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FEBRUARY 2011 (BI-MONTHLY)

न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान
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JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE
HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

# JOTI JOURNAL FEBRUARY - 2011

# SUBJECT- INDEX

# PART-II
## (NOTES ON IMPORTANT JUDGMENTS)

## CRIMINAL TRIAL

# FROM THE PEN OF THE EDITOR

**J.P. Gupta**
**Director, JOTRI**

At the very outset let me wish all of you a VERY HAPPY AND PROSPEROUS NEWYEAR 2011. With the advent of this year, the Journal has completed 16 years since its first publication.

Our Constitution in Article 51-A. Clause (i) says that – "It shall be the duty of every citizen of India to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement". We have to aim high because it implies an obligation to achieve excellence in all our activities without which we cannot reach our goal. It is human nature to crave for excellence. All living creatures can aspire and achieve perfection but it is only human being who can achieve excellence. Excellence can be achieved only when there is no selfishness. If we have been destined to be Judges then we have to strive to become a good Judge. We have to earn recognition from the members of the bar, litigants, our colleagues and the society and admired as good Judges. This is a great reward for our labour and sacrifices that are made by us.

All of us cannot have high skills in every aspect of law. But then that skill has to be sharpened so that dust does not collect in our life of law and gradually smear its shine. The search for truth plays a very important role. That is reflected at its height in legal profession of which we are a part in its wider connotation.

As a Judge we should have the expertiseness in the field of law, with the qualities of wisdom, fearlessness, courage and impartiality. The quest for lore is an unending process. Our profession is also not aloof in this matter. We have to keep ourselves abreast with the positive changes and advancements in the field of law. We are required to keep in view what is right according to the ethical principles, morality of society and the material evidence brought on record. We have to give paramount importance to justice and has to decide the case on the basis of ethical principles. Sentencing should neither be very severe nor mild. We should not let anger, lust, ignorance and greed to empower us.

The Institute in all its earnestness conducts training programmes, workshops and even at times symposiums. These programmes give us an opportunity to enhance our knowledge and sharpen our tools for better judging. They also provide a chance for participation, to exchange thoughts and to churn the fluid of problems to get the cream of solutions. The success of these programmes ultimately depends on the satisfaction of the participants that they are better equipped, more confident and enriched with not only the solutions but also the tricks of profession and extended their vision of justice.

Coming to the training activities, the Institute organized a *Workshop/ Symposium on Key Issues and Challenges regarding offence of Dishonour of Cheque u/s 138 N.I. Act* in the second week of the year 2011 which was soon followed by the two Training Programmes on *Application of Information & Communication Technology to District Judiciary.* Thereafter, *Refresher Course Training for Directly Appointed Additional District Judges* was organized in the second week of February, 2011 and *Refresher Course Training for Civil Judge Class II of 2007 Batch* to the third and fourth batches were organized. In the meantime, the Institute conducted regional level *Workshop/ Symposium on key issues and challenges under Protection of Women from Domestic Violence Act/Juvenile Justice (Care & Protection of Children Act* at Gwalior, Bhopal and Jabalpur respectively.

In this Journal, Part I contains an Article on *'Mediation – An Introduction'* by Hon'ble Mr. Justice R.V. Raveendran, Judge, Supreme Court of India alongwith some other articles. Part II is abound with pronouncements of Supreme Court and our High Court. Part III contains a notification regarding empowering the Sessions Court as a Children's Court for the purpose of providing speedy trial of offences against Children or of Violation of Child Rights. Part IV contains amendment on Personal Laws.

Time is too precious. Let us not waste a single minute or leave alone a single second without work. We have to achieve excellence in our field and for achieving excellence; one cannot idle away one's time doing nothing. A strong Judiciary is the foundation of a strong and better society. Through excellence only, we can achieve this. Let us all pledge and strive to make our judiciary very strong.

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## APPOINTMENT OF ADDITIONAL JUDGES IN HIGH COURT OF MADHYA PRADESH

*Hon'ble Shri Justice Giriraj Das Saxena and Hon'ble Shri Justice Tarun Kumar Kaushal have been administered the oath of office by Hon'ble Shri Justice Syed Rafat Alam, Chief Justice, High Court of Madhya Pradesh on 3rd January, 2011, as Additional Judges of High Court of Madhya Pradesh in a Swearing-in-Ceremony held in the High Court at Jabalpur.*

*Hon'ble Shri Justice Giriraj Das Saxena was appointed as Additional Judge of High Court of Madhya Pradesh. Born on 02.04.1952 at Mandsaur in Advocate Family of Shri Babu Bachchan Lalji Saxena, renowned Advocate of his time. After obtaining degrees of B.A. and LL.B., joined Bar on 19.11.1973 and started practice on Civil side at Mandsaur. Joined Judicial Service as Civil Judge Class-II on 18.08.1979. Was promoted as Additional District & Sessions Judge in the year 03.03.1992 Was granted Selection Grade on 08.05.1999 and Super Time Scale on 26.02.2006. Worked in different capacities at Ratlam, Jhabua, Indore, Alirajpur, Gwalior, Bhopal, Shahdol, Sehore, Narsinghpur and Dewas. Also worked as District Judge (Inspection & Vigilance) Indore. Prior to elevation, he was District & Sessions Judge, Dhar.*

*Took oath as Additional Judge of the High Court of Madhya Pradesh on 03.01.2011.*

*Hon'ble Shri Justice Tarun Kumar Kaushal was appointed as Additional Judge of High Court of Madhya Pradesh. Born on 08.09.1953 in Bombay. Son of Late Shri Uddhav Kumar Kaushal, Gwalior based poet and Freedom Fighter. Obtained B.Sc. and LL.B. degrees in the years 1974 and 1977, respectively. Won awards in debate and Moot Court competitions. Started practice in criminal side in the High Court of Madhya Pradesh in the year 1978. Joined Judicial Service on 20.08.1979. Was promoted as Additional District & Sessions Judge in the year 1992 and confirmed as District Judge in the Higher Judicial Services on 04.10.1997. Granted Selection Grade on 08.05.1999 and Super Time Scale on 26.02.2006. Worked in different capacities at Bhind, Morena, Sardarpur (Dhar), Sanwer (Indore), Ujjain, Indore, Dhar, Mandleshwar, Khargone and Khandwa. Also worked as President, District Consumer Forum, Guna and Additional Welfare Commissioner, Bhopal Gas Victims, Bhopal. Also worked in different capacities in the High Court Registry at main seat Jabalpur from 2007 as O.S.D., Principal Registrar (Inspection & Vigilance) and was Registrar General of the High Court of M.P prior to his elevation.*

*Took oath as Additional Judge, High Court of Madhya Pradesh on 03.01.2011.*

***We on behalf of JOTI Journal wish Their Lordships a very happy and successful tenure.***

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# PART - I

## MEDIATION — AN INTRODUCTION

**By Hon'ble Shri Justice R.V. Raveendran**
Judge Supreme Court of India & Chairman,
Mediation & Conciliation Project Committee

There are two types of dispute resolution. The first is by adjudication, a binding-process resulting in a decision by a third party. The second is by negotiations, a non-binding process dependent upon the volition of parties, which if successful, does not result in a 'decision', but in a 'solution' agreeable to the parties.

2. A binding dispute resolution can be achieved in two ways. First is adjudication by a public forum (courts or statutory tribunals). Second is adjudication by a private forum (Arbitral Tribunals). In the first method, a party raises a dispute by petitioning to the court or statutory tribunal, presided by adjudicator/s appointed by the State, for a decision. The parties have no choice in the selection of the adjudicator and the decision-making is governed by the procedural laws and the decision is based on the substantive laws of the country. In the second method, a reference is made to an Arbitral Tribunal consisting of person/s chosen by the parties for adjudication and decision. The adjudication process is governed by the Arbitration and Conciliation Act, 1996. The decision of the Arbitral Tribunal is based on the substantive laws, unless parties authorise the Arbitral Tribunal to decide the disputes *ex acquo et bono* or as amiable compositeur. In the binding mode, there is always a certainty of a decision with one party ending up the winner and the other being the loser. However, the decision may or may not be to the liking of one of the parties, or sometimes both parties. Usually, the decision is open to challenge before an appellate or other forum as provided by law.

3. The non-binding dispute resolution can also be by two methods – either by direct negotiations or by negotiations with the assistance of a neutral third party. Direct negotiations are the process by which parties to a dispute endeavour to settle it by adopting a friendly and unantagonistic attitude towards each other. There are no set rules governing this mode of settlement. Any agreement reached is governed by the Contract Act, 1872. Negotiations with the assistance of a neutral third party can be by any of the three modes – Mediation, Conciliation and Lok Adalats.

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- This article was provided by the National Judicial Academy to the participants in its programme.

4. The frequently asked questions about mediation are: What is so important about mediation? If mediation is given importance, will not courts and lawyers become redundant? What cases are suitable for mediation? Who should be mediators? What happens in mediation? Who are mediators?

**Mediation** *vis-a-vis* **litigation**

5. If the advantages of mediation (or any non-adjudicatory dispute resolution process) are to be highlighted, it will be necessary to set out the disadvantages of litigation as a dispute resolution process. But that does not mean that the adjudicatory process by way of litigation in courts is outdated, impractical or has lost its relevance. It only means that for certain categories of litigation, non-adjudicatory dispute resolution process is better suited and beneficial to the parties. The question therefore is not whether mediation is better or litigation is better. The question should be: "which process is more suited for a particular type of dispute?"

6. Criminal cases, cases involving public interest, cases affecting a large number of persons, matters relating to taxation (direct and indirect) and administrative law have to be decided by courts by adjudicatory process. Even among civil litigations, cases involving fraud, forgery, coercion, undue influence, cases where a judicial declaration is necessary as, for example, grant of probate or letters of administration, representative suits which require declarations against the world at large, election disputes have to be necessarily decided through adjudicatory process by courts and not by negotiations.

7. On the other hand, settlement by negotiations would be the appropriate method of dispute resolution in the following types of civil cases:

(i) *Cases arising from soured personal relationships,* which including:
   - disputes relating to matrimonial causes, maintenance, custody of children;
   - disputes relating to partition/division among family members/ coparceners/co-owners; and
   - disputes relating to partnership among partners.

(ii) *Cases relating to commerce and contracts,* which include :
   - disputes arising out of contracts;
   - disputes relating to specific performance;
   - disputes between suppliers and customers;
   - disputes between bankers and customers;
   - disputes between developers/builders and customers;
   - disputes between landlords and tenants; and
   - disputes between insurer and insured.

(iii) *Cases where there is a need to maintain the pre-existing* relationship in spite of the disputes, which include :

- disputes between neighbours;
- disputes between employers and employees;
- disputes among members of societies/associations etc.;

(iv) *Cases arising out of tortious liability,* which include claims for compensation in motor accidents/other accidents; and

(v) *Consumer disputes* where a trader or service provider is keen to maintain his business/ professional reputation and credibility.

Of course, if the parties are willing, other categories of civil disputes may also be referred to mediation.

8. The relevance of mediation *vis-à-vis* the courts can be effectively brought out by some illustrations, by comparing a litigant approaching a court to a patient approaching a hospital for treatment.

8.1) A *patient approaching the hospital may have a serious ailment or a comparatively simpler life-style related ailment like hyper-tension. The patient with hyper-tension is normally treated by a physician as an out-patient by prescribing some medicines and by suggesting a regimen of diet and exercise. A patient with a serious ailment, on the other hand, is admitted to the hospital as an in-patient and subjected to surgery or other medical procedures. Imagine the reverse situation. It will be disastrous to admit a patient with a non-serious ailment to the hospital and subject him to a surgery. It will be equally disastrous if a patient in an emergency situation requiring surgery is treated as an out-patient by prescribing some medicine. The question is not whether treatment by a physician is better or treatment by a surgeon is better. The question is which type of treatment is required by the patient, having regard to the nature of his ailment.* Similarly, when a litigant approaches a court, what requires to be seen is whether the dispute requires to be adjudicated by a court or could be settled by mediation. If the dispute falls under the category of cases suited for mediation, it has to be referred to mediation.

*8.2) Let us look at the matter from another angle. Let us assume that the Government, wanting to provide medical facilities to the residents of a town, establishes a 25 Bed Hospital with an operation theatre and assigns a surgeon to attend to the patients. Will it serve the needs of the residents? The answer obviously is 'No'. The hospital should not only be equipped with an operation theatre but also with an out-patient clinic. It is not sufficient to have only a surgeon to perform surgeries, but also a physician to treat ailments which do not require surgery. In fact, the number of patients requiring prescription of medicines and medical advice will be many times more than those who have to be admitted as in-patients and subjected to surgery. Of course, if the physician finds that the patient is suffering*

*from a serious ailment requiring surgery, he may refer him to the surgeon. Imagine a hospital without a clinic and physician, but only an operation theatre and a surgeon. Imagine what will happen if all persons with all types of ailments, howsoever minor they are, are admitted as in-patients and made to undergo surgery, simply because there is no physician to attend to them.* Courts without Mediation Centres are like hospitals without out-patient clinics and physicians. Courts should have Mediation Centres to settle those cases which do not require a trial and adjudication, so that the courts can concentrate upon those cases which require adjudication.

*8.3) Let us see from a third angle. A hospital has to choose which patients require in-patient care and which patients require out-patient care. If all and sundry patients who require only a prescription for medicine, are admitted as in-patients, merely because they are rich or because they wont to be admitted without ascertaining whether they require treatment as in-patients, the result will be that when really serious patients who require treatment as in-patients seek admission in the hospital, they will have to be sent back or made to wait for want of vacant beds for admission. As a result, the serious patients may die even before their treatment begins, as the much needed hospital facilities are hogged by non-needy patients who do not really require such facilities.* Similarly if cases which do not really require adjudication by trial and which are fit for negotiated settlements are not referred to mediation, those cases will fill the courts' board and take up the entire time of the court, thereby preventing courts from taking up cases which require their urgent attention and decision.

*8.4) Let us examine from yet another angle. When someone extols the benefits of yoga-cum-diet regimen for physical well being, it does not mean that hospitals and surgeries have become outmoded or redundant. It only means that yoga-cum-diet regimen can prevent ailments and can also cure when the ailments are not serious. But if the ailments are serious, in-patient treatment in a hospital is a must.* Similarly, when the advantages of mediation or the disadvantages of litigation are highlighted in the context of encouraging ADR processes, it does not mean that mediation is 'better' than adjudication by courts. It only means that the mediation is more suitable and appropriate for resolving certain types of disputes. For other types of cases, and in cases where mediation though appropriate, has failed, courts alone can provide a remedy.

9. The object of mediation is to offer to the litigant public, a speedy and satisfactory alternative dispute resolution process in certain types of civil cases. When the cases suitable for negotiated settlements are referred to mediation, the benefits are two-fold. First, the parties find an amicable solution by the negotiated settlement. Second, the courts will have more space to deal with cases which require to be adjudicated by courts. Building awareness regarding mediation and invoking mediation as an alternative dispute resolution process is only to supplement the functioning of courts, with reference to certain types

of civil cases. Mediation is not intended to, and in fact cannot, replace courts. With this clarification, we may proceed to see the need for urgency in introducing court annexed mediation.

**Mediation, Conciliation & Lok Adalats**

10. Mediation, Conciliation and Lok Adalat, are all basically non-adjudicatory dispute resolution processes, where a neutral third party renders assistance to the parties to the dispute to reach a satisfactory settlement. In all the three processes, the neutral third party listens to the parties, ascertains the facts and circumstances and the nature of dispute, identifies the causes for the difference or conflict and facilitates the parties to reach an amicable settlement.

10.1) Mediation is a non-binding, non-adjudicatory dispute resolution process, where a neutral third party renders assistance to the parties in conflict to arrive at a mutually agreeable solution. To put it differently, it refers to a voluntary and flexible negotiated conflict reduction process with the assistance of experts. It involves a structured negotiation where the mediator listens to the parties, ascertains the facts and circumstances as also the nature of the grievance, conflict or dispute, encourages the parties to open up to identify the causes therefor, creates a conducive atmosphere to enable the parties to explore various alternatives and ultimately facilitates the parties to find a solution or reach a settlement. In short, it is a professionally and scientifically managed negotiation process.

10.2) Conciliation is statutorily regulated by the Arbitration and Conciliation Act, 1996 but not defined by that statute. Section 67(1) of the Act however impliedly defines 'conciliation' as the assistance rendered by a conciliator to the parties to a dispute, in an independent and impartial manner, in their attempt to reach an amicable settlement of their dispute.

10.3) Where the reference by the court is to a forum consisting of two or more members a Judge (serving or retired) and others (preferably an advocate or social worker) constituted under Section 19 of the Legal Services Authorities Act, 1987 to facilitate the parties to the proceeding to arrive at a compromise or settlement, the settlement process as also the members constituting the third-party team facilitating the settlement, is known as a 'Lok Adalat'.

11. Though mediation and conciliation are the same in principle, in practice, conciliation and mediation are understood to be different processes. One view is that where the person facilitating the settlement also suggests the terms of settlement, the process becomes a conciliation; and where the person facilitating the settlement merely facilitated the disputing parties to arrive at a settlement without suggesting any terms, so that the parties themselves find a solution and reconcile their differences, the process is a mediation. There is also a diametrically opposite view, that is, where the third party facilitates a settlement by suggesting the terms on which the disputes may be resolved, the process is mediation and where the third party only attempts to bring the disputing parties

together to arrive at a settlement, the process is 'conciliation'. A third view is that both refer to the same process, and where the third party-facilitator is a non-professional (that is, a friend, relative, well-wisher) the process is 'conciliation', and where the third party-facilitator is professionally trained in assisting parties to settle disputes, the process is known as 'mediation'. The fourth view was that if the settlement process through a third party, is on a reference by a court in a pending litigation, it is mediation, and if the settlement is attempted with the help of a third party, it is called as 'conciliation'. In other words, a pre-litigation third party assisted negotiated settlement is 'conciliation' and a neutral third party assisted negotiated settlement in a pending litigation is a 'mediation'. But none of the four views is accurate.

12. There is no etymological difference between conciliation and mediation as both are processes relating to negotiated settlement with the assistance of third parties. The two words are considered to be interchangeable in other jurisdictions. In India, however, having regard to the provisions of the Arbitration and Conciliation Act, 1996 and the provisions of Section 89 of the Code of Civil Procedure, the terms 'conciliation' and 'mediation' have different connotations. If both parties to a dispute agree to negotiate with the help of a neutral third party (or third parties) to arrive at a settlement and appoint conciliators for that purpose, the process is a conciliation governed by the provisions of the Arbitration and Conciliation Act, 1996. Where in a pending suit, only one party is agreeable for negotiations and the other is not (or where neither party is agreeable for negotiations), and the court is of the view that the parties should attempt a settlement by negotiations with the assistance of a neutral third party, and refers the matter to an institution or to a third party for that purpose, then the resulting ADR process is termed as mediation. In other words, a conciliation is a negotiation process commenced with the consent of parties, where the conciliators are appointed by the parties themselves, under Section 64 of the Arbitration and Conciliation Act, 1996. When a settlement is arrived at by conciliation, it will have the status of an executable decree under Section 74 of the Arbitration and Conciliation Act, 1996. On the other hand, if a court refers a case to a mediation centre or a third party, to enable the parties to negotiate with the assistance of a neutral third party, the ADR process is a mediation. In mediation, the reference is by the court to the mediation centre or a mediator, either with or without the consent of the parties. In a mediation, the court retains control over the entire process, and settlement does not have the statutory status of a decree, consequently whatever settlement is arrived at the mediation, has to be is placed before the court and the court makes an order or decree in terms of the settlement.

13. The words "mediation" "conciliation" "lok adalat" and "judicial settlement" are defined in Section 89 of the Code of Civil Procedure. Mediation, conciliation and Lok Adalats are different *avatars* of negotiation process for arriving at a settlement, with the assistance of third parties. Though 'Conciliation' and 'Lok

Adalats' are governed by statutes – the first by the Arbitration and Conciliation Act, 1996 and the second by the Legal Services Authorities Act, 1987, 'Mediation' is not statutorily regulated and this is clear from Section 89 of the Code. Great confusion is however caused by the erroneous mix-up of the definitions of 'Mediation' and 'Judicial Settlement' in Section 89 of the Code. "Mediation" is erroneously defined in Section 89 of the Code as the process where the court effects a compromise between the parties by following the prescribed procedure. "Judicial settlement" is erroneously defined in Section 89 of the Code as reference to a third party, who will assist or facilitate the parties in arriving at a settlement. But the courts, lawyers and litigants have all recognised that mediation is the process where courts refers to a third party or institution, for facilitating the parties to the proceedings to arrive at a settlement. Amendment to Section 89 is an urgent necessity, as otherwise 'Mediation' as practiced and 'Mediation" as defined would be completely different. (For a more elaborate discussion on this aspect see the Article: "*Section 89 CPC: Need for an urgent relook*" by the author, published in 2007 (4) SCC (J) 23).

14. Mediation, Conciliation and Lok Adalats are not new to India. They have been in vogue in our villages from time immemorial as *Dispute Resolution Panchayats*. So long as the village wisemen, committed to the welfare of the villagers, were the panchayatdars, mediation by such panchayats flourished. Their neutrality, impartiality and wisdom enabled them to find a mutually acceptable solutions which benefited the parties to the conflict. But things began to change when respected village elders were gradually replaced by 'leaders' based on caste, money or political affinity, for whom neutrality and impartiality were not important. Instead of attempting to serve the interests of the parties to the dispute, they started flaunting their power by issuing fiats based on their superstitions, moral beliefs, political compulsions and personal financial interests and started enforcing them by imposing sanctions like ex-communication, honour-killing or levying penalties for disobedience or non-compliance. As a result, the system of such *panchayats* resolving disputes, slowly and steadily lost the respect, trust and confidence which they earlier enjoyed. Courts, functioning under codified laws, replaced them as arbiters of disputes.

**Why - Mediation - Disadvantages of adjudicatory process**

15. The dispute resolution by courts, as noticed above, is adjudicatory and adversarial in nature resulting in a binding decision, whether the parties like it or not. Litigants have identified the following six short-comings with reference to adjudication by courts: (a) delay in resolution of the dispute; (b) uncertainty of outcome; (c) inflexibility in the result/solution; (d) high cost; (e) difficulties in enforcement; and (f) hostile atmosphere. We may refer to each one of them briefly.

(a) *Delay in dispute resolution :* Courts function under procedural laws which were made to ensure fair play, uniformity and avoidance of judicial error.

The procedural laws encourage appeals, revisions and reviews. They permit the litigants to file a series of interlocutory applications which often results in the main matter being delayed or even lost sight of. Seeking adjournments and granting of adjournments is considered to be normal and routine. The proliferation of laws and increase in population have resulted in an increase in the volume of litigation. The overloaded judicial system is finding it difficult to cope up with the demands on it, having regard to the inherent limitations of the system placed by age-old procedural laws and several redundant or archaic substantive laws. The demands for more Judges, more courts, better infrastructure, and better laws have remained unfulfilled. Those laws were intended to ensure fair play, uniformity and avoidance of judicial error. They permit appeals, revisions, reviews, innumerable interlocutory applications, and adjournments. Civil disputes are fought for several decades through the hierarchy of courts. Delay has thus virtually become a part of the adjudicatory process. Delay leads to frustration and dissatisfaction among litigant public and erosion of trust and faith of the common man in the justice-delivery system. In commercial litigation, delay destroys businesses. In family disputes, delay destroys peace, harmony and health, thereby turning litigants into nervous wrecks.

(b) *Uncertainty of outcome* : The outcome of a case depends, among other things, on the facts, the legal position, the evidence that is let in, the ability and efficiency of the advocate, and the perception and capacity of the Judges at trial and appellate stages. The personal philosophy of the Judges also adds to the uncertainty and inconsistency in views. Benjamin Cardozo in *The Nature of the Judicial Process Lecture* I, put it aptly thus:

> "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction in thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions ..... It is often through these sub-conscious forces that Judges are kept consistent with themselves, and inconsistent with one another."

On account of their personal philosophies, some Judges are identified as acquitting Judges and some as convicting Judges; some as liberal and some as strict; some as pro-landlord and some as pro-tenant; some as pro-labour and others as pro-management. In the words of Mr. Fali S. Nariman, "Justice is so often a matter of perception on which opinions can genuinely differ" (*"Before Memory Fades....."* – published by Hay House India, 2010 Ed., p. 46). Resultantly, many cases similar on facts and law, end up with different results with different Judges. In short, there are several factors which may result in uncertainty in regard to the outcome. A litigant may win in the trial court, but lose in appeal. He may win in the trial court and the first appellate court, but may lose in a

further appeal. On the other hand, he may lose before the trial court as also in the first appellate court but succeed in a further appeal. The hierarchy of appeals and revisions leads to reversals and further reversals. These again lead to uncertainty as to what the result will be, when someone wants to initiate a legal action. Nothing is certain.

(c) *Inflexibility in the result/solution :* When a party with a grievance approaches a civil court, the decision is regulated by law. Courts cannot grant relief which is most beneficial to parties, nor a decision which is most convenient, just and equitable, but can only grant a relief or render a decision that is prescribed or permissible in law. As a result a party may succeed in a case but he may not be satisfied with the decision or result. A party to a conflict would therefore prefer a system which will enable him to find an amicable solution to the conflict or dispute, tailored to take note of his viewpoint, claims, hardships and conveniences, or which gives him choices in the solution.

(d) *High cost :* A court litigation means payment of court fee, lawyer's fee, clerical fee and expenditure for securing documents and witnesses. All this costs money. Mere expenditure of money is not sufficient. He must be willing to invest his time. Innumerable adjournments mean that many times of attendance in courts and visits to lawyers' office and consequential absence from work or business. He has to secure the documents and get witnesses and conduct the case. He has to stay motivated for decades and keep his lawyer 'motivated'. It is not realised that a litigation does not mean merely spending money and time, but also requires spending energy and staying committed. Dealing with the delay, procedural wrangles, technicalities, expenditure and the need to coordinate with lawyers and witnesses in a non-friendly atmosphere, requires considerable perseverance, commitment and energy to pursue the litigation.

(e) *Difficulties in enforcement :* It is said that the difficulties of a litigant often begin, not when he files a case but when he obtains a decree. The process of execution or enforcement is more arduous and time consuming than the main litigation. Pendency of executions for periods exceeding the time spent for obtaining the decree, are quite common. Many a time, a decision obtained by a plaintiff remains a paper decree and he never sees the real fruits of such decree. Because of the artificial division of suits into preliminary decree proceedings, final decree proceedings and execution proceedings, many Trial Judges tend to concentrate only upon the adjudication of the right (which is considered as a judicial function) and do not give importance to the final decree proceedings and execution proceedings (which are considered to be ministerial functions). The focus is on disposing of cases, rather than ensuring that the litigant gets the relief. Even among lawyers, importance is given only to securing of a decree and not securing of relief. Many lawyers handle suits only till preliminary decree, then make it over to their juniors to conduct the final decree proceedings and then to their clerks for conducting the execution proceedings. Many a time, a party exhausts his finances and energy by the time he secures the preliminary

decree and has neither the capacity nor the energy to pursue the matter to get the final relief. As a consequence, we have cases where the suits are decreed or preliminary decrees are granted within two or three years but the final decree proceeding and/or execution takes decades for conclusion. This is an area which contributes to the loss of credibility of the civil justice delivery system.

(f) *Hostile atmosphere :* The litigants find court's atmosphere intimidating and unfriendly. They find the procedures, complicated; the Judges, lawyers and the staff, discourteous; and the infrastructure, wholly inadequate with little or no facilities or amenities for them. They feel that no one in courts (Judges, Lawyers or staff) understands their difficulties, tensions, worries and no attempt is made to make the procedures and formalities user-friendly. The entire litigation process is structured in a manner where the litigant is required to adjust himself to the convenience of the Judges and lawyers rather than the courts and lawyers adjusting themselves to serve the common man.

16. The delay, the uncertainty and inflexibility, the technicalities and frequent changes in laws, the absence of choice in solutions, the hostile atmosphere in courts, the difficulties in execution and the enormous expenditure of time, energy and money associated with adjudicatory process take a toll on the litigant. Many a time, the litigant feels that the remedies, reliefs and solutions, are all illusive and elusive. This leads to frustration, dissatisfaction and erosion of faith in courts and the adjudicatory process. As a result, persons with grievances start looking for a quicker and satisfactory remedy. They are tempted to approach the underworld or unscrupulous elements in police and politics, to secure relief. This leads to criminalisation of civil society and weakens the rule of law. Therefore, there is an urgent need to introduce quicker alternative dispute resolution processes and also improve the adversarial adjudicatory process by giving speedy, satisfactory and cost-effective justice.

