**

(ii) **Court's power to refer party to arbitration – Held, once the pre-requisite conditions are satisfied, the Court must refer the parties to arbitration – Position explained.**

Branch Manager, Magma Leasing and Finance Limited and another v. Potluri Madhavilata and another

Judgment dated 18.09.2009 passed by the Supreme Court in Civil Appeal No. 6399 of 2009, reported in (2009) 10 SCC 103

Held:

The core question that falls to be determined in this appeal by special leave is: does the arbitration agreement survive for the purpose of resolution of disputes arising under or in connection with the contract even if its performance has come to an end on account of termination due to breach?

The statement of law expounded by Viscount Simon, L.C. in *Heyman v. Darwins Ltd., (1942) 1 All ER 337 (HL)* in our view, equally applies to situation where the contract is terminated by one party on account of the breach committed by the other particularly in a case where the clause is framed in wide and general terms. Merely because the contract has come to an end by its termination due to breach, the arbitration clause does not get perished nor rendered inoperative; rather it survives for resolution of disputes arising "in respect of" or "with regard to" or "under" the contract. This is in line with the earlier decisions of this Court, particularly as laid down in *Union of India v. Kishori Lal Gupta & Bros., AIR 1959 SC 1362.*

In the instant case, Clause 22 of the hire purchase agreement that provides for arbitration has been couched in widest possible terms as can well be imagined. It embraces all disputes, differences, claims and questions between the parties arising out of the said agreement or in any way relating thereto. The hire purchase agreement having been admittedly entered into between the parties and the disputes and differences have since arisen between them, we hold, as it must be, that the arbitration clause 22 survives for the purpose of their resolution although the contract has come to an end on account of its termination.

The next question, an incidental one, that arises for consideration is whether the trial court must refer the parties to arbitration under Section 8 of the Act, 1996. Section 8 reads thus:

"8. Power to refer parties to arbitration where there is an arbitration agreement.– (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

An analysis of Section 8 would show that for its applicability, the following conditions must be satisfied:

(a) that there exists an arbitration agreement;

(b) that action has been brought to the court by one party to the arbitration agreement against the other party;

(c) that the subject matter of the suit is same as the subject matter of the arbitration agreement;

(d) that the other party before he submits his first statement of the substance of the dispute, moves the court for referring the parties to arbitration; and

(e) that along with the application the other party tenders the original arbitration agreement or duly certified copy thereof.

Section 8 is in the form of legislative command to the court and once the pre-requisite conditions as aforestated are satisfied, the court must refer the parties to arbitration. As a matter of fact, on fulfillment of the conditions of Section 8, no option is left to the court and the court has to refer the parties to arbitration. There is nothing on record that the pre-requisite conditions of Section 8 are not fully satisfied in the present case. The trial court, in the circumstances, ought to have referred the parties to arbitration as per arbitration Clause 22.

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4. CIVIL PROCEDURE CODE, 1908 – Section 11

Res judicata, **scope and applicability of – A plea decided even in earlier suit for injunction touching the title between the same parties would operate as** *res judicata* **in later suit if in such earlier suit, a decision as to question of title was necessary for granting or refusing injunction and the relief for injunction was found or based on the findings of title between the same parties.**

Ramchandra Dagdu Sonavane (dead) by LRs. and others v. Vithu Hira Mahar (dead) by LRs. and others

Judgment dated 09.10.2009 passed by the Supreme Court in Civil Appeal No. 7184 of 2001, reported in (2009) 10 SCC 273 (3-Judge Bench)

Held:

It is well known that the doctrine of res judicata is codified in Section 11 of the Code of Civil Procedure. Section 11 generally comes into play in relation to civil suits. But apart from the codified law, the doctrine of res judicata or the principle of the res judicata has been applied since long in various other kinds of proceedings and situations by courts in England, India and other countries. The rule of constructive res judicata is engrafted in Explanation IV of Section 11 of the Code of Civil Procedure and in many other situations also Principles not only of direct res judicata but of constructive res judicata are also applied, if by any judgment or order any matter in issue has been directly and explicitly decided, the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceedings between the same parties.

The Principle of res judicata comes into play when by judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implications even then the Principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it, is deemed to have been constructively in issue and, therefore, is taken as decided [See *Workmen v. Cochin Port Trust, AIR 1978 SC 1283*].

In *Swamy Atmandanda v. Sri Ramakrishna, Tapovanam, (2005) 10 SCC 51*, it was held by this Court: (SCC p. 61, paras 26-27)

> "26. The object and purport of the principle of res judicata as contended in Section 11 of the Code of Civil Procedure is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute-book with a view to bring the litigation to an end so that the other side may not be put to harassment.
>
> 27. The principle of res judicata envisages that a judgment of a court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same

parties in some other matter in another court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment."

When the material issue has been tried and determined between the same parties in a proper suit by a competent court as to the status of one of them in relation to the other, it cannot be again tried in another suit between them as laid down in *Krishna Behari Roy v. Brojeswari Chowdranee, ILR (1875) 1 Cal 144* which is followed by this Court in the case of *Ishwar Dutt v. Collector (LA), (2005) 7 SCC 190,* wherein the doctrine of 'cause of action estoppel' and 'issue estoppel' has been discussed. It is laid down by this Court, that if there is an issue between the parties that is decided, the same would operate as a res-judicata between the same parties in the subsequent proceedings. This court in the case of *Isher Singh v. Sarwan Singh, AIR 1965 SC 948* has observed : (AIR p. 951, para 11)

> "11. We thus reach the position that in the former suit the heirship of the respondents to Jati deceased (a) was in terms raised by the pleadings, (b) that an issue was framed in regard to it by the trial Judge, (c) that evidence was led by the parties on that point directed towards this issue, (d) a finding was recorded on it by the appellate court, and (e) that on the proper construction of the pleadings it would have been necessary to decide the issue in order to properly and completely decide all the points arising in the case to grant relief to the plaintiff. We thus find that every one of the conditions necessary to satisfy the test as to the applicability of Section 11 of the Civil Procedure Code is satisfied."

In *Sulochana Amma v. Narayanan Nair, (1994) 2 SCC 14,* it is observed:

> "The decision in earlier case on the issue between the same parties or persons under whom they claim title or litigating under the same title, it operates as a res-judicata. A plea decided even in a suit for injunction touching title between the same parties, would operate as res-judicata.
>
> "9. .... It is a settled law that in a Suit for injunction when title is in issue, for the purpose of granting injunction, the issue directly and substantially arises in that suit between the parties. When the same is put in issue in a later suit based on title between the same parties or their privies in a subsequent suit, the decree in injunction suit equally operates as a res-judicata." (SCC p. 20, para 9)

To the same effect, the judgment of this court in the case of *Sulochana Amma case* (supra) (SCC para 9) in which it has been held that the issue between the same parties or persons under whom they claim title or litigating under the

same title, it operates as a res-judicata. A plea decided even in suit for injunction touching the title between the same parties, would operate as res judicata.

In *Syed Mohd. Salie Labbai v. Mohd. Hanifa, (1976) 4 SCC 780*, this court has stated that before a plea of res-judicata can be given effect to, the four conditions are requires to be proved. They are, that the litigating parties must be the same; that the subject matter of the suit also must be identical; that the matter must be finally decided between the parties; and that the suit must be decided by a court of competent jurisdiction. This court while analyzing those conditions as matter of fact found that the parties had not even filed the pleading of the suits instituted by them. In that factual scenario, this court has to observe that the pleadings cannot be proved merely by recitals of the allegations mentioned in the judgment.

In fact, the High Court, while deciding on this issue had observed that the pleadings of the parties in O.S. No. 104 of 1953 were not available before the civil court in the subsequent suit and, therefore, there is non-compliance of mandatory and basic requirements, as laid down by this Court in the case of *Syed Mohd* (supra). In our view, this reasoning of the High Court is fallacious and we cannot agree. In our view, each one of the conditions necessary to satisfy the test as to the applicability of Section 11 of Civil Procedure Code is satisfied.

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5. **CIVIL PROCEDURE CODE, 1908 – Section 35 and Order 6 Rule 17**
Application for amendment of pleadings – Should not be refused if it is bonafide, legitimate, honest and necessary and should not be permitted if it is malafide, worthless and dishonest.
By acceptance of application for amendment, if unnecessary delay and inconvenience is caused, the opposite party must be compensated with costs.

Revajeethu Builders and Developers v. Narayanaswamy and sons and others
Judgment dated 09.10.2009 passed by the Supreme Court in Civil Appeal No. 6921 of 2009, reported in (2009) 10 SCC 84

Held:

In our considered view, Order VI Rule 17 is one of the important provisions of the CPC, but we have no hesitation in also observing that this is one of the most misused provision of the Code for dragging the proceedings indefinitely, particularly in the Indian courts which are otherwise heavily overburdened with the pending cases. All Civil Courts ordinarily have a long list of cases, therefore, the Courts are compelled to grant long dates which causes delay in disposal of the cases. The applications for amendment lead to further delay in disposal of the cases.

To curtail delay in disposal of cases, in 1999 the legislation altogether deleted Rule 17 which meant that amendment of pleading would no longer have been permissible. But immediately after the deletion there was widespread uproar and in 2002 Rule 17 was restored, but added a proviso. That proviso applies only after the trial has commenced. Prior to that stage, the situation remains as it was. According to the view of the learned author Arun Mohan as observed in his book, although the proviso has improved the position, the fact remains that amendments should be permissible, but only if a sufficient ground therefore is made out, and further, only on stringent terms. To that end, the rule needs to be further tightened.

The general principle is that courts at any stage of the proceedings may allow either party to alter or amend the pleadings in such manner and on such terms as may be just and all those amendments must be allowed which are imperative for determining the real question in controversy between the parties. The basic principles of grant or refusal of amendment articulated almost 125 years ago are still considered to be correct statement of law and our courts have been following the basic principles laid down in those cases.

The first condition which must be satisfied before the amendment can be allowed by the court is whether such amendment is necessary for the determination of the real question in controversy. If that condition is not satisfied, the amendment cannot be allowed. This is the basic test which should govern the courts' discretion in grant or refusal of the amendment.

The other important condition which should govern the discretion of the Court is the potentiality of prejudice or injustice which is likely to be caused to the other side. Ordinarily, if other side is compensated by costs, then there is no injustice but in practice hardly any court grants actual costs to the opposite side. The Courts have very wide discretion in the matter of amendment of pleadings but court's powers must be exercised judiciously and with great care.

The purpose of imposing costs is to:

(a) Discourage malafide amendments designed to delay the legal proceedings;

(b) Compensate the other party for the delay and the inconvenience caused;

(c) Compensate the other party for avoidable expenses on the litigation which had to be incurred by opposite party for opposing the amendment; and

(d) To send a clear message that the parties have to be careful while drafting the original pleadings.

On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) Whether the application for amendment is bona fide or mala fide;

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.

The decision on an application made under Order VI Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments.

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6. CIVIL PROCEDURE CODE, 1908 – Section 91 and Order 1 Rule 8

***Locus standi* to file the representative suit – If religious sentiments or emotions of the plaintiff, who is the devotee of the Tomb (suit premises), are hurt by the act of the defendant, then being an affected person, he has a right on his own behalf and also on behalf of the interest of other devotees to file the representative suit.**

Representative suit – Compliance of Order 1 Rule 8 CPC – An application under Order 1 Rule 8 filed by the plaintiff was allowed and he was permitted to prosecute the suit under representative capacity – In compliance of such provision, to invite objections of other persons, notice regarding institution of the suit was given by publishing in daily newspaper.

Wrongful act affecting the public – Applicability of Section 91 of CPC – Plaintiff had *locus standi* to file the representative suit – Sub-section (2) of Section 91 does not debar the person like the plaintiff to file the suit for declaration and injunction when his personal right is affected by the activities of the defendant.

Awadesh Ozha & Ors v. Ramchandra Mourya & Ors.

Judgment dated 31.07.2009 passed by the Supreme Court in Second Appeal No.104 of 2006, reported in AIR 2009 MP 255

Held :

As per findings of both the Courts below the suit premises 'Tomb' was established and situated at the Government land and the name of said Swami Ji was also endorsed in such record. It was neither the property of Chhabi Narayan nor any disciple of said Swami Ji. Although the same was constructed and established by the various devotees including Chhabi Narayan, who was making the prayer and offering the food to such Tomb in his life time and after his demise the present appellants are claiming the right of ownership with respect of the same, but the same has not been found to be proved. In such premises not only the possession of the appellants was held illegal but their activities on such place are also found to be contrary to the religious sentiments and the emotion of the devotees. It is also held by both the Courts below that such religious place could not be used by any person like appellants for the purpose of their residence by disturbing and creating obstruction in the rights of devotees and the persons who are having the religious right to approach such place for making their prayer and offering to the Tomb. It appears from the record that such Tomb is situated near the very popular and religious Tombs of Bade Dadaji Dhuniwale and Chhote Dadaji Dhuniwale the disciple and brother-fellow of disciple, of said Swami Chandrashekhar Nand Ji respectively. It is apparent from the record that besides Chhabi Narayan the other devotees were used to visit such place for making their prayer and offering to Tomb. On appreciation of the evidence it was held by the Courts below that such premises was never used for the residence of family but subsequent to death of Chhabi Narayan and after retirement from service of Government Hospital, Burhanpur, the appellant No.3 Mata Prasad by taking advantage of the services of his father towards the Tomb, entered the premises illegally and thereby created the obstruction and inconvenience in the rights of the devotees to make their prayer and offer. Such findings of both the Courts below being based on evidence are findings of fact, the same do not give rise to any question of law, much less the substantial question of law. It is settled proposition of law that concurrent findings based on appreciation of the evidence being finding of facts could not be interfered under Section 100 of C.P.C. at the stage of second appeal as laid down by the Apex Court in the matter of *Ishwardas Jain v. Sohan Lal, reported in AIR 2000 SC 426* and of *Santosh Hazari v. Purushottam Tiwari,* reported in *AIR 2001 SC 965.*

So far argument of the appellants counsel that respondent No.1/plaintiff has neither any locus standi to file the suit nor the same was filed in accordance with the provision of O.1, R. 8 of C. P. C. is concerned, as per concurrent findings of the Courts below the respondent No.1/plaintiff has been held to be one of the devotees of such Tomb and in such premises, if his religious sentiments or emotions are hurt by the act of the appellants then being an affected person the respondent No.1 had a right, on his own behalf and also in the interest of other devotees to file the representative suit under the aforesaid provisions.

So far compliance of O.1, R. 8 of C.P.C. is concerned, it is apparent that after filing the suit an application under O.1, R. 8, C. P. C. was filed by respondent No.1, the same was allowed vide order dated 3-5-2000 and he was permitted to prosecute the suit under the representative capacity. In compliance of such provision to invite the objections of the other affected persons/devotees the direction for publishing the notice in daily newspaper Dainik Bhaskar and Nai Dunia was also given in such order. As per such direction the notice was published in such newspapers, the same are available on the record. In such circumstance, the approach of the Courts below holding locus standi of respondent No. 1/plaintiff to file and prosecute the suit in the representative capacity do not appear to be contrary to any existing law. On arising the occasion the aforesaid question is also answered by the Mysore High Court in the matter of *Veerbasavaradhya and others v. Devotees of Lingadagudi Mutt and others,* reported in *AIR 1973 Mysore 280* in which it is held as under :

> "22. It was however next contended by Sri Sundara Swamy that the suit was not maintainable since the consent of the Advocate General had not been obtained as required by Section 92 of the Code of Civil Procedure before it was instituted and that the plaintiffs had no right to institute the suit under Order 1, Rule 8 of the Code of Civil Procedure. The present suit is one for possession instituted by some of the devotees in a representative capacity for possession of the properties belonging to the trust. Section 92 is applicable only to those suits under which the reliefs claimed are those enumerated in Section 92. A suit for possession against a person who is not a trustee is not one enumerated in Section 92. Vide the decision in *Harendra Nath v. Kaliram Das, (AIR 1972 SC 246).* Hence, the consent of the Advocate General was not necessary. It is no doubt true that the shebait or manager who is in-charge of the administration of the properties belonging to a deity can institute a suit for recovery of possession of the same. That however, does not disentitle the devotees or worshippers who are interested in the deity in maintaining a suit on behalf of the entire body of devotees with the leave of the Court under O.1, R.8 of the Code of Civil Procedure against an alienee of temple property alleging that the alienation is not binding on the deity. The principle that such a right is in the body of worshippers is recognized by Indian Courts. In *Sri Veerabhadraswami v. Maya Kone, AIR 1940 Mad 81,* such a suit was held to be maintainable. In another decision of this Court in *Poona Setty v. B. N. Aradhya* a suit filed in a representative capacity of persons interested in a religious or charitable trust for a similar relief was decreed by this

Court. *In Mukaremdas Mannudas v. Chhagan Kisan Bhawsar, AIR 1959 Bom. 491,* a suit against the transferees from the head of a math belonging to vaishnava Bairagi community for declaration that property in their hands is trust property and for possession was held to be outside the scope of Section 92 of the Code of Civil Procedure and that the suit filed by the members of the Bairagi community who were interested in the math in a representative capacity under O.1, R. 8 of the Code of Civil Procedure was held to be maintainable. We, therefore, reject the contention that the present suit was not maintainable for the reasons mentioned above."

So far the argument of the appellants counsel with respect of the provision of Sections 91 and 92 of C. P. C. are concerned in view of the aforesaid findings based on the judgment of Mysore High Court holding the locus standi of the respondent No. 1/plaintiff for filing the representative suit, such argument does not require any consideration in the available circumstances. Apart this sub-section (2) of Section 91 does not debar the person like the respondent No. 1 to file the suit for declaration and injunction in the circumstance when his personal right is affected by any activities of the other persons like the appellants in the case at hand. While the Section 92 of C. P. C. being for different purpose is not relevant with the present dispute then such situation is also not giving rise to any question of law much less substantial question of law.

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***7. CIVIL PROCEDURE CODE, 1908 – Section 149 and Order 7 Rule 11 (c) COURT FEES ACT, 1870 – Section 4**

Section 4 of the Court Fees Act, 1870 mandates that when a plaint is presented, ordinarily it should be accompanied with the requisite court fee payable thereupon – It however, does not mean that whenever an application is presented with a deficit court fee, the same is to be rejected outrightly – Section 149 of the Code provides for the Court's power to extend the period and also raises the legal fiction in terms whereof that as and when such deficit court fee is paid, the same would be deemed to have been paid in the first instance – Payment of court fee furthermore, is a matter between the State and the suitor – Indisputably, in the event a plaint is rejected, the defendant would be benefited thereby, but if an objection is to be raised in that behalf or an application is to be entertained by the Court at the behest of a defendant for rejection of the plaint in terms of Order 7 Rule 11 (c) of the Code, several aspects of the matter are required to be considered – Once an application under Section 149 is allowed, Order 7 Rule 11 (c) of the Code will have no application. [Also see *Ganapathy Hegde v. Krishnakudva, (2005) 13 SCC 539* **and** *K.C. Skaria v. Govt. of State of Kerala, (2006) 2 SCC 285***]**

P.K. Palanisamy v. N. Arumugham and another
Judgment dated 23.07.2009 passed by the Supreme Court in Civil Appeal No. 4643 of 2009, reported in (2009) 9 SCC 173

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8. **CIVIL PROCEDURE CODE, 1908 – Section 151**
Whether court can grant relief under Section 151 of CPC about which there is no pleading or prayer in the plaint? Held, No.

Kanaklata & 2 others v. Subhadra & 5 others
Judgment dated 23.07.2009 passed by the High Court in S.A. No. 726 of 2007, reported in 2009 (IV) MPJR 160

Held :

The impugned suit was filed only for declaration and perpetual injunction and not for the relief of possession with respect of the disputed land.

Without any pleading or the prayer regarding possession in the plaint of the respondents, only on some whims, while affirming the decree of the trial court and dismissing the appeal, by invoking the provision of section 151 of CPC, the suit of the respondents was additionally decreed for possession and mesne profits. It is apparent on the record that such decree passed in favour of the respondents by the appellate court is beyond the pleadings.

It is settled proposition of the law that beyond the pleadings of the suit, no prayer can be accepted by the court as laid down by the Apex Court in the *matter of Union of India v. E.I.D Parry (India) Ltd., (2000) 2 SCC 223* in which it was held as under :-

> "4. The suit was filed.....In the absence of the pleading to that effect, the trial court did not frame any issue on that question. The High Court of its own proceeded to consider the validity of the rule and ultimately held that it was not in consonance with the relevant provisions of the Railways Act, 1890 and consequently held that it was ultra vires. This view is contrary to the settled law that a question, which did not form part of the pleadings or in respect of which the parties were not at variance and which was not the subject matter of any issue, could not be decided by the court. The scope of the suit was limited. The pleadings comprising of the averments set out in the plaint and the defence put up by the present appellant in their written statement did not relate to the validity of the rule struck down by the High Court. The High Court, therefore, traveled beyond the pleadings in declaring the rule to be ultra vires. The judgment of the High Court, therefore, on this question cannot be sustained."

The aforesaid question is also answered by this court in the matter of *Municipal Corporation, Indore and another v. Retd. Col. Anil Kak and another, 2003 (3) MPLJ 379.* Thus, it is revealed from the aforesaid discussion that without any prayer of pleadings in the plaint, the decree for possession of the disputed land has been passed by the appellate court in favour of the respondents No.1 to 5. The same is not sustainable.

The Apex Court in the matter of *National Institute of Mental Health and Neuro Sciences v. C. Parameshwara, AIR 2005 SC 242* in which it was held as under :-

> "12. In the case of *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal* reported in *AIR 1962 SC 527,* it has been held that inherent jurisdiction of the Court to make orders ex debito justitiae is undoubtedly affirmed by Section 151, CPC, but that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals expressly with a particular matter, the provision should normally be regarded as exhaustive. In the present case, as stated above, Section 10, CPC has no application and consequently, it was not open to the High Court to bye-pass Section 10, CPC by invoking Section 151, CPC."

I am of the considered view that where sufficient provisions for initiating the proceeding for possession or for amendment in the suit in this regard, are available under the substantive law then by invoking Section 151 of the CPC, no such relief can be granted by the court in favour of either of the parties. Granting the decree for possession the substantive law is well in existence, hence in the absence of the pleadings or the prayer in the plaint for possession of the disputed land, the suit of the respondents could not be decreed for such relief by invoking the provision under Section 151 of the CPC by the appellate court.

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9. CIVIL PROCEDURE CODE, 1908 – Order 5 Rule 20
FAMILY COURTS ACT, 1984 – Section 9
HINDU MARRIAGE ACT, 1955 – Section 13-B

(i) Substituted service of summons, without satisfying that defendant/non-petitioner was evading service, is not proper.

(ii) Object of the Family Court to decide matrimonial disputes with human approach.

(iii) Petition for divorce on the ground of mutual consent – Continuance of such consent till passing decree is must – Where husband absent on the first date of hearing and later on the case was preponed and thereafter decree passed, Court failed to discharge its duty in relation to hearing party – Continued consent of husband cannot be presumed from such absence – The decree is liable to be set aside.

Smruti Pahariya v. Sanjay Pahariya
Judgment dated 11.05.2009 passed by the Supreme Court in Civil Appeal No. 3465 of 2009, reported in AIR 2009 SC 2840 (3-Judge Bench)

Held:

From the sequence of events, it appears that on 19.11.2007 when the matter came up before the Court, the first day after the mandatory period of six months, the husband was absent. The Court directed service of summons on the husband on the request of the wife. The service return was before the Court on 1.12.2007. Looking at the service return, the Court found that service was not a proper one and the Court was also not satisfied with the endorsement of the courier. Under such circumstances, the Court's direction on the prayer of the appellant-wife, for substituted service under Order 5 Rule 20 of the Civil Procedure Code is not a proper one. Direction for substituted service under Order 5 Rule 20 can be passed only when Court is satisfied "that there is reason to believe that the defendant is keeping out of the way for the purpose of evading service, or that for any other reason the summons cannot be served in the ordinary way".

In the facts of this case, the Court did not, and rather could not, have any such satisfaction as the Court found that the service was not proper. If the service is not proper, the Court should have directed another service in the normal manner and should not have accepted the plea of the appellant-wife for effecting substituted service. From wife's affidavit asking for substituted service, it is clear that the servant of the respondent-husband intimated her advocate's clerk that respondent-husband was out of Bombay and will be away for about two weeks. However, the appellant-wife asserted that the respondent-husband was in town and was evading. But the Court on seeing the service return did not come to the conclusion that the husband was evading service. Therefore, the Court cannot, in absence of its own satisfaction that the husband is evading service, direct substituted service under Order 5 Rule 20 of the Code.