17. Weaker and downtrodden sections of the society, who are subjected to injustices, being ignorant of their rights and remedies, and not being able to get effective and speedy justice, tend to take law into their own hands. Several disputes which ought to have found solution in civil litigations end up in crimes. It has, therefore, become necessary to educate the weaker and downtrodden sections of the society, about their rights and obligations, as also about the remedies and fora that are available for securing justice, and also make available free legal aid to approach relevant fora, for securing relief. When there is a gradual increase in such awareness, there will be more and more seekers of justice demanding enforcement of rights and claiming equitable and effective distribution of nation's resources. The overloaded adjudicatory dispute resolution process will not be capable of effectively taking such additional load, resulting in further frustration and again driving justice-seekers towards extra-judicial remedies.

**What is required to be done?**

18. There is, therefore, an urgent need to make available alternative dispute resolution processes for civil litigation, capable of providing speedy justice and effective and efficient solutions. There is an urgent need to create 'space' in courts for accommodating cases which require trials, which require adjudication and which require speedy decisions.

19. Let us look at the causes for civil disputes and litigations. Conflict, and disharmony lead to 'differences'. When there are differences, there are three possibilities. The parties may sort out the differences. They may ignore and bury the differences. They may escalate the differences into disputes, requiring third party. Such third party intervention may be through an adjudicatory form (Courts and Arbitrations) or by non-adjudicatory form (Conciliation, Mediation, Lok Adalats). Conflict and disharmony which give rise to disputes, are the manifestations of negative human emotions and behaviour like (i) greed (ii) ego, pride and self-esteem; (iii) misunderstanding; (iv) jealousy and intolerance; (v) anger, hate and hurt landing to revenge; (vi) dilation; (vii) indecisiveness. If the underlying cause for the dispute is identified, addressed and dealt with, conflict and disharmony will disappear. The existing adjudicatory fora for dispute resolution do not deal with the causes for the dispute but only adjudicate upon the consequences of the disputes. The adjudicatory form of justice delivery system through courts, even if made more efficient, may not reduce the ills that afflict the society. Adjudicatory dispute resolution is like surgery – intended to be curative. Negotiated settlements, on the other hand, may prove to be palliative, curative and even preventive.

20. Therefore it is necessary to find an alternative non-adjudicatory dispute resolution process which will yield the following results:

- reduce conflict and foster fraternity;
- improve relationships — both personal and commercial;
- reduce tension and spread peace to make the society more civilized;
- reduce cost, save time and avoid harassment;
- provide flexibility in solutions, by taking note of long-term interests, and short-term effects;
- enable the parties to communicate with each other, to understand the weaknesses and strengths of both sides and participate in finding solutions; and
- ensure that the aggrieved party gets actual relief and not merely paper relief.

The search leads us to mediation/conciliation, which will provide all these benefits in a satisfactory manner.

**What are the advantages of mediation?**

21. Mediation saves precious time, energy and money of parties, apart from saving them from the harassment and hassles of a prolonged litigation. Its procedure is simple, informal and confidential and reduces worry and tension associated with litigation. Its advantages are:

21.1) By disclosing the strengths and weaknesses of their case, mediation enables parties to find and formulate realistic solutions to their conflicts.

21.2) Mediation provides an opportunity to communicate with the opposite party, in a neutral non-hostile atmosphere. It attempts to mend and restore strained/broken relationships. It focuses on long-term interests and relationships and fosters amity and friendship.

21.3) As the mutually agreeable solution reached by a negotiated settlement is tailor-made for the parties, the solution by mediation can be moulded, shaped, adjusted to suit the requirements of the parties. It gives choices and options in the solution to the conflict. It removes uncertainty and inflexibility from the result.

21.4) As mediation is voluntary, a party can opt out any time. The party (and not a Judge or advocate) is always in control of the dispute and its resolution. (This may also be viewed as a disadvantage. Because it is non-binding and non adjudicatory, the resolution of the dispute purely depends upon the volition of parties).

21.5) The process is simple, flexible and confidential. It enables settlement of disputes which are not the subject-matter of legal proceedings. This enables settlement of several connected matters also.

22. An adjudicatory dispute resolution by means of litigation invariably leads to bitterness, hostility and enmity between the parties to the lis, as the losing party will continue to nurture a grievance against the winner. The gloating by the successful party also aggravates the situation. In a civilised society, parties are expected to accept the decision of court with grace, but in reality it seldom happens. The advantage of a negotiated settlement is that at the end of the day, there are no winners or losers and the result is acceptable to all. In short, the adjudicatory process terminates relationship and creates permanent enemies whereas negotiated settlement help in continuing relationship and avoids enmity.

**Disadvantages of mediation**

23. Mediation has its limitations and is not without its disadvantages. As noticed above, it is effective and useful only in certain types of civil litigation. It can be resorted only when the parties mutually agree. Reference to mediation does not guarantee a settlement or solution. Unless the parties show maturity, understanding, tolerance and cooperation, there can be no solution or settlement. Where even if one of the parties is cantankerous or greedy or egoistic, or refuses to negotiate, there cannot be mediation and conciliation. Where no settlement is reached, the matter will have to go back to court for adjudication.

24. There are also several factors working against mediation/conciliation. We may refer to some of them briefly:

(a) *Mindset of litigants :* Each litigant normally believes or is led to believe that he has a very strong case. Such impression may either be on account of his own perception of the legal or factual position or based on the opinion expressed by his counsel. He, therefore, feels that any settlement involves giving up a part of his rights or claim and showing a concession to the other side. As a consequence, there is resistance to any suggestion of mediation.

(b) *Absence of incentive :* The litigant has no incentive to seek mediation in a pending litigation. The major part of the expenditure for a litigant would have been incurred when he commences the litigation, by way of court fee and lawyer's fee. Litigation costs awarded by the courts in India are nominal. Even the court fee payable is usually a nominal amount, except in a few categories of cases where it is payable *ad valorem.* Once a litigation reaches the stage of trial, there is no compelling reason for a litigant to settle a case. Unlike in countries like USA, UK and Australia, where once a civil dispute goes to trial, the costs escalate and the losing party will have to bear huge costs; whereas a litigant in India, on losing a litigation does not bear and pay the actual costs of the succeeding party, but only pays nominal costs. As there is no fear of heavy costs at the conclusion of the trial, there is no incentive to a party to a litigation to settle the matter.

(c) *Reluctance of advocates :* The reluctance on the part of some sections of advocates, to settle cases, stems from their fear that they may lose the fee, if the case is settled. The fee received for a case involving a full-fledged trial with possibilities of appeal, it is felt, is several times more than the fee that can, legitimately, be claimed if a matter is settled without trial. Many of lawyers are reluctant to participate in the settlement process. Unless the Bar recognizes and accepts negotiated settlement as part of an effective alternative dispute resolution process, no significant success can be achieved in mediation. There is therefore an urgent need to educate the lawyers and litigants about the advantages of the alternative dispute resolution methods in general and mediation, in particular.

**At what stage should mediation be attempted?**

25. Mediation can be attempted either at pre-litigation stage or during the pendency of the litigation. If the parties so desire, it can be attempted even post-litigation, during execution proceedings. So long as there is a dispute or conflict, there can be mediation.

**Who can be a mediator?**

26. Anyone who has patience and perseverance and who is a good listener and clear communicator, positive and optimistic in outlook and committed to the cause of justice and dispute resolution, can be a mediator. Any Judge, advocate, psychiatrist or social worker with abundant common sense and understanding,

can, with appropriate training, become a mediator. Specialists in various fields can also be mediators as, for example, engineers and architects in building/ engineering disputes, doctors in medical negligence claims, assessors in insurance claims, etc.

27. Some training is necessary to learn the process and the nuances of mediation, before one practices mediation. Experience has shown that mediation by persons without proper training and understanding has resulted in a high rate of failures, leading to loss of faith in, and credibility of mediation as an effective dispute resolution process. It is found that a minimum of 40 hours of specialized theoretical training by experts followed by conducting of 10 actual mediations under the supervision of expert trainers gives the mediators the required skills, knowledge and attitude required for mediation.

**What is expected of a Mediator?**

28. Only a trained, experienced and committed Mediator can increase the chances of settlement. Any half baked or halfhearted or clumsy attempts will be counterproductive. Let us see what are the qualities expected of a Mediator.

(a) *Neutrality :* A mediator should be neutral and also seem to be neutral. Consciously or even unconsciously, he should not take sides.

(b) *Understanding of human nature :* Mediation is conflict resolution. Conflicts arise on account of selfishness, greed, jealousy, ego, lack of understanding and sometimes feeling of hurt or wounding of pride. To remove conflicts, one has to understand the reasons for the conflict and be able to recognise the area of conflict. The mediator should remember that the more closer the earlier relationship, more bitter will be the fight when disputes occur. For example, disputes between two parties who have no personal relationship are the easiest to settle. Slightly more difficult are commercial disputes. The degree of difficulty increases in proportion to the previous closeness in relationship in the following ascending order: members of societies, employer/employee, landlord/tenant, neighbours, partners, siblings, parent/child, and the most difficult being husband/wife relationship.

(c) *Persuasive skills :* Mediator should have communication skills and felicity of language. He should be able to freely communicate with the parties. He should also be able to persuade parties to open up and disclose their mind and heart, their grievances and the solution they expect, so that he can assess them and suggest solutions.

(d) *Legal/technical knowledge :* A mediator should have the ability to assess the strengths and weaknesses of the case and be able to put across the same to the respective parties. He should also be able to highlight the strength of the opponent's case, so as to make a party to see reason. But at the same time, he should remember that he is not a Judge, and it is not his duty to render judgment or decide who is right or who is wrong, but only to facilitate a mutually acceptable solution/settlement.

(e) *Patience :* Only a few cases can be settled in a single sitting. Different types of cases may require different skills and different number of sittings. A mediator should be able to give the time needed for the parties to proceed from stage to stage, step by step.

(f) *Common sense :* Abundant common sense gives a Mediator understanding and an awareness of ground realities, enabling him to identify the nature and cause for the conflict, and suggest practical and acceptable solutions. It creates trust and confidence in the parties.

(g) *Confidentiality :* The parties tend to openly discuss their problems with the mediator. The strengths and weaknesses of the case of the parties become known to the mediator. Matters which would not be divulged in a court hearing including trade secrets and family secrets will be routinely disclosed during the negotiation process. A mediator has to be discreet and maintain confidentiality. He should neither disclose the facts/secrets of the parties to outsiders, nor use them for personal benefit or to the detriment of the parties.

**How is mediation conducted?**

29. The mediation procedure is not complicated. Though there is a settled procedure, it is flexible and user-friendly and enables the Mediator to make appropriate changes in the procedure to pave the way for a clear and satisfactory solution. Let us now briefly refer to the several standard stages of Mediation.

(i) *Opening statement by the mediator :* The Mediator informally chats with the parties and explains his position, experience and neutrality, explains the advantages of a negotiated settlement or conflict resolution as also the limitations and disadvantages of court adjudication. The object is to make the parties relaxed, gain the trust of the parties and motivate them to arrive at a negotiated settlement. *[Mediator explains]*

(ii) *Joint sessions :* The mediator encourages both parties to explain their side of the dispute/difference, put forth their claims, and express their grievances and complaints. This gives an opportunity to the Mediator to understand the dispute and the underlying cause. This also enables each party to hear and understand the other party's viewpoint and grievances. [*Mediator listens*]

(iii) *Private caucus/separate sessions :* Discusses with the parties separately. Evaluates and points out the strengths and weaknesses in their case, as also obstacles to certain types of solutions. Even gets to know confidential information, which a party may not wish to disclose to the other party. Points out the strength of the opponent's case and makes the parties understand their strengths and weaknesses. Explains the pros and cons of difficult solutions. [*Mediator assesses/ guides/persuades*]

(iv) *Finding a solution :* The mediator encourages parties to come out with solutions/alternatives. Helps the parties to draw up draft settlements. Enables parties to reach a mutually agreeable solution. [*Mediator facilitates*]

30. The agreement or settlement memo setting out the terms of settlement are signed by the parties in the presence of the mediator and countersigned by the mediator. If it is a court referred mediation, the settlement is placed before the court, for recording the same and making appropriate orders or passing appropriate decrees in terms of it. If it is a pre-litigation mediation, it is possible for the process to be conducted as conciliation and consequently the settlement agreement between the parties, duly signed by them and authenticated by the Conciliator, has the status of Arbitral Award on agreed terms (vide Section 74 read with Section 30 of the Arbitration and Conciliation Act, 1996, which is enforceable directly in the same manner as if it is a decree of court).

**Need for spreading awareness regarding Mediation**

31. To make mediation successful, the Judges, the lawyers and the public should understand:

- the relevance and importance of mediation;
- the impact of mediation on justice delivery system resulting in increasing of the faith, trust and confidence in the system; and
- the type and nature of cases which are suitable for being referred to mediation process.

31.1) Judges should have awareness about mediation so that they may refer the cases for mediation and also persuaded the litigant to go through the process of Mediation.

31.2) Lawyers should understand that mediation helps and benefits the litigants; that their apprehensions that mediation will adversely affect their practice or income, is baseless; that mediation is an integral part of dispute resolution process and is a part of their brief; that they can be mediators, or as lawyers effectively assist their clients to arrive at a solution by mediation; that if a party gets relief expeditiously to his satisfaction, it builds up his trust and confidence in the Bar to 'deliver' relief, and slowly and steadily citizens will be weaned away from extra-judicial solutions (like approaching the underworld or the police) to traditional civilised methods of dispute resolution with the active assistance of the members of the Bar.

31.3) The litigant should understand the process of mediation so that he is convinced that by having recourse to mediation, he can secure better reliefs and benefits and improve his personal, business and social relationships and make society a better place to live.

**How to spread mediation and make it successful?**

32. The following steps are required to be taken to make mediation gain wide acceptance:

- Drawing up a national plan for making mediation a regular recognised alternative disputes resolution process, and provide for inclusive participation of lawyers, Judges, NGOs and social workers in the process of mediation.
- Conducting programmes for increasing the awareness relating to mediation among Judges, lawyers and litigant public relating to mediation and its advantages.
- Providing necessary infrastructure for mediation centres.
- Frame necessary rules and regulations relating to registration of mediators, conduct of mediation, ethical standards of mediators, conduct and discipline of mediators, and maintenance of Records and Registers relating to reference to mediation and settlements through mediation.
- Providing appropriate training: (i) to those who want to become mediators (ideally 40 hours of lectures and 10 mediations); (ii) to Judges for identifying and referring cases to mediation; and (iii) to Trainers to train mediators.
- Prepare a User's manual for Mediators and an ADR reference Handbook for Judges; and Manual for (i) training mediators; (ii) conducting awareness programme for building awareness among referral Judges, lawyers and general public; and (iii) training Mediator-Trainers.
- Evolve a scheme for using the infrastructure and facilities of State Judicial Academies and State Legal Services Authorities for mediation related activities where no separate infrastructure or funds are available for mediation programme.
- Ensuring reference of adequate number of suitable cases to Mediation.

## CONCLUSION

Twenty First Century requires a dispute resolution system, which provides user-friendly, speedy and cost-effective solutions. A dispute resolution system that can provide multi-options solutions. A dispute resolution system that will permit him to have his say in the ultimate solution which can be tailor-made to meet his requirements and, at the same time, meet the requirements of the other side. Mediation appears to be the only solution on the horizon.

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# APPLICABILITY OF C.P.C. IN PROCEEDINGS U/S 125 Cr.P.C. : A CRITIQUE

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As it is said that the proceedings under Section 125 of the Code of Criminal Procedure, 1973 (in short - Cr.P.C.) are in the nature of quasi-criminal and quasi-civil, the Courts of Judicial Magistrate often come across the question whether the provisions of Code of Civil Procedure, 1908 (in short - C.P.C.) have any application to the proceedings under Section 125 Cr.P.C.? Before adverting to this legal point in the debate, it would be apposite to discuss the object and nature of the proceedings under Section 125 Cr.P.C.

## Object of the provision

Section 125 Cr.P.C. which occurs in Chapter IX under the caption; "Order for Maintenance of Wives, Children and Parents" is a recasting of the provision of Section 488 of the old Code, 1898 which is a measure of social justice and special enactment to protect distressed women, children and parents. The proceedings under Chapter IX of the Cr.P.C. are essentially judicial proceedings of a Criminal Court. However, the proceedings under this Chapter are not punitive. The object is not to punish a person for neglect to maintain those whom he is bound to maintain. The intent of Legislature is to provide only a speedy remedy against starvation for a deserted wife or children or parents by a summary procedure to enforce liability in order to avoid vagrancy. Section 125 Cr.P.C. gives effect to the natural and fundamental duty of a man to maintain his wife, children and parents so long as they are unable to maintain themselves.

The Supreme Court in *Captain Ramesh Chander Kaushal v. Veena Kaushal, AIR 1978 SC 1807* has underlined the very object of Section 125 Cr.P.C. and opined that this provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15 (3) reinforced by Article 39. This view has been reiterated by the MP High Court in *Nanhi Bai v. Netram, 2001 (3) MPLJ 170.*

## Nature of Proceedings

A remedy of civil nature is one by which a person seeks to enforce by appropriate relief the alleged infringement of his civil rights against another person or the State. Whereas, remedy of criminal nature is one under which a person can be punished for an offence committed. A criminal proceeding, if carried to its conclusion, may result in the imposition of sentences. The character of the proceedings depends not upon the nature of the Tribunal which is invested with authority to grant relief, but upon the nature of the right violated and the

appropriate relief which may be claimed. (See - *S.A.L. Narayan Row v. Ishwarlal Bhagwandas, AIR 1965 SC 1818*).

The Supreme Court in *Nand Lal Misra v. Kanhaiya Lal Misra, AIR 1960 SC 882* while dealing with the question that whether Section 488 of the old Code (now Section 125) contemplates any preliminary enquiry on the part of a Magistrate before he could issue notice to the opposite party, held that the relief given under this Chapter is essentially of civil nature. It prescribes a summary procedure for compelling a man to maintain his wife or children. It is conceded that Sections 200 to 203 of Cr.P.C. do not apply to an application under Section 488 of Cr.P.C. As the proceedings are of a civil nature, the Code does not contemplate any preliminary enquiry.

The Apex Court in its landmark decision of *Savitri v. Govind Singh Rawat, AIR 1986 SC 984* held that while passing an order under Chapter IX of the Cr.P.C. asking a person to pay maintenance to his wife, child or parent, as the case may be, the Magistrate is not imposing any punishment on such person for a crime committed by him. Chapter IX of the Cr.P.C. contains a summary remedy for securing some reasonable sum by way of maintenance.

The Supreme Court, in *Shail Kumari Devi v. Krishan Bhagwan Pathak, AIR 2008 SC 3006,* has opined thus;

> "Now, having regard to the nature of proceedings, the primary object to secure relief to deserted and destitute wives, discarded and neglected children and disabled and helpless parents and to ensure that no wife, child or parent is left beggared and destitute on the scrap-heap of society so as to be tempted to commit crime or to tempt others to commit crime in regard to them. It was held that the Magistrate had 'implied power' to make such order. The jurisdiction of the Magistrate under Chapter IX is not strictly criminal in nature."

In *Ahzaz Hussain v. Shama Parveen, 1986 (II) MPWN 91* it is held that the proceedings instituted on an application for maintenance under the Cr.P.C. are of civil nature.

Section 7 of the Family Courts Act, 1984 contemplates two-fold jurisdiction of the Family Court. Cases, except the case under Chapter IX of Cr.P.C., are decided by the Family Court as a District Court; whereas, while dealing with the proceedings under Chapter IX of Cr.P.C., Family Court exercises the jurisdiction of a Judicial Magistrate First Class. The M.P. High Court, in the matter of *Rajesh Shukla v. Meena R. Shukla, 2005 CrLJ 3800,* had an occasion to deal with the question as to whether the revision arising out of an order passed by the Family Court on application under Section 125 Cr.P.C. should be registered as Criminal

Revision as they flow from the proceedings under the Cr.P.C.? The Full Bench is of the view that since powers of Judicial Magistrate First Class have been exercised by the Family Court for deciding application under Section 125 Cr.P.C., therefore, the revision filed against such order should be registered as Criminal Revision. The Kerala High Court also expressed the same view in *Sathyabhama v. Ramchandran, 1997 CrLJ 4306.*

**Application of C.P.C.**

As the proceedings under Section 125 Cr.P.C. are of a civil nature and to provide speedy remedy against starvation for a deserted wife or children or parents, by a summary procedure, it is but natural to have procedural rules for deciding a case of maintenance under this scheme. The normal practice is that the parties to such proceedings are required to take various steps which are usually being taken in a civil proceeding under the law of civil procedure such as service of summons, amendments in pleadings, impleadment of parties, restoration of proceeding, setting aside ex-parte proceeding, compromise and so on. Therefore, the question as to whether the provisions of C.P.C. have any application to the proceedings under Section 125 Cr.P.C. needs to be answered.

Though the provisions of Section 125 Cr.P.C. appear in a criminal inquiry, the proceedings are of a civil nature. They do not amount to a civil suit. Thus, the proceedings under this Section are quasi – civil in nature. But, as observed in *Ram Chand Saudagar Ram v. Jiwan Bai, 1958 CrLJ 1437,* it does not mean that the Magistrate dealing with such cases gets all the powers of a Civil Court of that all the rules governing the civil proceedings can be imported.

In *Pandharinath Sakharam Thube v. Kum. Surekha Pandharinath Thube, 1999 CrLJ 2919* the Bombay High Court is of the view that the proceedings under Section 125 Cr.P.C. are wholly governed by the procedure of the Code of Criminal Procedure, they are really of civil nature, but are dealt with summarily in a Criminal Court for the purpose of speedy disposal on grounds of convenience and social order. In *Jamna Bai v.Shivnarayan, 1999 (I) MPWN 126,* the M.P. High Court has held that the proceedings under Section 125 Cr.P.C. are in the nature of quasi-criminal and quasi-civil and as such strict principles of civil or criminal law cannot be applied to these cases. In *Pendiyala Sureshkumar v. Sompally Arunbindu, 2005 CrLJ 1455,* the Gujrat High Court has held that rule of Best Evidence is not applicable in maintenance proceedings being a quasi-civil proceedings.

In *Rajesh Shukla's case* (supra) the Full Bench of the M.P. High Court has held that the Chapter IX of Cr.P.C. provides for its own procedure. Section 125 of Cr.P.C. pertains to orders for maintenance of wives, children and parents. Section 126 of Cr.P.C. provides the procedure for dealing with said application.

Code does not provide for review or change in the order once finally passed under Section 362 of the Code. However, unlike Section 362 of the Code, powers to alter or modify the maintenances is conferred upon the Court under Section 127 of the Code. Under Section 126 of the Code, power is conferred for setting aside ex parte order. Section 128 of the Code relates to enforcement of order of maintenance by the Magistrate. Thus, Chapter IX of the Code itself provides its own procedure for grant of maintenance.

*Service of summons*

Since the proceeding under Section125 Cr.P.C. against a person is essentially of a civil nature, the Court has a duty to inform him about the proceedings and of his right to appear and contest. Therefore, the Magistrate has to issue notice to the opposite party. Notice may be termed as summons but process does not consist of summons as contemplated in Chapter VI of the Cr P.C.. Where a person wilfully avoids service or neglects to attend the Court, the law enables the Magistrate to determine the case ex parte. This indicates that the Magistrate cannot compel appearance of such a person in the same manner in which he can compel appearance of an accused person by resorting to provisions relating to summons, warrant of arrest, proclamation and attachment contained in Chapter VI of the Code. Therefore, the service of notice in regard to proceedings under Section 125 Cr.P.C. is not to be effected strictly in terms of the provision contained in Part A of Chapter VI of the Cr.P.C. However, the service of notice by registered post is unknown to the Cr.P.C. but it is permissible in cases instituted under Chapter IX Cr.P.C.

In *Balan Nair v. Bhavani Amma Valsalamma, 1987 CrLJ 399* the Full Bench of the Kerala High Court has viewed that such service cannot be challenged on the ground that service has not been attempted in terms of the provisions of Part A of Chapter VI of the Code. In *Balaka Baburao v. Balaka Ramanamma, 1997 CrLJ 4324* the Andhra Pradesh High Court has held that service by registered post is one of the modes of service contemplated by the Code of Criminal Procedure in proceedings under Chapter VI of the Code. The M.P. High Court had an occasion to deal with similar situation in the matter of *Mohd. Yunus v. Mst. Shehada Bano, 1991 Cr L R (MP) 340* wherein it was observed that Section 62(2) Cr.P.C. itself indicates that the rules of service of summons personally on the person summoned is to be followed, if practicable. Section 64 Cr.P.C. provides for substituted service in case where the person summoned cannot, by exercise of due diligence, be found. In such a situation, resort to substituted service will not be illegal. Section 69 Cr.P.C. specifically provides that the Court issuing the summons may, in addition to and simultaneously with the issue of such summons, direct a copy of the summons to be sent by a registered post.

*Action by minor without Next-friend*

There is no difference between the right to maintenance and capacity to sue for maintenance under Chapter IX of the Cr.P.C. The provisions of the C.P. C. are not applicable to cases under Section 125 Cr.P.C. Therefore, a minor wife is entitled to maintain the action for maintenance without being represented by a next friend unlike as provided by Order XXXII of the C.P.C.

It has been held by the Andhra Pradesh High Court in *Gulam Mustafa v. Tahara Begum, 1980 CrLJ 124* that the fifteen years old Mohammedan wife is entitled to maintain application for maintenance without a next friend. The Court is of the view that if the Legislature intended that a wife, who is under 18 years of age, should not be permitted to start proceedings under Section 125 Cr. P. C. for maintenance against her husband, it would have certainly made the necessary provision therefor in that Section itself, as in the case of certain other proceedings covered by the Code. But the conspicuous absence of any such embargo on a wife, who is below the age of 18 years, applying for relief under Section 125, Cr. P. C. is sufficient to reject the contention that such wife is not competent to apply for maintenance under Section 125 Cr. P. C. unless she is represented by a guardian.

*Amendments in pleadings*

A proceeding instituted on an application for maintenance under Section 125 Cr.P.C. is of a civil nature. Whether such an application is required to be formatted under the rule of pleadings for a civil case? The answer is in the negative. In *Girishchandra v. Shushilabai, 1987 (II) MPWN 214* it has been held that the Court must avoid strict technicalities of pleading and proof in a proceeding under Section 125 Cr.P.C. In *Mohd. Hanif v. Aminabai, 1986 (II) MPWN 65* it has been held that rules of pleadings in civil cases are not attracted in proceedings under Section 125 Cr.P.C.

So far as amendments in an application filed under Section 125 Cr.P.C. is concerned, there is no specific provision in the Cr.P.C. for amending the application under it. But the Court can allow to amend the application for maintenance under its ancillary or incidental powers. In *Gulamnabi v. Raisabi, 1983 MPWN 396,* it has been held that it is true that there is no specific provision in the Cr.P.C. for amending the application under Section 125 Cr.P.C. but the proceedings under this Section are aimed at providing the persons entitled to maintenance a speedy relief in a summary form. Thus, not in the strict sense of amending one's pleading, certainly for the purpose of determining the real question of controversy between the parties and to promote the ends of justice necessary amendments have to be made.

It is said that the Courts are not powerless to do what is absolutely necessary for dispensation of justice in the absence of enabling provision provided there is no prohibition or illegality or miscarriage of justice is involved. In *Sainulabdheen v. Beena, 2004 CrLJ 2351* the Kerala High Court while dealing with a case under the Muslim Women (Protection of Rights on Divorce) Act, 1986, which is also a proceeding in the nature of quasi-civil and quasi-criminal and governed by the rule of criminal procedure, has observed that even assuming that the Magistrate has no specific power to amend the pleadings as in the Code of Civil Procedure, there is no specific prohibition in the Code of Criminal Procedure in allowing amendment of a petition filed under Chapter IX of the Code of Criminal Procedure.

*Restoration of proceeding*

There is no specific provision in Cr.P.C. if the application for maintenance is dismissed in non-appearance of the applicant to recall the order and to restore the case to its original number. With regard to such a situation, the Allahabad High Court in its decision of *Shabihul Hasan Jafari v. Zarin Fatima, 2000 CrLJ 3051* laid down that it will be wrong to say that since there is no express provision in the Code, the Magistrate does not have power to dismiss the proceeding for default of the petitioner. This view has been reiterated in *Kehari Singh v. State of U. P., 2005 CrLJ 2330* wherein it is held thus;

> "If it is held that the Court lacks the jurisdiction to restore the case in absence of such provision, the very object and purpose of Legislature would be frustrated. Therefore, the Magistrate is empowered to restore the proceedings initiated under Section 125 Cr. P. C. which were dismissed in non-appearance of the complainant/applicant."