Apart from the aforesaid irregularity, the Court, after ordering substituted service and perusing service return on 4.12.2007, fixed the matter for 10.12.2007. Then, on the application of the wife on 5.12.2007, pre-poned the proceeding to 5.12.2007 and on that very day granted the decree of divorce even though the matter was not on the list.

This Court strongly disapproves of the aforesaid manner in which the proceeding was conducted in this case. A Court's proceeding must have a sanctity and fairness. It cannot be conducted for the convenience of one party alone. In any event, when the Court fixed the matter for 10.12.2007, it could not pre-pone the matter on an ex-parte prayer made by the appellant-wife on 5.12.2007 and grant the decree of divorce on that day itself by treating the matter on the board in the absence of the husband. This, in our opinion, is a flagrant abuse of the judicial process and on this ground alone, the decree dated 5.12.2007 has to be set aside.

The Family Courts Act, 1984 (hereinafter, Act 66 of 1984) was enacted for adopting a human approach to the settlement of family disputes and achieving socially desirable results. The need for such a law was felt as early as in 1974 and Chief Justice P.B. Gajendragadhkar, as the Chairman of Law Commission, in the 59th report on Hindu Marriage Act, 1955 and Special Marriage Act, 1954, opined:-

> "In our Report on the Code of Civil Procedure, we have had occasion to emphasis that in dealing with disputes concerning the family, the court ought to adopt a human approach - an approach radically different from that adopted in ordinary civil proceedings, and that the court should make reasonable efforts at settlement before commencement of the trial. In our view, it is essential that such an approach should be adopted in dealing with matrimonial disputes. We would suggest that in due course, States should think of establishing family courts, with presiding officers who will be well qualified in law, no doubt, but who will be trained to deal with such dispute in a concerning the family should be referred."

Almost 10 years thereafter when the said Act 66 of 1984 was enacted, the words of the Chief Justice were virtually quoted in its statement of objects and reasons. Consistent with the said human approach which is expected to be taken by a Family Court Judge, Section 9 of the Act casts a duty upon the Family Court Judge to assist and persuade the parties to come to a settlement.

In the instant case by responding to the illegal and unjust demand of the wife of pre-poning the proceeding ex-parte and granting an ex-parte decree of divorce, the Family Court did not discharge its statutory obligation under Section 13B (2) of the said Act of hearing the parties. When a proceeding is pre-poned in the absence of a party and a final order is passed immediately, the statutory duty cast on the Court to hear the party, who is absent, is not discharged. Therefore, the Family Court has not at all shown a human and a radically different approach which it is expected to have while dealing with cases of divorce on mutual consent.

We are of the view that it is only on the continued mutual consent of the parties that decree for divorce under Section 13B of the said Act can be passed by the Court. If petition for divorce is not formally withdrawn and is kept pending then on the date when the Court grants the decree, the Court has a statutory obligation to hear the parties to ascertain their consent. From the absence of one of the parties for two to three days, the Court cannot presume his/her consent as has been done by the learned Family Court Judge in the instant case and especially in its facts situation, discussed above.

In our view it is only the mutual consent of the parties which gives the Court the jurisdiction to pass a decree for divorce under Section 13B. So in

cases under Section 13B, mutual consent of the parties is a jurisdictional fact. The Court while passing its decree under Section 13B would be slow and circumspect before it can infer the existence of such jurisdictional fact. The Court has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclose such consent. In the facts of the case, the impugned decree was passed within about three weeks from the expiry of the mandatory period of six months without actually ascertaining the consent of the husband, the respondent herein.

It is nobody's case that a long period has elapsed between the expiry of period of six months and the date of final decree.

For the reasons aforesaid, we affirm the view taken by the learned Judges of the Bombay High Court in the order under appeal.

[Also see *Sureshta Devi v. Om Prakash, 1991 AIR SCW 373 = (1991) 2 SCC 25*]

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10. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17 and Order 8 Rules 3 & 5

Resiling from admission by way of amendment – Ordinarily, should not be allowed – But in written statement, denying simply plaintiff's averments cannot be equated with admission of pleading – The amendment in written statement, proposed to insert contrary relief mentioned in plaint, should be allowed.

Sumesh Singh v. Phoolan Devi & Ors.

Judgment dated 15.04.2009 passed by the Supreme Court in Civil Appeal No. 2537 of 2009, reported in AIR 2009 SC 2831

Held:

It is true that ordinarily, an amendment of pleadings should not be allowed by reason whereof a party to the suit would resile from the admission made by him in the same proceedings at an earlier stage. This aspect of the matter has been considered in *Gautam Sarup v. Leela Jetly, (2008) 7 SCC 85* wherein it was held :

> "28. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other."

In this case, however, the averments made in the plaint have merely been denied. There is no categorical or unequivocal admission as such. It is, thus,

not a case where a party to the suit is resiling from his statement made in the earlier part of the proceedings. The learned trial Judge, in a case of this nature, had not or could not have taken recourse to the provisions of Order VIII Rule 3 and Order VIII Rule 5 of the Code of Civil Procedure. An issue has been framed by and between the plaintiff and the contesting defendant. The said issue is required to be determined. Parties are required to adduce evidence thereupon.

By reason of Section 16(2)(b) of the Code of Civil Procedure (Amendment) Act, 2002, the amendments carried out therein shall only apply to in respect of the suits which were filed thereafter. [See *State Bank of Hyderabad v. Town Municipal Council, (2007) 1 SCC 765*]. As the suit had been filed in the year 1999, the proviso appended to Order VI, Rule 17 shall not apply. The orders of Trial Court and High Court allowing the amendment application are upheld.

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11. CIVIL PROCEDURE CODE, 1908 – Order 11 Rules 14 & 21

(i) Power under Order 11 Rule 21 of the Code, exercise of – Failure to answer the interrogatories, order of discovery or inspection of documents is *sine qua non* for exercising the power – Further held, an order under Order 11 Rule 21 of the Code can be passed only on an application being filed therefor and that too, after giving reasonable opportunity of being heard the parties.

(ii) For non-compliance of Order 11 Rule 14 of the Code of production of document, provisions contained in Rule 21 of Order 11 of the Code cannot be invoked.

Archdiocese of Bhopal Regd. Society v. Hasan Kabir and others

Judgment dated 11.09.2009 passed by the High Court in Writ Petition No. 3066 of 2006, reported in 2009 (5) MPHT 23 (DB)

Held:

Power under Rule 21 is failure to answer the interrogatories, order of discovery or inspection of documents. Non-compliance of Rule 14, which is with respect to production of documents is not covered under Rule 21 CPC. Legislature has thought it appropriate in case of plaintiff if he fails to comply with the order relating to interrogatories, discovery or inspection of documents a suit be dismissed or in case of defendant his defence may be struck off. Legislature in its wisdom has not included in Rule 21 of Order 11, CPC such a penal consequence due to non compliance of order passed under Order 11 Rule 14, CPC. Moreover in the instant case, it is not in dispute that no application was filed for dismissal of suit under Order 11 Rule 21, CPC, which is condition precedent for exercise of the power under the aforesaid provision, thus, even assuming for a moment that aforesaid provision was applicable, it was not open for the Trial Court to have passed the order dismissing the suit. An order under Order 11 Rule 21, CPC can be passed only on an application and that too after

giving notice to the parties and giving them reasonable opportunity of being heard. It is also provided in sub-rule (2) of Rule 21 of Order 11 that once suit is dismissed under sub-rule (1) of Rule 21 of Order 11, CPC, the plaintiff shall be precluded from bringing a freshsuit on the same cause of action. This dire consequence is not provided with respect to non-compliance of Order 11 Rule 14 CPC, but it is the consequence of non-compliance of order of interrogatories, interrogatories are dealt with in Rule 1 to Rule 11 of Order 11, CPC. Rule 12 deals with discovery and Rules 15 to 18 deal with inspection of documents. The non-compliance as to aforesaid is covered within the ken of penal provisions contained in Rule 21 of Order 11, CPC.

In *Premraj Bheoraj Agarwal v. Nathumal Rupchand Marwadi, AIR 1936 Nagpur 130,* there was an application moved for inspection of documents which was allowed by the Court. Court has directed production of account bills which was not produced, in that context observation has been made that Order 11 Rule 21 CPC provides that penalty for non-compliance of such a direction. Order 11 Rule 14, CPC has also been referred. When the documents are in power of the Court, it was held that the Court would have no jurisdiction to proceed under Order 11 Rule 21 CPC. If it could not have proceeded under that rule, it could not have proceeded under the general provision of Section 25 of Provincial Insolvency Act. Thus, dismissal of the suit was set aside. The decision has to be seen in the context that Court has ordered inspection of documents and consequent production, inspection is dealt with under Rules 15 to 18 of Order 11, CPC.

In *Chinnappan v. Ramachandran, AIR 1989 Madras 314,* it was laid down that failure to produce the documents directed to be produced by an order of Court passed under Order 11 Rule 14, CPC does not enable the Court to exercise its powers under Order 11 Rule 21, CPC. Such an application misconceived and not maintainable.

In *Prem Sukh Chunder and others v. Indronath Banerjee, ILR (1891) 18 Cal. 420, Shankar Deoba Patil and another v. Ganpatilal Shiodayal Chamedia, AIR 1971 Bombay 87, Koduri Krishnarao v. State of Andhra, now Andhra Pradesh represented by Secy. to the Govt. (Public Works Dept.), Hyderabad, AIR 1962 Andhra Pradesh 249, Chander Bhan Singh v. Lallu Singh and another, AIR 1947 Allahabad 343, Ram Kishun Lal and others v. Abu Abdullah Syed Hussain Iman, AIR 1943 Patna 69* and in *Devakaran Bholaram and others v. Sangidas Jesiram and others, AIR 1925 Bom. 386,* it has been laid down that in the absence of an order under Rules 11, 12 or 18 and the disobedience thereof by the party against whom the order is made, the Court cannot Act under Rule 21 Order 11, CPC.

An order for production of documents under Rule 14 of Order 11, CPC is not one of the orders mentioned in Rule 21 of Order 11, CPC. A disobedience of an order for production under Rule 14 of Order 11, CPC would not empower the Court to take action under Rule 21 of Order 11, CPC has been laid down in *G. Kishan Rao v. B. Narayan Reddy, ILR (1970) Andh Pra 1203, M/s. Gur Prasad*

Shyam Babu and others v. State Bank of India and another, AIR 1994 Allahabad 151, Lyalpur Sugar Mills & Co. and another v. R.C.G. Sahai Cotton Mills & Co., AIR 1922 Allahabad 235, (Sahu) Munna Lal v. Tara and another, AIR 1929 Allahabad. 83, Subbayyar v. M.L.M. Ramanathan Chettiar, AIR 1924 Madras 582, Amarsingh v. Chaturbhuj and others, AIR 1957 Rajasthan 367 and in *Shri Baba Shiva Sambhu and another v. Raj Mohan Deb Nath and others, AIR 1966 Tripura 16.*

The Apex Court in *M/s. Babbar Sewing Machine Co. v. Tirlok Nath Mahajan AIR 1978 SC 1436,* has considered the provision of Order 11 Rule 21, CPC and it has been observed that power for dismissal of a suit or striking out of the defence under Order 11 Rule 21, CPC should be exercised only where the defaulting party fails to attend the hearing or is guilty of prolonged or inordinate and inexcusable delay which may cause substantial or serious prejudice to the opposite party. There was joint application under Rule 14 and Rule 18 of Order 11, CPC for production and inspection of documents. In the instant case, there was no application or order under Order 11 Rule 18, CPC. Thus, decision of Apex Court is in the context of Order 11 Rule 18, CPC.

A Single Bench decision of this Court in *Indore Development Authority, Indore v. Satyapal Anand and another, 2000 (2) MPLJ 229,* has been relied upon in which learned Single Judge of this Court has opined that suit can be dismissed under Order 11 Rule 21, CPC in case there is failure to comply with the order passed under Order 11 Rule 14, CPC. We are unable to agree with the view taken in *Indore Development Authority, Indore v. Satyapal Anand and another,* (supra), in view of clear language of the rule and number of decisions of the various High Courts on this aspect. We hold that law has not been correctly laid down in the aforesaid decision.

In view of above, we hold that due to non-compliance of provision under Order 11 Rule 14 of CPC suit cannot be dismissed under Order 11 Rule 21, CPC. It can be dismissed only in the exigencies such as due to non-compliance of orders of interrogatories, discovery or inspection as envisaged under Order 11 Rule 21, CPC.

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12. CIVIL PROCEDURE CODE, 1908 – Order 17 Rule 1 (2)
Intellectual property cases – Such cases require expeditious disposal and should proceed on day to day basis and the final judgment should be given normally within four months from the date of filing of the suit.

Shree Vardhman Rice and General Mills v. Amar Singh Chawalwala

Judgment dated 07.09.2009 passed by the Supreme Court in SLP (C) No. 21594 of 2009, reported in (2009) 10 SCC 257

Held:

We are of the opinion that the matters relating to trade marks, copyrights and patents should be finally decided very expeditiously by the trial court instead of merely granting or refusing to grant injunction. Experience shows that in the matters of trade marks, copyrights and patents, litigation is mainly fought between the parties about the temporary injunction and that goes on for years and years and the result is that the suit is hardly decided finally. This is not proper.

Proviso (a) to Order 17 Rule 1 (2) CPC states that:

> "(a) when the hearing of the suit has commenced, it shall be continued from day to day until all the witnesses in attendance have been examined unless the court finds that, for the exceptional reasons to be recorded by it, the adjournment of the hearing beyond the following day is necessary ."

The court should also observe clauses (b) to (e) of the said proviso. In our opinion, in matters relating to trade marks, copyrights and patents the proviso to Order 17 Rule 1 (2) CPC should be strictly complied with by all the courts, and the hearing of the suit in such matters should proceed on day-to-day basis and the final judgment should be given normally within four months from the date of the filing of the suit.

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***13. CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 92 and Order 21 Rule 4**

(i) Maintainability of suit after deciding objections by Executing Court – Property of judgment debtor put to auction as it failed to pay suit amount – Sale ordered – Objections were raised by the State Government and person who was in possession of property as lessee of the State Government – Objections decided against the objectors – Objectors subsequently filed civil suit for declaring the sale as bad – Held, once objections are decided by Executing Court, Order 21 Rule 92 (3) would come into play and would forbid every person against whom order is made to bring a suit – Suit not maintainable – Appeal dismissed.

(ii) Necessary parties – Decree holder and judgment-debtor are necessary parties in a suit challenging the title of judgment-debtor by third parties – Neither decree holder nor judgment-debtor were arraigned as party – Non-joinder would make the suit statutorily bad.

State of M.P. & anr. v. Rajendra Kumar & ors.

Judgment dated 30.07.2009 passed by the High Court in S.A. No. 725 of 2009, reported in I.L.R. (2009) M.P. 2979

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***14. CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 & 2**
PARTNERSHIP ACT, 1932 – Section 53
Suit for dissolution of partnership firm along with an application for grant of injunction – Appellate Court granted the injunction restraining defendants from using the name of the firm, its goodwill and its property – Held, Section 53 of the Act is not applicable as suit is for dissolution of partnership firm – Without appreciating allegations and counter allegations, Court cannot bring business to standstill or to a grinding halt – The balance of convenience would be in favour of defendants who are running the business – Irreparable injury would be suffered more by defendants in comparison to the plaintiff – Order set-aside with direction to protect interest of plaintiff – Petition allowed.

Ishwarchand Jain & ors. v. Sushil Kumar Jain
Judgment dated 30.03.2009 passed by the High Court in W.P. No. 6227 of 2008, reported in I.L.R. (2009) M.P. 2796 (DB)

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15. CIVIL PROCEDURE CODE, 1908 – Order 39 Rule 2-A
Proceedings under Order 39 Rule 2-A are quasi criminal in nature – Breach of injunction order – Proof of – Breach must be proved beyond all reasonable doubts by the person complaining of such violation.

Seema Dubey v. Prakash Dhirawani
Judgment dated 05.05.2009 passed by the High Court in Misc. Civil Case No. 1190 of 2005, reported in 2009 (4) MPLJ 518

Held :

The provision of Order 39, Rule 2-A, Civil Procedure Code are quasi criminal in nature and since a person violating the injunction order passed by the Civil Court or otherwise disregarding the same is liable to be detained in the civil prison, therefore, the aforesaid provisions of disregarding of injunction order has to be proved beyond all reasonable doubts by the persons complaining of such violation. The standard of proof requires in such a case would, no doubt, be as it requires in a criminal case, since the said act of violator itself entails his detention in civil imprisonment.

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***16. CIVIL PROCEDURE CODE, 1908 – Order 47 Rules 1 and 4**
Decree passed by trial court for mandatory injunction – No evidence was produced in respect of relief of *mesne profits* or this ground was not considered by the Trial Court – Trial Court not granted the relief of *mesne profits* in absence of evidence or deliberately – Petitioner moved an application under Order 47 Rule 1 CPC before the Trial Court seeking relief of *mesne profits* by amendment of decree – Held, it was

not a case of error apparent on the face of record – Setting aside the Trial Court's order allowing the application for review, was proper.

Kamal (Smt.) v. Hindustan Petroleum (M/s.)

Judgment dated 31.08.2009 Passed by the High Court in Writ Petition No. 14607 of 2007, reported in 2009(5) MPHT 293 (DB)

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*17. **CONSUMER PROTECTION ACT, 1986 – Section 2 (1) (d)**

Definition of 'consumer' interpreted and explained.

Appellant had bought the truck for a consideration which was paid by him – It was bought to be used exclusively for the purpose of earning his livelihood by means of self-employment – Definition of 'consumer' under Section 2 (1) (d) of the Consumer Protection Act makes it clear that Parliament wanted to exclude from the scope of the definition, the persons who obtain goods for resale and also those who purchase goods with a view to use such goods for carrying on any activity for earning – The immediate purpose as distinct from the ultimate purpose of purchase, sale in the same form or after conversion and a direct nexus with profit or loss would be the determinants of the character of a transaction whether it is for a 'commercial purpose' or not – Thus, buyers of goods or commodities for 'self consumption' in economic activities in which they are engaged would be 'consumers' as defined in the Act – Even if he was to employ a driver for running the aforesaid truck, it would not have changed the matter in any case, as even then the appellant would have continued to earn livelihood from it and of course, by means of self-employment.

Madan Kumar Singh (dead) through LR. V. District Magistrate, Sultanpur and others

Judgment dated 07.08.2009 passed by the Supreme Court in Civil Appeal No. 5165 of 2009, reported in (2009) 9 SCC 79

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18. **COURT FEES ACT, 1870 – Section 7 (iv)(d)**

Revocation of licence – Suit against licensee for relief of mandatory injunction to hand over possession, valuation of – Where a licensor approaches the court for an injunction within a reasonable time after the licence is terminated, he is entitled to mandatory injunction and such relief can be valued under Section 7 (iv) (d) of the Court Fees Act – The licensor will have to bring a suit for possession if he had not been diligent and such a suit would be governed by Section 7 (v) of the Court Fees Act.

Abdul Hussain and others v. Mansoor Ali and others
Judgment dated 13.10.2009 passed by the High Court in W.P. No. 8781 of 2007, reported in 2009 (4) MPLJ 672 (DB)

Held:

The Apex Court in the case of *Sant Lal Jain v. Avatar Singh, AIR 1985 SC 857* has clearly laid down that where a licensor approaches the Court for an injunction within a reasonable time after the licence is terminated, he is entitled to the mandatory injunction. If the licensor causes huge delay the Court may refuse the discretion to grant an injunction on the ground that the licensor had not been diligent, in that case the licensor will have to bring a suit for possession which will be governed by section 7 (v) of the Court Fees Act. Under Section 7 (iv) (d) relief for mandatory injunction can be valued as provided but at the same time in case there is non-diligence Court may ask in the facts of the case that property should be valued at the market value and can direct correction of the valuation made in the plaint so as to bring it in compass of section 7 (v) of the Court Fees Act as laid down by the Apex Court in same suit.

In *Minister of Health v. Bellotti, All England Law Reports 238,* Court of Appeal has laid down that under the mandatory injunction possession itself can be recovered from trustee. In *Th. Milka Singh and others v. Th. Diana and others, AIR 1964 Jammu and Kashmir 99,* it has been laid down that in a case of termination of license by valid notice, suit for injunction directing licensee to vacate is maintainable. In *Sardar Paramijeet Singh and others v. Prabhat Kumar Shrivastava and another, 1996 MPLJ 339,* the decisions rendered in *Sant Lal Jain case (supra),* and *Th. Milka Singh and others v. Th. Diana and others* (supra) have been relied upon by a single Bench of this Court and it has been laid down that suit for mandatory injunction is maintainable directing the licensee to vacate the premises but it is clear from the decision of Apex Court that there has to be reasonable diligence in filing of suit otherwise suit has to be valued as per section 7 (v) of the Court Fees Act. In *Ayissa Umma v. Ami, 1990 (1) KLT 98,* similar view has been taken. The view taken in *Smt. Saraswati @ Jaya Bichpuria v. Smt. Archana Bichpuria, 2007 (4) MPHT 131* is also the same. Decision in *Jiyajeerao Cotton Mills Ltd. v. Gokulchand Pande, AIR 1956 Madhya Bharat 47,* was based on unamended provision of Section 7 (v) and the view taken by Apex Court in *Sant Lal Jain* case (supra) has to prevail.

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***19. CRIMINAL PROCEDURE CODE, 1973 – Sections 190, 202, 203 and 204 (i)**

(i) In *Pramatha Nath Talukdar v. Saroj Ranjan Sarkar, AIR 1962 SC 876,* **the three Judge Bench has held that the order of dismissal on a complaint under Section 203 CrPC does not constitute a bar to the entertainment of a second complaint on the same facts, but it would be entertained only in exceptional circumstances such as (i) where the previous order was passed on an incomplete record; or (ii) on a misunderstanding of the nature of the**

complaint; or (iii) it was manifestly absurd, unjust or fallacious or false where new facts which could not with a reasonable diligence, have been brought on record in a previous proceeding, have been adduced – It was also observed that it could not be said in the interest of justice that after a decision had been given against the complainant upon a full consideration of his case, he or any other person should be given another opportunity to have his complaint inquired into.

In *Jatinder Singh v. Ranjit Kaur, (2001) 2 SCC 570,* it was held that there is no provision in the Code which debars a complainant from preferring a second complaint on the same allegations if the first complaint did not result in the conviction or acquittal or even discharge – If the dismissal of the complaint was not on merit but on default of the complainant to be present, there could be no bar in the complainant moving the Magistrate again with the second complaint on the same facts – However, this Court made a distinction in respect of a dismissal under Section 203 of the Code on merits on the basis of an inquiry conducted under Section 202 thereof – Relying on the observations made in *Pramatha Natha Talukdar's case* (supra), it was held that in such a case, the second complaint on the same facts cannot be made unless very exceptional circumstances existed.

(ii) After having considered the law crystallized as above held that filing of second complaint on same facts, same cause of action and between the same parties when first complaint having been dismissed earlier for non filing of the process fee is maintainable.

Ranvir Singh v. State of Haryana and another

Judgment dated 01.09.2009 passed by the Supreme Court in SLP (Crl.) No. 670 of 2008, reported in (2009) 9 SCC 642

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20. CRIMINAL PROCEDURE CODE, 1973 – Sections 195, 211 and 340
Prosecution for contempt of lawful authority of public servants for offences against public justice and for offences relating to documents given in evidence – Enquiry – Trial Court, except recording the finding that prosecution witnesses gave false evidence, did not go into the question whether it was expedient that they should be prosecuted – It must be a case of deliberate falsehood and the Court must be satisfied that there is reasonable foundation for charge – Appeal allowed – Court directed to withdraw complaint.

Meera Bai & anr. v. State of M.P.

Judgment dated 30.04.2009 passed by the High Court in Criminal Appeal No. 2571 of 2008, reported in I.L.R. (2009) M.P. 2443 = 2009 (5) MPHT 408

Held:

Learned counsel for the appellants submitted that before filing the complaint learned trial Judge ought to have made a preliminary enquiry as to whether a prima facie case was made out for filing a complaint against the appellants. It was necessary that this enquiry should have been made before filing the complaint. Since no such enquiry was made by the trial Court, filing of the complaint by it was illegal. He placed reliance in the case of *Vittappan v. State, 1987 CriLJ 1994* a judgment of the Kerala High Court.

Learned Panel Lawyer for the State, on the other hand, justified the filing of the complaint on the ground that the trial Court in its judgment gave clear finding that the complainant and the prosecution witness Balare had no faith in truth and they had given false evidence in the Court.

In the case of *Vittappan* (supra) it has been observed that :

> "8. The provisions of Section 340 are more or less procedural. Before directing a complaint to be lodged the court must form an opinion on being satisfied and come to the conclusion on such satisfaction that the person charged has intentionally given false evidence and that for the eradiction of the evils of perjury and in he interest of justice it is expedient that he should be prosecuted. The opinion must be formed at the time or before delivering the judgment. It may also be advantageous to consider whether there was mens rea in giving the false evidence. If there is any doubt in the mind of the court in respect of the bona fides of the defence of the person exercise of the power may not be justified. *Bibhuti Bhusan Basu v. Corporation of Calcutta, 1982 Cri. LJ. 909 (Cal.)*"

On perusal of the record, I find that except recording the finding that the prosecution witnesses (appellants) gave false evidence, trial Court did not go into the question whether it was expedient that they should be prosecuted. The enquiry as contemplated in Section 340 of the Code of Criminal Procedure is an enquiry by the trial Court itself for reassuring that the offence which appears to have been committed is in or in relation to the proceeding in that Court. Recording a finding by the trial Court regarding commission of the offence is a condition precedent to the prosecution. Some times, in many cases lack of truthfulness may be noticed in the evidence of witnesses, but it would not call for their prosecution in all the cases. It must be a prima facie case of deliberate falsehood and the Court must be satisfied that there is reasonable foundation for the charge.

In my opinion, in the instant case, since the trial Court did not keep in mind the aforesaid aspect of the matter, filing of complaint was not called for.

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21. CRIMINAL PROCEDURE CODE, 1973 – Section 200
NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
Application for amendment in the complaint to correct the cheque number mentioned in the complaint filed at the stage of final argument – Application allowed by the Magistrate – Held, Trial Court has inherent power to rectify such typographical errors to do justice and can allow the application for such amendment even at the stage of final argument in the interest of justice.

Pandit Gorelal and another v. Rahul Panjabi

Judgment dated 02.09.2009 passed by the High Court in Criminal Revision No. 1045 of 2008, reported in 2009 (5) MPHT 323

Held:

When the case was fixed for final arguments, at that stage an application was filed by the respondent on 13-8-2008 wherein it was prayed that wrong cheque number has been mentioned mistakenly and respondent may be permitted to put the correct cheque number in the plaint.

The application was contested by the petitioners vehemently. After hearing the parties, the learned Trial Court allowed the application, against which the present petition has been filed.

In the matter of *State of M.P. v. Awadh Kishore Gupta, 2004(2) JLJ 234,* Hon'ble Apex Court has held that "every Court whether civil or criminal possesses inherent power to do right and to undo a wrong in course of administration of justice.

In the matter of *Bhim Singh v. Kan Singh, 2004 (2) DCR 158,* in a prosecution under Section 138 of the Negotiable Instruments Act, Rajasthan High Court has held that application for amendment of cheque number and date of information by bank on ground of typographical mistake which was allowed by the Trial Court, it was held that Trial Court has inherent power to rectify such typographical mistakes to do justice.

Reliance was also placed on a decision in the matter of *Babli Majmudar v. State of West Bengal, 2009 (1) DCR 363,* wherein in a case under Section 138 of the Negotiable Instruments Act wherein wrong cheque number was mentioned, Calcutta High Court held that "wrong number on dishonour cheque is of no relevance for the drawer to pay the amount covered by such cheque."

Reliance was placed on a decision in the matter of *Pradeep Premchandani v. Smt. Neeta Jain,* rendered in *M.Cr.C. No.2907/2007,* decided on 18-9-2008, wherein this Court has held that so far as wrong mention of the cheque number either in the notice or in the complaint are concerned, the Court would always have the jurisdiction to look into the fact and do complete justice in the matter.

From perusal of record, it is evident that right from beginning in the notice, in complaint and also in the statement in support of the complaint the respondent has alleged the cheque No.739949 while in fact it was 739940, which shows the

complete carelessness on the part of the respondent. However, keeping in view the law laid by this Court whereby this Court has allowed the application for amendment which has caused due to typographical error, this Court is of the view that no illegality has been committed by the learned Trial Court in allowing the application filed by the respondent.

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22. CRIMINAL PROCEDURE CODE, 1973 – Section 319
Order under Section 319 for summoning additional accused – Must not be passed until the materials brought before the Court are such that convincing one at least for the purpose of exercise of the extraordinary jurisdiction – Court is required to apply stringent test; one test is that whether the evidence would reasonably lead to conviction of the person.

Sarabjit Singh & Anr. v. State of Punjab & Anr.
Judgment dated 12.05.2009 passed by the Supreme Court in Criminal Appeal No. 998 of 2009, reported in AIR 2009 SC 2792

Held:

The provision of Section 319 of the Code, on a plain reading, provides that such an extraordinary case has been made out must appear to the court. Has the criterion laid down by this Court in *Municipal Corporation of Delhi v. Ram Kishan Rastogi, (1983) 1 SCC 1* been satisfied is the question? Indisputably, before an additional accused can be summoned for standing trial, the nature of the evidence should be such which would make out grounds for exercise of extraordinary power. The materials brought before the court must also be such which would satisfy the court that it is one of those cases where its jurisdiction should be exercised sparingly.

We may notice that in *Y. Saraba Reddy v. Puthur Rami, 2007 AIR SCC 6238* this Court opined:

> "...Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word "evidence" in Section 319 contemplates that evidence of witnesses given in Court..."

An order under Section 319 of the Code, therefore, should not be passed only because the first informant or one of the witnesses seeks to implicate other person(s). Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. Mere ipse dixit would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of the extraordinary jurisdiction.

For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.

The observation of this Court in *Municipal Corporation of Delhi* (supra) and other decisions following the same is that mere existence of a prima facie case may not serve the purpose. Different standards are required to be applied at different stages. Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction. Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof, viz., (i) an extraordinary case and (ii) a case for sparingly exercise of jurisdiction, would not be satisfied.

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***23. CRIMINAL PROCEDURE CODE, 1973 – Sections 397 and 401**
Criminal revision, scope of – Jurisdiction is limited to question of law or error apparent on face of record that may arise – Further held, while exercising revisional jurisdiction, neither evidence can be reappreciated nor finding of facts can be assailed.

Tulsiram Mehta v. State of M.P.
Judgment dated 24.07.2008 passed by the High Court in Criminal Revision No. 875 of 2004, reported in 2009 (4) MPLJ 397

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24. CRIMINAL PROCEDURE CODE, 1973 – Sections 446 (3) and 362
Provisions of Section 362 CrPC regarding imposing restriction to alter or review the judgment or final order disposing of case, would not apply in passing of the order under Section 446 (3) of the Code – As the provision under Section 362 starts with a saving clause and the order under sub-sections (1), (2) or (3) of Section 446 of the Code is not a final order disposing a case.

Roop Singh v. State of M.P.
Judgment dated 12.02.2009 passed by the High Court in M.Cr.C, reported in I.L.R. (2009) M.P. 2472 (DB)

Held:

Section 446 of the Code has been embodied in Chapter XXXIII regarding provisions as to bail and bonds. The order passed under section 446 of the Code are appelable under section 449 of the Code available in the same Chapter.

Under the scheme of the Code of Criminal Procedure, it appears that Chapter XXXIII is an independent Chapter regarding provisions as to bail and bonds. Sections 436 to 439 are providing procedure and power of grant of bail in bailable and non-bailable offences by Judicial Magistrate First Class up to the High Court and from Sections 440 to 450 provide provision of amount of bond and reduction thereof, bond of accused and sureties, declaration by sureties discharge from custody, power to order sufficient bail when first taken is insufficient, discharge of sureties, deposit instead of recognizance (permission to deposit cash amount or Government Promissory Notes), procedure when bond has been forfeited, cancellation of bond and bail bond, procedure in case of insolvency or death of surety or when a bond is forfeited, bond required from minor, appeal from orders under section 446 and power to direct levy of amount due on certain recognizance.

Under Section 446 (1) the Court has power to forfeit the bond and call upon a person bound by such bond to pay the penalty or to show cause as to why it should not be paid. Under sub-section (2) if sufficient cause is not shown and penalty is not paid, the Court may start recovery proceedings. Under subsection (3), the Court has discretion to remit any portion of penalty imposed and enforce payment in part only.

Now the question is after passing of the order to pay penalty and commencement of recovery proceedings whether the Court has power to remit any portion of the penalty or not. This question came for consideration before this High Court in the case of *Suwalal v. State of M.P., 1957 MPLJ. 330, Roop Singh v. State of M.P., 1993 (2) W.N., 201, Rajendra Prasad Jaiswal v. State of M.P., 2002 (1) W.N. 181* and *Ram Prasad v. State of M.P., 1983 (2) Crimes 145* and other High Courts in the cases of *Balraj S. Kapoor v. State of Bombay, AIR 1954 Bombay 360 and Moolaram v. State of Rajasthan, 1982 (2) Cri.L.J. 2333.* In all these judgments of this High Court as well as Rajasthan and Bombay High Courts, it is held that Criminal Court has power to remit any portion of the penalty as per provision under section 446(3) of the Code till final realization of penalty amount. It is specifically held that forfeiture of bond and order for payment of penalty and non-payment of penalty amount and in pendency of recovery proceedings, the Court has power to remit any portion of the penalty as per provision under Section 446(3) of the Code till final realization of the penalty amount.

Considering the aforesaid judgments, this High Court passed a detailed judgment in the case of *Shambhulal v. State of M.P., 2005 Cr.L.R. (M.P.) 351* and specifically held and clarified that exercise of power under section 446(3) of the Code for remitting the penalty amount by criminal Court, would not amount to review of its own order and Subordinate Courts have power to remit any portion of penalty imposed and enforce payment in part only.

Learned counsel for the Non-applicant (State) has brought to the notice of this Court the judgment rendered by the learned Single Judge of Kerala High

Court in the case of *Jamila Khade and others v. State of Kerala, 2004 Cri.L.J. 3389,* wherein it is held in paras 20 and 21 that the criminal Court has no power to remit a portion of the penalty as per provision under section 446(3) of the Code and this provision can be considered by the Court at the time of passing the order under Section 446(1) and (2) of the Code. Learned Single Judge has also assigned reasons for this view that a criminal Court does not have power to review or alter its own order. This Court with respect, does not agree with this preposition. It is true that in the Code of Criminal Procedure, there is no specific power regarding review or alter its own order by the criminal Court. But when specific provision is prescribed in the Code of Criminal Procedure for review or alter a particular order by the criminal Court, then this general provision will not apply.

The provision of Section 362 of the Code would not apply because it starts with a saving clause, therefore, passing of order under section 446 (3) of the Code to remit any portion of the penalty is not covered by the provision of section 362 imposing restriction to alter or review the judgment or final order disposing of a case and the provision to bail and bonds in Chapter XXXIII under the Scheme of Criminal Procedure, 1973, are independent and provide separate and independent provisions to bail and bonds. It is also significant to mention here that by passing order under Sub-sections 1, 2 or 3 of Section 446 of the Code the case is not disposed of.

In view of the above, this Court has discretionary power, after recording reasons as per provision under section 446(3) of the Code to remit any portion of penalty imposed by order in para 12 of the impugned judgment. This court is conscious about use of discretionary powers judiciously.

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25. CRIMINAL PROCEDURE CODE, 1973 – Section 482

At the time of framing of charge it is not possible to hold the prosecution as false, frivolous or fictitious – It is to be decided after recording evidence – To frame a charge, strong suspicion about the commission of offence and the involvement of the accused is sufficient.

Sanjay Mishra v. State of M.P.

Judgment dated 26.08.2009 passed by the High Court in Misc. Cr. Case No. 5131 of 2009, reported in 2009 (5) MPHT 359

Held:

Essential ingredients of Section 307 of IPC are as follows :–

(i) That accused did an act;

(ii) That, act was done with intention or knowledge and under such circumstances to cause bodily injury as the accused knew to be likely to cause death or that such bodily injury was in the ordinary course of nature to cause death or that

accused attempted to cause such death by doing an act known to him to be so imminently dangerous that it must in all possibility cause death or such bodily injury as is likely to cause death; and

(iii) that the accused had no excuse for increasing the risk of causing such death or injury

On bare reading of Section 307 of IPC, it is apparent that to prove offence under Section 307 of IPC, the most important factor is intention or knowledge to cause death which must be established in the case. In the present case, whether petitioner and co-accused in furtherance of their common intention have caused injury to injured Ajay and Manju on vital part of their body with intention or knowledge to cause death, is to be established after evidence is recorded in the case.

Apex Court in the case of *Sanghi Brothers (Indore) Pvt. Ltd. v. Sanjay Choudhary and others, (2008) 10 SCC 681,* has held that while framing charge, only prima facie test is to be applied strong suspicion about the commission of offence and the involvement of the accused is sufficient for the Court to frame a charge. At that stage, formulating the opinion about the prospect of conviction is not necessary.

Over and above the earlier citations Apex Court in the case of *State of Haryana and others v. Bhajan Lal and others, 1992 SCC (Cri) 335,* has held that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases. The extraordinary or inherent powers do not confer any arbitrary jurisdiction on the Court to act according to it whim or caprice. The Court will not be justified in embarking upon an inquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint.

Further Apex Court in the case of *State of Orissa v. Debendra Nath Padhi, 2005 SCC (Cri) 415,* has held that at the stage of framing charge roving and fishing inquiry is impermissible and a mini trial cannot be conducted at such stage.

Further more in the case of *Bharat Parikh v. Central Bureau of Investigation and others, (2008) 10 SCC 109,* the Apex Court has held with regard to the High Court's powers to look into materials produced on behalf of or at the instance of the accused for the purpose of invoking its powers under Section 482 of the Code for quashing the charges framed, it has to be kept in mind that after the stage of framing charge evidence has to be led on behalf of the prosecution to prove the charge if an accused pleads not guilty to the charge and/or charges and claims to be tried. It is only in the exceptional circumstances enumerated in *State of Haryana v. Bhajan Lal* (supra), that a criminal proceeding may be quashed to secure the ends of justice, but such a stage will come only after evidence is led, particularly when the prosecution had produced sufficient material for charges to be framed.

Considering the above legal position at this stage, it is not just possible to hold that prosecution is false, frivolous or fictitious and petitioner is no way concerned with the incidence. All these points will be decided after evidence is recorded in the concerned trial.

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***26. CRIMINAL TRIAL:**

EVIDENCE ACT, 1872 – Section 9

(i) (a) Chance witness – Evidentiary value.

In *Sachchey Lal Tiwari v. State of U.P., (2004) 11 SCC 410,* **the Apex Court while considering the evidentiary value of the chance witness in a case of murder which had taken place in a street and a passerby had deposed that he had witnessed the incident, observed as under:**

> **"If the offence is committed in a street only a passerby will be the witness. His evidence cannot be brushed aside lightly or viewed with suspicion on the ground that he was a mere chance witness. However, there must be an explanation for his presence there."**

The Court further explained that the expression "chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle – It is quite unsuitable an expression in a country like India where people are less formal and more casual, at any rate in the matter of explaining their presence.

The evidence of a chance witness requires a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence [*Satbir v. Surat Singh, (1997) 4 SCC 192, Harjinder Singh v. State of Punjab, (2004) 11 SCC 253, Acharaparambath Pradeepan v. State of Kerala, (2006) 13 SCC 643 and Sarvesh Narain Shukla v. Daroga Singh, (2007) 13 SCC 360***] – Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded [vide** *Shankarlal v. State of Rajasthan, (2004) 10 SCC 632***].**

Conduct of the chance witness, subsequent to the incident may also be taken into consideration particularly as to whether he has informed anyone else in the village about the incident [vide *Thangaiya v. State of T.N., (2005) 9 SCC 650***]**

(i) (b) Injured witness – His testimony could not be brushed aside lightly – In *Shivalingappa Kallayanappa v. State of Karnataka, 1994 Supp (3) SCC 235,* **the Apex Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of**

major contradictions and discrepancies – For the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident. In *State of U.P. v. Kishan Chand, (2004) 7 SCC 629* a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy – The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence – In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon [vide *Krishan v. State of Haryana, (2006) 12 SCC 459*]

(ii) In a criminal case where the names of the accused persons have not been mentioned in FIR, identification parade would be of paramount importance – But in view of the fact that the witnesses were present at the time of the arrest of the accused rather they had been arrested on identification of the witnesses, holding identification parade would have been a futile exercise.

Jarnail Singh and others v. State of Punjab
Judgment dated 26.08.2009 passed by the Supreme Court in Criminal Appeal No. 1288 of 2007, reported in (2009) 9 SCC 719

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***27. CRIMINAL TRIAL:**
EVIDENCE ACT, 1872 – Section 32 (1)
INDIAN PENAL CODE, 1860 – Sections 302, 304-B & 498-A
DOWRY PROHIBITION ACT, 1961 – Sections 3 & 4

(i) In any criminal case where statements are recorded after a considerable lapse of time, some inconsistencies are bound to occur – But it is the duty of the Court to ensure that the truth prevails – If on material particulars, the statements of prosecution witnesses are consistent, then they cannot be discarded only because of minor inconsistencies.

(ii) Multiple dying declarations – The entire prosecution case hinges on the three dying declarations made by the deceased – The basic consistency between the three dying declarations, given to the father, the Investigating Officer and the Tehsildar/ Magistrate is that the accused brought kerosene oil, poured the same on the deceased and set her on fire and she died because of the burn injuries – It is the real genesis of all the three dying declarations – It must be properly appreciated that the deceased gave these dying declarations in a state when she was having acute pain and minor inconsistencies in one dying declaration with another should not render the dying declarations void –

Dying declarations must be construed in proper perspective – The doctor also certified that the deceased was in a fit mental condition to give statement – The Tahsildar/Magistrate also stated the same in his statement – The guilt of the accused of committing murder of the deceased is fully and clearly made out as no other view is possible in the light of the three dying declarations – Conviction under Section 302 IPC and sentence thereunder held proper.

(iii) Ingredients of Section 498-A IPC and Sections 3 and 4 of Dowry Prohibition Act are different from the ingredient of Section 304 -B IPC.

Sections 304-B and 498-A IPC are both distinct and separate offences. "Cruelty" is a common essential ingredient of both the offences. Under Section 304-B, it is the "dowry death" that is punishable and such death should have occurred within seven years of the marriage. In the statute, no such period is mentioned in Section 498-A IPC. The husband or his relative would be liable for subjecting the woman to "cruelty" any time after the marriage. The demand of dowry is an essential ingredient to attract Section 304-B IPC, whereas under Section 498-A IPC the demand of dowry is not the basic ingredient of the offence – Therefore, even if there is acquittal under Section 304-B IPC, still conviction under Section 498-A can be recorded under the law. [Also see *Shanti v. State of Haryana, (1991) 1 SCC 371*].

Section 3 of the Dowry Prohibition Act deals with penalty for giving and taking of dowry. The scope and ambit of Section 3 is different from the scope and ambit of Section 304-B IPC.

Section 4 of the Dowry Act deals with penalty for demanding dowry, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be. The object of Section 4 is to discourage the very demand for property or valuable security as consideration for a marriage between the parties thereto. Section 4 prohibits the demand for "giving" property or valuable security which demand, if satisfied, would constitute an offence under Section 3 read with Section 2 of the Act. Thus, the ambit and scope of Sections 3 and 4 of the Dowry Prohibition Act is different from the ambit and scope of Section 304-B.

State of Uttar Pradesh v. Santosh Kumar and others

Judgment dated 03.09.2009 passed by the Supreme Court in Criminal Appeal No. 1199 of 2001, reported in (2009) 9 SCC 626

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***28. EVIDENCE ACT, 1872 – Section 32 (1)**

Absence of signature or thumb impression of the deceased on dying declaration – The deceased had suffered about 90 to 95 per cent burn injuries covering 90 to 95 percent of body surface – The post-mortem

report also indicates that there was bandage in her thumb as it was burnt – In such situation, it was not possible to take her signature or left thumb impression on the dying declaration – Only because of this reason a dying declaration, which is otherwise found to be true, voluntary, correct and trustworthy, cannot be rejected.

Sukanti Moharana v. State of Orissa

Judgment dated 29.07.2009 passed by the Supreme Court in Criminal Appeal No. 1349 of 2009, reported in (2009) 9 SCC 163

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*29. EVIDENCE ACT, 1872 – Sections 32 (2) and 67
INDIAN PENAL CODE, 1860 – Sections 99 and 308
Statement made in discharge of professional duty – Proof of signature and handwriting of doctor – Treating Surgeon not traceable – Therefore, not examined – Medical reports proved by other doctors – Held, medical report admissible in evidence in view of Section 32 (2) of the Act – Signatures and handwriting of a person can be proved under Section 67 of the Act.
Right of private defence – How plea can be raised? Plea of self defence can be raised in cross-examination of prosecution witnesses or by way of defence evidence or otherwise – It need not be specifically raised in examination under Section 313 Cr.P.C.
Right of private defence, extent of – Appellants caused life threatening injuries using lethal weapons to complainant under grave and sudden provocation on account of beating given by the complainant party to the female members of the family of appellants – Injuries caused to the female members of the appellants were not of grievous nature – Held, right of private defence in no case extends to the inflicting of more harm than necessary for the purpose of defence – Appellants exceeded the right of private defence – Conviction under Section 308/34 upheld.

Pardeshi @ Peetambhar & Ors. v. State of M.P.

Judgment dated 15.05.2009 passed by the High Court in Criminal Appeal No. 816 of 1998, reported in I.L.R. (2009) M.P. 2706

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30. EVIDENCE ACT, 1872 – Section 41
Judgment rendered by Probate Court is conclusive and binding on criminal and other Courts but for mere pendency of proceedings before Probate Court, Section 41 of the Act would not attract to effect criminal proceedings.

Syed Askari Hadi Ali Augustine Imam & Anr. v. State (Delhi Admn.) & Anr.

Judgment dated 03.03.2009 passed by the Supreme Court in Criminal Appeal No. 416 of 2009, reported in AIR 2009 SC 3232 (3-Judge Bench)

Held:

Pendency of two proceedings whether civil or criminal, however, by itself would not attract the provisions of Section 41 of the Evidence Act. A judgment has to be pronounced. The genuineness of the Will must be gone into. Law envisages not only genuineness of the Will but also explanation to all the suspicious circumstances surrounding thereto besides proof thereof in terms of Section 63(c) of the Indian Succession Act and Section 68 of the Evidence Act. [See: *Lalitaben Jayantilal Popat v. Pragnaben Jamnadas Kataria & Ors, 2009 AIR SCW 828*]

Exercise of such a jurisdiction furthermore is discretionary. As noticed by several decisions of this Court, including two Constitution Bench decisions, primacy has to be given to a criminal case. The FIR was lodged on 19.9.2002. Not only another civil suit is pending, as noticed hereinbefore, but a lis in relation to mutation is also pending.

Whereas the criminal case is pending before the Delhi court, the testamentary suit has been filed before the Jharkhand High Court. Since 2003 not much progress has been made therein. The Will has not been sent to the handwriting expert for his opinion, which is essential for determination of the question in regard to the genuineness of the Will. It is alleged that the Will was registered at Hazaribagh after the death of the testatrix. For the last seven years in view of the pendency of the matters before the High Courts in different proceedings initiated by the appellant, the criminal case has not proceeded, although as noticed hereinbefore charge-sheet has been filed and cognizance of the offence has been taken.

We, therefore, are of the opinion that it is not a fit case where we should exercise our discretionary jurisdiction

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31. EVIDENCE ACT, 1872 – Section 45

(i) In cases where medical issue is to be settled and question of science is involved, the central role of expert cannot be disputed – Evidence of expert witness is admissible – Requirements for admissibility of expert evidence reiterated.

(ii) Credibility of expert opinion – Without examining expert as a witness, no reliance can be placed on his opinion alone – Its credibility depends on the reasons stated in support of his conclusions and data and material furnished, which formed the basis of his conclusion.

Ramesh Chandra Agrawal v. Regency Hospital Limited and others

Judgment dated 11.09.2009 passed by the Supreme Court in Civil Appeal No. 5991 of 2002, reported in (2009) 10 SCC 709

Held:

The law of evidence is designed to ensure that the court considers only that evidence which will enable it to reach a reliable conclusion. The first and foremost requirement for an expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience of the lay person. Thus, there is a need to hear an expert opinion where there is a medical issue to be settled. The scientific question involved is assumed to be not within the court's knowledge. Thus cases where the science involved, is highly specialized and perhaps even esoteric, the central role of expert cannot be disputed. The other requirements for the admissibility of expert evidence are:

(i) that the expert must be within a recognized field of expertise

(ii) that the evidence must be based on reliable principles, and

(iii) that the expert must be qualified in that discipline.