In *Sk. Alauddin @ Alai Khan v. Khadiza Bibi, 1991 CrLJ 2035,* the Calcutta High Court, while dealing with a question that whether the learned Magistrate has the jurisdiction to restore the proceeding under Section 125 Cr.P.C. to file once it is dismissed for default, has held that the Magistrate can invoke the inherent powers to recall his earlier order finally disposing a proceeding of this nature provided sufficient grounds are shown.

A Division Bench of the Orissa High Court in *Smt. Aruna Kar v. Dr. Sarat Dash, 1993 CrLJ 1506,* while examine the question that whether the Family Court could exercise its ancillary or incidental powers for restoration of a case under Section 125 Cr.P.C., observed that the Court in exercise of its implied powers can direct dismissal for non-prosecution and restore the proceedings.

*Setting aside ex-parte proceeding*

The duty of the Court is to give opportunity of hearing to the person against whom the claim for maintenance is made. That does not and cannot mean that the Court can compel his appearance. Whether he should appear or not is a matter left to his own choice. However, where such a person wilfully avoids service or neglects to attend the Court, the law enables the Magistrate to determine the case *ex parte*. This is the rationale for the proviso to Section 126 Cr.P.C. which empowers the Court under certain circumstances to proceed ex parte. Further, proviso to Section 126 Cr.P.C. confers the power to set aside ex parte order for good cause shown on an application made within stipulated period subject to such terms including terms as to payment of costs to the opposite party.

In *Suryakanth v. Smt. Allamaprabhu alias Allawwa, 2000 CrLJ 120* the Karnataka High Court is of the view that when the proviso gives the power to pass the order *ex parte* which could be either by passing an order under Section 125 Cr.P.C. or placing the other side *ex parte* and proceeding under Section 125 Cr. P.C. contemplates passing of an order and therefore, it cannot be said that the order passed under Section 125 Cr.P.C. is not an order or that the application under Section 126(2) Cr.P.C. is not maintainable.

Thus it is clear that Chapter IX of the Cr.P.C. itself provides for proceed ex parte and for setting aside ex parte order and for this purpose, provisions contained in C.P.C. would not apply.

*Impleadment of parties*

Under Section 125 Cr.P.C., a wife, a minor child or a child who has attained majority but unable to maintain itself by reason of any physical or mental abnormality and parents are entitled to sue for maintenance. If situation arises, more than one may be joined in one application as claimants and they can sue for maintenance together against one who is bound to maintain all of them. However, the rules regarding joinder of parties in a civil suit does not apply in a proceeding under Section 125 Cr.P.C.

In *Smt. Radhamani v. Sonu, 1986 CrLJ 1129* where the wife had not joined her two minor sons, the MP High Court was of the view that this irregularity cannot come in the wife's way for claiming the maintenance. The Court, further opined that there cannot be too great an insistence on technicality, and practical justice has to be handed down, without being too rigid in the matter of requirement of the provisions.

*Compromise*

There is no provision in Chapter IX of the Cr.P.C. like that contained in Order XXIII of the C.P.C. which enables the Magistrate to dispose of an application for maintenance under Section 125 Cr.P.C. on the basis of compromise arrived at between the parties.

In this regard the Madras High Court in *Padmanabhan v. Bama, 1988 CrLJ 1386,* is of the view that it is within the competence of the Magistrate to accept a compromise made by the parties and to pass an order under Section 125 Cr.P.C. giving effect to the terms agreed between parties as to the rate of maintenance.

In *Sailesh Padhan v. Harabati Padhan, 1989 CrLJ 1661* the Orissa High Court has held that If the compromise is entered into between the parties and it forms a part of the order, it must be taken to be a competent one under Section 125(1), since the compromise is not in derrogation of the jurisdiction of the Court to pass the order CrPC.

In *Hashim Hussain v. Smt. Rukaiya Bano, 1979 CrLJ 1143* the Allahabad High Court has held that Section 125 Cr. P. C. does not prescribe any particular form in which the final order of the Magistrate should be passed while granting maintenance. It was open to the Magistrate while deciding the case in terms of the compromise to specify each and every condition in his order which was included in the compromise. No justification for the submission that an order passed upon a compromise is not contemplated and cannot be passed under Section 125 (1) Cr. P. C. It is really the pith and the substance of the order which has to be taken into consideration and not the form in which it is passed.

**Ancillary or incidental powers by necessary intendment**

It is the settled principle of law that every Court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. This principle is embodied in the maxim *"ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest"* that means where anything is conceded, there is conceded also anything without which the thing itself cannot exist. Where the statute confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are necessary to its execution. (*Maxwell on Interpretation of Statutes, 11th Edition, Page350*).

Whenever anything is required to be done by law and it is found impossible to do that thing unless something is not authorized in express terms be also done then that something else will be supplied by necessary intendment. Such a construction, though it may not always be admissible, but to advance the object of the legislation under the scheme of Chapter IX of the Cr.P.C. would be

admissible. It is well reflected from the exposition by the Apex Court in *Savitri v. Govind Singh Rawat* (supra) which reads as under:

> "It is the duty of the Court to interpret the provisions in Chapter IX of the Code in such a way that the construction placed on them would not defeat the very object of the legislation. In the absence of any express prohibition, it is appropriate to construe the provisions in Chapter IX as conferring an implied power on the Magistrate to direct the person against whom an application is made under Section 125 of the Code to pay some reasonable sum by way of maintenance to the applicant pending final disposal of the application."

**Conclusion**

It reveals from the above discussion that in order to decide quickly and summarily a proceeding under Section 125 Cr.P.C. the Courts are competent to take inevitable steps to promote the ends of justice, however, not under the provisions of C.P.C. but under its ancillary or incidental powers possessed by necessary intendment. There is enough room for the apprehension that if the tangled provisions of C.P.C. are held applicable to such proceedings, all the subtleties of such provisions would also require to be observed while applying them which can affect adversely the very purpose of speedy remedy on the grounds of convenience and social order enshrined in Chapter IX of the Cr.P.C.

Though, the proceedings of Chapter IX of the Cr.P.C. are of civil nature, but are dealt with summarily in a Criminal Court for the purpose of speedy disposal. Therefore, such proceedings are wholly governed by the procedure prescribed in the Cr.P.C. and the provisions of C.P.C. are not applicable to such proceedings. It is a firmly established rule that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective. Therefore, it stands to reason that the Court, while dealing with the proceedings under Section 125 Cr. P.C., in exercise of ancillary and incidental powers can take all necessary steps which are necessary for execution of the legislative intent.

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# SCOPE OF FILING SEPARATE WRITTEN STATEMENT BY LEGAL REPRESENTATIVES OF THE DECEASED DEFENDANT UNDER ORDER 22 RULE 4 (2) C.P.C.

**Judicial Officers**
**Districts Jabalpur and Morena**

Procedure has always been viewed as the handmaid of justice. Law of procedure is meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose an adjudication on merits of substantial rights of citizen under the law. The provisions contained in Order 22 of the Code of Civil Procedure, 1908 (in short- C.P.C.) would lend credit and support to the view that they were devised to ensure their continuation and culmination into an effective adjudication and not to retard the further progress of the proceedings and thereby non-suit the others similarly placed as long as their distinct and independent rights remain intact and nor lost forever due to the death of one or other in the proceedings. (See- *S. Amarjit Singh Kalra v. Pramod Gupta, AIR 2003 SC 2588*).

Order 22 C.P.C., based on the doctrine of representation of estate, provides for bringing the legal representatives of the deceased party on record. Rule 4 of Order 22 C.P.C. contemplates the procedure in case of death of one of several defendants or of sole defendant. Relevant portion of Rule 4 needs to be quoted which runs as under :-

> "4. Procedure in case of death of one of several defendants or of sole defendant.– (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
>
> (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant."

Rule 4 of Order 22 C.P.C. applies where one of two or more defendants dies and the right to sue does not survive against the remaining defendant or defendants alone, or when a sole defendant dies and the right to sue survives. In such case, the legal representatives of the diseased defendant should be substituted within the prescribed time and on failure to do so, the suit shall abate as against the deceased defendant. The expression 'legal representative', as defined in Section 2 (11) of the Code, means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a

representative character, the person on whom the estate devolves on the death of the party so suing or sued. But the question arises as to what extent a legal representative of the deceased defendant can have right to make defence. Whether such legal representative can file a separate written statement in defence? Sub-rule (2) to Rule 4 of Order 22 C.P.C. states that any person so made a party i.e. legal representative, may make any defence appropriate to his character as legal representative of the deceased. The survey of the judicial decisions reveals that judicial view is consistent to the extent that legal representative has right to file additional written statement which is appropriate to his character as legal representative as provided in Sub-rule (2) to Rule 4 of Order 22 C.P.C. But there are divergent views relating to the concept of "Character as legal representative".

The Calcutta High Court in case of *Babulal N. Shukla v. Jeshankar N. Shukla, AIR 1972 Cal. 494,* has observed that a legal representative substituted in place of a deceased-defendant cannot be permitted to make out a new case afresh in another written statement. The only right he has is to make a defence appropriate to his character as a legal representative of the deceased-defendant. In case of *Ramgopal v. Khiv Raj, AIR 1998 Raj. 98,* it was held that the legal representatives are stepped into the shoes of the deceased-plaintiff or defendant, as the case may be, and they must adopt the position occupied by his predecessor plaintiff or defendant. They cannot be allowed to file the written statement, the right of which was closed as soon as the *ex parte* order was passed against the deceased-defendant. In case of *Chandra Kala v. Kanak Mal, AIR 2003 Raj. 306,* it has been held that it is settled legal proposition that once the defendant had filed the written statement and made certain admissions and after his death if his LRs are brought on record, they cannot be permitted to take the stand contrary to what had been taken by their predecessor-in-interest. In *M.M.Katyal v. Subhash Chand, AIR 2005 P&H 203,* it was observed that the pleas which the defendant wants to incorporate are the one, which were personal and were not available to the original defendant, the same cannot be allowed to be raised by way of additional written statement under Order 22 Rule 4(2) of the Code. The High Court of Madhya Pradesh also narrated the proposition in the same tune that legal representative cannot litigate their personal right, as legal representative (See- *Bhagwandas v. Gaya Prasad, 1973 MPLJ 469*). In a case of peculiar facts, the Madhya Pradesh High Court held that it was open to the legal representatives of the defendant not only to apply for the amendment of the written statement filed by their predecessor-in-interest but even for filing a fresh written statement if the earlier written statement was not a written statement contemplated under the law. [See-*Noshe Khan v. Masood Khan, 1986 (II) MPWN 55*].

The right of a legal representative to make any defence is not absolute but restricted to his character as legal representative of the deceased. In a noted case of *J.C. Chatterjee v. Kishan Tandon, AIR 1972 SC 2526,* Their Lordships of the Apex Court propounded the law in the following terms:

"Under sub-clause (ii) of Rule 4 of Order 22, Civil Procedure Code any person so made a party as a legal representative of the deceased respondent was entitled to make any defence appropriate to his character as legal representative of the deceased respondent. In other words, the heirs and the legal representative could urge all contentions which the deceased could have urged except only those which were personal to the deceased. Indeed this does not prevent the legal representatives from setting up also their own independent title, in which case there could be no objection to the court impleading them not merely as the legal representatives of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the independent title."

In *Vidyawati v. Man Mohan and others, AIR 1995 SC 1653,* the Supreme Court considered the question whether a person impleaded as a legal representative of the deceased defendant can independently claim title to and interest in the property under a Will. On this point Supreme Court observed that whether the petitioner has independent right, title and interest dehors the claim of the first defendant is a matter to be gone into at a later proceeding. It is true that when the petitioner was impleaded as a party-defendant, all rights under Order 22 Rule 4(2), and defences available to the deceased defendant became available to her. In addition, if the petitioner had any independent right, title or interest in the property, then she had to get herself impleaded in the suit as a party-defendant. Thereafter, she could resist the claim made by the plaintiff or challenge the decree that may be passed in the suit. It is open to the petitioner to implead herself in her independent capacity under Order 1 Rule 10 or retain the right to file independent suit asserting her own right.

The proposition laid down in *J.C.Chattrajee's case* (supra) was reiterated by the Supreme Court in *Bal Kishan v. Om Prakash and another, AIR 1986 SC 1952,* wherein it was held that Sub-rule (2) of Rule 4 of Order 22 Civil Procedure Code has authorised the legal representative of a deceased defendant to file an additional written statement or statement of objections raising all pleas which the deceased-defendant had or could have raised except those which were personal to the deceased-defendant.

The Supreme Court, in case of *Abdul Razak (D) through L.R.s and others v. Mangesh Rajaram Wagle and others, 2010 (1) Civil Court Cases 631 (SC)* has again reiterated the propositions laid down in its earlier decisions in *J.C. Chatterjee's, Balkishan's,* and *Vidyawati's cases* (supra).

The MP High Court has also taken the same view in case of *Munna Lal v. Chironjilal, 2007 (2) MPLJ 104,* and held that such newly added defendant may

file additional written statement which is appropriate to his character as a legal representative.

Here it would be worthy to mention another significant point. As we have seen that a legal representative may be impleaded in personal capacity also, no doubt, in such a contingency he is free to take any defence but in such a situation, whether the defence which oust the jurisdiction of the Court, can be permitted? In case of *Bal Kishan* (supra), the Supreme Court was confronted with such a situation, Their Lordships explaining the ratio of *J.C. Chatterjee case* (supra) and held thus:

> "Even if a prayer had been made to bring the appellant on record in his personal capacity, the Rent Controller could not have allowed the application and permitted him to raise the plea of independent title because such a plea would oust the jurisdiction of the Rent Controller to try the case itself. The observations made in the *Jagdish Chander Chatterjee case* (supra) have to be confined to only those cases where the Court hearing the case has jurisdiction to try the issues relating to independent title also. The Rent Controller, who had no jurisdiction to pass the decree for possession against a trespasser could not have, therefore, impleaded the appellant as a respondent to the petition for eviction in his independent capacity."

Therefore, when a prayer is made to bring the legal representative on record in his personal capacity, the Court cannot allow the prayer and permit him to raise the plea of independent title if such a plea would oust the jurisdiction of the Court.

In *J. C. Chatterjee case* (supra), it is propounded that the legal representative is entitled to make any defence appropriate to his character as legal representative of the deceased respondent. But this does not prevent the legal representatives from setting up their own independent title also, in which case the Court will implead them, not merely as legal representatives of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the independent title. The Supreme Court approved this view in case of *Vidyawati* (supra). However, in such a situation it is open to the petitioner to implead herself in her independent capacity under Order 1 Rule 10 or retain the right to file independent suit asserting her own right. In case of *J.C. Chatterji* (supra) it was observed that in appropriate case, the court can implead the heirs of a deceased defendant in their personal capacity also in addition to bringing them on record as legal representatives of the deceased defendant avoiding thereby a separate suit for a decision on the independent title. This view is approved in case of *Bal Kishan case* (supra) meaning thereby that a legal representative of a deceased defendant may be made party in a suit in dual capacity, one as legal representative and another as new defendant.

The phrase "appropriate to their character as a legal representative" has created demur. It appears to us that legal representative may take all the defence which deceased defendant may take except which are personal to deceased and additional written statement should not counter to the original pleadings and may also raise contention which a legal representative may raise. For example, in suit for recovery of money against father, son as legal representative may urge he is not liable to pay because father has left no property or debt was for immoral purpose, therefore he is not liable. [See- *Oriental Bank of Commerce v. Rajrani, 2004 (1) MPLJ 470*].

There may be a contention that the defendant is impleaded not only as legal representative of the deceased defendant but in his personal capacity also. How this contention should be dealt with? A caption or a title to an application cannot be treated as a determining factor, but the Court should examine the written statement in the light of the theory of "pith and substance" and then record the finding whether newly arrayed defendant is impleaded as legal representative or in his personal capacity. If the additional written statement filed by the legal representative is not appropriate to his character as legal representative, and defence taken by him is different in pith and substance as taken by the original defendant, in such a situation it can be said that he is impleaded in his personal capacity. A legal representative can be liable to satisfy the decree to the extent he received the property of the deceased, if he is defendant in his personal capacity he himself and his property would be answerable for the satisfaction of the decree. It would be proper, if the court, at the time of passing order, clearly indicates that what would be the status of the newly added defendant, whether he will be treated as a legal representative or a defendant in personal capacity. [See-*Chandra Kala's case (supra)]*

In *Sumtibai v. Paras Finance Co. Regd. Partnership Firm, AIR 2007 SC 3166,* where a suit for specific performance was filed alleging that defendant entered into a contract for sale of property. In that agreement original defendant stated that the property in dispute was his self-acquired property. During the pendency of the suit, defendant died and his son was brought on record as a legal representative. He made an application to file additional written statement, taking a plea that property was not his father's self-acquired property but he is also a co-owner. Trial Court rejected the application and order was confirmed by the High Court. The Supreme Court allowing the special appeal and, in particular circumstances of the case, held thus;

> "We are of the opinion that a party has a right to take whatever plea he/she wants to take, and hence the view taken by the High Court does not appear to be correct.
>
> Every party in a case has a right to file a written statement. This is in accordance with natural justice. The Civil

Procedure Code is really the rules of natural justice which are set out in great and elaborate detail. Its purpose is to enable both parties to set a hearing. The appellants in the present case have already been made parties in the suit, but it would be strange if they are not allowed to take a defence. In our opinion, Order 22 Rule 4(2) CPC cannot be construed in the manner suggested by the learned counsel for the respondent."

However, the plaintiff was objected additional written statement on the ground that in suit for specific performance, stranger claiming title over the subject-matter of the suit property cannot be made party. The argument was based on *Kasturi v. Iyyamperumal, AIR 2005 SC 2813* wherein the Supreme Court has ruled that in a suit for specific performance of contract for sale, third party/stranger claiming independent title and possession over contracted property is neither necessary nor proper party and, therefore, not entitled to join as party defendant in suit. The Apex Court, by explaining the proposition laid down in *Kasturi's case* (supra) in para 14 of the report opined thus;

"In view of the aforesaid decisions we are of the opinion that *Kastrui's case* (supra) is clearly distinguishable. In our opinion it cannot be laid down as an absolute proposition that whenever a suit for specific performance is filed by A against B, a third party C can never be impleaded in that suit. In our opinion, if C can show a fair semblance of title or interest he can certainly file an application for impleadment. To take a contrary view would lead to multiplicity of proceedings because then C will have to wait until a decree is passed against B, and then file a suit for cancellation of the decree on the ground that A had no title in the property in dispute. Clearly, such a view cannot be countenanced."

The law regarding the right and scope of filing written statement by the legal representative is not changed by *Sumtibai's case* (supra). However, in *Sumtibai's* case (supra) legal representative was made a party in personal capacity as well as legal representative as laid down in *Bal Kishan's* case (supra).

**Right to file written statement where deceased defendant was proceeded ex-parte**

Where the deceased defendant was proceeded *ex-parte* and deprived of the right to file the written statement and when his legal representative has stepped into his shoes, then such legal representative is not authorized to alter or amend that situation. Merely because he is legal representative of the deceased defendant, he does not get a new right to put the clock back and file

the written statement as if the case had started afresh. Procedure is not meant to hamper the cause of justice or sanctify miscarriage of justice. The only remedy open to such legal representative is to move an application for setting aside the ex-parte proceedings, if sufficient grounds exist in his favour or that of his predecessor or if he has got independent right, he can move an application for impleadment not merely as a legal representative of the deceased but also in his personal capacity. This was held by the Delhi High Court in *Smt. Manju Parthi and others v. Rohit Parthi CM (M) No. 1419/2007 dated 6.11.2007.*

**Right to file written statement at the appellate stage**

In *Ramesh Sethi v. Vinod Kumar Kataria, 2007 (3) MPLJ 201,* the MP High Court, while dealing with the provision of Rule 11 of Order 22 C.P.C., has held that the word "appellant" is included by virtue of the aforesaid rule in the word "plaintiff" who has no right to file written statement. Rule 3 of Order 22 provides the procedure in case of death of one of several plaintiffs or of sole plaintiff. This rule does not contain a provision similar to that of sub-rule (2) of Rule 4 of Order 22. Thus, it seems that the legislature has not deliberately given a right akin to one conferred by virtue of sub-rule (2) of Rule 4 on the plaintiff. Intention of the legislature seems to be that the legal representative of the appellant may not be provided with such a right. The words, 'so far as may be', employed in Rule 11 of Order 22 of C.P.C., are very important. At the appellate stage, there is no specific provision to allow a legal representative of the deceased defendant/appellant to submit a written statement or additional written statement. That stage is *co-terminus* with the decision of the suit by the trial Court.

**CONCLUSION:**

From the above discussion it is amply clear that though under Order 22 Rule 4(2) of the Civil Procedure Code the legal representative of deceased defendant has got a right to file separate written statement but the said right is not absolute and only limited to the defences, objections and pleas, which were available to the deceased defendant and not those pleas which were personal to the deceased defendant. However, in addition to that if the legal representative has any independent right, title or interest in the property, then he has to get himself impleaded in the suit as a party defendant in which event he could set up his own independent right, title and interest to resist the claim made by the plaintiff or challenge the decree that may be passed in the suit. If defence taken by legal representative oust the jurisdiction of the Court, in such a situation written statement cannot be permitted. Right to file written statement by a legal representative is confined only to those cases where the Court hearing the case has jurisdiction to try the issues relating to independent title also.

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# SCOPE AND NATURE OF REVIEW OF AN APPEALABLE CIVIL JUDGMENT OR ORDER IN CONTEXT OF ITS PROCEDURE AND PASSING OF FINAL ORDER

**Judicial Officers**
**District Rewa**

A combined reading of Section 114 and Order 47 of the Code of Civil Procedure, 1908 (in short - C.P.C.) would make the topic crystal clear. To understand the scope and nature of review, it would be just to dissect legal provisions regarding review. Section 114 C.P.C. reads as under:

> "**114. Review.-** Subject as aforesaid, any person considering himself aggrieved –
>
> (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,
>
> (b) by a decree or order from which no appeal is allowed by this Code or.
>
> (c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order and the Court may make such order thereon as it thinks fit."

The word review has not been interpreted and given a restricted meaning either narrower than that contained in C.P.C. or larger though the scope of a review application has been limited in Order 47 of C.P.C.

Order 47 C.P.C. reads thus :

> "1. **Application for review of judgment.-** (1) Any person considering himself aggrieved,–
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred.
>
> (b) by a decree or order from which no appeal is allowed,
>
> (c) by a decision on reference from a Court of Small Causes,
>
> and who, from the discovery of new and important matter or evidence which, after the exercise of the diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for review.

*Explanation.*- The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment."

Reproduction of Section 114 and Order 47 C.P.C. would help us in unearthing the scope of review. The basic objective of above legal provisions is to impart justice. The Supreme Court has thrown flood of light over the scope of review in many leading cases. It would be apposite to discuss few case laws to understand the concept of review.

The Supreme Court, in the case of *Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, AIR 1979 SC 1047,* has made the following pertinent observations;

> "....there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court,"

We may usefully refer to the observations of the Supreme Court in the case of *Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale, AIR 1960 SC 137,* wherein the Court has made the following observations in connection with an error apparent on the face of the record:

> "An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged

error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior Court to issue such a writ."

In *Smt. Meera Bhanja v. Smt. Nirmala Kumari Choudhury, AIR 1995 SC 455* the Apex Court observed that it is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 C.P.C.

Thus, the review the cannot be equated with an original hearing. The scope of review is limited and same cannot be equated with appeal. Scope of review is governed by provisions of Order 47 Rule 1 C.P.C.

Section 114 C.P.C. is about when review can be filed, provisions of Order 47 Rule 1 C.P.C. supplements the provision of Section 114 C.P.C. Order 47 Rule 1 C.P.C. provides that material evidence which could not be produced earlier in spite of due diligence of parties may be considered, secondly, apparent mistake can be corrected, thirdly, review may be allowed on the basis of sufficient reason. All the terms used in Order 47 Rule 1 C.P.C. like due diligence, apparent mistake and sufficient reason have to be interpreted in the tune of Order 47 Rule 1 C.P.C. In *Chandrakant Jagannath Manjrekar v. Shripad Vaikunth Nayak, AIR 1989 Bombay 91,* wherein the judgment was sought to be reviewed on the ground that certain observation made by the Court was erroneous as it was against some earlier decisions, but the judgment was on an interlocutory application and did not finally determine the rights of the parties and all the more the order was not solely based on the observation, the Bombay High Court was of the view that the review application is not maintainable.

In *Parsian Devi v. Sumitri Devi, 1998 (2) Civil LJ 723* the Supreme Court has held that review jurisdiction can be exercised when there is mistake or error apparent on the face of the record. It means such an error or mistake which is self-evident. Rehearing of matter for detecting error is beyond the scope of review. While exercising review jurisdiction Courts cannot act as Appellate Court. The Apex Court in *Sri Dokka Samuel v. Dr. Jacob Lazarus Chelly, 1997 (3) Civil LJ 537,* has held that the omission to cite an authority of law is not a ground for reviewing the prior judgment saying that there is an error apparent on the face of the record.

In a landmark decision of *Moran Mar Basselios Chatholicos and another v. Most Rev. Mar Poulose Athanasius, AIR 1954 SC 526,* it has been held by the Apex Court that the scope of an application for review is much more restricted than that of an appeal. The Court further held that review can also be made on

any other sufficient reason. It means "a reason sufficient on grounds at least analogous to those specified in the rule."

The concept of "apparent mistake" has also been interpreted narrowly by Courts. In *Smt. Kamal v. Hindustan Petroleum (M/S), 2009 (5) MPHT 293,* it has been held that where no evidence was produced in respect of relief of *mesne profits,* trial Court had not granted relief of *mesne profits* in absence of evidence, petitioner moved an application under Order 47 Rule 1 C.P.C. before trial Court seeking relief of *mesne profits* by amendment of decree. The High Court has held that it was a case of "error apparent on the face of record. It was held that setting aside the trial Court's order allowing application for review, was proper.

A decision or order erroneous in law or on merits cannot be corrected in exercise of power of review under Order 47 Rule 1 C.P.C. The basic object of this provision is the "dispensation of justice." In case of *Board of Control for Cricket, India v. Netaji Crecket Club 2005 AIR SCW 230,* the Supreme Court has widened the scope of review by holding that application for review is maintainable even on account of misconception of law or fact by Court or an Advocate.

Thus, we can conclude that the scope of review is not as broad as that of appeal. The Court can review judgment or order only when conditions mentioned in Order 47 Rule 1 C.P.C. are fulfilled.

**Distinction between Review and Appeal**

It is pertinent to mention here that review is different from appeal both in procedure and in relief. In case of *Surendra Kumar Dilliwai vs. State of M.P., 2002 (1) MPHT 415 (DB),* it has been held that the power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made. It may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of appeal. Power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court.

A review petition has a limited purpose and it can not be allowed to be "an appeal in disguise". The Chattishgarh High Court, in *Gorelal v. State Bank of India, 2002 (4) MPHT 7(CG),* held that a judgment may be open to review *inter alia* if there is a mistake or an error apparent on the face of the record. An error, which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order 47 Rule 1 C.P.C. In exercise

of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be reheard and corrected. There is a clear distinction between an erroneous decision and an error apparent on the face of the record, while the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction. A review petition has a limited purpose and cannot be allowed to be "an appeal in disguise."

**Procedural Aspect**

Now let us examine the procedural aspect of review. According to Rule 372 of M.P. Civil Court Rules, applications for review should be registered as miscellaneous judicial case. Order 47 Rule 3 C.P.C. says that provisions as to form of preferring appeals shall apply *mutatis mutandis,* to applications for a review. Order 47 Rule 4 provides that where it appears to the Court that there is not sufficient ground for review, it shall reject the application. Where court is of the opinion that application for review should be granted, then notice should be given to other party. Opportunity of hearing to other side is *sine qua non of audi alteram parterm* is the bedrock of judicial system.

Sometimes situation may arise that one party to the suit has filed an appeal another side has filed review. Order 47 Rule 2 C.P.C. deals with such situation. It states "a party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant or appellant or when being respondent, he can present to the Appellate Court the case on which he applies for review. The law is well-settled that a party cannot file both review and appeal. The object of the above provision is to provide opportunity of fair hearing to parties.

The law has been settled by catena of decisions that the effect of allowing an application for review of a decree is to vacate the decree passed. The decree subsequently passed on review is a new decree superseding the original one. Above principle has been laid down in the case of *Sushil Kumar Sen v. State of Bihar, AIR 1975 SC 1185.*

**The M.P. High Court in its recent decision of Anandi Prasad Dwivedi v. State of M.P., ILR (2010) M.P., 1904 has laid down the procedure when the application for review is granted. The relevant portion of the Order reads thus:*

> *"An application for review if is allowed then in our opinion proceedings under Rule 8 of Order 47 are to be drawn. Rule 8 provides that when an application for review is granted, a note thereof shall be made in the register and the Court may at once rehear the case or make such order in regard to*

* The italicised portion of the article has been supplemented by the Institute.

*rehearing as it thinks fit. When a Judge decides to grant an application for review, he should record an order to that effect and a note thereof should be made in the register under Rule 8 of Order 47. Decree which is passed subsequent to grant of review, is a new decree superseding the original one. We have to understand a distinction between grant of review application and passing a fresh decree or order after the review is granted. Granting of an application for review merely amounts to a decision to rehear the case."*

*The above discussion regarding procedural aspect of review makes it clear that it has two parts. In the first part, Court has to examine whether there is sufficient ground for review or not? In case where there is no sufficient ground, the application for review shall be rejected as per the provision of O. 47 R. 4 (1) of C.P.C. and in case where there is sufficient ground, it should be granted as per the provision of O. 47 R. 4 (2) of C.P.C.*

*The second part relates to the procedure to be followed when the application for review is granted. In this part, the Court is required to make entry in the register relating to institution of the case that the review application is granted relating to the earlier judgment and decree. Thereafter, the Court may at once rehear the case or make such order in regard to rehearing as it thinks fit as per the provision of O.47 R.8 of C.P.C. and then pass the order and that order may confirm, modify or set aside the earlier decree. An entry to that effect should be made in the register concerned so that the entries in the register concerned show complete and final status of the adjudication.**

## CONCLUSION:

It would be appropriate to conclude the topic citing observations made by the Supreme Court in *Vinod Kumar Singh v. Banaras Hindu University, AIR 1988 SC 371.* The Apex Court observed that "judgment pronounced in open Court is the final act of the Court. Any alteration or addition thereafter is not permissible unless permitted by exceptional circumstances. Thus, we can say that the powers of review has been given to the Courts to advance cause of justice. By the very nature of the concept the scope of review is limited as discussed herein above.

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# विधिक समस्याएं एवं समाधान

(न्यायिक दायित्वों के निर्वहन के क्रम में अनेक प्रकार की विधिक समस्यायें समय–समय पर न्यायाधीशों के समक्ष उपस्थित होती हैं। ऐसी समस्याओं के विधि सम्मत समाधान के सुस्पष्ट सोच के अभाव में न केवल न्यायादान में विलम्ब की सम्भावना बढ़ जाती है अपितु न्याय के हनन का खतरा भी आसन्न रहता है। फरवरी 2006 अंक के साथ प्रारंभ इस स्तंभ 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)

**अपराध के संज्ञान हेतु विहित परिसीमा काल के विस्तारण हेतु क्या अभियुक्त को सुना जाना आवश्यक है? यदि न्यायालय ने परिसीमा काल पर विचार किये बिना किसी अपराध का संज्ञान कर लिया है तब क्या न्यायालय ऐसे विलंब की माफी पश्चातवर्ती प्रक्रम पर कर सकता है? परक्राम्य लिखत अधिनियम, 1881 की धारा–142 (ख) के परंतुक के अधीन संज्ञान हेतु परिसीमा काल के विस्तारण हेतु क्या प्रक्रिया होगी?**

दंड प्रक्रिया संहिता की धारा 468 के अधीन कतिपय अपराधों के संज्ञान हेतु परिसीमा काल विहित किया गया है तथा ऐसे परिसीमा काल की समाप्ति के पश्चात् संबंधित अपराध का संज्ञान वर्जित किया गया है।

दण्ड प्रक्रिया संहिता की धारा–473 के अधीन विलंब का उचित समाधान होने अथवा न्यायहित में न्यायालय ऐसे परिसीमा काल के अवसान के पश्चात् भी विलंब को माफ करते हुए किसी अपराध का संज्ञान करने हेतु सशक्त है।

प्रश्न यह है कि क्या ऐसे विहित परिसीमा काल के विस्तारण हेतु अभियुक्त को सुना जाना आवश्यक है। चूंकि परिसीमा अवधि के अवसान पर अभियुक्त को एक मूल्यवान अधिकार प्राप्त होता है क्योंकि अवधि बाधित अभियोग पत्र/परिवाद गुणावगुण पर विचारित नहीं हो सकता है जब तक कि विलंब को माफ न कर दिया जाये। अतएव यह प्राकृतिक न्याय की अपेक्षा है कि अभियुक्त को तत्संबंधी मूल्यवान अधिकार से वंचित किये जाने के पूर्व सूचना दी जाए एवं सुनवाई का अवसर प्रदान किया जाये । (देखें – *Krishna Sanghi v. State of M.P., 1977 CriLJ 90 (M.P.), and State of Maharashtra vs. Sharadchandra Vinayak Dongre, AIR 1995 SC 231*)

स्पष्ट है कि अपराध के संज्ञान हेतु विहित परिसीमा काल के विस्तारण हेतु अभियुक्त को सुना जाना आवश्यक है।

पुनः यदि न्यायालय ने परिसीमा काल पर विचार किए बिना किसी अपराध का संज्ञान कर लिया है तो भी पश्चात्वर्ती किसी भी प्रक्रम पर विचारण की समाप्ति के पूर्व यदि ऐसे विलंब को माफ करने

हेतु आवेदन न्यायालय के समक्ष प्रस्तुत किया जाता है तो न्यायालय अपने समाधान के अधीन ऐसे विलंब को माफ कर सकता है।

द.प्र.सं. की धारा – 473 के अधीन परिसीमा काल के विस्तारण हेतु कोई प्रक्रम विहित नहीं किया गया है। अतएव न्यायालय संज्ञान कर लिये जाने के उपरांत अभियोजन पक्ष की ओर से विलंब को माफ करने हेतु प्रस्तुत आवेदन पर सुनवाई से प्रवारित नहीं है। इस बिंदु पर *Sukhdev Raj v. State of Punjab, 1994 SCC (Cri) 1480 = 1994 Supp(2) SCC 398, Sureshbhai K. Desai v. State of Gujarat, 1983 CriLJ 1684 (Gujrat High Court), R. V. Kunhiraman v. Inspector of Police, Special Police Establishment, CBI, Cochin, 1998 CriLJ 3679 (Kerala High Court)* तथा *Sulochana v. State Registrar of Chits, (Investigation and Prosecutor) Madras, 1978 CriLJ 116 (Madras High Court)* के न्यायदृष्टांतों में प्रतिपादित विधि अवलोकनीय है।

यह भी उल्लेख किया जाना अपेक्षित है कि विलंब की माफी यद्यपि न्यायालय के विवेक का विषय है परंतु ऐसे विवेक का प्रयोग विनिर्दिष्ट एवं सकारण आदेश द्वारा अग्रसरित होना चाहिये। (देखें *State of Himanchal Pradesh v. Tara Datt 2000 CriLJ 485=AIR 2000 SC 297*)

परक्राम्य लिखत अधिनियम, 1881 की धारा 142 (ख) के परंतुक के अधीन न्यायालय धारा 138 के अधीन दण्डनीय अपराध के संज्ञान हेतु विहित परिसीमा काल के विस्तारण हेतु सशक्त है यदि परिवादी यह समाधान कर देता है कि उसके पास विहित अवधि में ऐसा न करने का पर्याप्त कारण था।

इस प्रावधान के अधीन परिसीमा काल के विस्तारण हेतु भी पूर्ववर्णित प्रक्रिया का अनुसरण किया जाना आज्ञापक है अर्थात विलंब से प्रस्तुत परिवाद पत्र पर प्रसंज्ञान लेने से पूर्व अभियुक्त को सुनवाई का अवसर दिया जाना आवश्यक है। इस बिंदु पर *Prashant Goel v. State, 2007(1) Crimes 78* (Delhi High Court) के न्याय दृष्टांत में प्रतिपादित विधि अवलोकनीय है।

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## क्या एक प्रतिवादी, सह–प्रतिवादी के विरूद्ध प्रतिदावा संस्थित कर सकता है? सह–प्रतिवादी के विरूद्ध प्रतिदावा लाये जाने पर न्यायालय द्वारा क्या प्रक्रिया अपनायी जानी चाहिए?

आदेश 8 नियम 6–क सिविल प्रक्रिया संहिता, के अंतर्गत प्रतिवादी को वादी के दावे के विरूद्ध किसी अधिकार या दावे के लिए जो वाद प्रस्तुत किये जाने के पूर्व या पश्चात् किन्तु प्रतिवादी द्वारा अपनी प्रतिरक्षा परिदत्त करने या इसके लिए परिसीमित समय व्यतीत हो जाने के पूर्व किसी वाद हेतुक

के संबंध में प्रोद्भूत हुआ हो, प्रतिदावा करने का अधिकार दिया गया है। ऐसा प्रतिदावा न्यायालय की अधिकारिता की धन संबंधी सीमाओं के अंदर संस्थित किया जा सकता है। ऐसा प्रतिदावा वाद पत्र के रूप में माना जाएगा जिसके लिए वाद पत्रों को लागू होने वाले नियम लागू होंगे। प्रावधान से स्पष्ट है कि प्रतिवादी, वादी के दावे के विरूद्ध ही प्रतिदावा संस्थित कर सकता है। प्रतिदावे को वाद पत्र के रूप में मान्य करने का तात्पर्य यह नहीं है कि ऐसा प्रतिदावा अन्य सभी प्रयोजनों के लिए एक नया वाद पत्र होगा। इसलिए सह–प्रतिवादी के विरूद्ध अनुतोष की मांग प्रतिदावे के माध्यम से नहीं की जा सकती है। सह–प्रतिवादी के विरूद्ध प्रतिदावा पोषणीय नहीं है। जैसा कि माननीय मध्यप्रदेश उच्च न्यायालय ने ***उधवदास त्यागी विरूद्ध श्रीमूर्ति राधाकृष्ण मंदिर, 2002 (1) एम.पी. वीकली नोट 31,*** में प्रतिपादित किया है। ऐसा ही मत ***कुलवंत सिंह विरूद्ध गुरूचरण सिंह, ए.आई.आर. 2003 पंजाब एवं हरियाणा 1,*** में प्रतिपादित किया गया है।

आदेश 8 नियम 6–ग सिविल प्रक्रिया संहिता में यह प्रावधान किया गया है कि जहाँ प्रतिदावा के संबंध में वादी कि यह दलील है कि प्रतिवादी के दावे का निराकरण स्वतंत्र वाद के रूप में किया जाना चाहिए, वहाँ न्यायालय प्रतिदावे के अपवर्जन का आदेश कर सकता है। इस तरह से जहाँ प्रतिवादी ने सह–प्रतिवादी के विरूद्ध अनुतोष के लिए प्रतिदावा प्रस्तुत किया है वहाँ न्यायालय के लिए यह उपयुक्त होगा कि ऐसे मामले में आदेश 8 नियम 6–ग सिविल प्रक्रिया संहिता के अंतर्गत प्रतिदावे का अपवर्जन करने और प्रतिवादी को सह–प्रतिवादी के विरूद्ध ऐसे किसी अनुतोष, जो प्रतिदावे के माध्यम से चाहा गया है, के संबंध में पृथक और स्वतंत्र वाद संस्थित करने का निर्देश देते हुए आदेश पारित करे।

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Apologizing doesn't mean that you are wrong & the other is right.
It means that you value the relationship more than your ego...

# PART - II

## NOTES ON IMPORTANT JUDGMENTS

***1. ACCOMMODATION CONTROL ACT, 1961 (M.P.)**

*Tenant – Right of pre-emption.*

**Whether tenant has any right of pre-emption to purchase the tenanted premises? Held, No – In the existing law, the tenant did not have any such right of pre-emption in the tenanted premises to purchase the same – Once a person who enters into the premises as tenant will always remain tenant and will not acquire any right of pre-emption against the lands lord to purchase the same unless some express contract takes place between the parties by their acts.**

**Mool Chand Rajak v. S.P. Kapoor & ors.**

**Judgment dated 18.08.2010 passed by the High Court of M.P. in S.A. No. 646 of 2006, reported in ILR (2010) M.P. 2582**

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**2. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 3 (2), 12 and 20**

**(i) Exemption – Appellant Trust is registered at Bombay and the property of Trust is also situated in M.P. – Held, registration of Trust under the provisions of Bombay Public Trust Act, suffice the purpose and the exemption granted u/s 3(2) of M.P. Accommodation Control Act is equally applicable for the appellant Trust.**

**(ii) Even if a public institution that is not covered u/s 3(2) of the Act files a suit for eviction, then too, the said institution is not governed by Section 12, but is governed by Section 20 of the Act.**

**Shri Bhagwatacharya Narayan Dharmarth Trust, Balaji Mandir & ors. v. Jai Prakash**

**Judgment dated 12.08.2010 passed by the High Court of M.P. in S.A. No. 159 of 1997, reported in ILR (2010) M.P. 2578**

Held

The purpose of registration of trust under the Public Trust Act is to regulate and to make the better trust, therefore, in case where trust is having its properties in more than one State, then it is not expected from the trust to get it registered in all the States where the properties are situated. In the facts and circumstances of the case, since the trust is registered at Bombay and the property of the appellant trust is also situated in M.P., therefore, the registration of the appellant trust under the provisions of Bombay Public Trust Act, suffice the purpose and the exemption granted under Section 3(2) of M.P. Accommodation Control Act is equally applicable for the appellant trust.

From perusal of the judgment it is evident that the learned Courts below dismissed the suit filed by the appellant Trust holding that the appellant trust

has failed to make out a case for eviction under Section 12 of M.P. Accommodation Control Act as the appellant has failed to prove the bonafide requirement. Section 3(2) of the M.P. Accommodation Control Act empowers the Government to exempt from all or any of the provisions of this Act which is owned by educational, religious or charitable institution. Even if an institution which is not covered under Section 3(2) of M.P. Accommodation Control Act files a suit for eviction, then too, the said institution is not governed by Section 12 of M.P. Accommodation Control Act, but is governed by Section 20 of M.P. Accommodation Control Act, which lays down a special provision for recovery of possession where the landlord is any company or other body corporate or any local authority or any public institution. Since appellant Trust is public institution, therefore, Section 12 of M.P. Accommodation Control Act is not applicable in the present case. Even if it is assumed for the sake of argument that appellant Trust is not entitled for the benefit of exemption as appellant Trust is registered at Bombay, then too, it is only Section 20 of M.P. Accommodation Control Act which is applicable. Since the appellant is a registered charitable Trust, therefore, in view of the notification dated 07.09.89 it was not necessary for the appellant to make out a case either under Section 12 or 20 of M.P. Accommodation Control Act and the appellant was entitled to terminate the tenancy of the respondent under Section 106 of T.P. Act. In view of this, this Court is of the view that the learned Courts below committed error in dismissing the suit filed by the appellant trust holding that the appellant trust failed to prove that the suit accommodation is required bonafidely for running Ayurvadic Dispensary. In the facts and circumstances of the case, appeal filed by the appellant is allowed and the impugned judgment passed by the learned Courts below are set aside and decree of eviction is passed in favour of appellant holding that the appellant shall be entitled to get vacant possession of the suit accommodation.

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***3. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 13(6)**
**CIVIL PROCEDURE CODE, 1908 – Order 47 Rule 1**
**Delay in deposit of rent – Trial court after condonation directed tenant to deposit all arrears of rent within one month – Tenant deposited arrears of rent and rent in advance but failed to produce receipts in Courts within time – Order for striking of defense passed – Application for review filed along with rent receipts also rejected – Held, tenant was not in arrears of rent and he had deposited all the arrears of rent in compliance of order and thereafter in accordance with provision as contained u/s 13(1) of the Act – Trial Court erred in rejecting application for review – Petition allowed.**

**Ganesh Prasad v. Asadulla Usmani**

**Judgment dated 11.08.2010 passed by the High Court of M.P. in Writ Petition No. 9911 of 2010, reported in ILR (2010) M.P. 2528 (DB)**

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4. **ADMINISTRATIVE LAW:**
**NATURAL JUSTICE:**

(i) **Exercise of power to review judicial/quasi-judicial orders – Permissibility of – Jurisdiction of review can be derived only from the statute and thus any order of review in the absence of any statutory provision for the same is a nullity being without jurisdiction – Legal position reiterated.**

(ii) **Dismissal of case – Effect of interim orders and duty of the Court – No litigant can derive any benefit from the mere pendency of a case in a Court of Law as the interim order always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically – It is the duty of the Court to pass an order to neutralize or undo the effect of any undeserved or unfair advantage gained by a party.**

(iii) **'Legal malice', meaning of – 'Malice in law' means something done without lawful excuse – Passing an order for an unauthorised purpose constitutes malice in law.**

## Kalabharati Advertising v. Hemant Vimalnath Narichania and others

**Judgment dated 06.09.2010 passed by the Supreme Court in Civil Appeal No. 7349 of 2010, reported in (2010) 9 SCC 437**

Held:

It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In the absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed, is ultra vires, illegal and without jurisdiction. (Vide *Patel Chunibhai Dajibha v. Narayanrao Khanderao Jambekar, AIR 1965 SC 1457* and *Harbhajan Singh v. Karam Singh, AIR 1966 SC 641*).

In *Patel Narshi Thakershi v. Pradyuman Singhji Arjunsinghji, AIR 1970 SC 1273, Major Chandra Bhan Singh v. Latafat Ullah Khan, (1979) 1 SCC 321, Kuntesh Gupta (Dr.) v. Hindu Kanya Mahavidyalaya, AIR 1987 SC 2186, State of Orissa v. Commr. of Land Records and Settlement, (1998) 7 SCC 162* and *Sunita Jain v. Pawan Kumar Jain, (2008) 2 SCC 705* this Court held that the power to *review is not an inherent power. It must be conferred by law either expressly/specifically or by necessary implication* and in the absence of any provision in the Act/Rules, review of an earlier order is impermissible as review is a creation of statute. Jurisdiction of review can be derived only from the statute and thus, any order of review in the absence of any statutory provision for the same is a nullity, being without jurisdiction.

Therefore, in view of the above, the law on the point can be summarized to the effect that in the absence of any statutory provision providing for review, entertaining an application for review or under the garb of clarification/ modification/correction is not permissible.

No litigant can derive any benefit from the mere pendency of a case in a court of law, as the interim order always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting an interim order and thereafter blame the court. The fact that the case is found, ultimately, devoid of any merit, or the party withdrew the writ petition, shows that a frivolous writ petition had been filed. The maxim *actus curiae neminem gravabit,* which means that the act of the court shall prejudice no one, becomes applicable in such a case. In such a situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralized, as the institution of litigation cannot be permitted to confer any advantage on a party by the delayed action of the court. [Vide *A.R. Sircar (Dr.) v. State of U.P., 1993 Supp (2) SCC 734, Shiv Shankar v. U.P., SRTC, 1995 Supp (2) SCC 726, Arya Nagar Inter College v. Sree Kumar Tiwari, AIR 1997 SC 3071, GTC Industries Ltd. v. Union of India, AIR 1998 SC 1566 and Jaipur Municipal Corpn. v. C.L. Mishra, (2005) 8 SCC 423.*]

In *Ram Krishna Verma v. State of U.P., (1992) 2 SCC 620* this Court examined the issued while placing reliance upon its earlier judgment in *Grindlays Bank Ltd. v. ITO, AIR 1980 SC 656* and held that no person can suffer from the act of the court and in case an interim order has been passed and the petitioner takes advantage thereof, and ultimately the petition stands dismissed, the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court must be neutralized. A similar view has been reiterated by this Court in *Mahadeo Savlaram Shelke v. Pune Municipal Corpn., (1995) 3 SCC 33.*

In *South Eastern Coalfields Ltd. v. State of M.P., (2003) 8 SCC 648,* this Court examined this issue in detail and held that no one shall suffer by an act of the Court. The factor attracting the applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the Court; the test is whether an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage it would not have otherwise earned, or the other party suffering an impoverishment which it would not have suffered but for the order of the court and the act of such party. There is nothing wrong in the parties demanding to be placed in the same position in which they would have been had the court not intervened by its interim order, when at the end of the proceedings, the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. The injury, if any, caused by the act of the court shall be undone and the

gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences.

The Court further held: (South *Eastern Coalfields Ltd. case (supra) SCC pp. 664-65, para 28*)

> "28. .....Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated...."

In *Karnataka Rare Earth v. Deptt. of Mines & Geology, (2004) 2 SCC 783* a similar view has been reiterated by this Court observing that the party who succeeds ultimately is to be placed in the same position in which they would have been if the court would not have protected them by issuing interim order.

The aforesaid judgments are passed on the application of legal maxim *sublato fundamento, cadit opus*, which means in case a foundation is removed, the superstructure falls.

In *Badrinath v. State of T.N., (2000) 8 SCC 395,* this Court observed that once the basis of a proceeding is gone, all consequential acts, action, orders would falls to the ground automatically and this principle of consequential order which is applicable to judicial and quasi-judicial proceedings is equally applicable to the administrative orders.

It is a settled legal proposition that the forum of the writ court cannot be used for the purpose of giving interim relief as the only and the final relief to any litigant. If the court comes to the conclusion that the matter requires adjudication by some other appropriate forum and relegates the said party to that forum, it should not grant any interim relief in favour of such a litigant for an interregnum period till the said party approaches the alternative forum and obtains interim relief. (Vide *State of Orissa v. Madan Gopal Rungta, AIR 1952 SC 12, Amarsarjit Singh v. State of Punjab, AIR 1962 SC 1305, State of Orissa v. Ram Chandra Dev, AIR 1964 SC 685, State of Bihar v. Rambalak Singh "Balak", AIR 1966 SC 1441* and *Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke, AIR 1975 SC 2238*)

It is settled proposition that an order of withdrawal of a suit does not amount to a decree of the court, which can be executed. [See *Kandapazha Nadar v. Chitraganiammal, AIR 2007 SC 1575.*]

It is not permissible for a party of file a writ petition, obtaining certain orders during the pendency of the petition and withdraw the same without getting proper adjudication of the issue involved therein and insist that the benefits of the interim orders or consequential orders passed in pursuance of the interim order passed by the writ court would continue. The benefit of the interim relief automatically gets withdrawn/neutralized on withdrawal of the said petition. In such a case concept of restitution becomes applicable otherwise the party would continue to get benefit of the interim order even after losing the case in the court. The court should also pass order expressly neutralizing the effect of all consequential orders passed in pursuance of the interim order passed by the court. Such express directions may be necessary to check the rising trend among the litigants to secure the relief as an interim measure and then avoid adjudication on merits. [Vide *Abhimanyoo Ram v. State of U.P., (2008) 17 SCC 73*]

The State is under obligation to act fairly without ill will or malice – in fact or in law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for "purposes foreign to those for which it is in law intended". It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts. [Vide *ADM, Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207, S.R. Venkataraman v. Union of India, AIR 1979 SC 49, State of A.P. v. Goverdhanlal Pitti, AIR 2003 SC 1941, BPL Ltd. v. S.P. Gururaja, (2003) 8 SCC 567* and *W.B. SEB v. Dilip Kumar Ray, (2007) 14 SCC 568.*]

Passing an order for an unauthorized purpose constitutes malice in law [*Vide Punjab SEB Ltd. v. Zora Singh, (2005) 6 SCC 776* and *Union of India v. V. Ramakrishnan, (2005) 8 SCC 394.*]

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**5. ARBITRATION AND CONCILIATION ACT, 1996 – Section 34**
**Award against specific terms of contract between parties is without jurisdiction.**
**Award – Valid part of award can be saved by severance from invalid part.**

**M/s Rashtriya Chemicals & Fertilizers Ltd. v. M/s. Chowgule Brothers & Ors.**
**Judgment dated 07.07.2010 passed by the Supreme Court in Civil Appeal No. 5286 of 2006, reported in AIR 2010 SC 3543**

Held:

That brings us to the question whether an Arbitrator can make an award contrary to the terms of the contract executed between the parties. That question is no longer res integra having been settled by a long line of decisions of this Court. While it is true that the Courts show deference to the findings of fact recorded by the Arbitrators and even opinions, if any, expressed on questions of law referred to them for determination, yet it is equally true that the Arbitrators have no jurisdiction to make an award against the specific terms of the contract executed between the parties. Reference may be made, in this regard, to the decision of this Court in *Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor, AIR 1999 SC 3275* where this Court observed:

> " ..... that it is settled law that the arbitrator derives authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one; that this deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to mala fide action....."
>
> ..... It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary,capricious and without jurisdiction. Whether the arbitrator has acted beyond the terms of the contract or has travelled beyond his jurisdiction would depend upon facts, which however would be jurisdictional facts, and are required to be gone into by the court. The arbitrator may have jurisdiction to entertain claim and yet he may not have jurisdiction to pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error...."

It was further observed:

> ".....Further, the Arbitration Act does not give any power to the arbitrator to act arbitrarily or capriciously. His existence depends upon the agreement and his function is to act within the limits of the said agreement....."

In *W.B. State Warehousing Corporation & Anr. v. Sushil Kumar Kayan & Ors., AIR 2002 SC 2185,* again this Court observed:

> "..... If there is a specific term in the contract or the law which does not permit the parties to raise a point before the arbitrator

and if there is a specific bar in the contract to the raising of the point, then the award passed by the arbitrator in respect thereof would be in excess of his jurisdiction...."

In *Bharat Coking Coal Ltd. v. Annapurna Construction, AIR 2003 SC 3660* this Court reiterated the legal position in the following words:

> "There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record."

In *MD, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd. AIR 2004 SC 1344* also this Court took the similar view and observed:

> "An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power ex debito justitiae. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference.

Reference may also be made to the decisions of this Court in *Associated Engineering Co. v. Government of Andhra Pradesh & Anr., AIR 1992 SC 232, Jivarajbhai Ujamshi Sheth & Ors. v. Chintamanrao Balaji & Ors., AIR 1965 SC 214, State of Rajasthan v. Nav Bharat Construction Co., AIR 2005 SC 4430 and Food Corporation of India v. Surendra, Devendra & Mahendra Transport Co., AIR 2003 SC 1495* which sufficiently settle the law on the subject.

That leaves us with the question whether the valid part of the award can be saved by severance from the invalid part. Before the Arbitrators the respondent-Chairman had quantified the claim at Rs. 27,91,984.29 on account of escalation of the rates consequent upon statutory increases in the wages of M.D.L.B. during the extended period of contract. A further sum of Rs. 9,88,713.20 on account of escalation in the wages of other categories of workers such as Tally Clerks, Stichers, Foreman, Asst. Foremen, Supervisors etc. was also made on the same basis. In addition, a claim for the recovery of Rs. 8,63,953/- towards the final payment due and payable to the claimant with interest @ 18% p.a. on the same was also made.

The entitlement of the respondent to claim any amount on account of escalation consequent upon the increase in the wages of M.D.L.B. workers is not established. The first two claims mentioned above on account of escalation could not, therefore, have been allowed by the Arbitrators nor could the incidental claim for payment of interest on that claim be granted. The question then is

whether there is any lawful justification for disallowing the only other claim made by the respondents representing the balance amount due to the claimant towards its final bill. The only defence which the appellant had offered to that claim was based on the law of limitation. That defence having been withdrawn by senior Advocate for appellants we see no real justification for disallowing the said claim especially when the counter-claim made by the appellant has been rejected and the said rejection was not questioned before the High Court. In fairness to Senior Advocate for appellants we must record that he did not seriously oppose the severance of the award made by the Arbitrators so as to separate the inadmissible part of the claim based on an interpretation of Clause 2.03 from the admissible part.

In the result we allow this appeal but only in part and to the extent that the award made by the Arbitrators shall stand set aside except to the extent of a sum of Rs. 8,63,953/- which amount shall be payable to the respondent-contractor with the interest @ 9% p.a. from 1st April, 1985 till the date of actual payment thereof.

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*6. **ARBITRATION AND CONCILIATION ACT, 1996 – Sections 34 and 31(7)(a)**

**Whether the Arbitration Tribunal can award pendene lite interest even if it is barred in the contract ? Held, the Arbitration Tribunal has no power to award interest from the date of cause of action to the date of order (*pendente lite*) if it is specifically barred in the contract – In such case, only future interest can be awarded.**

**M/s Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works), Palghat & Ors.**

**Judgment dated 20.08.2010 passed by the Supreme Court in Civil Appeal No. 6815 of 2010, reported in AIR 2010 SC 3337**

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7. **ARBITRATION AND CONCILIATION ACT, 1996 – Section 34 (2)(b)(ii), Expln.**

**Award can be set aside if it is induced by fraud or corruption as it is against public policy.**

**Expression "making of award was induced or affected by fraud" cannot be narrowly construed – The fact surfaced subsequent is also relevant and considerable and can be brought on record by making application to amend the pleading.**

**Venture Global Engineering v. Satyam Computer Services Ltd. & Anr.**

**Judgment dated 11.08.2010 passed by the Supreme Court in Civil Appeal No. 6519 of 2010, reported in AIR 2010 SC 3371**

Held:

The concept of public policy in ABC, 1996 as given in the explanation has virtually adopted the aforesaid international standard, namely if anything is found in excess of jurisdiction and depicts a lack of due process, it will be opposed to public policy of India. When an award is induced or affected by fraud or corruption, the same will fall within the aforesaid grounds of excess of jurisdiction and a lack of due process. Therefore, if we may say so, the explanation to Section 34 of ABC is like 'a stable man in the saddle' on the unruly horse of public policy.