[See *Errors, Medicine and the Law,* Alan Merry and Alexander McCall Smith, 2001 Edn., Cambridge University Press, p.178]

Section 45 of the Evidence Act, 1872 speaks of expert evidence. The importance of the provision has been explained in the case of *State of H.P. v. Jai Lal, (1999) 7 SCC 280.* It is held, that, Section 45 of the Evidence Act which makes opinion of experts admissible lays down, that, when the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting, or finger impressions are relevant facts. Therefore, in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.

An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions. [See *Malay Kumar Ganguly v. Dr. Sukumar Mukherjee, (2009) 9 SCC 221*].

In *State of Maharashtra v. Damu, AIR 2000 SC 1691,* it has been laid down that without examining the expert as a witness in Court, no reliance can be placed on an opinion alone. In this regard, it has been observed in The *State*

(Delhi Administration) v. Pali Ram, AIR 1979 SC 14 that "no expert would claim today that he could be absolutely sure that his opinion was correct, expert depends to a great extent upon the materials put before him and the nature of question put to him."

In the Article "Relevancy of Expert's Opinion" it has been opined that the value of expert opinion rest on the facts on which it is based and his competency for forming a reliable opinion. The evidentiary value of the opinion of expert depends on the facts upon which it is based and also the validity of the process by which the conclusion is reached. Thus the idea that is proposed in its crux means that the importance of an opinion is decided on the basis of the credibility of the expert and the relevant facts supporting the opinion so that its accuracy can be cross checked. Therefore, the emphasis has been on the data on basis of which opinion is formed. The same is clear from following inference:

> "Mere assertion without mentioning the data or basis is not evidence, even if it comes from an expert. Where the experts give no real data in support of their opinion, the evidence even though admissible, may be excluded from consideration as affording no assistance in arriving at the correct value."

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32. EVIDENCE ACT, 1872 – Section 134

Effect of non-examination of all witnesses present on spot – It is not necessary that all those persons must be examined by the prosecution to prove the guilt of the accused and the testimonies of other witnesses are found to be trustworthy and cogent, cannot be discarded on account of aforesaid shortcomings.

Raj Narain Singh v. State of Uttar Pradesh and others

Judgment dated 18.09.2009 passed by the Supreme Court in Criminal Appeal No. 891 of 2002, reported in (2009) 10 SCC 362

Held:

Section 134 of the Evidence Act,1872 provides that no particular number of witnesses is required for proof of any fact. It is trite law that it is not the number of witnesses but it is the quality of evidence which is required to be taken note of by the courts for ascertaining the truth of the allegations made against the accused. In *Takhaji Hiraji v. Thakore Kubersing Chamansing, (2001) 6 SCC 145,* at p.p. 155-56, para 19, this Court observed as follows:

> "19. So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses. It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a

gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself – whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least 5 witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein. The injuries sustained by these witnesses are not just minor and certainly not self-inflicted. None of the witnesses had a previous enmity with any of the accused persons and there is apparently no reason why they would tell a lie. The genesis of the incident is brought out by these witnesses. In fact, the presence of the prosecution party and the accused persons in the chowk of the village is not disputed. How the vanity of the Thakores was hurt leading to a heated verbal exchange is also not in dispute. Then followed the assault. If the place of the incident was the chowk then it was a sudden and not premeditated fight between the two parties. If the accused persons had reached their houses and the members of the prosecution party had followed them and opened the assault near the house of the accused persons then it could probably be held to be a case of self-defence of the accused persons in which case non-

explanation of the injuries sustained by the accused persons would have assumed significance. The learned Sessions Judge has on appreciation of oral and circumstantial evidence inferred that the place of the incident was the chowk and not a place near the houses of the accused persons. Nothing more could have been revealed by other village people or the party of tightrope dance performers. The evidence available on record shows and that appears to be very natural, that as soon as the melee ensued all the village people and tightrope dance performers took to their heels. They could not have seen the entire incident. The learned Sessions Judge has minutely scrutinised the statements of all the eyewitnesses and found them consistent and reliable. The High Court made no effort at scrutinising and analysing the ocular testimony so as to doubt, if at all, the correctness of the several findings arrived at by the Sessions Court. With the assistance of the learned counsel for the parties we have gone through the evidence adduced and on our independent appreciation we find the eyewitnesses consistent and reliable in their narration of the incident. In our opinion non- examination of other witnesses does not cast any infirmity in the prosecution case."

Further, we cannot lose sight of the fact that ghastly acts, of the nature and gravity as the present one, when committed in a public place may very well create a sense of fear and shock in the minds of the witnesses and thus prevent them from coming forward and deposing against the perpetrators of the crime. If the testimonies of those witnesses, who have deposed during the trial, are otherwise found to be reliable, trustworthy and cogent, the said evidence cannot be disbelieved or discarded merely because the prosecution has failed to examine other witnesses allegedly present on the spot.

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33. EVIDENCE ACT, 1872 – Section 137
INDIAN PENAL CODE, 1860 – Section 302
Murder trial – Merely on the ground of delay in examination of particular witness, prosecution version does not become suspected – It would depend upon several factors – I.O. should be asked in cross-examination to explain the reason for delay – In absence of that, defence cannot gain any advantage therefrom.

*** Abuthagir & Ors. v. State represented by Inspector of Police, Madurai**

Judgment dated 08.05.2009 passed by the Supreme Court in Criminal Appeal No. 26 of 2007, reported in AIR 2009 SC 2797

Held:

The prosecution version has to be judged as a whole having regard to the totality of the evidence. In appreciating the evidence the approach of the Court must be integrated and not truncated or isolated. The Court has to appreciate in reaching the conclusion about the guilt of the accused, analyse and assess the evidence placed before it by the yardstick of probabilities, its intrinsic value and the animus of the witnesses. Much emphasis has been led by learned counsel for the appellants on the alleged delayed examination of the witnesses. It is well settled that delay in examination of the prosecution witnesses by the police during the course of investigation ipso facto may not be a ground to create a doubt regarding the veracity of the prosecution's case. So far as the delay in recording a statement of the witnesses is concerned no question was put to the investigating officer specifically as to why there was delay in recording the statement. Unless the investigating officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for delayed examination is plausible and possible and the Court accepts the same as plausible there is no reason to interfere with the conclusion. (See *Ranbir and Ors. v. State of Punjab, AIR 1973 SC 1409, Bodhraj @ Bodha and Ors. v. State of Jammu and Kashmir, (2002) 8 SCC 45, Banti @ Guddu v. State of M.P. (2004) 1 SCC 414* and *State of U. P. v. Satish, AIR 1004 SC 261*). It is seen that the PWs 3 and 4 disclosed that they had witnessed the incident. Before PW-22 their evidence was recorded. The incident took place on 29.8.1997 and the accused persons were arrested after about 8 months. Till the arrest of the accused the statements of PWs 3 and 4 were not recorded under Section 161 of Code. After arrest because their photos were published in the newspapers, that is how PWs 3 and 4 came to the police station on their own accord on two different occasions and gave statements. It has been submitted by learned counsel for the appellants that PWs 3 and 4 did not disclose the incident to any one. They have no interest either for prosecuting the accused or making a statement in the defence. They are independent witnesses. In such a case it is absurd to hold that investigating officer had erred in recording the statement of PWs 3 and 4. The investigating agency was making all possible efforts to know the names of the witnesses. This factor cannot be doubted. If really as contended by learned counsel for the appellants the prosecution wanted to tamper some witnesses they could have immediately done so after the incident.

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*34. EVIDENCE ACT, 1872 – Section 138

Re-examination – The purpose of re-examination is only to get clarification of some doubts that arose in the cross-examination – One cannot supplement the examination-in-chief by way of a re-examination and for the first time, start introducing totally new facts, which have no concern with the cross-examination.

When we again go back to the evidence of Subbiah (PW-1), in his examination-in-chief, he did not even distantly whisper about the identification of the said ornaments nor did he claim specifically regarding any identifying marks of the said ornaments – The Public Prosecutor, who conducted this matter, had probably totally forgotten to get the ornaments identified at least by Subbiah (PW-1) in his examination-in-chief.

Very significantly, after his cross-examination was over, it was in PW-1's re-examination that for the first time, the subject of his wife's clothes and jewels worn by her was broached and he then went on to identify M.O. 1 the Saree worn by her, M.O. 2 her yellow coloured petticoat, M.O. 3 her blue coloured blouse, M.O. 4 thali rope, M.O. 5 wheat design gold chain of three sovereign and M.O. 6 thali bowl – Very significantly, he also identified the ear studs, which were M.O. 7 series, in respect of which it is a concluded position that those ear studs never belonged to his wife and were in fact given away by Shankar (PW-6).

In his cross-examination, he admitted that the chain was made out of the old jewelleries and he could not remember the date, on which the chain was made – This slip-shod evidence, therefore, is very hopelessly insufficient in establishing the fact that the so-called ornaments belonged to and were on the person of Thilagavalli.

The purpose of the re-examination is only to get the clarifications of some doubts created in the cross-examination – One cannot supplement the examination-in-chief by way of a re-examination and for the first time, start introducing totally new facts, which have no concern with the cross-examination – The Trial Court has obviously faulted in allowing such a re-examination – Be that as it may, even if we accept that the Trial Court was justified in allowing the re-examination, the evidentiary value of the contents of the re-examination, in our firm opinion, is nil.

Pannayar v. State of Tamil Nadu by Inspector of Police

Judgment dated 17.08.2009 passed by the Supreme Court in Criminal Appeal No. 829 of 2008, reported in (2009) 10 SCC 152

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35. **HINDU LAW :**

Joint family property – Family governed by Mitakshra School of Hindu Law – Patta was not granted in favour of one of the members of the joint family in his individual capacity – If, for any purpose, the name of such coparcener was entered into in the revenue records, the same would not mean that the land vested in him – It would vest in the joint family – Legal position explained.

Amrit Lal & Ors. v. Maharani & Ors.

Judgment dated 21.07.2009 passed by the Supreme Court in Civil Appeal No. 4585 of 2009, reported in AIR 2009 SC 2930

Held :

The core question involved in this appeal, which arises out of a judgment and order dated 15th November 2006 passed by a learned single judge of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Writ Petition No. 8555 of 1987, is as to whether a purported patta granted in favour of the appellant's predecessor herein could enure to the benefit of the joint family or not.

It is not a case where the patta was granted in favour of one of the members of the family. Admittedly, it belonged to a family governed by Mitakshra School of Hindu Law. If for the purpose of collection of revenue or otherwise, the name of Shankar was entered into in the revenue records after the death of Baldi, but the same would not mean that the property vested in him irrespective of the share of the other co-owners. A mitakshra coparcenary being a separate entity; once the property vested in it, the same would continue to vest in it irrespective of the death of one or the other coparceners subject of course to the application of rule of survivorship. Furthermore, upon coming into force of the U.P. Zamindari Abolition and Land Reforms Act, 1951, the right, title and interest of the Zamindar vested in the State. The matter relating to succession and inheritance would be governed by the provisions of the Hindu Succession Act, 1956.

In any view of the matter as has rightly been held by the High Court, there exists a presumption with regard to the continuance of the joint family. It was for the appellants to establish that the joint family disrupted prior to the said purported grant. It has been found as of fact that there has been no pleading far less any proof that Baldi was in possession of the land pursuant to any patta granted by the Zamindar in his individual capacity. On the other hand, the records clearly pointed out that the Khata in question was an ancestral property recorded in the name of late Baldi.

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36. **HINDU MARRIAGE ACT, 1955 – Sections 5 and 7**
INSURANCE ACT, 1938 – Section 39

(i) **Evidence to establish marital status – Long co-habitation and acceptance of the society of a man and woman as husband and wife goes a long way in establishing a valid marriage.**

(ii) Effect of nomination of policy holder – Insurer gets a valid discharge of its liability under the policy on payment to nominee but such amount is subject to the law of succession applicable to the deceased.

Challamma v. Tilaga and others

Judgment dated 31.07.2009 passed by the Supreme Court in Civil Appeal No. 4961 of 2009, reported in (2009) 9 SCC 299

Held:

The question as to whether a valid marriage had taken place between a man and woman is essentially a question of fact. In arriving at a finding of fact indisputably the learned trial judge was not only entitled to analyze the evidences brought on record by the parties hereto so as to come to a conclusion as to whether all the ingredients of a valid marriage as contained in Section 5 of the Hindu Marriage Act, 1955 stand established or not; a presumption of a valid marriage having regard to the fact that they had been residing together for a long time and has been accepted in the society as husband and wife, could also be drawn.

A long cohabitation and acceptance of the society of a man and woman as husband and wife goes a long way in establishing a valid marriage.

In *Tulsa v. Durghatiya, (2008) 4 SCC 520,* this Court held: (SCC p. 525, paras 11-14)

> "11. At this juncture reference may be made to Section 114 of the Evidence Act, 1872 (in short "the Evidence Act"). The provision refers to common course of natural events, human conduct and private business. The court may presume the existence of any fact which it thinks likely to have occurred. Reading the provisions of Sections 50 and 114 of the Evidence Act together, it is clear that the act of marriage can be presumed from the common course of natural events and the conduct of parties as they are borne out by the facts of a particular case.
>
> 12. A number of judicial pronouncements have been made on this aspect of the matter. The Privy Council, on two occasions, considered the scope of the presumption that could be drawn as to the relationship of marriage between two persons living together. In first of them i.e. *Andrahennedige Dinohamy v. Wijetunge Liyanapatabendige Balahamy, AIR 1927 PC 185,* Their Lordships of the Privy Council laid down the general proposition that: (AIR p. 187)

"... where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage."

13. In *Mohabbat Ali Khan v. Mohd. Ibrahim Khan, AIR 1929 PC 135 = (1928-29) 56 IA 201,* Their Lordships of the Privy Council once again laid down that: (IA p. 207)

> "The law presumes in favour of marriage and against concubinage, when a man and a woman have cohabited continuously for a number of years."

14. It was held that such a presumption could be drawn under Section 114 of the Evidence Act."

It is also well settled that a presumption of a valid marriage although is a rebuttable one, it is for the other party to establish the same. [See *Ranganath Parmeshwar Panditrao Moli v. Eknath Gajanan Kulkarni (1996) 7 SCC 681* and *Sobha Hymavathi Devi v. Setti Gangadhara Swamy, (2005) 2 SCC 244*]. Such a presumption can be validly raised having regard to Section 50 of the Indian Evidence Act. [See *Tulsa* (supra)]. A heavy burden, thus, lies on the person who seeks to prove that no marriage has taken place.

Section 39 of the Insurance Act, 1938 enables the holder of a policy, while effecting the same, to nominate a person to whom the money secured by the policy shall be paid in the event of his death. The effect of such nomination was considered by this Court in *Vishin N. Khanchandani v. Vidya Lachmandas Khanchandani, (2000) 6 SCC 724* wherein the law has been laid down in the following terms: (SCC p. 733, para 10)

> "10. ....The nomination only indicated the hand which was authorised to receive the amount on the payment of which the insurer got a valid discharge of its liability under the policy. The policy-holder continued to have an interest in the policy during his lifetime and the nominee acquired no sort of interest in the policy during the lifetime of the policy-holder. On the death of the policy-holder, the amount payable under the policy became part of his estate which was governed by the law of succession applicable to him. Such succession may be testamentary or intestate. Section 39 did not operate as a third kind of succession which could be styled as a statutory testament. A nominee could not be treated as being equivalent to an heir or legatee. The amount of interest under the policy could, therefore, be claimed by the heirs of the assured in accordance with the law of succession governing them."

In *Sarbati Devi v. Smt. Usha Devi, (1984) 1 SCC 424,* this Court held: (SCC p. 427, para 4)

> "4. At the outset it should be mentioned that except the decision of the Allahabad High Court in *Kesari Devi v. Dharma Devi, AIR 1962 All 355* on which reliance was placed by the High Court in dismissing the appeal before it and the two decisions of the Delhi High Court in *S. Fauza Singh v. Kuldip Singh, AIR 1978 Del 276 and Uma Sehgal v. Dwarka Dass Sehgal, AIR 1982 Del 36* in all other decisions cited before us the view taken is that the nominee under Section 39 of the Act is nothing more than an agent to receive the money due under a life insurance policy in the circumstances similar to those in the present case and that the money remains the property of the assured during his lifetime and on his death forms part of his estate subject to the law of succession applicable to him."

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37. HINDU MARRIAGE ACT, 1955 – Sections 13 and 13-B

(i) Irretrievable breakdown of marriage is not one of the grounds for granting divorce indicated under Section 13 or 13-B of the Hindu Marriage Act – This doctrine is only available to the Supreme Court under Article 142 of the Constitution.

(ii) Divorce by mutual consent – Consent of both the parties given at the time of presentation of the petition must be continued till the decree is finally passed – The Courts, except the Apex Court, are not competent to pass a decree for mutual divorce if one of the consenting parties withdraws his/her consent before the decree is passed.

Anil Kumar Jain v. Maya Jain

Judgment dated 01.09.2009 passed by the Supreme Court in Civil Appeal No. 5592 of 2009, reported in (2009) 10 SCC 415

Held:

At this juncture, reference may be made to the provisions of Section 13-B of the Hindu Marriage Act, and the same is extracted hereinbelow:-

> **"13-B. Divorce by mutual consent.** – (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been

able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

As will be clear from the above, sub-Section (1) of Section 13-B is the enabling Section for presenting a petition for dissolution of a marriage by a decree of divorce by mutual consent. One of the grounds provided is that the parties have been living separately for a period of one year or more and that they have not been able to live together, which is also the factual reality in the instant case.

Sub-Section (2) of Section 13-B, however, provides the procedural steps that are required to be taken once the petition for mutual divorce has been filed and six months have expired from the date of presentation of the petition before the Court. The language in sub-section (2) is very specific in that it intends that on a motion of both the parties made not earlier than six months after the date of presentation of the petition referred to in sub-section (1) and not later than 18 months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

The question whether the consent of both the parties given at the time of presentation of the petition for mutual divorce under Section 13-B of the Act must continue till the decree is finally passed, has been the subject-matter of several decisions of this Court.

In all the subsequent cases, the Supreme Court invoked its extraordinary powers under Article 142 of the Constitution of India in order to do complete justice to the parties when faced with a situation where the marriageties had completely broken and there was no possibility whatsoever of the spouses coming together again. In such a situation, this Court felt that it would be a travesty of justice to continue with the marriage ties.

It may, however, be indicated that in some of the High Courts, which do not possess the powers vested in the Supreme Court under Article 142 of the Constitution, this question had arisen and it was held in most of the cases that despite the fact that the marriage had broken down irretrievably, the same was

not a ground for granting a decree of divorce either under Section 13 or Section 13-B of the Hindu Marriage Act, 1955.

In the ultimate analysis the aforesaid discussion throws up two propositions. The first proposition is that although irretrievable break-down of marriage is not one of the grounds indicated whether under Sections 13 or 13- B of the Hindu Marriage Act, 1955, for grant of divorce, the said doctrine can be applied to a proceeding under either of the said two provisions only where the proceedings are before the Supreme Court. In exercise of its extraordinary powers under Article 142 of the Constitution the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months stipulated in Section 13-B of the aforesaid Act. This doctrine of irretrievable break-down of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution. Neither the civil courts nor even the High Courts can, therefore, pass orders before the periods prescribed under the relevant provisions of the Act or on grounds not provided for in Section 13 and 13-B of the Hindu Marriage Act, 1955.

The second proposition is that although the Supreme Court can, in exercise of its extraordinary powers under Article 142 of the Constitution, convert a proceeding under Section 13 of the Hindu Marriage Act, 1955, into one under Section 13-B and pass a decree for mutual divorce, without waiting for the statutory period of six months, none of the other Courts can exercise such powers. The other Courts are not competent to pass a decree for mutual divorce if one of the consenting parties withdraws his/her consent before the decree is passed. Under the existing laws, the consent given by the parties at the time of filing of the joint petition for divorce by mutual consent has to subsist till the second stage when the petition comes up for orders and a decree for divorce is finally passed and it is only the Supreme Court, which, in exercise of its extraordinary powers under Article 142 of the Constitution, can pass orders to do complete justice to the parties.

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38. IDENTIFICATION OF PRISONERS ACT, 1920 – Sections 3, 4 and 5

(i) Directions issued by the High Court – Prevalence of – Held, directions are subject to the provisions of the Prisoners Act, Police Regulations and Cr.P.C. – In case of conflict, statute itself will prevail.

(ii) Identification of prisoners – Desirability of taking photographs of the accused, complainant and material witnesses in criminal cases – The directions given by the M.P. High Court to the State Government to ensure sufficient safeguard against impersonation confirmed and slightly modified by the Apex Court.

(iii) Prisoners Act – Applicability – Held, so far as the accused is concerned, the Prisoners Act applies both at pre and post trial stages.

State of M.P. v. Devendra

Judgment dated 05.05.2009 passed by the Supreme Court in Criminal Appeal No. 979 of 2002, reported in AIR 2009 SC 3009 (3-Judge Bench)

Held :

Challenge in this appeal is to the order passed by a learned Single Judge of Madhya Pradesh High Court, Indore Bench, which gave certain directions to the State Government in the matter of identification of prisoners and methodology for investigation.

The High Court noted that though Section 170(2) of the Code provides for taking surety bonds from the accused persons for their appearance in Court at the time when the charge sheet is filed or when the accused is forwarded to Magistrate, this is not sufficient safeguard in cases of impersonation. Accordingly the following directions were given :

"1. That the State shall make suitable amendments in the Police Regulations about taking and filing photographs of the complainant, material witnesses and accused persons along with the charge sheet in all criminal cases, sessions trials, except in minor/petty offences and non-cognizable offence.

2. In a case where there is no dispute of identification of the accused, the photograph of such person should invariably be taken at the time of arrest of any person for crime, while noting his identification marks to avoid any set back on the prosecution case regarding identification and when identification is doubtful then the photograph should be taken at the time of filing charge sheet.

3. In all criminal cases and sessions trials, except in non cognizable and minor/petty offences, at the time of filing of the challan/charge sheet the State should also file the photographs of complainant, material witnesses and all the accused persons and the same should be part of the papers of the trial. The State may also retain copy of photographs with the case diary or at the police station for the purposes of service of summons and warrants for arresting the absconding accused persons.

4. The photographs should be of enough number to show the accused clearly from his front pose and may include a photograph of the accused in standing position.

5. The photographs of the accused persons should be duly authenticated by the concerned officer, who arrested the accused persons.

6. In all sessions trials and criminal cases when warrants of arrest are issued the photographs and marks of identification should be checked with the accused.

7. In all sessions trials and criminal cases at the time of arrest the identity of the accused should be properly verified and care should be taken to ascertain his correct name and address.

8. The officer arresting the accused must certify the photographs and the particulars of his identity with a certificate which should accompany the chargesheet, which is sent to the Court.

9. In all appeals against acquittal the photographs should also form part of record of the trial Court and whenever notices and warrants are issued by the appellate Court or High Courts the photographs and marks of identification should be cross-checked by the office with the accused and when the notices are returned duly served and warrants executed, they should accompany a cetificate by the officer that the accused has been duly served after verifying the identity, name and address with the photograph."

In all criminal cases and sessions trials, except in non-cognizable and minor/petty offences, at the time of filing of the challan/charge sheet the State should also file the photographs of complainant, material witnesses and all the accused persons and the same should be part of the papers of the trial. The State may also retain copy of photographs with the case diary or at the police station for the purposes of service of summons and warrants for arresting the absconding accused persons.

Section 3 deals with taking of measurement of the convicted persons. The photographs and measurements and photographs can be taken by the police officer in the manner prescribed. Section 4 deals with taking of measurement etc. of non-convicted persons. It is taken if the police officer so requires it and it has to be done in the prescribed manner. So far as Section 5 is concerned it deals with the power of the Magistrate to direct any person for measurement or photographs to be taken if he is satisfied that for the purpose of any investigation or proceedings under the court the same is necessary.

Directions 1 & 3 are overlapping to certain extent. So far as the accused is concerned the Prisoners Act apply at both pre trial and post trial stages. So far as the complainant and the witnesses are concerned their role is during the trial.

The directions given by the High Court are modified to the following extent: So far as para 8 of the directions is concerned the identification has to bebased on the basis of information relating to identification of somebody. So far as the direction No.9 is concerned only when it is so necessary by the Magistrate action

shall be taken. Needless to say the directions are subject to provisions of the Act, the Regulation and the Code. In case of conflict statute itself prevails. In case of complainant as well as witnesses, where prosecution wants to protect the identity, the reasons, therefore, must be recorded. In case of rape victims, photographs should not be taken.

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***39. INDIAN PENAL CODE, 1860 – Section 84**

Exception to unsoundness of mind.

Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law (Section 84 IPC) – The benefit of this provision is available to a person who at the time when the act was done was incapable of knowing the nature of his act or that what he was doing was wrong or contrary to law – The implication of this provision is that the offender must be of this mental condition at that time when the act was committed and the fact that he was of unsound mind earlier or later are relevant only to the extent that they, along with other evidence, may be circumstances in determining the mental condition of an accused on the day of incident.

Jagdish v. State of Madhya Pradesh

Judgment dated 18.09.2009 passed by the Supreme Court in Criminal Appeal No. 338 of 2007, reported in (2009) 9 SCC 495

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40. INDIAN PENAL CODE, 1860 – Section 194

The documents prepared during investigation were fabricated for procuring conviction as inserting time during the trial by the Investigating Officer surreptitiously – The conviction under Section 194 IPC on complaint filed by Sessions Court upheld.

Suresh Chandra Sharma v. State of M.P.

Judgment dated 15.04.2009 passed by the Supreme Court in Criminal Appeal No. 42 of 2004, reported in AIR 2009 SC 3169 (3-Judge Bench)

Held:

The appellant was a Sub-Inspector of Police. During the trial of Sessions Trial No. 118/90, the Sessions Judge came to a prima facie conclusion that the appellant who was the Investigating Officer in that case in the course of trial fabricated false evidence by surreptitiously inserting the timings in various documents prepared during investigation and that he thereby committed an offence punishable under Section 194 IPC. He filed a complaint before the competent Magistrate who received the same on file and in due course committed the case to the Sessions Court for trial. To the complaint were annexed documents in which timings were inserted by the appellant and the copy of his evidence

recorded in Sessions Trial No. 118/90. In the said Sessions Trial No. 118/90 four accused persons were tried for commission of offences punishable under Sections 302, 302 read with Section 34, 394 and 397 IPC. But they were acquitted.

The documents in which the appellant was found to have surreptitiously inserted the timings are memorandum, (Exs. P14, P20, P23 and P25), spot map (Ex.P11), Panchnama (Ex.P12 and P13) and Seizure Memo Exs. (P16, P19 and P20).

Section 194 appears in Chapter 11 of IPC under the heading "Of False Evidence and Offences against Public Justice". Section 194 makes punishable the act of giving or fabricating false evidence with intent to procure conviction of capital offence. Both Sections 194 and 195 provide for aggravated forms of giving or fabricating false evidence. The stress on these provisions is on giving or fabricating false evidence intending thereby to cause or knowing it to be likely that he will thereby cause any person to be convicted of an offence which is not capital by the law for the time being in force in India. On the facts of the case it has been established that there was fabrication of official records by manipulating the records in large number of documents. The appellant was the Investigating Officer. The obvious purpose was to get the accused persons convicted. The purpose could have been achieved had the fabrication gone unnoticed. Additionally, the defence lawyer himself had deposed to have seen manipulation. Though, his conduct in not reporting the same to anybody is not certainly to be appreciated yet the evidentiary value thereof, and the evidence of the then Presiding Officer who was examined as PW-5 clearly established the accusations. That being so, the trial Court and the High Court were justified in holding the appellant guilty.

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***41. INDIAN PENAL CODE, 1860 – Section 300**

Murder trial – Appreciation of evidence – An eye witness, friend of deceased, narrated whole story of the prosecution – The fact that articles found in stomach of deceased on post mortem did not match with the fact of taking of food by the deceased and the time of death as stated by the eye witness and also delay in recording of his police statement are insignificant under the circumstances of the given case. Testimony of tender aged boy – Appreciation of – The doctor who conducted the post mortem has found ten injuries suffered by the deceased – But the eye witness, a boy of 13-14 years, had not described the assault, so that it could suggest causing ten injuries – Even then the testimony of the witness of tender age is reliable as a witness of tender age is not expected to explain each and every injury – He has deposed about the participation of the accused persons and crucial part played by some of them – Offence proved.

Mallappa Siddappa Alakanur & Ors. v. State of Karnataka
Judgment dated 07.07.2009 passed by the Supreme Court in Criminal Appeal No.1055 of 2002, reported in AIR 2009 SC 2959

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42. **INDIAN PENAL CODE, 1860 – Section 300/34**
Murder of two boys under superstition – Main accused beat and killed the boys by way of sacrifice that they would regain their lives – Other accused who were present and were close relatives but not opposed the gruesome act due to superstitious psyche, cannot be said to have a common intention to commit the crime – Their acquittal is proper.

State of U.P. v. Sahrunnisa & Anr.
Judgment dated 07.07.2009 passed by the Supreme Court in Criminal Appeal No. 431 of 2003, reported in AIR 2009 SC 3182

Held:

Superstition plays a very important role in the Indian society. It is not restricted to any particular religion or a particular section of society including the haves and the have-nots. The present case is one such dreadful and hair-raising example wherein two innocent boys lost their lives while the third barely escaped death. Very unfortunately, in all this, the father and the paternal aunt of the unfortunate boys were involved while their own mother had to remain as a powerless and mute spectator to this gruesome act of cruelty.

The sordid saga of un-paralleled cruelty as a result of superstitions took place in the area called Canal Colony situated at Kasba Koraon, P.S. Koraon, District Allahabad where accused No.1 was working as an Amin in Irrigation Department, accused No. 2, Shakila Bano, wife of Siraj Khan, is his daughter, accused No.3 Shahrunnisa is the wife of accused No.1, while accused No.4, Siraj Khan is the husband of accused No.2. The unfortunate deceased who lost their lives were Shamshad Ali, Naushad Ali while Shaukat Ali barely escaped. All the three boys were born to Saharunnisa and Abdul Hafeez Khan and belonged to the tender age of 7 years, 4 years and 3 years, respectively. The Sessions Judge came to the conclusion that the crimes were committed in the name of "Peer Paigamber". He found all the accused guilty for offences under Section 302 read with Section 44, IPC and also Section 307 read with Section 34, IPC and sentenced them to suffer rigorous imprisonment for life. The accused were also separately convicted and sentenced to rigorous imprisonment of three years for the offences under Section 307, IPC.

On appeal, the High Court confirmed the conviction and sentence of the two accused namely A1 & A2. However, the High Court acquitted A-3, Shahrunnisa and A-4, Siraj Khan. The High Court took the view that there was no evidence on record to show that A-3 and A-4 had done any over act or had shared common intention of Abdul Hafiz Khan (A-1) and Shakila Bano (A-2) and the allegation against them was that they were not raising objection to the illegal

criminal acts of A-1 and A-2. The High Court, however, took the view that under the circumstances it could not be said that they had shared common intention as perhaps they were afraid of the accused or the so-called powers. The High Court, therefore, gave benefit of doubt to the said accused and acquitted them.

The question, therefore, is as to whether by their mere presence these two respondents could be attributed with the common intention. The answer is clearly in the negative. There can be no dispute that the spectre of superstition had affected the psyche of all these accused persons. The case of the Shahrunnisa (A-3) is one of a Mohammedan lady whose husband and daughter were overpowered by the superstitious belief. The force of the superstition was so overpowering that A-1 and A-2 probably were convinced of the non-existent supernatural powers of A-2. A poor Mohammedan lady coming from the humble background, whose husband and whose daughter claimed these powers could not have ordinarily opposed which was being done and, therefore, had to see with open eyes the death of her two sons. We do not think that her not opposing the gruesome acts speaks in favour of her nurturing the common intention. The High Court was undoubtedly right that she could be afraid of A-1 and A-2 has she herself might be under the superstitious psyche.

It is bane of the Indian society that in search of some worldly gains, the society becomes superstitious and blindly follows the path which leads only to desolation. Number of lives are lost and number of families are destroyed because of this false belief in the so-called black magic and so-called supernatural powers. All this is a result of the total lack of education and human avarice. It is for this reason that we agree with the findings of the High Court. Even the case of the 4th respondent is no different. True it is that he was a police Constable, but the fact is that he has not committed any overt acts. Again it is his own wife who claimed all the supernatural powers and went on to commit the horrible acts of un-paralleled cruelty against the two innocent boys. True it is that it was his duty to stop the crime from being committed but inaction on his part would not by itself make him join the company of the guilty accused. This is apart from the fact that he has not been asked about his duty in his examination. In fact, the whole prosecution is strangely silent about the aspect of Section 221 IPC nor was such charge ever levelled against him.

We, therefore, would agree with the High Court, though with a heavy heart.

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43. INDIAN PENAL CODE, 1860 – Section 300/304 Part II
Murder – Accused caused injuries to her co-wife without intention to cause death as she had knowledge that it is likely to cause death – Liable to be convicted under Section 304 Part II but not for murder.

Jagriti Devi v. State of H.P.
Judgment dated 06.07.2009 passed by the Supreme Court in Criminal Appeal No. 823 of 2003, reported in AIR 2009 SC 2869

Held:

It is quite clear from the record that there was an altercation preceding the incident of murder in which the accused-appellant was insulted by the deceased and by doing so the deceased provoked the accused-appellant. The deceased also took out the 'Khukri' which was under the pillow with the intention of assaulting the accused-appellant and the accused-appellant in order to save herself grappled with the deceased and during that process she also received injuries. The prosecution has failed to give any explanation with regard to those injuries received by the accused-appellant. Further, it is also established in evidence that the 'Khukri' used in the commission of offence was kept by the deceased under her pillow while she was sleeping in the veranda outside the house. Clearly, there was no intention on the part of the accused-appellant to kill the deceased. That being the position, we are of the considered view that the present case cannot be said to be a case under Section 302 IPC but it is a case falling under Section 304 Part II IPC. It is trite law that Section 304 Part II comes into play when the death is caused by doing an act with knowledge that it is likely to cause death but there is no intention on the part of the accused either to cause death or to cause such bodily injury as is likely to cause death.

We, therefore, hold the accused-appellant to be guilty for offence under Section 304 Part II IPC. Her conviction under Section 302 IPC is, therefore, set aside.

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44. INDIAN PENAL CODE, 1860 – Sections 302 and 148
CRIMINAL TRIAL:
Murder Trial – Appreciation of evidence – Witness belonged to a deprived section of society and her statement was recorded after 8 years of the incident – As improvements and inconsistencies in the statements given by the witnesses to the police vis-a-vis their statement in Court can be ignored unless they go to the root of the matter and affect the veracity of the prosecution story because such discrepancies are bound to occur.

Gamini Bala Koteswara Rao & others v. State of Andhra Pradesh

Judgment dated 19.08.2009 passed by the Supreme Court in Criminal Appeal No. 634 of 2008, reported in (2009) 10 SCC 636 (DB)

Held :

On facts learned counsel for the appellants has urged that the observations of the trial Court that PW.1 was an interested witness and PW.5 a chance witness called for no interference more particularly as no corroborating evidence had come on record. He has further highlighted that the medical evidence was completely at variance with the ocular evidence and in that eventuality the accused were entitled to claim the benefit of doubt in their favour.

We have gone through the evidence of PW.1 and PW.5 very carefully with the help of the learned counsel. PW.1 stated that he had come to the place of incident as his uncle, the deceased, was a candidate in the election. His presence is therefore absolutely natural. PW.5 stated that she was vegetable vendor and had come to the site in order to sell her wares. Learned Senior Counrel for the appellants, has, however, sought to demolish her testimony by observing that she had started from her house at about 7.00 a.m. (as stated by her) and had reached the murder site after selling vegetables to several people and realising this difficulty she had changed the time to 6.00 a.m. to suit the circumstance that the murder too had been committed at 7.00 a.m.

We are of the opinion that inconsistency can be ignored as the witnesses belonged to a deprived section of society and her statement was being recorded after 8 years of the incident. It also cannot be ignored that PW.5 was hawking vegetables and it would, therefore, have been logical for her to have chosen the polling site for a visit as that would have ensured a crowd, and a crowd would have meant good business.

Learned counsel for the appellants has also pointed out that PW.5 belonged to the Congress party which was the party of the deceased as well whereas the appellants belonged to the Telugu Desam Party and as such she could not be said to be an impartial witness. The matter has been extensively dealt with by the High court and we believe that had there been any motive to implicate any body on the basis of party affiliations, the main role in the entire incident would have been ascribed to A.6 who was the rival candidate. On the contrary A.6 has been given a very minor role in the entire incident and this was one of factors that had let to his acquittal by the trial Court and the confirmation of that order by the High Court as well.

Great emphasis has been laid by learned counsel for the appellants in the apparent discordance between the medical and the ocular evidence.

A perusal of the injuries would reveal that injury No. 1 has been caused by A.1, Injury No. 2 either by A.2 or A.3, Injury No. 3 by A.1, Injury Nos.4 and 5 by A.1 with a stone and there are three or four additional injuries (on which emphasis has been laid by learned counsel for the appellants) as they remain unexplained. Even assuming, however, that three injuries out of eight are unexplained, this one circumstance alone would not destroy the flow of the other evidence.

It is clear that the incident had happened in the course of the Mandal Parishad Elections with several people being involved and a large group of spectators being present at the spot. In this scenario we feel that it would have been well-nigh impossible for any witness to have given a mathematical or precise description of all the injuries that had been caused and that too in a melee.

We have also gone through the so called improvements/ inconsistencies in the statements given by PW.1 and PW.5 to the police vis-a-vis their statements in court. It must be emphasized that the incident happened in the year 1995 whereas the evidence was recorded after about 8 years. Some discrepancies

are, therefore, bound to occur. The question to be noted is as to whether the discrepancies or improvements are such which go to the root of the matter and affect veracity of the prosecution's story. We are of the opinion that the evidence herein does not fall within this slippery category. It is clear from the FIR recorded by PW.1 and his statement in Court that PW.5 had been present at the time of the incident. The other discrepancies that have been pointed out are to no avail keeping in view the over all picture.

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45. **INDIAN PENAL CODE, 1860 – Section 302/149**
Vicarious liability – Inference against the members of the unlawful assembly for commission of another offence – Held, where a member of such unlawful assembly was aware as regards likelihood of commission of another offence or not would depend upon the facts and circumstances of each case, background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behaviour of the members soon before the act or after the actual commission of the crime would be relevant factors for drawing an inference in that behalf.

Vishnu and others v. State of Rajasthan

Judgment dated 15.09.2009 passed by the Supreme Court in Criminal Appeal No. 891 of 2006, reported in (2009) 10 SCC 477

Held:

The plea that the provisions of Section 149 IPC would not be attracted to the facts of the case and, therefore, the appellants who had not played overt act in causing injury to deceased Sukh Lal could not have been convicted under Section 302 with the aid of Section 149 IPC has no substance.

Section 149 of the Penal Code provides for vicarious liability. If an offence is committed by any member of an unlawful assembly in prosecution of a common object thereof or such as the members of that assembly knew that the offence to be likely to be committed in prosecution of that object, every person who at the time of committing that offence was member would be guilty of the offence committed. The common object may be commission of one offence while there may be likelihood of commission of yet another offence, the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. Whether a member of such unlawful assembly was aware as regards likelihood of commission of another offence or not would depend upon the facts and circumstances of each case. Background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behaviour of the members soon before, at or after the actual commission of the crime would be relevant factors for drawing an inference in that behalf.

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46. **INDIAN PENAL CODE, 1860 – Sections 304 Part II and 299**
Rash or negligent act, when may amount to culpable homicide? Explained – Such an act may not amount to culpable homicide unless the act(s) which resulted in death, have been done by the offender willfully and with knowledge.

Hemraj Jain v. State of M.P.

Judgment dated 22.07.2009 passed by the High Court in Criminal Appeal No. 1941 of 2002, reported in 2009 (5) MPHT 49

Held:

It seems that accused Pannalal asked Babulal to climb over D.P. to disconnect jumpers believing that the electric current was not running in the line either because the feeder was closed for repair or there was load shedding. He cannot be held to have knowledge that by repairing the electric line at that time he would suffer the shock by sudden charging of the electric line. It is not the case of the prosecution that he intended or had motive to kill Babulal. It was just by chance that when he asked Babulal to repair the fault, electric current was released in the line. Had he been there in place of Babulal, he would have been the victim. At the most, in my opinion, it could be a case of negligence on the part of the person who charged the electric line without taking due care and caution. In criminal proceeding criminality can never be presumed subject to statutory exceptions. A rash or negligent act does not amount to culpable homicide under Section 299 of the Indian Penal Code unless it is proved that the offender willfully and with the knowledge did the act which resulted in the death of the victim. In the fact situation of the present case, in my opinion, it cannot be held that either of the accused had knowledge that by his act he was likely to cause the death of deceased. Since the essential ingredient 'knowledge' on the part of the accused persons is not established, they cannot be punished for the offence of culpable homicide not amounting to murder.

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47. **INDIAN PENAL CODE, 1860 – Section 376**
Rape – Whether conviction can be awarded in case the prosecutrix has not been examined? Held, merely because a victim is dead and consequently could not be examined, can never be a ground to acquit an accused if there is evidence otherwise available proving the criminal act of the accused concerned.

Bhola Prasad Raidas v. State Of M.P.

Judgment dated 13.03.2009 passed by the High Court in Criminal Appeal No. 1840 of 2004, reported in I.L.R. (2009) M.P. 2433

Held:

Legality and propriety of impugned conviction have been assailed primarily on the ground that, in absence of victim's evidence, the charge of rape was also not proved beyond a reasonable doubt. However, learned Dy. Govt. Advocate,

while inviting attention to the corresponding incriminating pieces of evidence, has submitted that the conviction in question is well merited.

Before proceeding to appreciate the merits of the rival contentions in a proper perspective, it is necessary to first advert to the medical and forensic evidence available on record.

Autopsy Surgeon Dr. S. Kori (PW-9) testified that sexual intercourse was performed with the prosecutrix before her death due to asphyxia caused by hanging. According to her, for confirmation of the opinion as to rape, she also prepared slides from the prosecutrix's vaginal secretion. The relevant findings recorded by Dr. S. Kori in the post-mortem report (Ex.P-12) may be reproduced as under –

> "No matting found over the pubic hairs, dry blood found over post part of perineum.
>
> Hymen tear found completely circular in shape. Size 2.5 cm x 2.5 cm. Vagina both sides two lacerated wounds found. Right side – 1 cm x ½ cm x ¼ cm. Lt. Side – 1 cm x ¼ x ¼ cm in size.
>
> Blood found in vagina. No injury in uterus. No injury found over labia majora. Slight swelling found over labia minora".
>
> In the light of these findings, a categorical opinion that the prosecutrix was subjected to sexual assault before her death was rightly accepted."

No dispute was raised as to the opinion recorded by Dr. O.P. Choudhary (PW-11) in the report (Ex.P-15) that the appellant was capable of performing sexual intercourse. His assertion that he had prepared two slides from the semen of the appellant was also not challenged in the cross-examination. As pointed out already, Chemical Examiner also confirmed the factum of sexual intercourse with the prosecutrix by reporting that the slides and the Sari forwarded to FSL, Sagar contained seminal stains and human spermatozoa.

Coming to the other evidence on record, it may be seen that Pushpa (PW-3) mother of the prosecutrix, duly corroborated the prosecution version. According to her, on being asked in presence of her Deorani (co-sister) about cause of delay in fetching water, the prosecutrix candidly revealed that she was ravished by the appellant only and the Sari worn by the prosecutrix was also found stained with blood and soil. It also came in her statement that on the following day, the prosecutrix neither took bath nor ate anything and, in the next morning, her dead body was found hanging in the Saar. Pushpa was cross-examined at length but nothing beneficial to the defence could be elicited. Her evidence drew adequate support not only from the medical evidence but also from other evidence on record.

Corroborating testimony of his wife, Babbu Prasad (PW-2) deposed that on being informed about the incident, he consulted Koledas and Ramkhelawan,

who, in turn, had proposed a visit to his house to understand the things but, in the meanwhile, his daughter ended her life. Koledas (PW-1) and Ramkhelawan (PW-4) substantially supported Babbu's corresponding statement. It is relevant to note that no question as to the alleged dispute regarding Bari was put in the cross-examination of Babbu Prasad. Thus, the defence was not only after thought but was inherently improbable as no father would stoop so low to bring forth a false charge of rape with his minor and unmarried daughter because of some dispute of trivial nature.

Evidence of A.K. Pandey (PW-7) relates to investigation. His assertion that he had seized a Sari containing stains from Pushpa was not challenged in the cross-examination. While corroborating the fact that dead body of the prosecutrix was found hanging in the Saar, he also described the attendant circumstances to prove suicide. He firmly refuted the suggestion that it was a case of murder. As indicated already, the medical evidence also did not support the theory of homicide.

Further, irrespective of the mode of prosecutrix's death, the case of the prosecution could not be thrown overboard due to non-availability of the victim for examination (*State of Karnataka v. Mahabaleshwar Gourya Naik, AIR 1992 SC 2043* relied on). The relevant observations may be reproduced as under –

> "merely because a victim is dead and consequently could not be examined can never be a ground to acquit an accused if there is evidence otherwise available proving the criminal act of the accused concerned."

Accordingly, learned trial Judge did not commit any illegality in holding that the other overwhelming evidence on record was sufficient to prove the charge of rape beyond a reasonable doubt. Moreover, the probability of defence was not established. The impugned conviction, therefore, deserves to be maintained.

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48. INDIAN PENAL CODE, 1860 – Section 376
Offence under Section 376 IPC: –

(i) Testimony of prosecutrix – Consent – Mere absence of injuries on the person of prosecutrix, it cannot be inferred that she was consenting party.

(ii) Corroboration – It is not necessary in every case – It requires only in the cases of high improbability.

(iii) Reliability – Prosecutrix stated in cross-examination that the accused threatened her with dagger on her refusal to go to place as per his directions – Such fact neither stated in her statement under Section 161 CrPC nor in the FIR – Such contradiction not sufficient to discard her, as prosecutrix made categorically clear and unequivocal deposition that accused committed forcible sexual intercourse with her – Her testimony is reliable

Rajinder @ Raju v. State of H.P.
Judgment dated 07.07.2009 passed by the Supreme Court in Criminal Appeal No. 670 of 2003, reported in AIR 2009 SC 3022

Held:

In the context of Indian Culture, a woman - victim of sexual aggression - would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the Courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and, therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent. Insofar as the present case is concerned, the circumstances referred to and pointed out by the learned counsel are neither sufficient nor do they justify discarding the evidence of the prosecutrix. There is nothing on record that creates any doubt/disbelief or a suspicion about the evidence of the prosecutrix. In a case, such as this, where the prosecutrix was misrepresented by the accused that he would show her to his cousin (a doctor) as she was suffering from some throat pain and she accompanied him but the accused took her to other places and when it became dark, took her to a lonely place and committed sexual intercourse, the prosecutrix was not expected to put any resistance lest her life would have been in danger. In the facts and circumstances, the absence of injuries on the person of the prosecutrix does not lead to an inference that she consented for sexual intercourse with the accused. The young girl became victim of lust of the accused who was more than double her age and yielded to sexual intercourse against her will.

The prosecutrix in her deposition has been categorical, clear and unequivocal that the accused committed forcible sexual intercourse with her. She testified:

> "While going, the accused stopped the scooter at a lonely place on the road and thereafter he dragged me by holding me from my arm at some distance from the road and gagged my mouth and after placing 'pattu' on the ground, he untied my salwar and committed the sexual intercourse with me. I had felt a pain in my private part and the blood started oozing."

It is true that in her cross examination she stated that the accused had threatened her with a dagger before Jablu when she refused to go with him and this aspect was neither stated in her statement under Section 161 Cr.P.C. nor in

the FIR but does this contradiction make her evidence unreliable. We do not think so. The trial court as well as High Court has accepted her evidence. We find no justifiable reason to take a different view.

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*49. **JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000**
Claim as to juvenility, determination of – Although, in the enquiry as to the age, the applicant was found to be under 18 years of age on the date of incident, yet the application for treating the applicant as juvenile was rejected by the Trial Court on the ground that on the date of filing of the application he had crossed the age of 18 years – Held, the relevant date for determination of age of juvenile is the date of commission of offence – Setting aside the order passed by the trial court, direction was given to trial court to send the record of the proceedings alongwith the applicant to the competent authority.

Ballu @ Balram v. State of M.P.

Judgment dated 07.09.2009 passed by the High Court in Cri. Rev. No. 1610 of 2007, reported in 2009(4) MPLJ 658

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50. **LAND ACQUISITION ACT, 1894 – Sections 23 and 54**
Determination of market value of land – Admissibility of previous judgment relating to value of land – Held, previous judgment relating to value of land to be admitted in evidence, either as an instance or as one from which the market value of the acquired land could be inferred or deduced, must be judgment of that same Court.