This Court is unable to accept the contention of the learned counsel for the respondent that the expression 'fraud in the making of the award' has to be narrowly construed. This Court cannot do so primarily because fraud being of 'infinite variety' may take many forms, and secondly, the expression 'the making of the award' will have to be read in conjunction with whether the award 'was induced or affected by fraud'.

On such conjoint reading, this Court is unable to accept the contentions of the learned counsel for the respondents that facts which surfaced subsequent to the making of the award, but have a nexus with the facts constituting the award, are not relevant to demonstrate that there has been fraud in the making of the award. Concealment of relevant and material facts, which should have been disclosed before the arbitrator, is an act of fraud. If the argument advanced by the learned counsel for the respondents is accepted, then a party, who has suffered an award against another party who has concealed facts and obtained an award, cannot rely on facts which have surfaced subsequently even if those facts have a bearing on the facts constituting the award. Concealed facts in the very nature of things surface subsequently. Such a construction would defeat the principle of due process and would be opposed to the concept of public policy incorporated in the explanation.

This Court also holds that the facts concealed must have a causative link. And if the concealed facts, disclosed after the passing of the award, have a causative link with the facts constituting or inducing the award, such facts are relevant in a setting aside proceeding and award may be set aside as affected or induced by fraud.

In this appeal, this Court is concerned only with the question whether by allowing the amendment, as prayed for by the appellant, the Court will allow material facts to be brought on record in the pending setting aside proceeding.

Judging the case from this angle, this Court is of the opinion that in the interest of justice and considering the fairness of procedure, the Court should allow the appellant to bring those materials on record as those materials are not wholly irrelevant or they may have a bearing on the appellant's plea for setting aside the award.

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*8. **BANKING REGULATION ACT, 1949 – Section 45-ZA (2)**
**GOVERNMENT SAVINGS CERTIFICATES ACT, 1959 – Section 6 (1)**
**Section 45-ZA (2) merely puts the nominee in the shoes of the depositor after his death and clothes him with the exclusive right to receive the money lying in the account – It gives him all the rights of the depositor so far as the depositor's account is concerned – But it by no stretch of imagination makes the nominee the owner of the money lying in the account – All the monies receivable by the nominee by virtue of Section 45-ZA (2) would, therefore, form part of the estate of the deceased depositor and devolve according to the rule of succession to which the depositor may be governed.**
**The provision under Section 6 (1) of the Government Savings Certificates Act, 1959 is materially and substantially the same as the provision of Section 45-ZA (2) of the Banking Regulation Act, 1949.**

**Ram Chander Talwar and another v. Devender Kumar Talwar and others**

**Judgment dated 06.10.2010 passed by the Supreme Court in Civil Appeal No. 1684 of 2004, reported in (2010) 10 SCC 671**

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9. **CIVIL PROCEDURE CODE, 1908 – Section 9**
**INDUSTRIAL EMPLOYMENT (STANDING ORDERS) ACT, 1946 – Section 5**
**INDUSTRIAL DISPUTES ACT, 1947**
**Jurisdiction of Civil Court as to dispute regarding dismissal from service – Employee asserted that departmental enquiry as contemplated under Standing Orders ought to have been held before issuance of the order of dismissal – Such right, if available, could have been enforced only by raising an industrial dispute and not in the civil suit – Nature of right sought to be enforced is decisive in determining the jurisdiction – Civil Court had no jurisdiction to entertain such suit.**

**Rajasthan State RoadTransport Corporation and others v. Deen Dayal Sharma**

**Judgment dated 05.05.2010 passed by the Supreme Court in Civil Appeal No. 3027 of 2007, reported in 2010 (4) MPLJ 274 (SC)**

Held:

The case of the respondent as set up in the plaint, therefore, is that in the absence of departmental enquiry as contemplated in Standing Orders, the order of dismissal is bad in law. It is true that respondent pleaded that he has been dismissed from service without affording any opportunity of defence and hearing and in breach of principles of natural justice but the said plea has to be understood in the backdrop of his pleading that the dismissal order has been passed contrary to Standing Orders without holding any departmental enquiry. The legal position

that Standing Orders have no statutory force and are not in the nature of delegated/subordinate legislation is clearly stated by this Court in *Rajasthan State Road Transport Corporation and another, v. Krishna Kant and others, (1995) 5 SCC 75.* In that case *Krishna Kant* (supra), this Court while summarizing the legal principles in paragraph 35(6) stated that the certified Standing Orders framed under and in accordance with the Industrial Employment (Standing Orders) Act, 1946 are statutorily imposed conditions of service and are binding both upon the employers and employees, though they do not amount to 'statutory provisions' and any violation of these Standing Orders entitles an employee to appropriate relief either before the forum created by the Industrial Disputes Act or the Civil Court where recourse to Civil Court is open according to the principles indicated therein. In *Rajasthan State Road Transport Corporation and another, v. Bal Mukund Bairwa, (2009) 4 SCC 299,* in para 37 of the report, the position has been explained that if the infringement of the Standing Orders is alleged, the Civil Court's jurisdiction may be held to be barred but if the suit is based on the violation of principles of common law or constitutional provisions or on other grounds, the Civil Court's jurisdiction may not be held to be barred. In our opinion, nature of right sought to be enforced is decisive in determining whether the jurisdiction of Civil Court is excluded or not. In the instant case, the respondent who hardly served for three months, has asserted his right that the departmental enquiry as contemplated under the Standing Orders, ought to have been held before issuing the order of dismissal and in absence thereof such order was liable to be quashed. Such right, if available, could have been enforced by the respondent only by raising an industrial dispute and not in the civil suit. In the circumstances, it has to be held that Civil Court had no jurisdiction to entertain and try the suit filed by the respondent.

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**10. CIVIL PROCEDURE CODE, 1908 – Section 11**

*Res judicata* – **Whether findings on the question of title recorded in a suit for eviction would operate as res judicata for declaration of title? Held, it would depend on the manner the question of title was raised by the parties and how it was dealt with by the Court – Position explained.**

**Mohd. Nooman and others v. Mohd. Jabed Alam and others**

**Judgment dated 22.09.2010 passed by the Supreme Court in Civil Appeal No. 2579 of 2004, reported in (2010) 9 SCC 560**

Held:

A finding on the question of title recorded in a suit for eviction would how far be binding in a subsequent suit for declaration of title and recovery of possession between the same parties? This is the question that arises for consideration in this appeal. The answer to the question would depend on, in what manner the question of title was raised by the parties and how it was dealt with by the court in the eviction proceedings. Ordinarily, it is true, in a suit for eviction even if the Court goes into the question of title, it examines the issue in an ancillary manner and in such cases (which constitute a very large majority)

any observation or finding on the question of title would certainly not be binding in any subsequent suit on the dispute of title. But there may be exceptions to the general rule and as we shall find presently, the case in hand seems to fall in that exceptional category of very limited number of cases.

We have carefully examined the pleadings of the parties in the two suits and the evidence led by them in support of their respective claims regarding title in the two suits. And, we are satisfied that the issue of title was expressly raised by the parties in the earlier eviction suit and it was expressly decided by the eviction court. The question of title was directly and substantially in issue between the parties in the earlier suit for eviction. Hence, the High Court was right in holding that the finding recorded in favour of the plaintiff in the earlier suit for eviction would operate as res judicata in the subsequent suit for declaration of title and recovery of possession between the parties.

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**11. CIVIL PROCEDURE CODE, 1908 – Section 20 (c)**
**Cause of action and territorial jurisdiction – All the essential, substantial, material and integral facts constituting a cause of action have to be ascertained first – Unless these important elements exist at a place, the accrual of the cause of action could not be inferred.**

## M/s Archana Sarees, Proprietor Jugal Kishore Pateria v. M.P. Handicraft and Handloom Development Corporation Ltd. and others

**Judgment dated 19.02.2010 passed by the High Court of M.P. in Misc. Appeal No. 958 of 2007, reported in 2010 (5) MPHT 443**

Held:

The plaintiff has averred in his plaint that the plaintiff – firm carries on business of selling Chanderi Sarees and the Firm had directly entered into transactions, with the Branch Office of the Corporation, situated at Ahmedabad, for selling the Sarees, amounting to Rs. 1,39,240/- and an amount of Rs. 30,000/- was actually received by the plaintiff at Chanderi, however, against the price of the rest of the Sarees, the plaintiff could not receive any amount from the Branch Office, as the Showroom of the Branch Office caught fire on account of "Godhra Incident", but the plaintiff had not averred in the plaint as to how the cause of action for filing of the suit accrued to him at Chanderi, except by offering an explanation in his statement that he has forwarded the consignment from Chanderi and received a part payment at Chanderi.

A bare perusal of Section 20 of CPC demonstrates that the accrual of the "cause of action" has been envisaged for the purposes of determination of the territorial jurisdiction of a Court and the Explanation appended to Section 20(c) of CPC, clarifies that the "cause of action" has to arise in respect of a 'place' where it accrues.

In *Alchemist Ltd. and another v. State Bank of Sikkim and others, (2007) 2 SCC 337,* the Supreme Court has clarified that all the essential, substantial, material and integral facts constituting a cause of action becomes available for evaluating the territorial jurisdiction of a Court and unless these important elements exist at a place, the accrual of the cause of action could not be even inferred.

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**12. CIVIL PROCEDURE CODE, 1908 – Sections 51 (b) & 64 and Order 21 Rules 54, 55, 57 & 58**

**Attachment of an immovable property affected in execution of a decree – It will continue until the said property is sold and the sale is confirmed unless it is determined – Reasons for determination of attachment restated.**

**C.S. Mani (deceased) by L R C.S. Dhanapalan v. B. Chinnasamy Naidu (deceased) through LRs.**

**Judgment dated 31.08.2010 passed by the Supreme Court in Civil Appeal No. 5798 of 2002, reported in (2010) 9 SCC 513**

Held:

One of the modes of enforcing execution of a money decree is by attachment and sale of the property of the judgment-debtor [vide Section 51 (b) of the Code]. Attachment of an immovable property is made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge (vide Order 21 Rule 54 of the Code). Section 64 of the Code of Civil Procedure provides that private alienation of property after attachment is void and sub-section (1) thereof is extracted below:

> "64. *Private alienation of property after attachment to be void.* – (1) Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment."

An attachment of an immovable property effected in execution of a decree, will continue until the said property is sold and the sale is confirmed, unless it is determined or removed on account of any of the following reasons:

> (i) *By deemed withdrawal under Order 21 Rule 55 of the Code,* that is, where the attachment is deemed to be withdrawn on account of (a) the amount decree with all costs, charges and expenses resulting from the attachment being paid into court; or (b) satisfaction of the decree being otherwise made through the court or is certified to the court; or (c) the decree being set aside or reversed.

(ii) *By determination under Order 21 Rule 57 of the Code,* that is, after any property has been attached in execution of a decree, the court passes an order dismissing the application for execution of the decree, but omits to give a direction that the attachment shall continue. (When an execution application is dismissed, for whatsoever reason, the court is required to direct whether the attachment shall continue or cease and shall also indicate the period up to which the attachment shall continue or the date on which such attachment shall cease.)

(iii) *By release of the property from attachment under Order 21 Rule 58 of the Code,* that is, when any claim is preferred to the property attached in execution, or any objection is made to the attachment, on the ground that the property is not liable to such attachment and the court, on adjudication of the claim or the objections, releases the property from attachment.

(iv) *By operation of law,* that is, on account of any statute declaring the attachment in execution shall cease to operate, or by the decree (in respect of which the property is attached) being nullified, or by the execution being barred by the law of limitation.

(v) *By consent of parties,* that is, where the decree-holder and the judgment-debtor agree that the attachment be withdrawn or raised.

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**13. CIVIL PROCEDURE CODE, 1908 – Section 79, Order 9 Rule 1 and Order 27 Rule 1**

**Necessary party – Suit relating to land belonging to the State Government – Plaintiff sought declaration on certain rights on such land – State Government is necessary party being the owner of the land.**

**Jagtu v. Suraj Mal & Ors.**

**Judgment dated 05.08.2010 passed by the Supreme Court in Civil Appeal No. 644 of 2004, reported in AIR 2010 SC 3490**

Held:

Admittedly, the respondents/plaintiffs had filed the suit seeking declaration of certain rights over the suit land admitting the factual position that the land belonged to the State of Haryana. The respondents/ plaintiffs as well as the appellants/ defendants were tenants in the said suit land. Before the Trial Court, the appellants/ defendants had raised the preliminary objection regarding maintainability of the suit for non-joinder of parties. They had taken a stand that the suit for declaration

of certain rights in the land belonging to the State of Haryana was not maintainable without impleading the State of Haryana. The Trial Court framed large number of issues including the issue of maintainability of the suit for non-joinder of the necessary parties. After considering the case in totality, the Trial Court recorded the finding on the said issue that suit was not maintainable for want of necessary parties and the suit was dismissed. The First Appellate Court reversed the finding on the said issue merely observing that the respondents/ plaintiffs had not claimed any relief against the State, therefore, State was not a necessary party and decreed the suit. The High Court, while considering the Second Appeal, affirmed the Judgment and findings of the First Appellate Court and dismissed the Second Appeal preferred by the appellants/defendants.

In view of the provisions of Section 79 read with Order 27, Rule 1 and in view of the provisions of the proviso contained in Order 1, Rule 9 of the Code of Civil Procedure, if any relief is claimed against the State, the State is a necessary party. This view has been reiterated by this Court time and again, as is evident from the Judgments in The *State of Punjab v. The Okara Grain Buyers Syndicate Ltd., Okara & Anr., AIR 1964 SC 669 ; Ranjeet Mal v. General Manager, Northern Railway, New Delhi, AIR 1977 SC 1701 ; The State of Kerala v. The General Manager, Southern Railway, Madras, AIR 1976 SC 2538; Chief Conservator of Forests, Government of A.P. v. Collector & Ors., AIR 2003 SC 1805 and The District Collector, Srikakulam & Ors. v. Bagathi Krishna Rao & Anr., AIR 2010 SC 2617.*

In view of the above, we are of the concerned opinion that as the respondents/plaintiffs sought declaration of certain rights on the suit land belonging to the State of Haryana, the State of Haryana was a necessary party. There is a complete fallacy in the finding recorded by the First Appellate Court that the respondents/plaintiffs had not sought any relief against the State. The Appellate Court failed to appreciate that declaration in respect of certain rights over the land belonging to the State was the relief sought in the suit. Thus, in absence of the owner of the land, no such declaration could be granted. Therefore, State of Haryana was a necessary party. The suit, therefore, could not proceed for want of necessary parties.

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**14. CIVIL PROCEDURE CODE, 1908 – Order 2 Rule 2 and Order 6 Rule 6**

**(i) Unless plea of bar to the suit under Order 2 Rule 2 CPC is raised by a defendant and issue is framed thereon, Court cannot dismiss the suit as so barred only raising of plea of res judicata by defendant – Distinction between pleas of res judicata and bar under Order 2 Rule 2 stated.**

**(ii) To determine the applicability of Order 2 Rule 2 only question relevant therefor is whether relief claimed in both suits arose from same cause of action – Merits and validity of second suit or conduct of plaintiff are irrelevant.**

## Alka Gupta v. Narendra Kumar Gupta

**Judgment dated 27.09.2010 passed by the Supreme Court in Criminal Appeal No. 8321 of 2010, reported in (2010) 10 SCC 141**

Held:

Order 2 Rules 1 and 2 of the CPC reads as under:

> "1. *Frame of suit.* – Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.
>
> 2. *Suit to include the whole claim:* (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) *Relinquishment of part of claim. :* Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> (3) *Omission to sue for one of several reliefs:* A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

The object of Order 2 Rule 2 of the Code is two-fold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. Second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of Order 2 Rule 2 of the Code is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not however bar a second suit based on a different and distinct cause of action.

This Court in *Gurbux Singh v. Bhooralal, AIR 1964 SC 1810 held : (AIR p. 1812, para 6)*

> "6.In order that a plea of a bar under Order. 2, Rule. 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out *(1)* that the second suit was in respect of the same cause of action as that on which the previous suit was based; *(2)* that in respect of that cause of action the plaintiff was entitled to more than one relief; *(3)* that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to

sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the latter suit is based there would be no scope for the application of the bar."

Unless the defendant pleads the bar under Order 2 Rule 2 of the Code and an issue is framed focusing the parties on that bar to the suit, obviously the court cannot examine or reject a suit on that ground. The pleadings in the earlier suit should be exhibited or marked by consent or at least admitted by both parties. The plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action.

It has erroneously assumed that plea of *res judicata* would include a plea of bar under Order 2 Rule 2 of CPC.

Res judicata relates to the plaintiff's duty to put forth all the grounds of attack in support of his claim, whereas Order 2 Rule 2 of the Code requires the plaintiff to claim all reliefs flowing from the same cause of action in a single suit. The two pleas are different and one will not include the other.

While considering whether a second suit by a party is barred by Order 2 Rule 2 of the Code, all that is required to be seen is whether the reliefs claimed in both suits arose from the same cause of action. The court is not expected to go into the merits of the claim and decide the validity of the second claim. The strength of the second case and the conduct of plaintiff are not relevant for deciding whether the second suit is barred by Order 2 Rule 2 of the Code.

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***15. CIVIL PROCEDURE CODE, 1908 – Order 5 Rule 17 and Order 9 Rule 7** *Ex parte* **order, setting aside of – Process server offered summons to the petitioner but he was asked to come on next day – On next day, no adult member was found in the house of petitioner at the time of visiting of process server – Process server returned the summons without following the procedure prescribed in Order 5 Rule 17 of CPC – Trial court proceeded** *ex parte* **on the ground of implied refusal on behalf of the petitioner – Later on, petitioner filed an application under Order 9 Rule 7 of CPC for setting aside** *ex parte* **order but it was rejected – Held, the object of Order 9 CPC is not penal in nature and Order 9 Rule 7 CPC specially provides good cause for setting aside** *ex parte* **order, then the trial court ought to have taken lenient view in the matter in setting aside the** *ex parte* **order.**

**Ujjwal Kesari v Shri Krishna Gupta & ors.**

**Judgment dated 01.09.2010 passed by the High Court of M.P. in Writ Petition No. 3707 of 2010, reported in ILR (2010) M.P. 2538**

Held

Order 5 Rule 17 CPC specifically provides that where defendant refuses to sign acknowledgement, the serving officer shall affix copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carriers on business and then shall return the original to the Court from which it was issued with a report endorsed thereon stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person by whom the house was identified and in whose presence the copy was affixed. But in the present case, no such procedure was followed. The election Tribunal before proceeding exparte against the petitioner ought to have looked into the procedure as contained in the M.P. Municipalities (Election Petition) Rules, 1962 or in Rule 17 of Order 5 of the Code of Civil Procedure and as such on recording a satisfaction about the compliance of the aforesaid provisions, the trial Court ought to have proceeded exparte in the matter. But it appears that ignoring aforesaid provisions, the election Tribunal presumed refusal of the summons which is apparently not correct, in the facts of the case. When the process-server himself returned the summons as unserved, the Election Tribunal ought to have issued a fresh summons to the petitioner. Apart from this, when the petitioner on 25.2.2010 itself moved an application for setting aside the exparte order dated 15.2.2010, the election Tribunal ought to have taken a lenient view in the matter. The object of Order 9 CPC is not penal in nature and Order 9 Rule 7 CPC specifically provides a good cause for setting aside exparte order, then the trial Court ought to have taken a lenient view in the matter in setting aside the exparte order. The subject matter of the case is election petition in which substantial rights of the petitioner, who is a returned candidate are involved and in these circumstances, the trial Court ought to have set aside the exparte order dated 15.2.2010 on the application filed by the petitioner on 25.2.2010 i.e. within a period of 10 days from the date of exparte order.

In view of aforesaid, impugned order is not sustainable under the law and is hereby set aside. The petitioner is permitted to participate in the proceedings. The trial Court shall permit the petitioner to file written statement in the case within a period of 30 days from today.

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**16. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17**
**LIMITATION ACT, 1963 – Articles 65 and 113**

**(i) Order 6 Rule 17 – Proviso – If the application for amendment under Order 6 Rule 17 of CPC filed before the date of enforcement of Proviso of Order 6 Rule 17 i.e. 1.7.2002, Proviso is not applicable – Amendment could be allowed.**

**(ii) Order 6 Rule 17 – Suit filed for declaration, perpetual and mandatory injunction against petitioner/defendant – Commissioner inspected the spot and found the construction –**

**Plaintiff filed an application for amendment in relief clause of plaint after 9 years of commissioner's report – Petitioner/ defendant raised an objection that amendment was barred by limitation – Article 113 of Limitation Act is not applicable – Suit was based on title – Article 65 of the Limitation Act is applicable under which limitation is 12 years – Amendment could be allowed as *prima facie* it is not time barred.**

**Smt. Ratna Shrivastava v. Mr. M.M. Bhargava and another**
**Judgment dated 12.08.2010 passed by the High Court of M.P. in Writ Petition No. 3908 of 2010, reported in 2010 (5) MPHT 315 (DB)**

Held:

The plaintiff has prayed amendment in relief clause in which he has sought amendment that the 'vacant possession after demolition of the construction' be permitted to be inserted in Para 14 (b). In Para 14 (b) of the relief clause, the plaintiff had already sought relief of mandatory injunction against the defendants for restraining them to raise illegal construction and restore the possession of the plot by issuance of mandatory injunction. A specific relief was prayed by the plaintiff for the mandatory injunction in this regard and by way of amendment, aforesaid relief has been made specifically for restoring possession of the plot in favour of the plaintiff by removing the construction raised by the defendants. Though it is disputed by the defendants that construction was raised during the pendency of the suit, as before filing of the suit it was completed, while the averments in the application are that this construction was raised by the defendants during pendency of the suit. However, it is a matter of evidence which is to be decided by the Trial Court after recording evidence of the parties.

Though it is true that the evidence of the plaintiff is over and the defendants' evidence is to commence in the case and as per proviso to Rule 17 of Order 6 CPC, after commencement of the trial normally such an amendment cannot be allowed, but the Apex Court has made the position clear in *State Bank of Hyderabad v. Town Municipal Council, (2007) 1 SCC 765,* that the amended proviso to Order 6 Rule 17 CPC inserted with effect from 01.07.2002 is not applicable in the cases which are filed before 01.07.2002. In the light of the aforesaid judgment, contention of the petitioner that after commencement of the trial, such amendment could not be allowed is found without merit.

By the aforesaid amendment, the plaintiff is amending relief clause specifically that possession of the plot be restored to the plaintiff by removing construction raised by the defendant's. Though in Para 14(b) of the plaint, in relief clause, the plaintiff has already prayed for a mandatory injunction against defendants, but to make the relief specific, such amendment if made, no fault is found. So far as contention of the petitioner that on the date of filing of the application, such relief was barred by limitation is concerned, he has placed reliance to Article 113 of the Limitation Act. For ready reference, Article 113 of the Limitation Act is quoted which reads as under:-

| | | | |
|---|---|---|---|
| 113. | Any suit for which no period of limitation is provided elsewhere in this schedule | Three years | When the right to sue accrues |

Aforesaid Article is residuary Article and is not application in the present case. The suit was based on title. Article 65 of the Limitation Act will be applicable in the present case by which limitation of 12 years is provided from the date when possession of the defendants became adverse. Prima facie aforesaid amendment was not barred by limitation, so contention of the petitioner that the amendment was sought after period of limitation, is also replaced. However, the defendants can raise a plea of limitation in the written statement by way of consequential amendment and if raised, it shall be considered by the Trial Court.

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17. **CIVIL PROCEDURE CODE, 1908 – Order 9 Rule 9**
**Restoration of suit – The suit was dismissed in default because of non-appearance of 'next friend' on the date of hearing – Applicants/ plaintiffs are minors and represented by the next friend – Next friend did not perform his duty to appear on the date of hearing and to adduce evidence on behalf of the minors to protect their interest – After attending majority and being competent to take care of their interest, they filed an application for restoration of the suit but rejected – Held, applicants are entitled to an opportunity to prove their case – Dismissal of the suit set aside and restored for being decided on merit.**

## Harishankar Arora and another v. Vedbati and others

**Judgment dated 06.09.2010 passed by the High Court of M.P. in Civil Rev. No. 147 of 2009, reported in 2010 (4) MPLJ 673**

Held:

It is obvious that at the outset it is the Court which is a guardian of the minor and is obliged to take care of minor's interest. This may be achieved through next friend in case of plaintiff and through guardian-ad-litem in case of defendant. In either case, the Court is to be vigilant that next friend or guardian should perform his duty of protecting the interest of the minor. If a next friend is negligent in performing his/her duty to represent the minor's case in proper manner, he/she may be removed by the Court as provided in Rule 9. Revisionists were admittedly minors as shown in the cause title of the plaint. Even from the cause-title, revisionist No.2 was undoubtedly minor on the date of dismissal of suit in default of appearance on 5-2-1999. Non-applicant No.3 who was next friend of plaintiffs No. 2 and 3 did not remain present in the Court on date of hearing and further did not adduce evidence for minors/plaintiffs. Thus, she has obviously acted negligently against the interest of the minors by not adducing evidence for establishing minors' right to seek redemption of mortgage.

Division Bench of Andhra Pradesh in the case of *Pakalapati Audiseshu Venkataramayya and another v. Pakalpati Prakasa Rao and others, AIR 1957 A.P. 293* while dealing with the case for restoration of minor's suit dismissed in default of appearance has observed:

> "(3) It is to be noted that one of the appellants is a minor. When a question arises as to whether a minor has been prevented by sufficient cause from appearing in a suit, it has to be determined with reference to the conduct of the next friend of the minor. Now the non-appearance of the guardian (which term will hereafter include a next friend in the following discussion) may be due to accident, design or negligence. Where it is the result of accident the absence of the guardian will, of course, be treated as sufficient cause for the non-appearance of the minor. The guardian and the minor are treated as one, and the dismissal for default or the ex parte decree will in consequence be set aside. The non-appearance may on the other hand be deliberate and designed. Such wilful absence may be due either to the guardian acting in collusion with the opposite party and against the interests of his ward or to his acting in the interests of the minor and or in the interests of other parties to the litigation. If the Court is satisfied that the next friend had betrayed his trust, it will of course set aside the decree or dismissal, appoint a fresh guardian and proceed with the suit. If, on the other hand, it is clear that the absence was inspired purely by dilatory tactics designed in the supposed interests of the minor, the Court will let the order or decree stand.
>
> .....The third reason for the absence of the guardian may be his indifference or recklessness. In our opinion, where the Court is satisfied that the guardian has in not making his appearance neglected his duty to his ward as well as to the Court, it is incumbent upon the Court to protect the interests of the minor from the consequences of such negligence. The suit must be restored or the ex parte decree set aside, and a fresh guardian or next friend appointed."

There is no evidence on record to show that the absence of the next friend was inspired purely by dilatory tactic designed in the supposed interest of the minor. No such finding is recorded by the Courts below while rejecting the application.

It is equally true that defendants/non-applicants No.1 and 2 have been unable to establish that the revisionists would have gained unfair advantage by protracting the trial by remaining deliberately absent. This being so, the dismissal

of the suit in default of appearance is liable to be set aside in view of the law laid down by this Court in the case of *Puranlal v. Laxmiram, 1961 MPLJ SN (6)*.

I may also refer here the decision of Hon'ble Shri Justice Chagla, the then Chief Justice of Bombay High Court, in the case of *Bai Dahi and others v. Shankarbhai Deojibhai and another, AIR 1954 Bombay 214,* in which in para 3 it has been observed:-

> "(3) I should suggest a third way by which the interests of the minors should be protected. The Court has undoubtedly, as pointed out by Mr. Gokhale, very wide powers to restore suits independently of O. IX, R. 9. The Courts has got power to act under section 151 and the Court should be quicker to act under section 151 where a minor's suit is dismissed."

Punjab and Haryana High Court in the case of *Sham Singh v. Jaswant Singh and others, AIR 1971 Punjab and Haryana 462* has held that a suit by minor plaintiff through a guardian i.e. next friend cannot be dismissed on the ground that the guardian persistently refused to appear before the Court. The proper course is to remove such a guardian and appoint another guardian. It goes without saying that the Court has to safeguard the interests of a minor and cannot act in a manner to prejudice his interest.