Chandrashekar & Ors. v. Addl. Special Land Acquisition Officer

Judgment dated 08.07.2009 passed by the Supreme Court in Civil Appeal No. 4163 of 2009, reported in AIR 2009 SC 3012

Held:

It is settled that the High Court should not have deprived the appellants of their rightful claim on the technical ground of want of requisite Court-fee and an opportunity should have been afforded to them for payment of the deficit Court-fee. This position is also supported by the decision of this Court in a recent case *viz. Bhimashas v. Special Land Acquisition Officer, (2008) 10 SCC 797* wherein it has been held that the High Court should have, after taking note of the facts of the case and the market value determined by it, awarded the higher compensation subject to the payment of the balance Court-fee.

Since we have come to the conclusion that the Hgih Court was not justified in denying the appellants compensation @ Rs.32.10/- per Sq. Ft. after having recorded its finding that the value of the acquired land would be not less than @ Rs.32.10/- per Sq. Ft., on a mere technical ground that the Court-fee paid by the appellants would entitle them to compensation of only Rs.23/- per Sq. Ft., we now proceed to consider the other submissions of the appellants. The learned

counsel for the appellant submitted that since the High Court had awarded compensation @ Rs.100.50/- per Sq. Ft. in MFA No.2366/2003 (LAC) C/W MFA *CR.OB. No.52/2004 (Asst. Commissioner & the LAO, Bijapur v. Tukaram S/o. Shivaram Zinjade,* arising out of LAC No.180/1998], the appellants should also be awarded compensation at the same rate affording an opportunity to them to pay the deficit Court-fee. In this regard our attention was drawn to the decision of this Court in *Pal Singh v. UT of Chandigarh (AIR 1993 SC 225).*

In the case of *Pal Singh* (supra), this Court had examined the question whether a judgment of a Court in a land acquisition case determining the market value of a land in the vicinity of acquired lands, even though not inter-parties, was admissible in evidence in a subsequent case, either as an instance or one from which the market value of the acquired land could be deduced or inferred. The Court had analyzed the same and expressed the following opinion :

> "5. No doubt, a judgment of a Court in a land acquisition case determining the market value of a land in the vicinity of the acquired lands, even though not inter-partes, could be admitted in evidence either as an instance or one from which the market value of the acquired land could be deduced or inferred as has been held by the Calcutta High Court in *H.K. Mallick v. State of West Bengal, 79 Calcutta Weekly Notes 378* based on the authority of the Judicial Committee of the Privy Council in *Secretary of State v. Indian General Steam Navigation and Railway Co., 1909 ILR 36 Cal 967,* where the Judicial Committee did refuse to interfere with High Court judgment in a land acquisition case based on previous awards, holding that no question of principle was involved in it."

So it seems that the Court in principle recognized the admissibility of such previous decision in a subsequent case as far as the market value of the acquired land was concerned. However, the Court further held that :

> "...But what cannot be overlooked is, that for a judgment relating to value of land to be admitted in evidence either as an instance or as one from which the market value of the acquired land could be inferred or deduced, must have been a previous judgment of Court and as an instance, it must have been proved by the person relying upon such judgment by adducing evidence aliunde that due regard being given to all attendant facts and circumstances, it could furnish the basis for determining the market value of the acquired land..."

Thus, for a judgment relating to value of land to be admitted in evidence either as an instance or as one from which the market value of the acquired land could be inferred or deduced, must have been a previous judgment of that

same Court and this requirement is fulfilled in the present case. However, the requirement was that it must have been proved by the person relying upon such judgment by adducing evidence aliunde and that due regard being given to all other attendant facts and circumstances it could furnish the basis for determining the market value of the acquired land, is in our opinion the more important test for admission of such previous decision of the High Court for determination of the market value of the land acquired in the present case. On a perusal of the materials submitted before us by the appellants, we must conclude that the appellants had failed to satisfactorily furnish the basis for determining the market value of the acquired land according to the decision of the same High Court in *Assistant Commissioner & the LAO* (supra) at Rs.100.50/- per sq. ft. Thus, we conclude that this plea of the appellants is not acceptable in the present case.

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***51. LIMITATION ACT, 1963 – Section 5**

Consideration of application for condonation of delay, criteria therefor – It is settled that judicial system of our country encourages *bi parte* proceedings on merits and technicalities are not permitted to come in the way while imparting justice – Application must be decided on considering the reasons shown in the affidavit in support of the application in a judicious manner and with an intent to promote justice.

Darshan Singh and others v. Collector Singh and others

Judgment dated 23.09.2009 passed by the High Court in S.A. No. 83 of 2009, reported in 2009(4) MPLJ 650

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52. MOTOR VEHICLES ACT, 1988 – Section 147 (1)(b)(i)

Motor accident – Liability of Insurance Company to pay compensation under Section 147 (1) (b) (i) of the Act, extent of – The deceased was travelling in the vehicle along with the goods (vegetables) which he was taking for sale – The vehicle turned turtle resulting in death of the deceased in hospital due to injuries received by him in the accident – Held, insurer is liable to pay compensation as the requirement of Section 147 (1) (b) (i) of the Act is fulfilled.

Resham Bai and others v. Jabbar and others

Judgment dated 14.07.2009 passed by the High Court in Misc. Appeal No. 1744 of 2004, reported in 2009 (4) MPLJ 426

Held:

Section 147(1)(b)(i) covers the liability in respect of the death or bodily injury to any person including owner of the goods or his authorised representative carried in the vehicle. The Supreme Court in the matter of *National Insurance Co. Ltd. v. Baljit Kaur and others* reported in *2004 (2) MPLJ (SC) 4 = 2004 ACJ 428* has held that term 'any person' included in section 147 (1) by way of

amendement in 1994 includes a third party as also the owner of goods or his authorised representative carried in a goods vehicle. Following the judgment of the Supreme Court in the matter of *Baljit Kaur* (supra) Division Bench of this Court in the matter of *Kesari Bai and others v. Dhanna and others,* reported in *2007 ACJ 1550* held the Insurance Company liable in the case of death of person traveling in goods vehicle along with his bag of wheat when the vehicle met with an accident. The Division Bench of this Court in the matter of *Umrao Singh v. Bharatlal and others,* reported in *2007 (II) MPWN 108,* held the Insurance Company liable to pay compensation to the claimants traveling in trolley with his goods. In somewhat similar circumstances the Division Bench of this Court in the matter of *Indarlal and others v. Vijay Kumar and others* reported in *2009 ACJ 1077,* held the Insurance Company liable in case of death of passenger in metador, who was travelling with his load of vegetables.

On the basis of the pleadings and oral evidence on record, it is established that on the date of the accident the deceased was travelling in the vehicle in question along with his goods (vegetables) for which he had paid the charges and he was taking these vegetables to the market for sale.

Learned counsel for the respondent has relied upon the judgment of the Supreme Court in the matter of *National Insurance Co. Ltd v. Cholleti Bharatamma and ors.,* reported in *I (2008) ACC 225 (SC)* and submitted that the insurance company is not liable because the deceased was not travelling in the cabin of the vehicle. Such a submission cannot be accepted at this stage since no such defence was raised by the insurance Company before the Tribunal and it did not plead or adduce any evidence to show that the deceased was not travelling in the cabin of the vehicle, therefore, the tribunal did not frame any issue on this point and no finding has been recorded. Thus, in the appeal Insurance Company cannot be permitted to raise the factual issue for the first time. Even otherwise, the evidence on record establish that the deceased was travelling in the metador as owner of the goods along with his goods, therefore, insurance Company cannot escape the liability.

The reliance of the counsel for the respondent on the judgment of the Supreme Court in the matter of *National Insurance Company Ltd. v. Kaushalaya Devi and others,* reported in *2009 (1) MPLJ (SC) 288 = 2008 ACJ 2144* is also misplaced since in that case the deceased who was a vegetable dealer was traveling in the truck for collecting empty vegetable boxes, therefore the Supreme Court held he was not travelling in the truck as owner of the goods i.e. vegetable. Similarly, the judgment of the *Karnataka High Court in the matter of United India Insurance Company Ltd. vs. Lalithabai and ors., reported in III (2007) ACC 415,* relied upon by the counsel for the Insurance Company is of no held since in that case the Court held that the personal effects or personal luggage carried by person in motor car or passenger traveling in vehicle will not come within the ambit of definition of goods. The judgment of the Andhra Pradesh High Court in the matter of *Anasuyamma and another v. B. Narsinga Rao and another, reported*

in 2008 ACJ 2385, relied upon by the counsel for the Insurance Company is also distinguishable on facts since in that case, it was found that the deceased was not transporting any goods and was not accompanying them in the lorry at the time of the accident and he was not found to be the owner of the goods at the time of the accident. Thus, none of the judgment relied upon by the Counsel for the Insurance Company help the respondent.

Thus, I find that the deceased was travelling in the vehicle in question as owner of the goods along with his goods and the requirement of section 147(1)(b)(i) of the Motor Vehicles Act, 1988 is satisfied.

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***53. MOTOR VEHICLES ACT, 1988 – Sections 147 (1) (b) and 82**
Violation of terms and conditions of policy of insurance – Effect on liability of Insurance Company to indemnify – Bus carrying passengers caught fire due to explosives carried by a passenger and in the incident 18 passengers died and some others received serious injuries – On the date of accident there was no permit in existence as the bus in question had been covered by permit in the name of "R" who died near about two years ago.
As per the insurance policy, the risk was to be covered on vehicle being used under a permit – Held, there was violation of terms and condition of the policy of insurance, therefore, the insurance company could not be held liable to indemnify the insured.

National Insurance Company Ltd. Gwalior v. Smt. Madhuri Kushwah and others
Judgment dated 30.07.2009 passed by the High Court in Misc. Appeal No. 1266 of 2007, reported in 2009 (4) MPLJ 377

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54. MOTOR VEHICLES ACT, 1988 – Sections 163-A and 166
Driver died in an accident – Borrowing vehicle was driven by the deceased – Deceased stepped into the shoes of the owner of the vehicle – The claim of legal representative of deceased is not maintainable under Section 163-A of the Act.

Ningamma & Anr. v. United India Insurance Co. Ltd.
Judgment dated 13.05.2009 passed by the Supreme Court in Civil Appeal No. 3538 of 2009, reported in AIR 2009 SC 3056

Held:

In the case of *Oriental Insurance Company Ltd. v. Rajni Devi and others, (2008) 5 SCC 736,* it has been held that the question is no longer res integra. The liability under section 163-A of the MVA is on the owner of the vehicle. So a person cannot be both, a claimant as also a recipient, with respect to claim. Therefore, the heirs of the deceased could not have maintained a claim in terms of Section 163-A of the MVA. In our considered opinion, the ratio of the aforesaid

decision is clearly applicable to the facts of the present case. In the present case, the deceased was not the owner of the motorbike in question. He borrowed the said motorbike from its real owner. The deceased cannot be held to be employee of the owner of the motorbike although he was authorised to drive the said vehicle by its owner, and therefore, he would step into the shoes of the owner of the motorbike.

A bare perusal of the said provision would make it explicitly clear that persons like the deceased in the present case would step into the shoes of the owner of the vehicle. In a case wherein the victim died or where he was permanently disabled due to an accident arising out of the aforesaid motor vehicle in that event the liability to make payment of the compensation is on the insurance company or the owner, as the case may be as provided under Section 163-A. But if it is proved that the driver is the owner of the motor vehicle, in that case the owner could not himself be a recipient of compensation as the liability to pay the same is on him. This proposition is absolutely clear on a reading of Section 163-A of the MVA. Accordingly, the legal representatives of the deceased who have stepped into the shoes of the owner of the motor vehicle could not have claimed compensation under Section 163-A of the MVA.

When we apply the said principle into the facts of the present case we are of the view that the claimants were not entitled to claim compensation under Section 163-A of the MVA and to that extent the High Court was justified in coming to the conclusion that the said provision is not applicable to the facts and circumstances of the present case. However, the question remains as to whether an application for demand of compensation could have been made by the legal representatives of the deceased as provided in Section 166 of the MVA. The said provision specifically provides that an application for compensation arising out of an accident of the nature specified in sub-section (1) of Section 165 may be made by the person who has sustained the injury; or by the owner of the property; or where death has resulted from the accident, by all or any of the legal representatives of the deceased; or by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be. When an application of the aforesaid nature claiming compensation under the provisions of Section 166 is received, the Tribunal is required to hold an enquiry into the claim and then proceed to make an award which, however, would be subject to the provisions of Section 162, by determining the amount of compensation, which is found to be just. Person or persons who made claim for compensation would thereafter be paid such amount. When such a claim is made by the legal representatives of the deceased, it has to be proved that the deceased was not himself responsible for the accident by his rash and negligent driving. It would also be necessary to prove that the deceased would be covered under the policy so as to make the insurance company liable to make the payment to the heirs.

Section 147 of the MVA provides that the policy of insurance could also cover cases against any liability which may be incurred by the insurer in respect of death or fatal injury to any person including owner of the vehicle or his authorised representative carried in the vehicle or arising out of the use of vehicle in the public place.

When we analyze the impugned judgment of the High Court in terms of aforesaid discussion, we find that the counsel for the insurance company himself contended before the High Court that the policy of insurance was an Act policy and the risk that is covered is only in respect of persons contemplated under Section 147 of the MVA. It is the finding of fact which we have also upheld in this Judgment that the deceased was authorised by the owner of the vehicle to drive the vehicle. When we examined the facts of the present case in view of the aforesaid submission made, we are of the opinion that such an issue was required to be considered by the High Court in the light of the facts and evidence adduced in the case. On consideration of the Judgment and Order passed by the High Court we find the same to be sketchy on the aforesaid issue as to whether the claim could be considered under the provisions of Section 166 of the MVA. In this connection, reference can be made to a judgment of this Court in the case of *Oriental Insurance Company Ltd. vs. Rajni Devi and others* (supra), wherein, it was held that where compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the insurance company would depend upon the terms thereof.

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55. MOTOR VEHICLES ACT, 1988 – Section 166
Motor vehicle accident case – Strict proof of accident caused by a particular vehicle in a particular manner may not be possible – The standard of proof beyond reasonable doubt could not be followed – Claimants can establish their case merely on touchstone of preponderance of probability.

Bimla Devi & Ors. v. Himachal Road Transport Corpn. & Ors.
Judgment dated 15.04.2009 passed by the Supreme Court in Civil Appeal No. 2538 of 2009, reported in AIR 2009 SC 2819

Held:

The deceased was a Constable. Death took place near a police station. The post mortem report clearly suggests that the deceased died of a brain injury. The place of accident is not far from the police station. It is, therefore, difficult to believe the story of the driver of the bus that he slept in the bus and in the morning found a dead body wrapped in a blanket. If the death of a constable has taken place earlier, it is wholly unlikely that his dead body in a small town like Dharampur would remain undetected throughout the night particularly when it was lying at a bus stand and near a police station. In such an event, the court can presume that the police officers themselves should have taken possession of the dead body.

The learned Tribunal, in our opinion, has rightly proceeded on the basis that apparently there was absolutely no reason to falsely implicate the respondent Nos.2 and 3. Claimant was not at the place of occurrence. She, therefore, might not be aware of the details as to how the accident took place but the fact that the First Information Report had been lodged in relation to an accident could not have been ignored. Some discrepancies in the evidences of the claimant's witnesses might have occurred but the core question before the Tribunal and consequently before the High Court was as to whether the bus in question was involved in the accident or not. For the purpose of determining the said issue, the Court was required to apply the principle underlying burden of proof in terms of the provisions of Section 106 of the Indian Evidence Act as to whether a dead body wrapped in a blanket had been found at the spot at such an early hour, which was required to be proved by the respondent Nos.2 and 3.

In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties.

The judgment of the High Court to a great extent is based on conjectures and surmises. While holding that the police might have implicated the respondents, no reason has been assigned in support thereof. No material brought on record has been referred to for the said purpose.

For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly.

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56. N.D.P.S. ACT, 1985 – Sections 8, 18, 20 (B) (i) & (ii)
Recovery and seizure of contraband substance from house – Requisite evidence to prove the guilt of accused – Police Officials raided the house allegedly belonging to the appellant/accused and recovered contraband substance from the house – Even assuming for a moment the house belonged to the appellant/accused and was in his possession, the prosecution was further required to show that the appellant/accused had exclusive possession of the contraband inasmuch as a large number of persons including the appellant/ accused were living in the house – Legal position explained.

Om Prakash @ Baba v. State of Rajasthan
Judgment dated 25.08.2009 passed by the Supreme Court in Criminal Appeal No. 575 of 2009, reported in (2009) 10 SCC 632

Held :

The prosecution story is as under: on 11-9-1999 at about 7.00 a.m., PW 11, Ram Chander, SHO, Kotwali Fatehpur and several other police officials raided the house allegedly belonging to the appellant to arrest Pankaj, his son in some criminal matter, and as they approached his residence, they saw the appellant who was present, attempting to run away. He was however apprehended and the house entered and searched and a huge quantity of charas, opium and gaanja were recovered from under a mattress in a newly-constructed room.

The trial court recorded a finding that the ownership and possession of the contraband in question had been proved beyond doubt, in the light of the fact that the witnesses had deposed that the recovery had been made from the house belonging to and in possession of the appellant and that the samples of the contraband had been properly sealed and kept in proper custody and having held as above, convicted and sentenced the appellant. An appeal taken to the High Court by the appellant did not succeed. The matter is now before us by special leave.

A bare perusal of the evidence aforementioned would reveal that the ownership and possession of the house and the place of recovery is uncertain. As a matter of fact PW 3 has categorically stated that the house from where the recovery had been made belonged to one Durga Bhanji and not to the appellant. Even assuming for a moment that the house did belong to the appellant and was in his possession, the prosecution was further required to show that the appellant had exclusive possession of the contraband as a very large number of persons including the appellant and five of his brothers, their children and their parents were living therein.

Admittedly, there is no evidence as to the appellant's exclusive possession. In this situation we find that the judgment cited by the learned counsel, that is, *Mohd. Aslam Khan v. Narcotics Control Bureau, (1996) 9 SCC 462* fully supports the plea on behalf of the appellant. We observe that in addition to the ocular evidence, the prosecution had also put on record a document pertaining to the ownership of the house, but this Court nevertheless held as under: (*Mohd. Aslam Khan* (Supra), SCC p. 465, para 9)

> "9. ... The prosecution did not bother to produce any independent evidence to establish that the appellant was the owner of the flat in question by producing documents from the Registrar's office concerned or by examining the neighbours. No statement has been made by the prosecution that in spite of the efforts taken by them, they could not produce the document or examine the neighbours to prove the ownership of the appellant relating to the flat in question. It is relevant to note here that two independent witnesses attested the panchnama. Only one of them was examined as PW 5 who did not support the prosecution

version and therefore was treated as hostile. In this case except the retracted statements of the appellant to connect the appellant with the house in question, no other independent evidence is available to sustain the finding of the learned Special Judge extracted in the beginning and confirmed by the High Court."

To our mind, the aforequoted observations clearly support the learned counsel for the appellant's argument. We find that there is no evidence on record to prove the appellant's ownership and possession of the premises and the contraband in question.

The appeal is accordingly allowed, the judgments of the courts below are set aside and the appellant acquitted.

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57. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
Offence u/s 138 of the Act, scope of – In absence of proof for establishing all the ingredients required to constitute an offence under Section 138 of the Act, issuance of cheque alone is not sufficient to bring the act within the sweep of the section – When it is established that the authority, as the drawer, had ceased to continue till the date it was presented for encashment.

Ramla Rusiya v. State of M.P. and another
Judgment dated 19.06.2009 passed by the High Court in Misc. Criminal Case No. 9408 of 2006, reported in 2009(4) MPLJ 638

Held :

Asserting that he was not the Proprietor of the Firm, the respondent took the defence that the cheque in question was dishonoured by the Bank for want of authority despite the fact that sufficient amount was available in the corresponding account. According to him, the power of attorney executed in the favour of Smt. Nirmala Devi, the Proprietor, authorizing him to withdraw the amount was cancelled much before the dishonour of cheque. To substantiate the plea S.G. Tripathi (D.W. 1), the then Accountant and Ramautar Pathak (D.W. 2), Munim of the Firm were examined.

A bare perusal of the judgment would reveal that the finding of not guilty was recorded in view of the following facts :-

(i) The demand notice was not issued within the prescribed period of fifteen days of receipt of information from the Bank regarding dishonour of cheque.

(ii) The post dated cheque was given by way of guarantee in respect of agreement dated 1-4-1999 (Exh. P-1).

There is yet another aspect of the matter justifying the acquittal that though not dealt with by learned Trial Magistrate also deserves consideration as under :-

Although the cheque was issued on behalf of M/s Vaibhav Enterprises yet, it was not arraigned as an accused. It is true that a Proprietary concern is neither a Company incorporated under the Companies Act, 1956 nor a Firm within the meaning of Section 4 of the Partnership Act, 1932, but in absence of averments as to whether the Firm was a registered Partnership Firm, its Proprietor namely Nirmala Devi ought to have been prosecuted for the dishonour of cheque. However, as explained by the Apex Court in *Anil Hada v. Indian Acrylic Ltd., AIR 2000 SC 145,* the complaint could not be dismissed simply because the Firm or its Proprietor was not impleaded as an accused. But the only fact that the respondent had issued the cheque, by itself, was not sufficient to attract penal liability for the offence under Section 138 as he was able to establish that his authority as the drawer had ceased to continue till the date it was presented for encashment. In other words, the applicant had failed to prove that the respondent had played some role at the time when the cheque was dishonoured (See : *DCM Financial Services Ltd. v. J.N. Sareen, 2009(1) MPLJ (SC) 593 = 2009(1) MPLJ (Cri.) (SC) 1 = AIR 2008 SC 2255*).

Moreover, section 138 of the Act covers only those cases wherein the cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank.

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58. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
The cheque in question was returned back by the Bank on one more ground that signature does not tally besides insufficient funds – Offence u/s 138 of Negotiable Instruments Act not made out.

Raj Kumar Shukla v. Subodh Agrahari
Judgment dated 08.09.2009 passed by the High Court in M.Cr.C. No. 6267 of 2008, reported in 2009 (5) MPHT 290

Held:

The question involved in this petition is that as the disputed cheque was returned on two grounds stating that:-

(i) The funds are insufficient, and

(ii) Drawers signature differs with the specimen signature.

Therefore, in such a situation complaint filed under Section 138 of the Act is maintainable or not is to be answered in this petition.

Learned Counsel of respondent submitted that impugned complaint was filed by respondent under Sections 420, 467 of IPC along with Section 138 of Negotiable Instruments Act with averment that applicant has deliberately signed

differently with the original signature but the JMFC has taken cognizance only under Section 138 of Negotiable Instruments Act, such objection can be decided only after recording of evidence by Trial Court.

The second question "drawers signature differs with the specimen signature" has been answered by the Apex Court in the matter of *Vinod Tanna and another v. Zaher Siddique and others, 2003 (1) MPLJ 373.* In this case drawers signature differs from the signature on record. Whether drawers signature differs or signature is incomplete, the result is the same that the cheque was dishonoured.

It is not every return of cheque which is made punishable by the provisions of Section 138 of Negotiable Instruments Act. After the said cheque is returned, for the reason it is referred to drawer for some other reasons e.g., the signature does not tally then the drawer of the cheque cannot be said to have committed an offence under Section 138 of the Negotiable Instruments Act and this being the legal position the Magistrate was not justified in issuing process for an offence punishable under Section 138 of the Negotiable Instruments Act.

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59. NEGOTIABLE INSTRUMENTS ACT, 1881– Section 138
GENERAL CLAUSES ACT, 1897 – Section 9
Computation of period of 30 days – Date on which cheque was returned and received by the complainant has to be excluded.

Sanjay Gawalani v. Sunil Satwani
Judgment dated 29.04.2009 passed by the High Court in M.Cr.C. No. 5841 of 2008, reported in I.L.R. (2009) M.P. 2731

Held:

In the case of *Saketh India Ltd, v. India Securities Ltd.,* reported in *(1999) 3 SCC 1,* the Hon'ble Apex Court observed that where a particular time is given from a certain date within which an act is to be done, the day on that date is to be excluded; the effect of defining the period from such a day within which an act is to be done is to exclude the first day and to include the last day. This rule has been consistently followed and has been adopted in the General Clauses Act and the Limitation Act. Applying the said rule, the period of one month for filing the complaint will be reckoned from the day immediately following the day on which the period of 15 days from the date of the receipt of the notice by the drawer expires. The notice of bouncing of the cheque having been served on the drawer expires. The notice of bouncing of the cheque having been served on the drawer on 29.9.1995, the period of 15 days in the present case expired on 14.10.1995. So cause of action for filing complaint would arise from 15.10.1995. That day (15th October) is to be excluded for counting the period of one month. Therefore, the complaint filed on 15.11.1995 is within time. Further reliance has been placed on the decision of the Apex Court in the matter of *Tarun Prasad Chatterjee v. Dinanath Sharma,* reported in *AIR 2001 SC 36,* wherein

the dispute was relating to computation of period of limitation of filing of election petition, which has to be within a period of 45 days. While considering this aspect the Hon'ble Apex Court has held that Section 81 of Representation of Peoples Act indicating that petition is to be presented within 45 days from date of election. Word "from" is used indicating the beginning and the first day of the period, therefore, is to be excluded in view of Section 9 of General Clauses Act. On the strength of the aforesaid position of law, the petition is without any merits and deserves to be dismissed.