A right of a minor to avoid the decree obtained against him on account of the gross negligence of his guardian-ad-litem has been held to be a substantive right by the High Court of Kerala in *Narayanan Nambooripad and others v. Gopalan Nair and another, AIR 1960 Kerala 367.*

Considering the present case from this angle, it is observed that non-applicant No.3 by absenting herself failed to adduce evidence even to protect the interest of minors/co-plaintiffs who are presently revisionists and has, thus, acted with gross negligence. They have become majors and are quite competent to take care of their own interest. Thus, they are entitled, in the interest of justice, to an opportunity to prove their case.

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**18. CIVIL PROCEDURE CODE, 1908 – Order 9 Rule 13**
**Plaintiffs obtained a compromise decree by Lok Adalat by exercise of fraud – In original suit defendant/respondent No. 5 was not served with summons, written statement on her behalf was not signed, alleged compromise was equally not signed by her, she was not present in the Lok Adalat when alleged compromise was accepted – Application under Order 9 Rule 13 CPC filed by defendant No.5 against such compromise decree – Provisions of Order 9 Rule 13 CPC can be invoked – Application rightly allowed.**

**Krishna Gopal & Ors v. Pushpa Devi & ors.**
**Judgment dated 18.08.2010 passed by the High Court of M.P. in Civil Revision No. 40 of 2010, reported in 2010 (IV) MPJR 25**

Held:

Learned Senior Advocate for the revisionists, submitted that the decree having been passed on the basis of compromise cannot be legally termed as ex-parte decree and the provisions of Order IX Rule 13 CPC cannot be legally invoked. Reliance for this purpose is placed in paragraph 12 of Apex Court decision in the case of *State of Punjab and another v. Jalour Singh and others, (2008) 2 SCC 660,* which is reproduced below:

> "12. It is true that where an award is made by the Lok Adalat in terms of a settlement arrived at between the parties (which is duly signed by parties and annexed to the award of the Lok Adalat), it becomes final and binding on the parties to the settlement and becomes executable as if it is a decree of a civil court, and no appeal lies against it to any court. If any party wants to challenge such an award based on settlement, it can be done only by filing a petition under Article 226 and/or Article 227 of the Constitution, that too on very limited grounds. But where no compromise or settlement is signed by the parties and the order of the Lok Adalat does not refer to any settlement, but directs the respondents to either make payment if it agrees to the order, or approach the High Court for disposal of appeal on merits, if it does not agree, is not an award of the Lok Adalat. The question of challenging such an order in a petition under Article 227 does not arise. As already noticed, in such a situation, the High Court ought to have heard and disposed of the appeal on merits."

Sub-section (2) of Section 21 of the Legal Services Authorities Act, 1987 reads as under:

> "Every award made by a Lok Adalat shall be final and binding on all parties to the dispute, and no appeal shall lie to any court against the award."

While passing the award, Lok Adalat is empowered to take cognizance of cases in the manner as laid down in sub-sections (3) and (4) of Section 20 of the said Act which are reproduced hereunder:

> 20. Cognizance of cases by Lok-Adalats.-
>
> 1. xx xx xx
>
> 2. xx xx xx
>
> 3. Where any case is referred to a Lok Adalat under sub-section (1) or where a reference has been made to it under sub-section (2), the Lok Adalat shall proceed to dispose of the case or matter and arrive at a compromise or settlement between the parties.

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

In the case of *Jalour Singh* (supra), it is made clear that where no compromise or settlement is signed by the party and the parties are not in agreement, it is not an award of the Lok Adalat.

In the instant case, it has clearly been averred and found proved that defendant/respondent No.5 was not served with the summons. Written statement on her behalf was not signed by her. Alleged compromise was equally not signed by her. She was not present in the Court/Lok Adalat when the alleged compromise was accepted. Entire house property in question was owned by Deenanath after whose death it devolved upon defendant/respondent No.5. Thus, her allegations about fraud having been committed on her are found proved.

Effect of fraud has already been explained by the Apex Court in the case of *A.V. Papayya Sastry and others v. Govt. of A.P. and others, (2007) 4 SCC 221* in the following words:

"22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgment, decree or order – by the first court or by the final court – has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings."

In the case of *A.A. Gopalakrishnan v. Cochin Devaswom Board and others, (2007) 7 SCC 482,* it has held that the power contained in Rule 3-A of Order XXIII CPC will not come in the way of High Court to examine the validity of compromise decree when allegations of fraud, collusion are made against a party which entered into such compromise.

This being so, it is not open for the revisionists to contend that Order IX Rule 13 CPC cannot be invoked. This objection was already raised in Civil Revision No. 134/2007 which was rejected by imposing cost of Rs. 5,000/-. This order operates as *res judicata* so far as questing of applicability of Order IX Rule 13 read with Section 151 CPC is concerned in view of the law laid down by the Hon'ble Apex Court in the case of *Commissioner of Endowments and others v. Vittal Rao and others, (2005) 4 SCC 120.*

Coming to the merits of the case, it may be seen that defendant/ respondent No.5 was not served with summons by process server of the Court. She was allegedly served in Dasti manner by the plaintiffs themselves. Written Statement

as well as verification on behalf of defendant/respondent No.5 does not bear her signature. Execution of the alleged Power of Attorney dated 24.07.95 has been denied by defendant/respondent No.5. Even if it is considered for the sake of arguments, it authorizes the power of attorney to act on behalf of the principal in respect of the agricultural land bearing survey numbers 383 to 393 situated in Kasba Seondha. The suit in question is in respect of the house property and not in respect of any agricultural land. Thus, the action on behalf of the alleged power of attorney is prima facie unauthorized and without competence. Otherwise also a power of attorney by virtue of Order III Rule 2 CPC has limited powers. He may act on behalf of the principal mainly within the degree of consent accorded by such principal. He at his own cannot enter into a compromise without knowledge or consent of principal. In the case in hand the consent and/or knowledge about alleged compromise is not found proved.

Although, it is stated in paragraph 8-9 in reply to application under Order IX Rule 13 CPC that the compromise was entered at the house of Ratanbai herself and in her presence, her signatures were not obtained on any of the papers submitted by the alleged power of attorney holder who is not an independent person but happens to be the son of defendant No.1 who is beneficiary to the extent of half of the house belonging to defendant/respondent No.5 In the statement of Govindprasad, alleged power of attorney holder, it was nowhere deposed that Ratanbai had entered into a compromise. It is interesting to read statement of power of attorney which was recorded by the Lok Adalat. He has merely stated that he has entered into a compromise with the plaintiffs and the ownership of the plaintiffs in respect of the disputed portion has been acknowledged in the compromise which is not opposed by him or other defendants. He has further stated that the compromise was duly signed by him after reading and understanding the same. Thus, it is clear that the power of attorney has nowhere stated that the alleged compromise was made known to Ratan Bai or it was ever agreed in her presence. He has not even deposed that Ratan Bai was aware of the compromise and the same was acceptable to her. Thus, there is absolutely no iota on record to hold that the alleged compromise was made in the presence of Ratan Bai or she was aware of it. There is no iota to further hold that the alleged compromise was with the consent of Ratan Bai or the same was ever made known to her. In the application under Order IX Rule 13 CPC, Ratan Bai has clearly stated which has been substantiated in her statement also that Omprakash was never adopted by Deenanath, the deceased husband of Ratan Bai. Entire house property was owned by Deenanath alone which was inherited by his widow. Omprakash or his legal heirs i.e. defendants No.1 to 4 have no right, title or interest in it but for the alleged compromise. The result of alleged compromise and hence of the judgment and decree impugned under Order IX Rule 13 CPC is that Ratan Bai would be defrauded and would be deprived of her immovable house property.

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**19. CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 97**

**Whether the expression 'any person' as used in Order 21 Rule 97 of CPC includes the judgment-debtor too? Held, Yes – The expression 'any person' as used in Rule 97 of Order 21 CPC covers all persons who resist/obstruct delivery of possession of immovable property and such a person can also be the judgment – debtor.**

## Ranchhod and another v. Hukmaji and others

**Judgment dated 20.07.2010 passed by the High Court of M.P. in S.A. No. 1022 of 2007, reported in 2010 (4) MPLJ 426**

Held:

Order 21 Rule 97 provides that in case, where the decree holder having decree for possession of immovable property is resisted or obstructed by 'any person' obtaining possession of property, he can make an application to the Court complaining of such resistance or obstruction. Under Order 21 Rule 97 any party in possession of the property resisting execution of the decree can seek adjudication of his objection. The word 'any person' in Rule 97 of Civil Procedure Code has not been assigned narrow meaning only to cover the third parties and stranger but all persons resisting delivery of possession are covered within its meaning and such a person can also be the judgment-debtors in a given case.

The Supreme Court in the matter of *Bhanwar Lal v. Satyanarain and another* reported in *AIR 1995 SC 358,* has held that any person includes the judgment-debtor also. The Supreme Court has in the matter of *Bhanwar Lal* (supra) laid down:-

> "A reading of O.21 R.97, Civil Procedure Code clearly envisages that "any person" even including the judgment-debtor irrespective of whether he claims derivative title from the judgment-debtor or set up his own right, title or interest *de hors* the judgment-debtor and he resists execution of a decree, then the Court in addition to the power under R. 35(3) has been empowered to conduct an enquiry whether the obstruction by that person in obtaining possession of immovable property was legal or not."

The Supreme Court in the matter of *Shreenath and another v. Rajesh and others* reported in *1998(2) MPLJ (SC) 180 = AIR 1998 SC 1827* while considering the expression "any person" has held that:-

> ".....Order 21 Rule 99 conceives of resistance or obstruction to the possession of immovable property when made in execution of a decree by "any person". This may be either by the person bound by the decree, claiming title through judgment-debtor or claiming independent right of his own including tenant not party to the suit or even a stranger. A decree holder, in such case, may make an

application to the Executing Court complaining such resistance, for delivery of possession of the property.

...We find the expression "any person" under sub-clause (1) is used deliberately for widening the scope of power so that the Executing Court could adjudicate the claim made in any such application under Order 21 Rule 97. Thus, by the use of the words 'any person' it includes all persons resisting the delivery of possession, claiming right in the property even those not bound by the decree, includes tenants or other persons claiming right on their own including a stranger"

The Supreme Court in the matter of *N.S.S. Narayana Sarma and others v. Goldstone Exports (P) Ltd. and others* reported in *(2002) 1 SCC 622* while considering the scheme of Order 21, Rules 97 and 99 of the Civil Procedure Code has held that:-

"15. .....On a fair reading of the Rule it is manifest that the legislature has enacted the provision with a view to remove, as far as possible, technical objections to an application filed by the aggrieved party whether he is the decree-holder or any other person in possession of the immovable property under execution and has vested the power in the executing Court to deal with all questions arising in the matter irrespective of whether the Court otherwise has jurisdiction to entertain a dispute of the nature. This clear statutory mandate and the object and purpose of the provisions should not be lost sight of by the Courts seized of an execution proceeding. The Court cannot shirk its responsibility by skirting the relevant issues arising in the case."

As against this, learned counsel appearing for the respondent has placed reliance upon the judgment of the Supreme Court in the matter of *Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal and others* reported in *1997(1) MPLJ (SC) 487 = 1997 AIR SCW 685,* in the matter of *Silverline Forum Pvt. Ltd. v. Rajiv Trust and another* reported in *(1998) 3 SCC 723,* and in the matter of *Ranjeet Singh v. Banwarilal Samdasani* reported in *1999(1) M.P. Weekly Notes 36.* In these matters, it has been held that a third party has right to file objection under Order 21 Rule 97, but it has not been laid down that the judgment-debtor has no right to raise objection under Order 21 Rule 97.

It is worth noting that in the present matter, the appellants judgment-debtor has raised a dispute about the identity of the suit property. He has not disputed the binding nature of the decree. Thus, in view of the aforesaid position in law it is held that the appellant judgment-debtor was covered within the meaning of 'any person' as contained in Order 21 Rule 97 and his objection under the said provision was maintainable. The Courts below have committed an error in

rejecting the objection filed by the appellants on the wrong premises that the objection by the judgment-debtor under Order 21 Rule 97 is not maintainable.

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**20 CIVIL PROCEDURE CODE, 1908 – Order 23 Rule 3-A**
**If a person is not a party to the compromise, the decree against him is void – Certainly, against such decree, a suit is maintainable and the bar of Order 23 Rule 3-A would not be applicable in that case.**

**Santosh Kumar & Anr. v. Hachhu & others**
**Judgment dated 21.09.2010 passed by the High Court of M.P. in S.A. No. 272 of 2001, reported in 2010 (IV) MPJR 216**

Held:

In the present case, it is clear that Amarchand was minor at the time of passing of the decree of Civil Suit No. 393-A/1980. No guardian was appointed on behalf of him. Hence, it could be held that Amarchand was not a party to the decree. In such circumstances, the judgment and decree passed by the trial court in Civil Suit No. 393-A/1980 is not binding on Amarchand. The provision of Order 23 Rule 3-A is applicable only to the persons, who are parties to the compromise, however, the persons who were not party to the compromise, can institute a suit. The decree passed in Civil Suit No. 393-A/1980 is a decree against all the four persons including Amarchand. If it is not executable against Amarchand, then the decree is also not executable against the other defendants. Hence, the decree was void and in that circumstances, the suit filed by the plaintiffs-respondents was maintainable.

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**21. CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 and 2**
**Interlocutory mandatory injunction is equitable relief which is to be decided by the Court on the basis of sound judicial discretion – While granting interlocutory mandatory injunction, Court is required to see that the plaintiff has a strong case for trial i.e. it should be of a higher standard than the *prima facie* case which is normally required for temporary injunction.**

**F.F. (I) L.C v. M/s Supreme Engineers**
**Judgment dated 25.03.2010 passed by the High Court of M.P. in Misc. Appeal No 1240 of 2010, reported in 2010 (5) MPHT 173**

Held:

It is settled position in law that while granting interlocutory mandatory injunction the Court is required to see that the plaintiff has a strong case for trial, i.e., it should be of a higher standard than the prima facie case which is normally required for temporary injunction and it is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money and the balance of convenience should be in favour of the one who is seeking such a relief. The interlocutory mandatory injunction is essentially the

equitable relief which is to be decided by the Court on the basis of sound judicial discretion to be exercised in the fact situation in a particular case. Though exercise of such a discretion is limited to rare and exceptional cases but there is no absolute bar to the Court in granting such a relief in deserving cases. Whether or not a case comes in the category of rare and exceptional one, is to be decided according to the facts and circumstances of the case. Such an order of temporary injunction can be granted on an interlocutory application after notice to the defendants and after hearing the parties.

The aforesaid position in law is supported by the judgments in the matter of *Dorabji Warden v. Sorab Warden, (1990) 2 SCC 117, Mrs. Vijay Shrivastava v. Rahul, AIR 1988 Delhi 140, Baban Narayan Landge v. Madhu Bhikaji Tonchar and others, AIR 1989 Bombay 247 and Indian Cable Company Limited v. Smt. Sumitra Chakraborty, AIR 1985 Calcutta 248.*

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**22. CONSTITUTION OF INDIA – Article 311**
**Compulsory retirement – Effect of adverse entries in service record even after promotion – "WASHED OFF THEORY" does not have universal application – Reviewing Authority can consider it as a part of the entire service record.**

## Pyare Mohan Lal v. State of Jharkhand & Ors.

**Judgment dated 10.09.2010 passed by the Supreme Court in Writ Petition No. 382 of 2003, reported in AIR 2010 SC 3753 (Three Judge Bench)**

Held:

In *State of Punjab v. Dewan Chuni Lal, AIR 1970 SC 2086,* a two-Judge Bench of this Court held that adverse entries regarding the dishonesty and inefficiency of the government employee in his ACRs have to be ignored if, subsequent to recording of the same, he had been allowed to cross the efficiency bar, as it would mean that while permitting him to cross the efficiency bar such entries had been considered and were not found of serious nature for the purpose of crossing the efficiency bar.

Similarly, a two-Judge Bench of this Court in *Baidyanath Mahapatra v. State of Orissa & Anr., AIR 1989 SC 2218,* had taken a similar view on the issue observing that adverse entries awarded to the employee in the remote past lost significance in view of the fact that he had subsequently been promoted to the higher post, for the reason that while considering the case for promotion he had been found to possess eligibility and suitability and if such entry did not reflect deficiency in his work and conduct for the purpose of promotion, it would be difficult to comprehend how such an adverse entry could be pressed into service for retiring him compulsorily. When a government servant is promoted to higher post on the basis of merit and selection, adverse entries if any contained in his service record lose their significance and remain on record as part of past history.

This view has been adopted by this Court in *Baikuntha Nath Das v. Chief District Medical officer, Baripad & anr., AIR 1992 SC 1020.*

However, a three-Judge Bench of this Court in *State of Orissa & Ors. v. Ram Chandra Das, AIR 1996 SC 2436,* had taken a different view as it had been held therein that such entries still remain part of the record for overall consideration to retire a government servant compulsorily. The object always is public interest. Therefore, such entries do not lose significance, even if the employee has subsequently been promoted. The Court held as under:-

> "Merely because a promotion has been given even after adverse entries were made, cannot be a ground to note that compulsory retirement of the government servant could not be ordered. The evidence does not become inadmissible or irrelevant as opined by the Tribunal. What would be relevant is whether upon that state of record as a reasonable prudent man would the Government or competent officer reach that decision. We find that selfsame material after promotion may not be taken into consideration only to deny him further promotion, if any. But that material undoubtedly would be available to the Government to consider the overall expediency or necessity to continue the government servant in service after he attained the required length of service or qualified period of service for pension."

This judgment has been approved and followed by this court in *State of Gujarat v. Umedbhai M. Patel, AIR 2001 SC 1109,* emphasising that the "entire record" of the government servant is to be examined.

In *State of U.P. & ors. v. Vijay Kumar Jain, AIR 2002 SC 1345* this Court held that the vigour or sting of an entry does not get wiped out, particularly, while considering the case of employee for giving him compulsory retirement, as it requires the examination of the entire service records, including character rolls and confidential reports. 'Vigour or sting of an adverse entry is not wiped out' merely because it relates to the remote past. There may be a single adverse entry of integrity which may be sufficient to compulsorily retire the government servant.

In *State of U.P. v. Ram Chandra Trivedi, AIR 1976 SC 2547,* this Court observed that it must be borne in mind that in cases where there is any conflict between the views expressed by larger and smaller Bench of this Court, the court cannot disregard or skirt the views expressed by the larger Bench.

(Also see: *Smt. Triveniben v. State of Gujarat, AIR 1989 SC 1335* and *A.R. Antulay v. R.S. Nayak, AIR 1988 SC 1531*)

In view of the above, the law can be summarised to state that in case there is a conflict between two or more judgments of this court, the judgment of the larger Bench is to be followed. More so, the washed off theory does not have universal application. It may have relevance while considering the case of Government servant

for further promotion but not in a case where the employee is being assessed by the Reviewing Authority to determine whether he is fit to be retained in service or requires to be given compulsory retirement, as the Committee is to assess his suitability taking into consideration his "entire service record."

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***23. CONTRACT ACT, 1872 – Sections 2 (a), 5, 37 and 39**
**'Earnest money' and forfeiture thereof – Earnest money furnished with a tender is part of the purchase price if the offer of the tenderer is accepted or it is refunded to the tenderer if someone else's offer is accepted – But if for some fault or failure on the part of the tenderer the transaction or the contract does not come through, the party inviting the tender is entitled to forfeit the earnest money furnished by that tenderer.**

**Villayati Ram Mittal Private Limited v. Union of India and another**
**Judgment dated 21.09.2010 passed by the Supreme Court in SLP (C) No. 12144 of 2009, reported in (2010) 10 SCC 532**

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**24. CRIMINAL PROCEDURE CODE, 1973 – Sections 154 and 174**
**Recording of formal FIR after inquest report – In every case such FIR does not lose authenticity because it is not general proposition of universal application. The object of inquest report and necessity of FIR explained.**

**Sambhu Das alias Bijoy Das & Anr. v. State of Assam**
**Judgment dated 15.09.2010 passed by the Supreme Court in Criminal Appeal No. 342 of 2007, reported in AIR 2010 SC 3300**

Held:

In the present case, there is the documentary evidence in the form of G.D. entry No. 164 recorded by PW-8 in the General Diary on 07.06.1997 at about 6.30 P.M. That entry was made on the telephonic message/information supplied by Asabuddin Mazumdar, PW-3. It is clearly stated therein by PW-3 that a man named Fanilal Das was lying in a serious condition on the side of verandah of Chandan Das. It was on receipt of this information that PW-8 went to the place of occurrence of the incident, drew up the inquest report, made seizure of the material objects and recorded the statement of those present, including PW-1. Admittedly, the inquest report is prepared by PW-8 at 9.30 P.M. and the formal FIR is lodged by PW-1 at 11.30 P.M.

The learned senior counsel for the appellants by placing his fingers on the admission made by PW-8 in his evidence would contend, that, FIR loses its authenticity if it is lodged after the inquest report is recorded. This submission of the learned counsel is a general proposition and may not be true in all cases and all circumstances. This general proposition cannot be universally applied, by holding that if the FIR is lodged for whatever reason after recording the inquest report the same would be fatal to all the proceedings arising out of the Indian Penal Code.

The Inquest Report is prepared under Section 174 Cr.P.C. The object of the inquest proceedings is to ascertain whether a person has died under unnatural circumstances or an unnatural death and if so, what the cause of death is? The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted, is foreign to the ambit and scope of the proceedings under Section 174 Cr.P.C. The names of the assailants and the manner of assault are not required to be mentioned in the inquest report. The purpose of preparing the inquest report is for making a note in regard to identification marks of the accused. The inquest report is not a substantive evidence. Mention of the name of the accused and eye witness in the inquest report is not necessary. Due to non-mentioning of the name of the accused in the inquest report, it cannot be inferred that FIR was not in existence at the time of inquest proceedings. Inquest report and post mortem report cannot be termed to be substantive evidence and any discrepancy occurring therein can neither be termed to be fatal nor even a suspicious circumstance which would warrant a benefit to the accused and the resultant dismissal of the prosecution case. The contents of the inquest report cannot be termed as evidence, but they can be looked into to test the veracity of the witnesses. When an officer incharge of Police Station receives information that a person had committed suicide or has been killed or died under suspicious circumstances, he shall inform the matter to the nearest Magistrate to hold Inquest. A criminal case is registered on the basis of information and investigation is commenced under Section 157 of Cr.P.C. and the information is recorded under Section 154 of Cr.P.C. and, thereafter, the inquest is held under Section 174 Cr.P.C. This Court, in the case of *Podda Narayana v. State of Andhra Pradesh, AIR 1975 SC 1252,* has indicated that the proceedings under Section 174 Cr. P.C. have limited scope. The object of the proceedings is merely to ascertain whether a person has died in suspicious circumstances or an unnatural death and if so, what is the apparent cause of the death. The question regarding details as to how the deceased was assaulted or who assaulted him or under what circumstances, he was assaulted is foreign to the ambit and scope proceeding under Section 174. Neither in practice nor in law was it necessary for the Police to mention these details in the Inquest Report. In *George v. State of Kerala, AIR 1998 SC 1376,* it has been held that the Investigating Office is not obliged to investigate, at the stage of Inquest, or to ascertain as to who were the assailants. In *Suresh Rai v. State of Bihar, AIR 2000 SC 2207,* it has been held that under Section 174 read with Section 178 of Cr. P.C., Inquest Report is prepared by the Investigating Officer to find out prima facie the nature of injuries and the possible weapon used in causing those injuries as also possible cause of death.

This Court has consistently held that Inquest Report cannot be treated as substantive evidence but may be utilized for contradicting the witnesses of the Inquest. Section 175 Cr. P.C. provides that a Police Officer proceedings under Section 174 may, by an order in writing, summon two or more persons for the purpose of the said investigation. The provisions of Sections 174 and 175 afford

a complete Code in itself for the purpose of inquiries in cases of accidental or suspicious deaths.

Section 2 (a) of the Cr.P.C. defines "Investigation" as including all the proceedings under this Code for the collection of evidence conducted by the police officer.

Section 157 of the Code says that if, from the information received or otherwise an officer incharge of a police station has reason to suspect the commission of an offence which he is empowered to investigate, he shall forthwith send a report of the same to the Magistrate concerned and proceed in person to the spot to investigate the facts and circumstances of the case, if he does not send a report to the Magistrate, that does not mean that his proceedings to the spot, is not for investigation. In order to bring such proceedings within the ambit of investigation, it is not necessary that a formal registration of the case should have been made before proceeding to the spot. It is enough that he has some information to afford him reason even to suspect the commission of a cognizable offence. Any step taken by him pursuant to such information, towards detention etc., of the said offence, would be part of investigation under the Code.

In *Maha Singh v. State (Delhi Administration), (1976) SCC 644,* this court considered a case in which police officer arranged a raid after recording a complaint, but before sending it for registration of the case. It was held in that case that "the moment the Inspector had recorded a complaint with a view to take action to track the offender, whose name was not even known at that stage, and proceeded to achieve the object, visited the locality, questioned the accused, searched his person, seized the note and other documents, turns the entire process into investigation under the Code.

In *State of U.P. v. Bhagwant Kishore, AIR 1964 SC 221,* this court stated that:

> "Though ordinarily investigation is undertaken on information received by a police officer, the receipt of information is not a condition precedent for investigation."

The principles now well settled is that when information regarding a cognizable offence is furnished to the police that information will be regarded as the FIR and all enquiries held by the police subsequent thereto would be treated as investigation, even though the formal registration of the FIR takes place only later.

Assuming that some report was made on telephone and that was the real First Information Report, this by itself would not affect the appreciation of evidence made by the learned Sessions Judge and the conclusions of fact drawn by him. The FIR under Section 154 Cr. P.C. is not a substantive piece of evidence. Its only use is to contradict or corroborate the maker thereof. Therefore, we see no merit in the submission made by learned counsel for the appellants.

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**25. CRIMINAL PROCEDURE CODE, 1908 – Sections 190 (1) (b), 209 and 319 Whether the Magistrate can take cognizance for an offence exclusively triable by Court of Session under Section 190 (1) (b) CrPC against an accused who was not named in the chargesheet filed by the Investigating Agency or exonerated by the Investigating Authority? Held, Yes – The Magistrate can apply his mind independently to the material contained in the police report and take cognizance thereupon in exercise of his powers under Section 190 (1) (b) CrPC.**

## Uma Shankar Singh v. State of Bihar and another

**Judgment dated 09.09.2010 passed by the Supreme Court in SLP (Crl.) No. 5123 of 2009, reported in (2010) 9 SCC 479**

Held:

On behalf of the petitioner it was urged that when he was not named as an accused in the charge-sheet filed by the investigating agency, the Magistrate could not have taken cognizance as far as he was concerned and the trial court should have waited till the stage of Section 319 CrPC if at all the petitioner was to be arrayed as an accused. Learned Senior Advocate reiterated the oft-repeated saying that cognizance is taken of an offence and not the offender. The learned Senior Advocate submitted that the case was also investigated by CID on the directions of the High Court and, although the alleged offence was triable by a Court of Session, the learned Magistrate erroneously took cognizance thereof.

In support of the said proposition reliance was placed on the decision of this Court in *Raj Kishore Prasad v. State of Bihar, (1996) 4 SCC 495* wherein this Court when confronted with a similar question held that in order to apply Section 319 CrPC against any person other than the accused, it would depend on the evidence recorded in the course of any inquiry or trial and that the proceedings before a Magistrate under Section 209 CrPC are not trial proceedings nor were they ever meant to be.

Reference was then made to a decision of a three-Judge Bench of this Court in *Ranjit Singh v. State of Punjab, (1998) 7 SCC 149* wherein the Hon'ble Judges took the view that when a case is committed to the Court of Session under Section 209, the Court of Session has no jurisdiction to include a new person as an accused before evidence was led on behalf of the prosecution and that there was no power other than the power conferred under Section 319 CrPC by which the Court of Session could join a new person as an accused. It was held that there is no intermediary stage between committal under Section 209 CrPC and Section 319 CrPC for the aforesaid purpose.

The learned Senior Advocate submitted that the views expressed in *Ranjit Singh case* (supra) were contrary to those expressed by this Court in *Kishan Singh v. State of Bihar, (1993) 2 SCC 16* where, although 20 persons had been named in the FIR, the Magistrate had committed 18 to the Court of Session

under Section 209 CrPC to stand trial. On an application made under Section 319 CrPC indicating the involvement of the other two accused as well, a prayer was made that they should also be summoned and arraigned before the court as accused persons along with the 18 other accused already named in the charge-sheet. Despite objections raised on behalf of the said two persons the Sessions Judge, in exercise of his discretion, added the said persons as the accused along with the 18 others. The criminal revision preferred from the order of the learned Sessions Judge was dismissed by the High Court. This Court while granting special leave held that although the stage of Section 319 had not been reached on the materials available, the Sessions Judge was within his jurisdiction in taking cognizance against the said two persons under Section 193 of the Code.

The same question once again fell for consideration in *Kishori Singh v. State of Bihar, (2004) 13 SCC 11* where the decision rendered by this Court in *Ranjit Singh case* (supra) was followed, although another decision in *India Carat (P) Ltd. v. State of Karnataka, (1989) 2 SCC 132* was also cited wherein another Bench of three Judges of this Court has held that despite the police report that no case had been made out against the accused, the Magistrate can take cognizance of the offence under Section 190 (1) (b), taking into account the statement of witnesses made under police investigation and issue process.

Ultimately, *Dharam Pal v. State of Haryana, (2004) 13 SCC 9* came up for consideration before a Bench of two Judges when on account of the different views expressed by different Benches of this Court, the case was directed to be heard by a three-Judge Bench. After considering the various decisions in connection with the said issue, the three-Judge Bench observed that prima facie it did not think that the interpretation reached in *Ranjit Singh case* (supra) was correct and that the law was clearly enunciated in *Kishun Singh case* (supra). Further, having regard to the fact that the decision in *Ranjit Singh case* (supra) was by a three-Judge Bench, the learned Judges directed that the matter be placed before the Hon'ble the Chief Justice of India for placing the matter before a larger Bench.

Learned Senior Advocate appearing for some of the respondents, on the other hand, submitted that the question referred to the larger Bench in *Dharam Pal Singh* (supra) is not material for a decision in this case where the fact situation is different. He urged that the law was well settled that the Magistrate was not bound to accept the final report filed by the investigating authorities under Section 173 (2) CrPC and was entitled to issue process against an accused even though exonerated by the said authorities, without holding any separate enquiry, on the basis of the police report itself.

There is substance in learned Senior Advocate's submission that for a decision in the facts of the case, it is not necessary to wait for the outcome of the result of the reference made to a larger Bench in *Dharam Pal case* (supra). The reference is with regard to the Magistrate's power of enquiry if he disagreed with the final report submitted by the investigating authorities. The facts of this

case are different and are covered by the decision of this Court in *India Carat (P) Ltd.* (supra) following the line of cases from *Abhinandan Jha v. Dinesh Mishra, AIR 1968 SC 117* onwards.

The law is well settled that even if the investigating authority is one of the view that no case has been made out against an accused, the Magistrate can apply his mind independently to the materials contained in the police report and take cognizance thereupon in exercise of his powers under Section 190 (1) (b) CrPC.

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**26. CRIMINAL PROCEDURE CODE, 1973 – Sections 195, 173 and 223 INDIAN PENAL CODE, 1860 – Section 188**

**(i) The provisions of Section 195 Cr.P.C. are mandatory – Non-compliance of it would vitiate the prosecution and all other consequential orders – The Court cannot assume the cognizance of such case without complaint and the trial and conviction will be void.**

**(ii) Clubbing of complaints – When permissible – Separate complaints relating to different incidents may be clubbed together and one charge sheet can be filed where circumstances showing that in reality they were part of one and the same incident.**

**(iii) Defective investigation – Cannot be ground for acquittal – Duty of Court explained.**

**(iv) Hostile witness – Evidential value – Admissible part of the statement can be used by prosecution or defence.**

**(v) Omissions, contradictions and discrepancies – No undue importance should be attached unless they go to the heart of the matter and shake the basic version of prosecution witness.**

## C. Muniappan & Ors. v. State of Tamil Nadu

**Judgment dated 30.08.2010 passed by the Supreme Court in Criminal Appeal No. 127 of 2008, reported in AIR 2010 SC 3718**

Held:

**(i)** Section 195(a)(i) Cr.PC bars the court from taking cognizance of any offence punishable under Section 188 IPC or abetment or attempt to commit the same, unless, there is a written complaint by the public servant concerned for contempt of his lawful order. The object of this provision is to provide for a particular procedure in a case of contempt of the lawful authority of the public servant. The court lacks competence to take cognizance in certain types of offences enumerated therein. The legislative intent behind such a provision has been that an individual should not face criminal prosecution instituted upon insufficient grounds by persons actuated by malice, ill-will or frivolity of disposition and to save the time of the criminal courts being wasted by endless prosecutions. This provision has been carved out as an exception to the general rule contained under Section 190 Cr.PC that any person can set the law in motion by making a complaint, as it prohibits the court from taking cognizance of certain offences

until and unless a complaint has been made by some particular authority or person. Other provisions in the Cr.PC like Sections 196 and 198 do not lay down any rule of procedure, rather, they only create a bar that unless some requirements are complied with, the court shall not take cognizance of an offence described in those Sections. (vide *Govind Mehta v. The State of Bihar, AIR 1971 SC 1708; Patel Laljibhai Somabhai v. The State of Gujarat, AIR 1971 SC 1935; Surjit Singh & Ors. v. Balbir Singh, AIR 1996 SC 1592, State of Punjab v. Raj Singh & Anr., AIR 1998 SC 768, K. Vengadachalam v. K.C. Palanisamy & Ors., (2005) 7 SCC 352;* and *Iqbal Singh Marwah & Anr. v. Meenakshi Marwah & Anr., AIR 2005 SC 2119*).

The test of whether there is evasion or non-compliance of Section 195 Cr.PC or not, is whether the facts disclose primarily and essentially an offence for which a complaint of the court or of a public servant is required. In *Basir-ul-Haq & Ors. v. The State of West Bengal, AIR 1953 SC 293* and *Durgacharan Naik & Ors v. State of Orissa, AIR 1966 SC 1775,* this Court held that the provisions of this Section cannot be evaded by describing the offence as one being punishable under some other sections of IPC, though in truth and substance, the offence falls in a category mentioned in Section 195 Cr.PC. Thus, cognizance of such an offence cannot be taken by mis-describing it or by putting a wrong label on it.

In *M.S. Ahlawat v. State of Haryana & Anr., AIR 2000 SC 168,* this Court considered the matter at length and held as under:

> "....Provisions of Section 195 CrPC are mandatory and no court has jurisdiction to take cognizance of any of the offences mentioned therein unless there is a complaint in writing as required under that section." (Emphasis added)

In *Sachida Nand Singh & Anr. v. State of Bihar & Anr., (1998) 2 SCC 493,* this Court while dealing with this issue observed as under:

> "7...Section 190 of the Code empowers "any magistrate of the first class" to take cognizance of "any offence" upon receiving a complaint, or police report or information or upon his own knowledge. Section 195 restricts such general powers of the magistrate, and the general right of a person to move the court with a complaint to that extent curtailed. It is a well-recognised canon of interpretation that provision curbing the general jurisdiction of the court must normally receive strict interpretation unless the statute or the context requires otherwise." (Emphasis supplied)

In *Daulat Ram v. State of Punjab, AIR 1962 SC 1206,* this Court considered the nature of the provisions of Section 195 Cr.PC. In the said case, cognizance had been taken on the police report by the Magistrate and the appellant therein had been tried and convicted, though the concerned public servant, the Tahsildar had not filed any complaint. This Court held as under:

"The cognizance of the case was therefore wrongly assumed by the court without the complaint in writing of the public servant, namely, the Tahsildar in this case. The trial was thus without jurisdiction ab initio and the conviction cannot be maintained. The appeal is, therefore, allowed and the conviction of the appellant and the sentence passed on him are set aside."

Thus, in view of the above, the law can be summarized to the effect that there must be a complaint by the pubic servant whose lawful order has not been complied with. The complaint must be in writing. The provisions of Section 195 Cr.PC are mandatory. Non-compliance of it would vitiate the prosecution and all other consequential orders. The Court cannot assume the cognizance of the case without such complaint. In the absence of such a complaint, the trial and conviction will be void ab initio being without jurisdiction.

**(ii)** The submission on behalf of the appellants that two crimes bearing Nos. 188 and 190 of 2000 could not be clubbed together, has also no merit for the simple reason that if the cases are considered, keeping in view the totality of the circumstances and the sequence in which the two incidents occurred, taking into consideration the evidence of drivers and conductors/cleaners of the vehicles involved in the first incident and the evidence of *C. Ramasundaram V.A.O., (PW.87)*, we reach the inescapable conclusion that the second occurrence was nothing but a fall out of the first occurrence. The damage caused to the public transport vehicles and the consequential burning of the University bus remained part of one and the same incident. Merely because two separate complaints had been lodged, did not mean that they could not be clubbed together and one charge sheet could not be filed (See: *T.T. Antony v. State of Kerala & Ors., AIR 2001 SC 2637)*

**(iii)** There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the I.O. and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence de hors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation. (Vide *Chandra Kanth Lakshmi v. State of Maharashtra, AIR 1974 SC 220; Karnel Singh v. State of*

*Madhya Pradesh, AIR 1995 SC 247, Ram Bihari Yadav v. State of Bihar, AIR 1998 SC 1850; Paras Yadav v. State of Bihar, AIR 1999 SC 644; State of Karnataka v. K. Yarappa Reddy, AIR 2000 SC 185; Amar Singh v. Balwinder Singh, AIR 2003 SC 1164; Allarakha K. Mansuri v. State of Gujarat, AIR 2002 SC 1051;* and *Ram Bali v. State of U.P., AIR 2004 SC 2329*).

**(iv)** It is settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (vide *Bhagwan Singh v. The State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848; and Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853*).

In *State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC 2766,* this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in *Balu Sonba Shinde v. State of Maharashtra, AIR 2002 SC 3137 Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P., AIR 2006 SC 951; Sarvesh Naraian Shukla v. Daroga Singh & Ors., AIR 2008 SC 320;* and *Subbu Singh v. State, (2009) 6 SCC 462.*

Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.

In the instant case, some of the material witnesses i.e. B. Kamal (PW.86); and R. Maruthu (PW.51) turned hostile. Their evidence has been taken into consideration by the courts below strictly in accordance with law.

Some omissions, improvements in the evidence of the PWs have been pointed out by the learned counsel for the appellants, but we find them to be very trivial in nature.

**(v)** It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses. [vide *Sohrab & Anr. v. The State of*

*M.P., AIR 1972 SC 2020; State of U.P. v. M.K. Anthony, AIR 1985 SC 48; Bharwada Bhogini Bhai Hirji Bhai v. State of Gujarat, AIR 1983 SC 753; State of Rajasthan v. Om Prakash, AIR 2007 SC 2257; Prithu @ Prithi Chand & Anr. v. State of Himachal Pradesh, (2009) 11 SCC 588; State of U.P. v. Santosh Kumar & Ors., (2009) 9 SCC 626;* and *State v. Saravanan & Anr., AIR 2009 SC 152*].

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**27. CRIMINAL PROCEDURE CODE, 1973 – Section 197**
**PREVENTION OF CORRUPTION ACT, 1988 – Section 19 (3) and (4)**
**Sanction for prosecution given by competent authority – Sanction order is public document and its mere production tantamount to proof – Examination of sanctioning authority is not necessary as order itself shows about application of mind to accord sanction.**

**Shivraj Singh Yadav v. State of M.P.**
**Judgment dated 15.07.2010 passed by the High Court of M.P. in Criminal Appeal No. 544 of 2004, reported in 2010 (IV) MPJR 49 (DB)**

Held:

So far as the question of proper sanction is concerned, according to us, on going through the sanction order (Ex.P.30), we find that by application of mind the officer competent to accord sanction has accorded the sanction to prosecute the appellant. Merely because the sanction order has not been proved by examining the sanctioning authority, according to us, it cannot be said that it is not proved. Indeed the sanction order is a public document and mere its production tantamount to its proof and it is not at all necessary to get it proved by examining the sanctioning authority. Even otherwise, looking to the scope of sub-sections (3) and (4) of Section 19 of the Prevention of Corruption Act, we find that if some error, omission or irregularity in issuing the sanction order is there, it would not be fatal, unless and until any prejudice is shown. In the present case no prejudice has been shown. We have gone through the judgment passed by the learned Special Judge convicting the appellant under Section 7 of the Act and, according to us, the reasonings so assigned by the learned Special Judge is in accordance to the law. Hence, the conviction of appellant under Section 7 of the Act is hereby affirmed.

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**28. CRIMINAL PROCEDURE CODE, 1973 – Section 200**
**Complaint filed by Public Servant in discharge of his duties – Examination of complainant – Not necessary under Sections 200 and 202 of Cr.P.C. – Magistrate can take cognizance on the basis of affidavit.**

**Amita Gas Service and Anr. (M/s) v. Shri Raman Gupta**
**Judgment dated 05.08.2010 passed by the High Court of M.P. in M. Cr. C. No. 427 of 2010 reported in MPJR 2010 (IV) 159**

Held:

It is contended by the learned counsel for the petitioners that orders of learned trial court of taking cognizance is improper, illegal and learned trial court has erred in taking cognizance against the petitioner as statement of complainant and his witnesses have not been recorded under Sections 200 and 202 CrPC and only on the basis of affidavit sworn by complainant cognizance has been taken while it is mandatory to record statement of complainant as well as witnesses before taking cognizance. Hence the impugned orders to be quashed. Learned counsel for the petitioners drew this Court's attention to a citation *National Small Industries Corporation Limited v. State (NCT of Delhi) and others (2009) 1 SCC 407* wherein it is held that examination of complainant under Section 200 CrPC is mandatory. Apex Court quoted the following observations made in *Associated Cement Co. Ltd. v. Keshavanand, (1998) 1 SCC 687* with approval:

> "22. Chapter XV of the new Code contains provisions for lodging complaints with Magistrates. Section 200 as the starting provisions of that Chapter enjoins of the Magistrate, who takes cognizance of an offence on a complaint, to examine the complainant on oath. Such examination is mandatory as can be discerned from the words 'shall examine on oath the complainant.....'. The Magistrate is further required to reduce the substance of such examination to writing and it 'shall be signed by the Complainant'. Under Section 203 of CrPC, the Magistrate is to dismiss the complaint if he is of opinion that there is no sufficient ground for proceeding after considering that said statement on oath. Such examination of the complainant on oath can be dispensed with only under two situations, one if the complaint was filed by as public servant, acting or purporting to act in the discharge of his official duties and the other when a court has made the complaint. Except under the above understandable situations the complainant has to make his physical presence for being examined by the Magistrate."

Further reliance is placed on *Banshilal v. Abdul Munnar, 2010(1) MPHT 40* in which Bench of this Court considering the non-compliance with the statutorily mandatory procedure of examining the complainant has set aside the order dated 22.8.08 directing issuance of process against petitioners/accused and directed that it would not be possible to quash the complaint in its entirety referring *Narmada Prasad Sonkar v. Sardar Avatar Singh Chabara, (2006) 9 SCC 601.* It is held that Magistrate shall be at liberty to make an inquiry under Sections 200 and 202 CrPC to ascertain as to whether there exists sufficient ground for quashing proceedings against petitioner under Section 138 of the Act.

Learned counsel for the petitioners placing reliance on the above cititations submitted that orders of the learned trial court of taking cognizance are to be quashed or in alternative trial Court may be directed to make inquiry under Sections 200 and 202 CrPC.

So far as the dictum relied upon by the learned counsel for the petitioners in *National Small Industries* (supra) is concerned, it is not applicable in the case at hand as in that case complainant has not filed any affidavit and the appellant was a government company who lodged complaint against second respondent/ Company alleging that they had issued a cheque drawn in favour of the appellant towards discharge of its liability, which was dishonoured when presented for payment. The Metropolitan Magistrate took cognizance and summoned the accused but did not examine the complainant and its witnesses, under Section 200 CrPC as he held that as the complaint was filed by a public servant in discharge of his public duties, his examination was dispensed with. The respondents challenged the summoning order on the basis that as the complainant was a government company and not a pubic servant, the exemption under clause (a) of the proviso to Section 200 CrPC was not available, and that the Magistrate could not have dispensed with the mandatory requirement of examining the complainant on oath, under Section 200 CrPC. The High Court accepted this contention and allowed the petition and quashed the summoning order. Appellant has thus filed appeal in Apex Court and appeal is allowed by Apex Court and it was held that "Thus, the answer to the question raised is where an incorporeal body is the payee and the employee who represents such incorporeal body in the complaint is public servant, he being the *de facto* complainant, clause (a) of the proviso to Section 200 of the Code will be attracted and consequently, the Magistrate need not examine the complainant and the witnesses." So the facts of the case in hand and petitioners do not deserve any benefit on the basis of above citation

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**29. CRIMINAL PROCEDURE CODE, 1973 – Sections 210 and 300 CONSTITUTION OF INDIA – Article 20 (2)**

*Clubbing and consolidation of two cases.*

**Under Section 210 CrPC, the Magistrate may try the two cases in respect of same offence arising out of a police report and of private complaint together as if both the cases were instituted on a police report – But where the versions in the complaint case and the police report are totally different, contradictory and mutually exclusive arising out of the same incident then such case should be tried separately by the same Court – The evidence is to be recorded separately in both the cases and they should be disposed of simultaneously so that the procedure does not infringe the provisions of Article 20 (2) of the Constitution of India or Section 300 CrPC.**

**Pal alias Palla v. State of Uttar Pradesh**
**Judgment dated 22.09.2010 passed by the Supreme Court in Criminal Appeal No. 1830 of 2010, reported in (2010) 10 SCC 123**
**Held:**

The question, which arises for consideration in this appeal is whether a common trial can be held in respect of two cases, one on the basis of the charge-sheet filed by the police and the other on the basis of a protest petition which has been treated as a complaint having been committed to the Court of Sessions, although none of the accused in the said two cases are common. In fact, as indicated hereinabove, the accused in one of the cases are the witnesses in the other and vice versa.

Section 210 Cr.P.C. provides the procedure to be followed when there is a complaint case and police investigation in respect of the same offence. Sub-Section (1) of Section 210 provides that when in a case instituted otherwise than on a police report, namely, a complaint case, the Magistrate is informed during the course of inquiry or trial that an investigation by the police is in progress in relation to the offence which is the subject matter of inquiry or trial held by him, the Magistrate is required to stay the proceedings of such inquiry or trial and to call for a report on the matter from the Police Officer conducting the investigation. Sub-Section (2) provides that if a report is made by the Investigating Officer under Section 173 and on such report cognizance of any offence is taken by the Magistrate against any person, who is an accused in a complaint case, the Magistrate shall inquire into or try the two cases together, as if both the cases had been instituted on a police report. Sub-Section (3) provides that if the police report does not relate to any accused in the complaint case, or if the Magistrate does not take cognizance of any offence on a police report, he shall proceed with the inquiry or trial which was stayed by him, in accordance with the provisions of the Code.

Although, it will appear from the above that under Section 210 Cr.P.C. the Magistrate may try the two cases arising out of a police report and a private complaint together, the same, in our view, contemplates a situation where having taken cognizance of an offence in respect of an accused in a complaint case, in a separate police investigation such a person is again made an accused, then the Magistrate may inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report. That, however, is not the fact situation in the instant case, since the accused are different in the two separate proceedings and the situation has, in fact, arisen where prejudice in all possibility is likely to be caused in a single trial where a person is both an accused and a witness in view of the two separate proceedings out of which the trial arises. In our view, this is a case where the decision in *Harjinder Singh v. State of Punjab, (1985) 1 SCC 422* would be more apposite. In the said case, the question of Article 20(2) of the Constitution, as well as Section 300 Cr.P.C., relating to double jeopardy was considered. A similar

situation has arisen in this case where the version in the complaint case and the police report are totally different, though, arising out of the same incident. In our view, this is a case where the two trials should be held simultaneously but not as a single trial.

The facts of the case also warrant that the two trials should be conducted by the same Presiding Officer in order to avoid conflict of decisions. As was observed in *Harjinder Singh's case* (supra) clubbing and consolidating the two cases, one on a police challan and the other on a complaint, if the prosecution versions in the two cases are materially different, contradictory and mutually exclusive, should not be consolidated but should be tried together with the evidence in the two cases being recorded separately, so that both the cases could be disposed of simultaneously.

Although, the High Court has relied on the provisions of Section 210 of the Code in directing that the two cases be clubbed together, in our view, the fact situation does not really attract the provisions contemplated in the said section. On the other hand, as indicated hereinabove, the trial court, in the unusual facts of the case, is required to hear the two cases together, though separately, and take evidence separately, except in respect of all witnesses who would not be affected either by the provisions of Article 20(2) of the Constitution or Section 300 Cr.P.C.

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**30. CRIMINAL PROCEDURE CODE, 1973 – Sections 227 and 228**

**(i) Framing of charge – Considerations therefor – Principles to be adhered while considering the question of framing of charge enumerated.**

**(ii) Long delay in prosecution – Effect of – Though it may be a relevant ground for granting discharge, but prosecution cannot be quashed on the ground of delay in each and every case without testing the material placed before the Court at the trial.**

## Sajjan Kumar v. Central Bureau of Investigation

**Judgment dated 20.09.2010 passed by the Supreme Court in Criminal Appeal No. 1803 of 2010, reported in (2010) 9 SCC 368**

Held:

It is clear that the Judge concerned has to consider all the records of the case, the documents placed, hear the submission of the accused and the prosecution and if there is *"not sufficient ground"* (emphasis supplied) for proceeding against the accused, he shall discharge the accused by recording reasons. If after such consideration and hearing, as mentioned in Section 227, if the Judge is of the opinion that *"there is ground for presuming"* (emphasis supplied) that the accused has committed an offence, he is free to direct the accused to appear and try the offence in accordance with the procedure after framing charge in writing against the accused.

In *Union of India v. Prafulla Kumar Samal, (1979) 3 SCC 4* the scope of Section 227 CrPC was considered.

On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following principles emerge:

> (i) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.
>
> (ii) Where the material placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing a charge and proceeding with the trial.
>
> (iii) The court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.
>
> (iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.
>
> (v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.
>
> (vi) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.

At the stage of framing of charge under Section 228 CrPC or while considering the discharge petition filed under Section 227, it is not for the Magistrate or the Judge concerned to analyse all the material including pros and cons, reliability or acceptability, etc. It is at the trial, the Judge concerned has to appreciate their evidentiary value, credibility or otherwise of the statement, veracity of various documents and is free to take a decision one way or the other.

The learned Senior Counsel appearing for the appellant further submitted that because of the long delay, the continuation of the prosecution and framing of charges merely on the basis of certain statements made after a gap of 23 years cannot be accepted and according to him, it would go against the protection provided under Article 21 of the Constitution.

Learned Senior Counsel for the appellant heavily relied on SCC para 20 of the decision of this Court in *Vakil Prasad Singh v. State of Bihar, (2009) 3 SCC 355* which reads as under: (SCC pp. 361-62)

"20. For the sake of brevity, we do not propose to reproduce all the said propositions and it would suffice to note the gist thereof. These are: [*Abdul Rehman Antulay v. R.S. Nayak, (1992) 1 SCC 225, SCC pp. 270-73, para 86*]

(i) fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily;

(ii) right to speedy trial flowing from Article 21 encompasses all the stages, namely, the stage of investigation, inquiry, trial, appeal, revision and retrial;

(iii) in every case, where the speedy trial is alleged to have been infringed, the first question to be put and answered is – who is responsible for the delay?;

(iv) while determining whether undue delay has occurred (resulting in violation of right to speedy trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on – what is called, the systemic delays;

(v) each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact

of incarceration of the accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case;

(vi) ultimately, the court has to balance and weigh several relevant factors – 'balancing test' or 'balancing process' – and determine in each case whether the right to speedy trial has been denied.

(vii) ordinarily speaking, where the court comes to a conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open and having regard to the nature of offence and other circumstances when the court feels that quashing of proceedings cannot be in the interest of justice, it is open to the court to make appropriate orders, including fixing the period for completion of trial;

(viii) it is neither advisable nor feasible to prescribe any outer time-limit for conclusion of all criminal proceedings. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint;

(ix) an objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in the High Court must, however, be disposed of on priority basis."

In *P. Vijayan v. State of Kerala, (2010) 2 SCC 398* this Court while considering the scope of Section 227 CrPC upheld the order dismissing the petition filed for discharge and permitted the prosecution to proceed further even after 28 years.

Though delay is also a relevant factor and every accused is entitled to speedy justice in view of Article 21 of the Constitution, ultimately it depends upon various factors/reasons and materials placed by the prosecution. Though learned counsel for the appellant heavily relied on para 20 of the decision of this Court in *Vakil Prasad Singh v. State of Bihar, (2009) 3 SCC 355,* the learned Additional Solicitor General, by drawing our attention to the subsequent paragraphs i.e. 21, 23, 24, 27 and 29 pointed out that the principles enunciated in *Abdul Rehman Antulay case* (supra) are only illustrative and merely because of long delay the case of the prosecution cannot be closed.

Learned Senior Counsel appearing for the intervenor has pointed out that in criminal justice "a crime never dies" for which he relied on the decision of this Court in *Japani Sahoo v. Chandra Sekhar Mohanty, (2007) 7 SCC 394. In SCC* para 14, C.K. Thakker, J. speaking for the Bench has observed: (SCC p. 401)

> "14. ...It is settled law that a criminal offence is considered as a wrong against the State and the society even though it has been committed against an individual. Normally, in serious offences, prosecution is launched by the State and a court of law has no power to throw away prosecution solely on the ground of delay."

In the case on hand, though delay may be a relevant ground, in the light of the materials which are available before the Court through CBI, without testing the same at the trial, the proceedings cannot be quashed merely on the ground of delay. As stated earlier, those materials have to be tested in the context of prejudice to the accused only at the trial.

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**31. CRIMINAL PROCEDURE CODE, 1973 – Sections 233 and 311**
**Whether a person already examined as prosecution witness can be permitted later on to be examined as defence witness? Held, No.**

**Sonu v State of M.P.**
**Judgment dated 07.07.2010 passed by the High Court of M.P. in Criminal Revision No. 511 of 2010 reported in ILR (2010) M.P. 2418**

Held

In case of *State of M.P. v. Badri Yadav & Anr., AIR 2006 SC 1769* witnesses were examined by prosecution as eye-witnesses on 18.12.1990, cross-examined and discharged. Thereafter, an application under Section 311 CrPC was rejected. It is observed by Supreme Court that witnesses were recalled purportedly to exercise of power under sub-section (3) of Section 233 CrPC. and examined as DW-1 and DW-2 on behalf of the accused on 17.07.1995. This was clearly for the purpose of defeating the ends of justice, which is not permissible under the law. That apart, in the present case both PWs are related to the deceased. Being the close relative and friend of the deceased there is no rhyme and reason to depose falsely against the accused and allowing the real culprit to escape unpunished. On 21.09.1989, their statements were recorded under Section 164 CrPC. before the Magistrate. On 18.12.1990, their depositions were recorded before the Sessions Judge. In both the statements they have stated that they were eye-witnesses and witnessed the occurrence. Both of them have stated that they saw the accused assaulting the deceased with knives and swords. They were subjected to lengthy cross-examination but nothing could be elicited to discredit the statement-in-chief. Their examination as defence witnesses was recorded on 17.07.1995 when they resiled completely from the previous statements as prosecution witnesses. It, therefore, clearly appears that the

subsequent statements as defence witnesses were concocted as well as afterthought. They were either won over or were under threat or intimidation from accused. No reasonable power, properly instructed in law, would have acted upon such statements. Prima facie prosecution witnesses in their subsequent affidavits made a false statement which they believed to be false or did not believe to be true. It was held that these witnesses are liable for perjury for giving false evidence punishable under Section 193 IPC.

Considering the above legal aspect and overall facts and circumstances of the case, this petition deserves to be dismissed.

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**32. CRIMINAL PROCEDURE CODE, 1973 – Sections 244 and 245**
**In complaint case where trial Court recorded evidence before charge and gives an opportunity to cross-examine the opposite party – At the time of framing of charge, whatever facts came in the cross-examine ought to be considered by the trial Court also.**

**Madhumilan Syntax Ltd. & Ors. v. Syndicate Bank**
**Judgment dated 5.02.2010 passed by the High Court of M.P. in Misc. Cr. C. No. 6249 of 2007, reported in 2010 (III) MPJR 338**

Held:

The present case is having a peculiar circumstance that the respondent/ complainant has filed a private complaint against the applicants. Therefore, the procedure for trial is applicable as provided under Section 244 Cr.P.C., wherein it is incumbent upon the trial Court to record the before charge evidence and an opportunity for cross-examination ought to be given to the opposite party, i.e., the accused and after the before charge evidence the trial Court should have form an opinion as to whether the *prima facie* charge is made out or not and at that stage the trial Court cannot ignore whatever facts came in the cross-examination on the prosecution witnesses before the charge stage. The purpose of the procedure prescribed under Sections 244 and 245 of Cr.P.C. for ready reference it will be useful to quote here the relevant provisions which reads as under:-

> "B. – **Cases instituted otherwise than on police report.**
> **244. Evidence for prosecution** – (1) When, in any warrant-case instituted otherwise than on a police report the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.
>
> (2) The Magistrate may, on the application of the prosecution, issue summons to any of its witnesses directing him to attend or produce any document or other thing.