Keeping in view Section 9 of General Clauses Act and also keeping in view the law laid down by the Hon'ble Court and the fact that intimation in the present case was received on 25.1.2005 and the notice was issued on 24.2.2005, after excluding the day when the information was received, this Court is of the view that the notice was issued within thirty days, which is in accordance of proviso (b) of Section 138 of N I. Act.

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60. PREVENTION OF CORRUPTION ACT, 1988 – Sections 12 and 19 Previous sanction under Section 19 is not necessary for taking cognizance of an offence punishable under Section 12 of the Prevention of Corruption Act, 1988.

State through Central Bureau of Investigation v. Parmeshwaran Subramani and another

Judgment dated 11.09.2009 passed by the Supreme Court in Criminal Appeal No. 1758 of 2009, reported in (2009) 9 SCC 729

Held:

Section 19 of the Prevention of Corruption Act, 1988 deals with previous sanction for prosecution of an offence punishable under Sections 7, 10, 11 and 15 allegedly to have been committed by a public servant whereas Section 12 of the Act which provides for punishment for abetment of offences defined in Section 7 or Section 11 of the Act.

Section 12 of the Act, in clear and categorical terms, speaks that whoever abets any offence punishable under Section 7 or 11 whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term as provided thereunder. It is thus clear that abetment of any offence punishable under Section 7 or 11 is itself a distinct offence. The offence punishable under Section 7 or 11 whether actually committed by a public servant is of no consequence. It is precisely for the said reason Section 19 of the Act specifically omits Section 12 from its purview. The courts by process of interpretation cannot read Section 12 into Section 19 as it may amount to rewriting the very Section 19 itself.

It is settled law that where there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to undertake any exercise to read something into the provisions which the legislature in its wisdom

consciously omitted. Such an exercise if undertaken by the courts may amount to amending or altering the statutory provisions.

The language employed in Section 19 of the Act is couched in mandatory form directing the courts not to take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 only, alleged to have been committed by a public servant, except with the previous sanction of the Government.

The legislature consciously in its wisdom omitted the offence of abetment of any offence punishable under Section 7 or 11 of the Act thereby making its intention clear that no previous sanction as such would be required in cases of offence punishable under Section 12 of the Act.

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61. PREVENTION OF CORRUPTION ACT, 1988 – Sections 19 and 19 (3)

(i) Error, omission or irregularity in sanction order – High Court reversed the judgment of conviction on the ground of irregularity in passing of the sanction order – Held, no finding has been recorded showing serious failure of justice had been caused to respondent – High Court was not justified in setting-aside the judgment of conviction in absence of such finding – Matter remanded back to High Court to consider the appeal on merits and dispose of accordingly.

(ii) Proof of sanction – Sanction order was clearly passed by the District Magistrate in discharge of routine official functions – Hence, there is a presumption that the same was done in a bona fide manner –There was no requirement for the District Magistrate to be examined as a witness by the prosecution.

State of M.P. v. Jiyalal

Judgment dated 31.07.2009 passed by the Supreme Court in Criminal Appeal No. 1386 of 2009, reported in I.L.R. (2009) M.P. 2487 (SC)

Held:

In the case before us, even if it were to be accepted that there has been an error, omission or irregularity in the passing of the sanction order, the learned single judge of the High Court has not made a finding which shows that a serious failure of justice had been caused to the respondent. In the absence of such a finding it was not correct for the High Court to set aside the conviction and sentence given by the Special judge.

It was also not justified for the learned single judge to hold that the District Magistrate who had passed the sanction order should have been subsequently examined as a witness by the prosecution in order to prove the same. The sanction order was clearly passed in discharge of routine official functions and hence there is a presumption that the same was done in a bona fide manner. It was of course open to the respondent to question the genuineness or validity of

the sanction order before the Special Judge but there was no requirement for the District Magistrate to be examined as a witness by the prosecution.

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*62. **PREVENTION OF INSULT TO NATIONAL HONOUR ACT, 1971 – Section 2**
FLAG CODE OF INDIA, 2002
Offence of insult to the Indian National Flag – It was alleged that petitioner has exhibited the coffins of the soldiers covered by the National Flag in his film titled 'LOC Kargil' and that National Flags were wrongly used for covering the coffins.
Held, it is no where stated how the flag has to be used – The offence under Section 2 of the Act can only be constituted if any person within the public view burns, mutilates, defaces, disfigures, destroys, tramples upon or otherwise brings into contempt commits an offence under the Act – Further held, the Flag Code of India contains the executive instructions of the Central Government and the same are not to be considered as law.

J.P. Dutta v. Ravi Antarolia
Judgment dated 29.04.2009 passed by the High Court in M.Cr.C. No. 1973 of 2006, reported in 2009 (IV) MPJR 249

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63. **PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Sections 23 and 31**
PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE RULES, 2006 – Rules 5 and 6
Whether breach of order of interim maintenance under Section 23 of the Act is punishable under Section 31 of the Act? Held, Yes, as it amounts to breach of protection order.

Sunil @ Sonu v. Sarita Chawla (Smt.)
Judgment dated 31.08.2009 passed by the High Court in Criminal Revision No. 594 of 2009, reported in 2009 (5) MPHT 319

Held:

The interim order passed by the learned Trial Court regarding the payment of maintenance has attained finality. The only question, which requires consideration is whether the interim order passed by the learned Trial Court, whereby the maintenance was awarded is a protection order and on account of breach of protection order, the proceedings can be initiated against the petitioner under Section 31 of the Act. Section 18 of the Act empowers the Court for passing a protection order against a respondent, who commits any act of domestic violence. In exercise of the powers conferred by Section 37 of the Act the Central Govt. has framed the Rules. As per Rule 6 every application of the aggrieved person under Section 12 of the Act is required to be filed in Form 11. Sub-clause III of Form No.1 deals with economic violence according to which

not providing money for maintaining of food, clothes, medicine etc. is amounting to the economic violence for which the Court is empowered to pass a protection order. As per sub-section (1) of Section 28 of the Act the proceedings are required to be governed by the provisions of Cr.P.C. As per sub-section (2) of Section 28, the Court is not prevented from laying down its own procedure for disposal of an application of Section 12 of the Act. In the facts and circumstances of the case where no amount of maintenance has been paid by the petitioner, no illegality was committed by the learned Trial Court in initiating the proceedings under Section 31 of the Act.

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***64. REGISTRATION ACT, 1908 – Sections 17(1)(b), (c) & (2)(xi) and 49**

(i) Whether an unregistered document purporting to extinguish the mortgage deed can be said to be admissible in evidence without being registered? Held, No – Further held, as per the provisions of Section 17 (2) (xi), 17 (1) (b) & 17(1)(c) of the Registration Act, 1908, if the document (receipt) purports to extinguish the mortgage, it is compulsorily registerable at the relevant place. [See: *Seth Pratapsingh Mohalalbhai and another v. Keshavlal Harilal Setalwad and another, AIR 1935 Privy Council 21*]

(ii) Whether such a document is admissible in evidence for collateral purposes? Held, Yes – The document can be looked into for collateral purposes under the proviso to Section 49 of the Registration Act.

Koushal Kishore and another v. Krishnakant Chaturvedi and others

Judgment dated 15.09.2009 passed by the High Court in W.P. No. 7717 of 2007, reported in 2009 (4) MPLJ 698 (DB)

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65. RENT CONTROL & EVICTION:
CIVIL PROCEDURE CODE, 1908 – Section 41 and Rule 5

(i) The need for a more balanced and objective approach instead of a pro-tenant approach to the relationship between the landlord and tenant emphasized – Tenancy comes to an end on passing of the decree and does not continue until the tenant is actually evicted.

(ii) Stay of the execution of eviction decree, passed by the Courts below, cannot be asked as of right – The Appellate/Revisional Court may direct to pay monthly rent at a rate higher than the contractual rent – Cautions and procedure to be followed stated.

State of Maharashtra and another v. Super Max International Private Limited and others

Judgment dated 27.08.2009 passed by the Supreme Court in Civil Appeal No. 5835 of 2009, reported in (2009) 10 SCC 772 (3-Judge Bench)

Held:

The way this Court has been looking at the relationship between the Landlord and the Tenant in the past and the shift in the Court's approach in recent times have been examined in some detail in the decision in *Satyawati Sharma v. Union of India & Anr., (2008) 5 SCC 287.* In that decision this Court referred to a number of earlier decisions of the Court and (in paragraph 12 of the judgment) observed as follows: (SCC pp. 304-05)

> "12. Before proceeding further we consider it necessary to observe that there has been definite shift in the Court's approach while interpreting the rent control legislations. An analysis of the judgments of 1950s to early 1990s would indicate that in majority of cases the courts heavily leaned in favour of an interpretation which would benefit the tenant- *Mohinder Kumar v. State of Haryana, (1985) 4 SCC 221, Prabhakaran Nair v. State of T.N., (1987) 4 SCC 238, D.C. Bhatia v. Union of India, (1995) 1 SCC 104* and *C.N. Rudramurthy v. K. Barkathulla Khan, (1998) 8 SCC 275.* In these and other cases, the Court consistently held that the paramount object of every rent control legislation is to provide safeguards for tenants against exploitation by landlords who seek to take undue advantage of the pressing need for accommodation of a large number of people looking for a house on rent for residence or business in the background of acute scarcity thereof. However, a different trend is clearly discernible in the later judgments."

This Court then referred to some later decisions and (in para 14 at SCC p. 306 of the judgment) quoted a passage from the decision in *Joginder Pal v. Naval Kishore Behal, (2002) 5 SCC 397,* to the following effect: (*Joginder Pal case,* SCC p. 404, para 9)

> "14. ... '9. .... The courts have to adopt a reasonable and balanced approach while interpreting rent control legislations starting with an assumption that an equal treatment has been meted out to both the sections of the society. In spite of the overall balance tilting in favour of the tenants, while interpreting such of the provisions as take care of the interest of the landlord the court should not hesitate in leaning in favour of the landlords. Such provisions are engrafted in rent control legislations to take care of those situations where the landlords too are weak and feeble and feel humble."

Commenting upon the Full Bench decision of the Delhi High Court that had upheld the Constitutional validity of Section 14(1)(e) of the Delhi Rent Control Act and that came under challenge in *Satyawati Sharma v. Union of India, (2008) 5 SCC 287,* this Court (in para 29 of the judgment) observed as follows: (SCC p. 318)

"29. ... It is significant to note that the Full Bench did not, at all, advert to the question whether the reason/cause which supplied rationale to the classification continued to subsist even after lapse of 44 years and whether the tenants of premises let for non-residential purposes should continue to avail the benefit of implicit exemption from eviction in the case of bona fide requirement of the landlord despite see-saw change in the housing scenario in Delhi and substantial increase in the availability of buildings and premises which could be let for non-residential or commercial purposes."

The decision in *Satyawati Sharma* (supra) then referred to the doctrine of temporal reasonableness and in para 32 observed as follows: (SCC p. 320)

"32. It is trite to say that legislation which may be quite reasonable and rational at the time of its enactment may with the lapse of time and/or due to change of circumstances become arbitrary, unreasonable and violative of the doctrine of equality and even if the validity of such legislation may have been upheld at a given point of time, the Court may, in subsequent litigation, strike down the same if it is found that the rationale of classification has become non-existent."

We reaffirm the views expressed in *Satyawati Sharma* and emphasise the need for a more balanced and objective approach to the relationship between the landlord and tenant. This is not to say that the Court should lean in favour of the landlord but merely that there is no longer any room for the assumption that all tenants, as a class, are in dire circumstances and in desperate need of the Court's protection under all circumstances.

In an appeal or revision, stay of execution of the decree(s) passed by the court(s) below cannot be asked for as of right. While admitting the appeal or revision, it is perfectly open to the court, to decline to grant any stay or to grant stay subject to some reasonable condition. In case stay is not granted or in case the order of stay remains inoperative for failure to satisfy the condition subject to which it is granted, the tenant-in-revision will not have the protection of any of the provisions under the Rent Act and in all likelihood would be evicted before the revision is finally decided. In the event the revision is allowed later on, the tenant's remedy would be only by way of restitution.

In *Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd., (2005) 1 SCC 705,* the Court framed two issues arising for consideration as follows: (SCC p. 714, para 10)

> "10. .... This submission raises the following two issues: (i) in respect of premises enjoying the protection of rent control legislation, when does the tenancy terminate; and (ii) up to what point of time is the tenant liable to pay rent at the contractual rate and when does he become liable to pay compensation for use and occupation of the tenancy premises unbound by the contractual rate of rent to the landlord?"

The Court answered the first issue as follows: [*Atma Ram Properties case (supra), SCC pp. 716-17, para 16*]

> "16. We are, therefore, of the opinion that the tenant having suffered a decree or order for eviction may continue his fight before the superior forum but, on the termination of the proceedings and the decree or order of eviction first passed having been maintained, the tenancy would stand terminated with effect from the date of the decree passed by the lower forum. In the case of premises governed by rent control legislation, the decree of eviction on being affirmed, would be determinative of the date of termination of tenancy and the decree of affirmation passed by the superior forum at any subsequent stage or date, would not, by reference to the doctrine of merger have the effect of postponing the date of termination of tenancy."

The second issue was answered as follows: [*Atma Ram Properties case* (supra), SCC p. 718, para 19]

> "(2) ... With effect from that date (the passing of the decree of eviction), the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree."

We are in respectful agreement with the decision of the Court in *Atma Ram Properties case* (supra).

In light of the discussions made above we hold that in an appeal or revision preferred by a tenant against a order or decree of an eviction passed under the

Rent Act it is open to the appellate or the revisional Court to stay the execution of the order or the decree on terms, including a direction to pay monthly rent at a rate higher than the contractual rent. Needless to say that in fixing the amount subject to payment of which the execution of the order/decree is stayed, the Court would exercise restraint and would not fix any excessive, fanciful or punitive amount.

Before concluding the decision one more question needs to be addressed: what would be the position if the tenant's appeal/revision is allowed and the eviction decree is set aside? In that event, naturally, the status quo ante would be restored and the tenant would be entitled to get back all the amounts that he was made to pay in excess of the contractual rent. That being the position, the amount fixed by the court over and above the contractual monthly rent, ordinarily, should not be directed to be paid to the landlord during the pendency of the appeal/revision. The deposited amount, along with the accrued interest, should only be paid after the final disposal to either side depending upon the result of the case.

In case for some reason the Court finds it just and expedient that the amount fixed by it should go to the landlord even while the matter is pending, it must be careful to direct payment to the landlord on terms so that in case the final decision goes in favour of the tenant the payment should be made to him without any undue delay or complications.

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***66. RIGHT TO INFORMATION ACT, 2005 – Sections 8(1), 8(1)(e), 8(1)(g) and 8 (1)(h)**

(i) Exemption from disclosure of information – Department claiming exemption under Section 8 (1) from disclosure of information regarding materials forming the basis for issuance of the charge-sheet and initiation of a D.E. – Held, a Govt. Servant has an access to the material forming basis of the charges and initiation of D.E., which can be utilized for his defence – It cannot be presumed that the D.E. gets impeded.

(ii) Exemption from disclosure of information – Disclosure of vigilance investigation report – Department claiming exemption on the basis of fiduciary relationship – Held, Vigilance Department is not a private secret service but an establishment operating under the rules – It, therefore, cannot be said that a fiduciary relationship exist between the Vigilance Department and other departments of Union of India as would deprive an employee, who has been subjected to a D.E. on the basis of Vigilance Department's investigation report, to have an access to the information or the record.

(iii) Exemption from disclosure of information – Department claiming exemption on the basis that the disclosure of information sought for would endanger the life or physical safety of person associated with the investigation – Held, no such material is brought on record to justify the averments – Since the investigation report forms the basis of initiation of a D.E., it cannot be presumed that the report was submitted for law enforcement or for security purposes.

(iv) Exemption from disclosure of information – Department claiming exemption on the basis that grant of information would impede the powers of investigation or apprehension on prosecution of offenders and being the basic document on which charges were framed, will affect the prosecution – Held, there is no chance for impeding process of investigation as apprehended, because already a charge-sheet has been framed and the D.E. is initiated.

Union of India v. Central Information Commissioner & anr.

Judgment dated 17.06.2009 passed by the High Court in W.P. No. 5704 of 2009, reported in I.L.R. (2009) M.P. 2824

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*67. SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 3 (1) (x)
EVIDENCE ACT, 1872 – Section 76
CRIMINAL PROCEDURE CODE, 1973 – Section 154
Offences under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Caste, proof of – As per provision of Section 76 of the Evidence Act, caste certificate cannot be treated as a public document – Prosecution is required to prove the same as other documents are proved in a criminal case – Further held, accused can be convicted under the provisions of the Act on proving the facts by prosecution with reliable and admissible evidence that the complainant belongs to the caste notified and covered under the Act and also that the accused is not covered under the caste notified in the Act.

Mangal Singh & ors. v. State of M.P.

Judgment dated 02.03.2009 passed by the High Court in Criminal Appeal No. 1701 of 1997, reported in I.L.R. (2009) M.P. 2671

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*68. **SERVICE LAW:**

Departmental enquiry – Disagreement of Disciplinary Authority with the finding of Enquiry Officer, procedure therefor – In departmental enquiry, Enquiry Officer held some of the charges as partly proved – Disciplinary Authority was of the opinion that all the charges had been fully proved and therefore, imposed the penalty of compulsory retirement on the delinquent employee – Held, before recording disagreement with the finding of the Enquiry Officer, the Disciplinary Authority was required to convey tentative reasons therefor to the delinquent employee – Further held, reasonable opportunity of being heard ought to have been given to the concerned employee before passing the order as to compulsory retirement – Relying on *Punjab National Bank and others v. Kunj Behari Misra, AIR 1998 SC 2713* **and** *Smt. Nilu and others v. M.P.S.E.B and others, (2009) 2 MPLJ 632,* **the order of Disciplinary Authority quashed.**

Kailash Chandra v. State of M.P. and Ors.

Judgment dated 28.08.2009 passed by the High Court in W.P. No. 7225 of 2007, reported in 2009 (4) MPLJ 554

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69. **STAMP ACT, 1899 – Sections 2 (5) and 2 (22)**
TRANSFER OF PROPERTY ACT, 1882 – Section 3
INDIAN SUCCESSION ACT, 1925 – Section 63 (c)

(i) **The term "attested", connotation of – The definition of the word "attested" in Section 63 (c) of the Indian Succession Act, 1925 and in Section 3 of the Transfer of Property Act, 1882 is similar – It means that a document is signed by two or three persons as witnesses, each of whom has seen the executant sign or affix thumb mark to the instrument in the presence and by the direction of the executant, a personal acknowledgment of his signature or mark or of the signature of such other person and each of whom has signed the instrument in the presence of the executant, but it shall not be necessary that more than one of such witnesses shall have been present at the same time.**

(ii) **Authentication of a document by a Notary, effect and meaning of – Authentication by Notary is not mere attestation, but something more – It means that person authenticating has assured himself of the identity of the person who has signed the instrument as well as to the fact of execution – Authentication of Notary is to be treated as equivalent to affidavit of identity of the executant and no affidavit of the identity of the executant is necessary – Very function of a Notary is to**

authenticate document to attest so as to ensure about as to the authenticity of the document, that would not make the Notary an attesting witness – Notary by affixing his seal, renders only authenticity to the document – He does not have *animo attestandi.*

Ram Kishan Dwivedi v. Rohni Prasad Tiwari and others
Judgment dated 27.08.2009 passed by the High Court in Writ Petition No. 1167 of 2007, reported in 2009 (5) MPHT 38 (DB)

Held:

Whether attestation by Notary would mean that he is a witness who has attested the document in the capacity of a witness. Attests means the Act of testifying; testimonial evidence, formal confirmation by signature, oath, etc.; administration of an oath. The signing by a witness to the signature of another of a statement that a document was signed in the presence of the witness. 'Attestation' is the signing by a witness to the signature of another of a stage that a document was signed in the presence of the witness. To attest is literally to witness any act or event but the term is not exclusively applied to the signature of the executant of a document Attestation of the signature, sealing or delivery of deed is not necessary to make a deed as such valid but in case of some instruments notably, wills, bills of sale, attestation is required by statute. The definition of the word "attested" in Section 63 (c) of the. Succession Act, 1925 and in Section 3 of the Transfer of Property Act, 1882 is similar. In these Acts, he word "attested" means that a document is signed by 2 or 3 persons as witnesses, each of whom has seen the executant sign or affix his thumb mark to the instrument in the presence and by the direction of the executant, a personal acknowledgment of his signature or mark or of the signature of such other persons and each of whom has signed the instrument in the presence of the executant, but it shall not be necessary that more than one of such witnesses shall have been present at the same time. Authentication by a Notary is not mere attestation, but something more. It means that person authenticating has assured himself of the identity of the person who has signed the instrument as well as to the fact of execution. Authentication of Notary is to be treated as equivalent to affidavit of identity of the executant and no affidavit of the identity of the executant is necessary.

The Apex Court in *M.L. Abdul Jabbar Sahib v. H. Venkata Sastri and Sons and others etc., AIR 1969 SC 1147,* has considered the definition of word "attested" in Section 3 of the Transfer of Property Act and has laid down that to attest is to bear witness to a fact. The essential conditions of a valid attestation under Section 3 of T.P. Act are : (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential

that the witness should have put his signature "animo attestandi", that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a Registering Officer, he is not an attesting witness, thus, he could not be said to be attesting witness at all.

In our opinion, very function of Notary is to authenticate document to attest so as to ensure about as to the authenticity of the document, that would not make the Notary or Registering Officer or as the case may be or identifier an attesting witness, thus, it could not be said from the reading of the document in question in instant case that Notary was attesting witness and had the "animo attestandi". There is no mention in the document that document was signed in the presence of the Notary. Notary affixed the seal that document was read over and admitted to be correct, thus, Notary by affixing his seal renders only authenticity to the document, he was not having animo attestandi. Counsel for respondent submitted that Notary has filed affidavit that he had attested document. No doubt he has attested document as Notary but not as attesting witness. What is mentioned in the document has to be seen so as to construe the nature of the document, thus, filing of affidavit cannot change nature of document as it stands.

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70. STAMP ACT, 1899 – Article 35
TRANSFER OF PROPERTY ACT, 1882 – Section 105
Lease – Distinction between 'premium' and 'rent'.
When the interest of the lessor in immovable property is parted with for a price paid, whether in instalments or lumpsum, such price is premium.
As against this, periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of 'rent'.

Rakesh Singare v. State of Madhya Pradesh and others
Judgment dated 05.01.2009 passed by the High Court in Writ Petition No. 19089 of 2006, reported in 2009 (5) MPHT 207

Held:

Section 105 of the Transfer of Property Act defines "lease" and also "premium" and "rent". When the interest of the lessor in immovable property is parted with for a price, the price paid is "premium". Such a payment can be made in instalments also. As against this, periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of "rent".

Supreme Court in the matter of *Commissioner of Income-tax, Assam v. The Panbari Tea Co. Ltd.* reported in *AIR 1965 SC 1871* has considered the distinction between the premium and the rent and after referring to *AIR 1943 PC 153, AIR 1957 SC 729 and AIR 1961 SC 732* has held that:-

3. The distinction between premium and rent was brought out by the Judicial Committee in *Kamakshya Narain Singh v. Commr. of Income-tax, B. and O., (1943) 11 ITR 513* at p. 519 : *(AIR 1943 PC 153* at p. 156*)* thus:-

> "It (salami) is a single payment made for the acquisition of the right of the lessees to enjoy the benefits granted to them by the lease. That general right may properly be regarded as a capital asset, and the money paid to purchase it may properly be held to be a payment on capital account. But the royalties are on a different footing."

It is true that in that case the leases were granted for 999 years; but, though it was one of the circumstances, it was not a decisive factor in the Judicial Committee coming to the conclusion that the salami paid under the leases was a capital asset. This Court in *Member for the Board of Agriculture Income-tax, Assam v. Sindhurani Chaudhurani, (1957) 32 ITR 169 : (S) AIR 1957 SC 729,* defined "salami" as follows:-

> "The Indicia of salami are (1) its single non-recurring character, and (2) payment prior to the creation of the tenancy. It is the consideration paid by the tenant for being let into possession and can be neither rent nor revenue but is a capital receipt in the hands of the landlord. "it is true that in that case the payment was paid in a single sum, but that was not a conclusive test, for salami can be paid in a single payment or by instalments. The real test is whether the said amount paid in a lump sum or in instalments is the consideration paid by the tenant for being let into possession. This Court again in *Chintamani Saran Nath Sah Deo v. Commr. of Income-tax, Bihar and Orissa, 1961-41 ITR 506 at* p. 510 : *(AIR 1961 SC 732* at p. 735*)* considered all the relevant decisions on the subject in the context of licences granted to the assessee to prospect for bauxite in some cases for 6 months and in others for a year or two and observed:-
>
> > "The definition of salami was a general one, in that it was a consideration paid by a tenant for being let into possession for the purpose of creating a new tenancy."
> >
> > Applying that test this Court held in that case that under the said licences there was a grant of right to a portion of the capital of the licensor in the shape of a general right to the capital asset.

(1) In view of these three decisions it is not necessary to multiply citations.

> 5. Under Section 105 of the Transfer of Property Act, a lease of immovable property is a transfer of a right to enjoy the property made for a certain time, express or implied or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent. The section, therefore, brings out the distinction between a price paid for a transfer of a right to enjoy the property and the rent to be paid periodically to the lessor. When the interest of the lessor is parted with for a price, the price paid is premium or salami. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. The former is a capital income and the latter a revenue receipt. There may be circumstances where the parties may camouflage the real nature of the transaction by using clever phraseology. In some cases, the so-called premium is in fact advance rent and in others rent is deferred price. It is not the form but the substance of the transaction that matters. The nomenclature used may not be decisive or conclusive but it helps the Court, having regard to the other circumstances, to ascertain the intention of the parties.

Thus, when the interest of the lessor in immovable property is parted for the price, the price paid is premium but the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent.

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***71. TORTS:**

Consumer protection/medical negligence for criminal liability.
Medical negligence and principle regarding liability of the doctors – Reiterated.
Charge of professional negligence on a medical person is a serious one as it affects his professional status and reputation and as such the burden of proof would be more onerous. A doctor cannot be held negligent only because something has gone wrong. He also cannot be held liable for mischance or misadventure or for an error of judgment in making a choice when two options are available. The mistake in diagnosis is not necessarily a negligent diagnosis.

Even under the law of tort a medical practitioner can only be held liable in respect of an erroneous diagnosis if his error is so palpably wrong as to prove by itself that it was negligently arrived at or it was the product of the absence of reasonable skill and care on his part regard being to the ordinary level of skill in the profession. For fastening criminal liability very high degree of such negligence is required to be proved. Death is the ultimate result of all serious ailments and the doctors are there to save the victims from such ailments. Experience and expertise of a doctor are utilized for the recovery. But it is not expected that in case of all ailments the doctor can give guarantee of cure.

There cannot be, however, any doubt or dispute that for establishing medical negligence or deficiency in service, the courts would determine the following:

(i) No guarantee is given by any doctor or surgeon that the patient would be cured.

(ii) The doctor, however, must undertake a fair, reasonable and competent degree of skill, which may not be the highest skill.

(iii) Adoption of one of the modes of treatment, if there are many, and treating the patient with due care and caution would not constitute any negligence.

(iv) Failure to act in accordance with the standard, reasonable, competent medical means at the time would not constitute a negligence. However, a medical practitioner must exercise the reasonable degree of care and sill and knowledge which he possess. Failure to use due skill in diagnosis with the result that wrong treatment is given would be negligence.

(v) In a complicated case, the court would be slow in contributing negligence on the part of the doctor, if he is performing his duties to the best of his ability.

Bearing in mind the aforementioned principles, the individual liability of the doctors and hospital must be judged.

Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and others
Judgment dated 07.08.2009 passed by the Supreme Court in Criminal Appeal No. 1191 of 2005, reported in (2009) 9 SCC 221

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PART - III

CIRCULARS/NOTIFICATIONS

NOTIFICATION REGARDING ENFORCEMENT OF CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 2008

(5 OF 2009)

[Published in the Gazette of India, Ex. Pt. II, S. 3 (ii), dated 30.12.2009]

In exercise of the powers conferred by sub-section (2) of Section 1 of the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), the Central Government hereby appoints the 31st day of December, 2009 as the date on which the provisions of the said Act except Section 5, Section 6 and clause (b) of Section 21, shall come into force.

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NOTIFICATION REGARDING ENFORCEMENT OF GRAM NYAYALAYAS ACT, 2008

(4 OF 2009)

[Published in the Gazette of India, Extraordinary, Part II, Section 3 (i), No. 537, dated 15th September, 2009]

No S.O. 2313 (E), dated September 11, 2009. – In exercise of the powers conferred by sub-section (3) of Section 1 of the Gram Nyayalayas Act, 2008 (No. 4 of 2009), the Central Government hereby appoints the 2nd day of October, 2009, as the date on which the provisions of the said Act shall come into force in area to which this Act, as provided in sub-section (2) of Section 1 of the said Act 2008, extends.

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NOTIFICATION REGARDING CONSTITUTION OF MAINTENANCE TRIBUNAL FOR ADJUDICATING AND DECIDING UPON THE ORDER FOR MAINTENANCE UNDER SECTION 5 OF THE MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS ACT, 2007

(56 OF 2007)

[Published in M.P. Rajpatra (Asadharan) dated 2-7-2009 page 613]

Notification No. F.1-22-2009-XXVI-2 dated the 2nd July, 2009. – In exercise of the powers conferred by sub-section (1) of Section 7 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (No. 56 of 2007), the State Government, hereby, constitutes a Maintenance Tribunal for each District of the State for the purpose of adjudicating and deciding upon the order for maintenance under Section 5 of the Act. It shall be presided over by an officer not below the rank of Sub Divisional Officer of the District.

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Most successful men have not achieved their distinction by having some new talent or opportunity presented to them. They have developed the opportunity that was at hand.

– BRUCE BARTON

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 2008

No. 5 of 2009

[7th January, 2009]

[Received the assent of the President on the 7th January, 2009; assent first published in the Gazette of India (Extraordinary), dated 9th January, 2009]

An Act further to amend the Code of Criminal Procedure, 1973.

BE it enacted by Parliament in the Fifty-ninth Year of the Republic of India as follows :–

1. **Short title and commencement.**– (1) This Act may be called the Code of Criminal Procedure (Amendment) Act, 2008.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint; and different dates may be appointed for different provisions of this Act.

2. **Amendment of Section 2.**– In Section 2 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the principal Act), after clause (w), the following clause shall be inserted, namely:–

> '(wa) "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir;'.

3. **Amendment of Section 24.**– In Section 24 of the principal Act, in sub-section (8), the following proviso shall be inserted, namely:–

> "Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section."

4. **Amendment of Section 26.**– In Section 26 of the principal Act, in clause (a), the following proviso shall be inserted, namely: –

> "Provided that any offence under Section 376 and Sections 376A to 376D of the Indian Penal Code shall be tried as far as practicable by a Court presided over by a woman.".

5. **Amendment of Section 41.**– In Section 41 of the principal Act,–

(i) in sub-section (1), for clauses (a) and (b), the following clauses shall be substituted, namely:–

"(a) who commits, in the presence of a police officer, a cognizable offence:

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:–

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary–

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured,

and the police officer shall record while making such arrest, his reasons in writing.

(ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence."

(ii) for sub-section (2), the following sub-section shall be substituted, namely:–

"(2) Subject to the provisions of Section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or

reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate."

6. **Insertion of new Sections 41A, 41B, 41C and 41D.**– After Section 41 of the principal Act, the following new sections shall be inserted, namely:–

"**41A.(1) Notice of appearance before police officer.**– The police officer may, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at anytime, fails to comply with the terms of the notice, it shall be lawful for the police officer to arrest him for the offence mentioned in the notice, subject to such orders as may have been passed in this behalf by a competent Court.

41B. Procedure of arrest and duties of officer making arrest.– Every police officer while making an arrest shall –

(a) bear an accurate, visible and clear identification of his name which will facilitate easy identification;

(b) prepare a memorandum of arrest which shall be –

  (i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made;

  (ii) countersigned by the person arrested; and

(c) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest.

41C. Control room at districts.– (1) The State Government shall establish a police control room –

(a) in every district; and

(b) at State level

(2) The State Government shall cause to be displayed on the notice board kept outside the control rooms at every district, the names and addresses of the persons arrested and the name and designation of the police officers who made the arrests.

(3) The control room at the Police Headquarters at the State level shall collect from time to time, details about the persons arrested, nature of the offence with which they are charged and maintain a database for the information of the general public.

41D. Right of arrested person to meet an advocate of his choice during interrogation.– When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation."

7. Amendment of Section 46.– In Section 46 of the principal Act, in sub-section (1), the following proviso shall be inserted, namely:-

"Provided that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest."

8. Substitution of new section for Section 54.– For Section 54 of the principal Act, the following section shall be substituted, namely:–

"54. Examination of arrested person by medical officer.– (1) When any person is arrested, he shall be examined by a medical officer in the service of Central or State Government, and in case the medical officer is not available, by a registered medical practitioner soon after the arrest is made:

Provided that where the arrested person is a female, the examination of the body shall be made only by or under the supervision of a female medical officer, and in case the female medical officer is not available, by a female registered medical practitioner.

(2) The medical officer or a registered medical practitioner so examining the arrested person shall prepare the record of such examination, mentioning therein any injuries or marks of violence upon the person arrested, and the approximate time when such injuries or marks may have been inflicted.

(3) Where an examination is made under sub-section (1), a copy of the report of such examination shall be furnished by the medical officer or registered medical practitioner, as the case may be, to the arrested person or the person nominated by such arrested person."

9. Insertion of new Section 55A.– After Section 55 of the principal Act, the following section shall be inserted, namely:–

"**55A. Health and safety of arrested person.**– It shall be the duty of the person having the custody of an accused to take reasonable care of the health and safety of the accused."

10. Insertion of new Section 60A.– After Section 60 of the principal Act, the following section shall be inserted, namely:–

"**60A. Arrest to be made strictly according to the Code** – No arrest shall be made except in accordance with the provisions of this Code or any other law for the time being in force providing for arrest."

11. Amendment of Section 157.– In Section 157 of the principal Act, in sub-section (1), after the proviso, the following proviso shall be inserted, namely:–

"Provided further that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality."

12. Amendment of Section 161.– In Section 161 of the principal Act, in sub-section (3), the following provisos shall be inserted, namely:–

"Provided that statement made under this sub-section may also be recorded by audio-video electronic means."

13. Amendment of Section 164.– In Section 164 of the principal Act, in sub-section (1), for the proviso, the following provisos shall be substituted, namely:–

"Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:

Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force."

14. Amendment of Section 167.– In Section 167 of the principal Act, in sub-section (2), –

(a) in the proviso, –

(i) for clause (b), the following clause shall be substituted, namely: –

"(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage."

(ii) for *Explanation II*, the following *Explanation* shall be substituted, namely:-

"*Explanation II.*-If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorizing detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be.";

(b) after the proviso, the following proviso shall be inserted, namely:–

"Provided further that in case of a woman under eighteen years of age the detention shall be authorized to be in the custody of a remand home or recognized social institution."

15. Amendment of Section 172.– In Section 172 of the principal Act, after sub-section (1), the following sub-sections shall be inserted, namely:-

"(1A) The statements of witnesses recorded during the course of investigation under Section 161 shall be inserted in the case diary.

(1B) The diary referred to in sub-section (1) shall be a volume and duly paginated."

16. Amendment of Section 173.– In Section 173 of the principal Act,-

(a) after sub-section (1), the following sub-section shall be inserted, namely:–

"(1A) The investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded by the officer in charge of the police station.";

(b) in sub-section (2), after clause (g), the following clause shall be inserted, namely:–

"(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under Sections 376, 376A, 376B, 376C or 376D of the Indian Penal Code."

17. Insertion of new Section 195 A .– After Section 195 of the principal Act, the following section shall be inserted, namely:–

> **"195A. Procedure for witness in case of threatening, etc.** – A witness or any other person may file a complaint in relation to an offence under Section 195A of the Indian Penal Code."

18. Amendment of Section 198.– In Section 198 of the principal Act, in sub-section (6), for the words "fifteen years of age", the words "eighteen years of age" shall be substituted.

19. Amendment of Section 242.– In Section 242 of the principal Act, in sub-section (1), the following proviso shall be inserted, namely:–

> "Provided that the Magistrate shall supply in advance to the accused, the statement of witnesses recorded during investigation by the police."

20. Amendment of Section 275.– In Section 275 of the principal Act, in sub-section (1), the following proviso shall be inserted, namely:–

> "Provided that evidence of a witness under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of the offence."

21. Amendment of Section 309.– In Section 309 of the principal Act,–

(a) in sub-section (1), the following proviso shall be inserted, namely:–

> "Provided that when the inquiry or trial relates to an offence under sections 376 to 376D of the Indian Penal Code, the inquiry or trial shall, as far as possible, be completed within a period of two months from the date of commencement of the examination of witnesses.";

(b) in sub-section (2), after the third proviso and before *Explanation 1*, the following proviso shall be inserted, namely:–

"Provided also that –

(a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

(b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;

(c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness

and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be."

22. **Amendment of Section 313.**– In Section 313 of the principal Act, after sub-section (4), the following sub-section shall be inserted, namely:–

"(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section."

23. **Amendment of Section 320.**– In Section 320 of the principal Act,–

(i) in sub-section (1), for the TABLE, the following TABLE shall be substituted, namely:–

"TABLE

Offence	Section of the Indian Penal Code applicable	Person by whom offence may be compounded
1	2	3
Uttering words, etc., with deliberate intent to wound the religious feelings of any person.	298	The person whose religious feelings are intended to be wounded.
Voluntarily causing hurt.	323	The person to whom the hurt is caused
Voluntarily causing hurt on provocation.	334	Ditto
Voluntarily causing grievous hurt on grave and sudden provocation.	335	The person to whom the hurt is caused.
Wrongfully restraining or confining any person.	341, 342	The person restrained or confined.
Wrongfully confining a person for three days or more.	343	The person confined.
Wrongfully confining a person for ten days or more.	344	Ditto.
Wrongfully confining a person in secret.	346	Ditto.

1	2	3
Assault or use of criminal force.	352, 355, 358	The person assaulted or to whom criminal force is used
Theft.	379	The owner of the property stolen.
Dishonest misappropriation of property.	403	The owner of the property misappropriated.
Criminal breach of trust by a carrier, wharfinger, etc.	407	The owner of the property in respect of which the breach of trust has been committed.
Dishonestly receiving stolen property knowing it to be stolen.	411	The owner of the property stolen.
Assisting in the concealment or disposal of stolen property, knowing it to be stolen.	414	Ditto
Cheating.	417	The person cheated.
Cheating by personation.	419	Ditto
Fraudulent removal or concealment of property, etc., to prevent distribution among creditors.	421	The creditors who are affected thereby.
Fraudulently preventing from being made available for his creditors a debt or demand due to the offender.	422	Ditto.
Fraudulent execution of deed of transfer containing false statement of consideration.	423	The person affected thereby.
Fraudulent removal or concealment of property.	424	Ditto.
Mischief, when the only loss or damage caused is loss or damage to a private person.	426, 427	The person to whom the loss or damage is caused.
Mischief by killing or maiming animal.	428	The owner of the animal.
Mischief by killing maiming cattle, etc.	429	The owner of the cattle or animal.

1	2	3
Mischief by injury to works of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to private person.	430	The person to whom the loss or damage is caused.
Criminal trespass.	447	The person in possession of the property trespassed upon.
House-trespass	448	Ditto.
House-trespass to commit an offence (other than theft) punishable with imprisonment.	451	The person in possession of the house trespassed upon.
Using a false trade or property mark.	482	The person to whom loss or injury is caused by such use.
Counterfeiting a trade or property mark used by another.	483	Ditto
Knowingly selling, or exposing or possessing for sale or for manufacturing purpose, goods marked with a counterfeit property mark.	486	Ditto
Criminal breach of contract of service.	491	The person with whom the offender has contracted.
Adultery.	497	The husband of the woman.
Enticing or taking away or detaining with criminal intent as married woman.	498	The husband of the woman and the woman.
Defamation, except such cases as are specified against section 500 of the Indian Penal Code (45 of 1860) in column 1 of the Table under sub-section (2).	500	The person defamed.
Printing or engraving matter, knowing it to be defamatory.	501	Ditto

1	2	3
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter	502	Ditto
Insult intended to provoke a breach of the peace.	504	The person insulted.
Criminal intimidation.	506	The person intimidated.
Inducing person to believe himself an object of divine displeasure.	508	The person induced.";

(ii) in sub-section (2), for the TABLE the following TABLE shall be substituted, namely :-

"TABLE

Offence	Section of the Indian Penal Code applicable	Person by whom offence may be compounded
1	2	3
Causing miscarriage	312	The woman to whom miscarriage is caused.
Voluntarily causing grievous hurt.	325	The person to whom hurt is caused.
Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	337	Ditto
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	338	Ditto
Assault or criminal force in attempting wrongfully to confine a person.	357	The person assaulted or to whom the force was used.
Theft, by clerk or servant of property in possession of master.	381	The owner of the property stolen.

1	2	3
Criminal breach of trust.	406	The owner of property in respect of which breach of trust has been committed.
Criminal breach of trust by a clerk or servant.	408	The owner of the property in respect of which the breach of trust has been committed.
Cheating a person whose interest the offender was bound, either by law or by legal contract, to protect.	418	The person cheated.
Cheating and dishonestly inducing delivery of property or the making, alteration or destruction of a valuable security.	420	The person cheated.
Marrying again during the life-time of a husband or wife.	494	The husband or wife of the person so marrying.
Defamation against the President or the Vice-President or the Governor of a State or the Administrator of a Union territory or a Minister in respect of his public functions when instituted upon a complaint made by the Public Prosecutor.	500	The person defamed.
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman.	509	The woman whom it was intended to insult or whose privacy was intruded upon.";

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

"(3) When an offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) or where the accused is liable under section 34 or 149 of the Indian Penal Code may be compounded in like manner."

24. **Amendment of Section 327.**– In Section 327 of the principle Act,–

(a) in sub-section (2), after the proviso, the following proviso shall be inserted, namely :–

"Provided further that *in camera* trial shall be conducted as far as practicable by a woman Judge or Magistrate.";

(b) in sub-section (3), the following proviso shall be inserted, namely:–

"Provided that the ban on printing or publication of trial proceedings in relation to an offence of rape may be lifted, subject to maintaining confidentiality of name and address of the parties."

25. **Amendment of Section 328.**– In Section 328 of the principal Act,–

(a) after sub-section (1), the following sub-section shall be inserted, namely:–

"(*1A*) If the civil surgeon finds the accused to be of unsound mind, he shall refer such person to a psychiatrist or clinical psychologist for care, treatment and prognosis of the condition and the psychiatrist or clinical psychologist, as the case may be, shall inform the Magistrate whether the accused is suffering from unsoundness of mind or mental retardation:

Provided that if the accused is aggrived by the information given by the psychiatrist or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of –

(a) head of psychiatry unit in the nearest government hospital; and

(b) a faculty member in psychiatry in the nearest medical college.":

(b) for sub-section (3), the following sub-sections shall be substituted, namely :–

"(*3*) If such Magistrate is informed that the person referred to in sub-section (*1A*) is a person of unsound mind, the Magistrate shall further determine whether the unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate shall record a finding to that effect, and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if he finds

that no *prima facie* case is made out against the accused, he shall, instead of postponing the enquiry, discharge the accused and deal with him in the manner provided under section 330:

Provided that if the Magistrate finds that a *prima facie* case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the proceeding for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused, and order the accused to be dealt with as provided under section 330.

(4) If such Magistrate is informed that the person referred to in sub-section (1A) is a person with mental retardation, the Magistrate shall further determine whether the mental retardation renders the accused incapable of entering defence, and if the accused is found so incapable, the Magistrate shall order closure of the inquiry and deal with the accused in the manner provided under section 330."

26. Amendment of Section 329.– In Section 329 of the principal Act,–

(a) after sub-section (1), the following sub-section shall be inserted, namely:–

"(1A) If during trial, the Magistrate or Court of Sessions finds the accused to be of unsound mind, he or it shall refer such person to a psychiatrist or clinical psychologist for care and treatment, and the psychiatrist or clinical psychologist, as the case may be shall report to the Magistrate or Court whether the accused is suffering from unsoundness of mind:

Provided that if the accused is aggrieved by the information given by the psychiatrist or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of –

(a) head of psychiatry unit in the nearest government hospital; and

(b) a faculty member in psychiatry in the nearest medical college.";

(b) for sub-section (2), the following sub-sections shall be substituted, namely:–

"(2) If such Magistrate or Court is informed that the person referred to in sub-section (*1A*) is a person of unsound mind, the Magistrate or Court shall further determine whether unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate or Court shall record a finding to that effect and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if the Magistrate or Court finds that no *prima facie* case is made out against the accused, he or it shall, instead of postponing the trial, discharge the accused and deal with him in the manner provided under section 330:

Provided that if the Magistrate or Court finds that a *prima facie* case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the trial, for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused.

(3) If the Magistrate or Court finds that a *prima facie* case is made out against the accused and he is incapable of entering defence by reason of mental retardation, he or it shall not hold the trial and order the accused to be dealt with in accordance with section 330."

27. **Substitution of new Section 330.**– For section 330 of the principal Act, the following section shall be substituted, namely:-

"330. Release of person of unsound mind pending investigation or trial. – (*1*) Whenever a person if found under section 328 or section 329 to be incapable of entering defence by reason of unsoundness of mind or mental retardation, the Magistrate or Court, as the case may be shall, whether the case is one in which bail may be taken or not, order release of such person on bail:

Provided that the accused is suffering from unsoundness of mind or mental retardation which does not mandate in-patient treatment and a friend or relative undertakes to obtain regular out-patient psychiatric treatment from the nearest medical facility and to prevent from doing injury to himself or to any other person.

(2) If the case is one in which, in the opinion of the Magistrate or Court, as the case may be, bail cannot be granted or if an appropriate undertaking is not given, he or it shall order the accused to be kept in such a place where regular psychiatric treatment can be provided, and shall report the action taken to the State Government:

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the State Government may have made under the Mental Health Act, 1987.

(3) Whenever a person is found under section 328 or section 329 to be incapable of entering defence by reason of unsoundness of mind or mental retardation, the Magistrate or Court, as the case may be, shall keeping in view the nature of the act committed and the extent of unsoundness of mind or mental retardation, further determine if the release of the accused can be ordered:

Provided that –

(a) If on the basis of medical opinion or opinion of a specialist, the Magistrate or Court, as the case may be, decide to order discharge of the accused, as provided under section 328 or section 329, such release may be ordered, if sufficient security is given that the accused shall be prevented from doing injury to himself or to any other person;

(b) If the Magistrate or Court, as the case may be, is of opinion that discharge of the accused cannot be ordered, the transfer of the accused to a residential facility for persons of unsound mind or mental retardation may be ordered wherein the accused may be provided care and appropriate education and training."

28. Insertion of new Section 357A. – After section 357 of the principal Act, the following section shall be inserted, namely: –

"**357A. Victim Compensation Scheme** – (1) Every state government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1)

(3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit."

29. Amendment of Section 372. – In Section 372 of the principal Act, the following proviso shall be inserted, namely: –

"Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court."

30. Amendment of Section 416. – In Section 416 of the principal Act, the words "order the execution of the sentence to be postponed, and may, if it thinks fit" shall be omitted.

31. Insertion of new Section 437A. – After Section 437 of the principal Act, the following section shall be inserted, namely: –

> **"437A. Bail to require accused to appear before next appellate Court. –** (1) Before conclusion of the trial and before disposal of the appeal, the Court trying the offence or the Appellate Court, as the case may be, shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court and such bail bonds shall be in force for six months.
>
> (2) If such accused fails to appear, the bond stands forfeited and the procedure under Section 446 shall apply.".

32. Amendment of Form 45.– In the Second Schedule to the principal Act, in Form No. 45, after the figures "437", the figures and letter "437A" shall be inserted.

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M.P. MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS RULES, 2009

M.P. Maintenance and Welfare of Parents and Senior Citizens Rules, 2009 have been published at page 78 of Part II of MPLT September, 2009 issue. Readers are requested to kindly go through the Rules.

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