> **245. When accused shall be discharged** – (1) If, upon taking all the evidence referred to in Section 244 the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out, which if unrebutted, would warrant his conviction, the Magistrate shall discharge him.
>
> (2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

On perusal of the aforesaid previsions of Sections 244 and 245 of Cr. P.C. it is apparent that at the time of framing of charge the trial Court should consider the examination-in-chief of the witnesses as well as whatever facts came in the cross-examination of the witnesses concerned, then only an opinion can be formed as to whether *prima facie* case is made out for framing of charge or not whereas in the procedure of police challan case there is no necessity for examination-in-chief or cross-examination before framing of charge. For that trial only charge sheet papers ought to be considered by the trial Court.

Learned counsel for the respondent strongly placed reliance on the decision of the Apex Court in *State of Orissa v. Debendra Nath, AIR 2005 SC 759* wherein the Hon'ble Apex Court held here as under:-

> "It is well settled that at the stage of framing of the charges the defence of the accused cannot be put forth. The acceptance of the contention of the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof. At that stage which is against the criminal jurisprudence. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submission of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more."

The aforesaid case law also relates to the charge sheet filed by the State wherein only the charge sheet papers ought to be seen by the court at the time of framing of the charge but as stated herein above, in the present case the trial is governed with the provisions of Sections 244 and 245 of Cr.P.C. wherein the right of cross-examination on the prosecution witness is also accrued to the accused and if some cross-examination has been done on the complainant witnesses then certainly at the time of framing of charge whatever facts came in the cross-examination ought to be considered by the trial Court at the time of framing of the charge. Therefore, if the prosecution witness himself admitted

the facts in favour of the applicants/accused that the dispute in between the parties relates to commercial transaction and they had also recovered the substantial amount of Rs. 2.89 crores from the insurance company concerned, for the remaining amount they had also filed the recovery proceedings before the Competent Court then certainly the prosecution of the applicants for the alleged misappropriation of properties and for the alleged cheating is not *prima facie* maintainable.

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**33. CRIMINAL PROCEDURE CODE, 1973 – Section 265**
**OFFICIAL LANGUAGE ACT, 1957 (M.P.) – Section 3**
**The accused cannot be held prejudiced by filing of charge sheet and other documents in English language and not providing Hindi translation where he is well represented by the counsel, who is well versed in English – Petition dismissed.**

**Mohd. Aslam & anr. v. State of M.P.**
**Judgment dated 30.04.2010 passed by the High Court of M.P. in Misc. Criminal Case No. 10254 of 2008, reported in ILR (2010) M.P. 2428 (DB)**

Held

It is true that an accused person would be in much better position to defend his case, if he would himself be able to go through the material collected in the charge sheet against him, but, since applicants in this case are represented by the counsel who is well versed in English, which is apparent from the fact that they filed their vakalatnama in English, it cannot be held that they would be prejudiced by filing of the charge sheet in English.

Taking into consideration all the above circumstances, we are of the opinion that the trial Court committed no error in rejecting the application filed by the applicants for supply of Hindi translation of the documents filed with the charge sheet in English.

Petition is, accordingly, dismissed.

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**34. CRIMINAL PROCEDURE CODE, 1973 – Sections 306, 307 and 308**
**A pardon granted to an accomplice under Section 306 or 307 CrPC protects him from prosecution and he becomes witness for the prosecution but on forfeiture of said pardon, he is relegated to position of an accused and his evidence is rendered useless for the purpose of the trial of the co-accused – He cannot be compelled to be a witness – Therefore, no occasion arises for the defence to cross-examine him.**

**State of Maharashtra v. Abu Salem Abdul Kayyum Ansari and others**
**Judgment dated 05.10.2010 passed by the Supreme Court in Criminal Appeal No. 1925 of 2008, reported in (2010) 10 SCC 179**

Held:

The salutary principle of tendering a pardon to an accomplice is to unravel the truth in a grave offence so that guilt of the other accused persons concerned in commission of crime could be brought home. It has been repeatedly said by this Court that the object of Section 306 is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with the aid of the evidence of the person granted pardon, the offence may be brought home to the rest. Section 306 Cr.P.C. empowers the Chief Judicial Magistrate or a Metropolitan Magistrate to tender a pardon to a person supposed to have been directly or indirectly concerned in or privy to an offence to which the section applies, at any stage of the investigation or inquiry or trial of the offence on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence.

The Magistrate of the first class, under Section 306, is also empowered to tender pardon to an accomplice at any stage of inquiry or trial but not at the stage of investigation on condition of his making full and true disclosure of the entire circumstances within his knowledge relative to the crime. Section 307 vests the court to which the commitment is made, with power to tender a pardon to an accomplice. The expression, 'on the same condition' occurring in Section 307, obviously refers to the condition indicated in sub-section (1) of Section 306, namely, on the accused making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

An accomplice who has been granted pardon under Section 306 or 307 Cr.P.C. gets protection from prosecution. When he is called as a witness for the prosecution, he must comply with the condition of making a full and true disclosure of the whole of the circumstances within his knowledge concerning the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and if he suppresses anything material and essential within his knowledge concerning the commission of crime or fails or refuses to comply with the condition on which the tender was made and the Public Prosecutor gives his certificate under Section 308 Cr.P.C. to that effect, the protection given to him is lifted.

In *A.J. Peiris v. State of Madras, AIR 1954 SC 616,* a 3-Judge Bench of this Court stated that the moment a pardon is tendered to the accused he must be presumed to have been discharged, whereupon he ceases to be an accused and becomes a witness. In *State v. Hiralal Girdharilal Kothari, AIR 1960 SC 360,* with reference to Sections 337 and 339 of the Code of Criminal Procedure, 1898 (now Sections 306, 307 and 308 Cr.P.C.), this Court stated that a pardon tendered under Section 337 is a protection from prosecution; failure to comply with the condition on which the pardon is tendered removes that protection.

In *State (Delhi Administration) v. Jagjit Singh, 1989 Supp (2) SCC 770,* this Court held as under:-

> "8. .....The power to grant pardon carries with it the right to impose a condition limiting the operation of such a pardon. Hence a pardoning power can attach any condition, precedent or subsequent so long as it is not illegal, immoral or impossible of performance. Section 306 clearly enjoins that the approver who was granted pardon had to comply with the condition of making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other concerned whether as principal or abettor, in the commission thereof. It is because of this mandate, the State cannot withdraw the pardon from the approver nor the approver can cast away the pardon granted to him till he is examined as a witness by the prosecution both in the committing court as well as in the trial court. The approver may have resiled from the statement made before the Magistrate in the committing court and may not have complied with the condition on which pardon was granted to him, still the prosecution has to examine him as a witness in the trial court. It is only when the Public Prosecutor certifies that the approver has not complied with the conditions on which the tender was made by wilfully concealing anything essential or by giving false evidence, he may be tried under Section 308 of the Code of Criminal Procedure not only for the offence in respect of which pardon was granted but also in respect of other offences.....".

The above statement of law in *Jagjit Singh's case* (supra) cannot be understood as laying down that an accomplice who has been tendered pardon and called as a witness for prosecution must be continued to be examined as a prosecution witness although he has failed to comply with the condition on which the tender of pardon was made and a Public Prosecutor certifies that he has not complied with the condition on which the tender was made. As a matter of fact, in *Jagjit Singh's case* (supra), no certificate was given by the Public Prosecutor. The legal position that flows from the provisions contained in Sections 306, 307 and 308 Cr.P.C. is that once an accomplice is granted pardon, he stands discharged as an accused and once the pardon is withdrawn or forfeited on the certificate given by the Public Prosecutor that such person has failed to comply with the condition on which the tender was made, he is reverted to the position of an accused and liable to be tried separately and the evidence given by him, if any, has to be ignored in toto and does not remain legal evidence for consideration in the trial against the co-accused, albeit such evidence may be

used against him in the separate trial where he gets an opportunity to show that he complied with the condition of pardon.

The provisions of Sections 114 III. (b), 132, 133 and 154 of the Evidence Act, Section 315 of CrPC and Article 20 (3) of the Constitution does not militate against the proposition that a pardon granted to an accomplice under Section 306 or 307 Cr.P.C. protects him from prosecution and he becomes witness for the prosecution but on forfeiture of such pardon, he is relegated to the position of an accused and his evidence is rendered useless for the purposes of the trial of the co- accused. He cannot be compelled to be a witness. There is no question of such person being further examined for the prosecution and, therefore, no occasion arises for the defence to cross examine him.

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***35. CRIMINAL PROCEDURE CODE 1973 – Section 441**
**RULES AND ORDERS (CRIMINAL) – Rules 382 and 383**
**Trial Judge while declining to accept the bail bond furnished by surety referred the question of his solvency to Tahsildar – Held, the order directing inquiry into solvency of the surety by the Tehsildar does not have legal sanction – If the Judge concerned is not satisfied with the solvency of the surety, he can do an inquiry himself or cause an inquiry to be made by a Judicial Magistrate as to sufficiency or fitness of the surety.**

**Laxmi Sahu v State of M.P.**
**Judgment dated 17.09.2010 passed by the High Court of M.P. in Criminal Appeal No. 441 of 2010 reported in ILR (2010) M.P. 2397**

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**36. CRIMINAL PROCEDURE CODE, 1973 – Section 470**
**Where challan was submitted before the Court by Police – The Court directed the police to file challan in competent Court – In computing the period of limitation, time during which petitioners have been prosecuted in the earlier Court, is to be excluded.**

**Bharat Singh and others v. State of M.P.**
**Judgment dated 29.09.2010 passed by the High Court of M.P. in M.Cr.C. No. 6429 of 2010 reported in 2010 (IV) MPJR 281**

Shashi Devi wife of petitioner No.2 Ajay made a written complaint to Police Station Digoda District Tikamgarh. As per the complaint, the complainant was married with petitioner No.2 in the year 2004 and after marriage petitioners started harassing and torturing her with respect to demand of dowry. On the day of Raksha-Bandhan complainant was kicked out from matrimonial house with a demand of Motorcycle. On that report Police Station Digoda has registered FIR No. 90/6 under Section 498-A/34 IPC and Section 3/4 of Dowry Prohibition Act. The matter was investigated and challan was submitted before the JMFC Tikamgarh as per Annexure – A/3. In that case prosecution produced evidence

and statements were recorded before the JMFC Tikamgarh and date was fixed for final hearing on 10.05.2010. On that date the petitioners raised objection with respect to territorial jurisdiction of the Court. That application was allowed as per Annexure – A/4 and the learned Court of JMFC Tikamgarh directed Police Station Digodha to file charge sheet in competent Court. Thereafter challan has been referred to Police Station Karera and Police Station Karera on 02.06.2010 registered an FIR. Thereafter charge-sheet was filed in the Court of JMFC Karera. Copy of the FIR and Final Report are Annexures – A/5 and A/6. The learned JMFC Karera without considering the matter rejected the objection filed by the petitioners as per Annexure – P/7 that the charge-sheet is barred by limitation under Section 468 CrPC, giving rise to this petition.

As the charge-sheet has been filed before the concerned Court of Tikamgarh within limitation and then by order dated 10.05.2010 of that Court as the alleged offence is committed at Karera charge-sheet was filed on 21.07.2010 before JMFC Karera. In computing the period of limitation, time during which petitioners have been prosecuted in Court of Tikamgarh is to be excluded under Section 470 CrPC during which charge-sheet was filed before the JMFC Tikamgarh.

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***37. CRIMINAL TRIAL:**

**(i)** *Appreciation of evidence* – **Where there are a large number of assailants – It can be difficult for a witness to identify each assailant and attribute a specific role to him – In such a case it is also not possible that all the witnesses may specifically refer to the acts of each assailants – Where large number of assailants attacked and caused injuries to the deceased persons with deadly weapons and incident stood concluded within few minutes, it is natural that the exact version of the incident revealing every minute details i.e. meticulous exactitude of individual acts cannot be given by an eyewitness.**

**(ii)** *Injured witness* – **The testimony of the injured witness is accorded a special status in law – This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence – Thus, 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 therein.**

**(iii)** *Appreciation of evidence in case of ocular versus medical evidence* – **The position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallized to the effect that though the ocular testimony of a witness has greater evidentiary value** *vis-a-vis* **medical evidence,**

**when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence – However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.**

**(iv)** *Conviction with the aid of Section 34 IPC in place of Section 149 IPC* **– There is no bar in law on conviction of the accused with the aid of Section 34 IPC in place of Section 149 IPC if there is evidence on record to show that such accused shared a common intention to commit the crime and no apparent injustice or prejudice is shown to have been caused by application of Section 34 IPC in place of Section 149 IPC – The absence of a charge under one or the other or the various heads of criminal liability for the conviction for the substantive offence without a charge can be set aside, prejudice will have to be made out – Such a legal position is bound to be held good in view of the provisions of Sections 215, 216, 218, 221 and 464 of Cr.P.C. – Unless the accused is able to establish that the defect(s) in framing the charge(s) has caused real prejudice to him; that he was not informed as to what was the real case against him; or that he could not defend himself properly, no interference is required on mere technicalities.**

**Abdul Sayeed v. State of Madhya Pradesh**

**Judgment dated 14.09.2010 passed by the Supreme Court in Criminal Appeal No. 1243 of 2007, reported in (2010) 10 SCC 259**

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***38. CRIMINAL TRIAL:**

**Standard of proof in a criminal trial involving serious offence – A criminal trial is not a fairy tale wherein one is free to give flight to one's imagination and fantasy – Crime is an event in real life and is the product of an interplay between different human emotions – The court must bear in mind that "human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions" – The prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel – In a criminal trial involving a serious offence of a brutal nature, the court should be wary of the fact that it is human instinct to react adversely to the commission of the offence and make an effort to see that such an instinctive reaction does not prejudice the accused in any way – In a case where the offence alleged to have been committed is a serious one, the prosecution must provide greater assurance to the court that its case has been proved beyond reasonable doubt.**

**Paramjeet Singh alias Pamma v. State of Uttarakhand**
**Judgment dated 27.09.2010 passed by the Supreme Court in Criminal Appeal No. 1699 of 2007, reported in (2010) 10 SCC 439**

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***39. CRIMINAL TRIAL:**
**EVIDENCE ACT, 1872 – Sections 32 (1), 137 and 157**
*Appreciation of evidence*

**(i) Unless a contradiction is proved by putting it to the person who records the original statement, such contradiction is of no consequence – The very purpose of putting the contradiction to the witness is to give an opportunity to him/her to explain a contradictory statement, if any – Unless the witness is specifically given an opportunity to explain such contradiction, it cannot be taken note of.**

**(ii) When a witness making a dying declaration survives, the said dying declaration does not remain substantive evidence – However, as held in *Ramprasad v. State of Maharashtra, (1995) 5 SCC 30* when such dying declaration has been recorded by a Magistrate then it can be used as a corroboration to the oral evidence of such witness under Section 157 of the Evidence Act – Where such statement is recorded by a police officer, its use is barred under Section 162 CrPC.**

**(iii) Trial Courts, sometimes, are extremely casual about framing of questions for examination of accused under Section 313 CrPC – Trial Courts should be extremely careful in this behalf and the record of the case must show that meticulous care is taken to put all the incriminating circumstances to the accused.**

**Sunder Singh v. State of Uttaranchal**
**Judgment dated 16.09.2010 passed by the Supreme Court in Criminal Appeal No. 1164 of 2005, reported in (2010) 10 SCC 611**

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**40. CRIMINAL TRIAL:**
**Inquest report, purpose thereof – Is to ascertain whether a person has died in some suspicious circumstances or an unnatural death and as to the apparent cause of death – The omission of the names of the accused on the inquest report itself is not enough to disbelieve the eyewitness.**

**Surendra Pal and others v. State of Uttar Pradesh and another**
**Judgment dated 16.09.2010 passed by the Supreme Court in Criminal Appeal No. 662 of 2006, reported in (2010) 9 SCC 399**

Held:

It appears from the record that the names of the accused and details of

weapons possessed by each one of the accused who participated in the assault are not mentioned in the inquest report. The panchayatnamas (Exts. K-25 to K-27) dated 25-5-1999 were prepared in between 6.30 a.m. to 9.30 a.m. over the dead bodies of the three deceased individuals. The inquest reports were dispatched along with the copy of the first information report. PW 1 (Kirpal Singh) who is the first informant and eyewitness to the incident is also one of the witnesses to the inquest reports. The first information report was available with the investigating officer at the time of preparation of the inquest reports.

The mere fact that PW 1 did not repeat the names of all the accused so as to be incorporated in the inquest reports, in our considered opinion, is of no consequence. The purpose of preparation of inquest report is to ascertain whether a person has died in some suspicious circumstances or an unnatural death and as to the apparent cause of death. The inquest report need not contain the details as to how the deceased were assaulted or who assaulted them. The omission of the names of the accused and the minute details of assault in the inquest report itself is not enough to disbelieve the prosecution case.

It is fairly well settled and needs no restatement at our hands that the purpose of holding an inquest is very limited *viz.* to ascertain as to whether a person has committed suicide or has been killed by any other or by an accident or has died under circumstances raising a reasonable suspicion that some other person has committed an offence. Section 174 of the Code of Criminal Procedure does not mandate the investigating officer to mention the names of the assailants in the inquest report. There is no other provision in law or practice requiring the purpose *(sic)* to mention the names of the assailants and weapons possessed by them in the inquest report. The omission thereof does not lead to any inference to doubt the prosecution case. Such omissions are not fatal to the prosecution case.

It is settled principle that merely because the witnesses on the inquest report who are also eyewitnesses did not give out the names of the accused persons while describing the cause of death in the inquest report does not render the presence of the eyewitnesses on the spot doubtful [see *Suresh Rai v. State of Bihar, (2000) 4 SCC 84* and *Eqbal Baig v. State of A.P., (1986) 2 SCC 476]*. It is unnecessary to further dilate on this particular aspect of the matter. In the circumstances, we are not inclined to agree with the submission that PW 1 was not an eyewitness to the incident.

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**41. EVIDENCE ACT 1872 – Sections 63 and 65**
**Copy of cassette of tape record is admissible as secondary evidence – It can be permitted to be produced and the question of admissibility, reliability and the probative value of evidence can be judged by the trial court, subsequently at appropriate stage – Shutting out of relevant evidence would serve no purpose – The production should not be denied on the ground that it was not kept in sealed condition.**

## Suresh Kumar Singh v. State of M.P. & another

**Judgment dated 15.07.2010 passed by the High Court of M.P. in Misc. Criminal case No 1615 of 2010, reported in 2010 (5) MPHT 84 (DB)**

Held:

According to prosecution, before making complaint to Lokayukta, respondent/complainant Hardayal Dubey had recorded a conversation which allegedly took place between him, the petitioner and the witness Shailesh Sharma. Complainant produced the said cassette before the Office of Special Police Establishment, Lokayukta, Bhopal. This cassette, by Bhopal Office, was then sent to Divisional Office, Lokayukta, Jabalpur, where its transcript was prepared and the cassette was sealed. After requisite investigation, charge sheet was filed. Along with the charge-sheet, though transcript and seizure memo of the cassette were produced before the Court, yet the cassette was produced in the Court in a sealed packet subsequently on 22.05.2006, on an application filed by Hardayal Dubey. On 13.10.2008, when the cassette was played in the Court, in a tape recorder, in presence of both the parties, no sound emerged from it.

Complainant as well as the prosecution moved applications before the Trial Court seeking permission to adduce secondary evidence in respect of the tape recording on the ground that on the instructions of Lokayukta Police, complainant had prepared a copy of the cassette and had kept with him because there was possibility of the tampering of the cassette because the complaint was against an Inspector of Lokayukta. This copy of the cassette was adduced in evidence in Special Case No. 10/2003, in which Hardayal Dubey was being prosecuted. By order dated 15.04.2009, Trial Court dismissed the application filed by the complainant on the ground that he was not authorized to conduct the prosecution; he could only assist the public prosecutor. The application filed by the Public Prosecutor was also rejected on the ground that the application was not in accordance with the provision of Section 65 of the Evidence Act and was not supported with any affidavit. The prosecution, however, was granted liberty to file a fresh application in accordance with the provisions of the said Act and by filing an affidavit in support of it. Prosecution, thereafter, chose not to file any application. The aforesaid order was challenged by the complainant before the High Court in Criminal Revision No. 1025/2009. The High Court by order dated 10.12.2009 permitted the complainant to move appropriate application under Sections 63 and 65 of the Evidence Act since State did not make such application. The High Court ordered as under:

> "If the complainant files such an application, it shall be dealt with by the Trial Court according to law on its own merits. Trial Court shall be free to decide the question of admissibility of the secondary evidence after giving adequate opportunity of hearing to all the concerned parties on the said application."

Complainant moved a fresh application on 14.12.2009 before the Trial Court making prayer that copy of the recorded cassette which was filed in Special Case No.10/03 (*State v. Hardayal Dubey*) be called and taken on record. This prayer was opposed by the accused, however, the Trial Court by the impugned order on 18.01.2010, allowed the said application and permitted the complainant to produce a copy of the cassette subject to condition that the admissibility and the probative value of the cassette shall depend upon the proof of requisite conditions as provided in the provisions of Sections 63 and 65 of the Evidence Act.

The cassette sought to be produced in the present case has been produced in Special Case No. 10/2003, by witness Shailesh Sharma, it may be relevant in the case if it is proved to be a genuine and untampered piece of evidence about the conversation alleged to have taken place between the accused and the other prosecution witness. The question of admissibility, reliability and the probative value of its evidence can be judged by the Trail Court subsequently at appropriate stage. Shutting out of relevant evidence would serve no purpose.

The Trial Court kept in mind all the necessary precautions and permitted the complainant to produce the copy of the cassette in evidence, therefore, in our opinion, no interference is called for in the said order.

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**42. EVIDENCE ACT, 1872 – Sections 137 and 138**
**Charge u/s 452, 327 and 506-B of IPC framed, and after evidence, case was fixed for judgment – Later on, additional charge of Sections 325/34 and 323/34 of IPC were framed and witnesses were recalled for further cross-examination – Out of them, two witnesses could not be produced – It was contended on behalf of State that the Court should have considered the evidence of these two witnesses for charge u/s 452, 327 and 506-B IPC as the cross-examination was already over – Held, as pesr settled proposition of law the deposition of witnesses could not be taken into consideration if the same is not complete in accordance with the provision of Sections 137 and 138 of Evidence Act – Appeal against acquittal dismissed.**

**State of M.P. v Pappoo @ Saleem & ors.**
**Judgment dated 18.05.2010 passed by the High Court of M.P. in Criminal Appeal No. 507 of 1994 reported in ILR (2010) M.P. 2383**

Held

At the initial stage the charges of Sections 452, 327 and 506-B of IPC were framed against the respondents and after holding the trial the case was fixed for delivery of judgment on 4.7.1989 and on such date instead to deliver the judgment the trial Court has framed additional charge of Section 325/34 and 323/34 of IPC against the respondents. So for additional framed charges of Section 323/34 of IPC is concerned, I am of the view that such charge was covered under Section 327 of IPC and for that purpose no further cross-examination of any examined witnesses was required because of on appreciation of evidence instead the offence

of Section 327 of IPC the offence of Section 323 of IPC is made out then by virtue of Section 222 of CrPC the trial court could have punished the respondents under Section 323 of IPC, as the same is a minor offence of Section 327 of IPC. So far the charge under Section 325/34 of IPC is concerned the same was not covered by any of the existing charge framed earlier. Therefore, further cross-examination of examined prosecution witnesses subject to request of the respondents was necessary and in that regard the trial has not committed any error in extending such liberty to the defence and directing the prosecution to produce the above mentioned three witnesses namely, Yogendar, Baldeo and Shivcharan for their further cross-examination. It is apparent on record as stated above that inspite extending various opportunities except Baldeo Prasad no other examined witnesses namely Yogendar and Shivcharan were produced for their further cross-examination, on which the evidence of prosecution was closed. As per settled proposition of law the deposition of witnesses could not be taken into consideration if the same is not complete in accordance with the provision of Sections 137 and 138 of Evidence Act. That statement of witness could be treated to be completed only after his cross-examination and if he is re-examined by the prosecution then after recross-examination. In such premises the right of the other party to cross-examine the witnesses is not only a formality but the same is a substantive right of such party to prove his case and defence. Such view is fully fortified by the decision of Oudh High Court in the matter of *Ram Kumar v. Emperor* reported in *AIR 1937 Oudh 168,* in which it was held as under:-

> "The testimony of a witness is not legal evidence unless it is subjected to cross-examination; and where no opportunity has been given to the accused's counsel to test the veracity of the principal prosecution witnesses, or where owing to the refractory attitude of the witness the Court is constrained to terminate all of a sudden and prematurely the cross-examination of the witness, the evidence of such a witness is not legal testimony and cannot be the basis of a judicial pronouncement."

In view of aforesaid legal position the depositions of Yogendar and Shivcharan could not be said to be complete statement. In such premises, the evidence of such witnesses could not be taken into consideration to draw any inference against the respondents/ accused.

At this stage I would like to mention here that after framing the additional charges the accused like respondents could not be deprived from recross-examination of the earlier examined prosecution witnesses. On extending such opportunity to the accused like respondent then they had an unfettered right to cross-examine such witnesses in the light of entire scenario of the case and with all available defences. This possibility could not be ruled out that on recross-examination of such witnesses the defence might have proved their other available defence also but on account of non production of such witnesses the respondents have been deprived for the same. In such premises it is held

that the trial court has not committed any error in excluding the statement of Yogendar and Shivcharan from consideration.

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*43. **FAMILY AND PERSONAL LAWS:**

**EVIDENCE ACT, 1872 – Sections 32 (5), 35, 50, 51, 59 to 61 and 114**

(i) **Presumption of marriage – The law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a number of years – In such a case there will be a presumption under Section 114 of the Evidence Act, that they live as husband and wife and the children born to them will not be illegitimate – However, such presumption can be rebutted by leading unimpeachable evidence.**

(ii) **Determination of age – The entries made in the official record by an official or person authorised in performance of official duties may be admissible under Section 35 of the Evidence Act but the Court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information as the admissibility of a document is one thing and its probative value is quite another. These two aspects cannot be combined. The entries in school register/school leaving certificate require to be proved in accordance with law and the standard of proof required in such cases remain the same as in any other civil or criminal cases. If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32 (5) or Sections 50, 51, 59, 60, 61, etc. of the Evidence Act by examining the person having special means of knowledge authenticity of date, time, etc. mentioned therein.**

**For determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeachable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, Government hospital/nursing home, etc., the entry in the school register is to be discarded.**

**Madan Mohan Singh and others v. Rajni Kant and another**

**Judgment dated 13.08.2010 passed by the Supreme Court in Civil Appeal No. 6466 of 2004, reported in (2010) 9 SCC 209**

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**44. FINANCIAL CODE, M.P. (VOL I) – Rules 22 and 23**

**Amount deposited before the trial Court by the tenant, not deposited in treasury and defalcated by Nazir – The petitioner/landlord when applied for withdrawal, he was declined payment – Held, in case of defalcation or misappropriation of the amount, such amount has to be paid by the State by debiting it to the Head "S-Special Advance" and thereafter, the aforesaid amount shall be recovered and deposited in the said head by the said Government officials – The person who is entitled for the refund of the amount cannot be directed to file a civil suit for the recovery of the aforesaid amount from the estate of such employee, as explained by State Government vide circulars Nos. E-3/2/89/C-IV dt. 30.12.1995 and M.P.F.D. Memo No. 1220/IV-B-6/72 dt. 2.11.1972 – Petition allowed.**

**Mehmooda Bai (Smt.) v. Central Bank of India & ors.**

**Judgment dated 05.08.2010 passed by the High Court of M.P. in Writ Petition No. 1897 of 2010, reported in ILR (2010) M.P. 2310 (DB)**

Held:

In the facts of the case, the Nazir of the Court was an employee of the State and was discharging the duties which were assigned to him. In the official capacity he received the amount from the respondents No. 1, 2 and 3 and a due receipt was issued by him to the respondents No 1,2 and 3. All these acts were done by him in his official capacity and none, either the petitioner or the respondents No. 1, 2 and 3 were required to see whether after deposit of the amount it was deposited by the Nazir in the Treasury or not. It was not the duty of the petitioner or respondents No. 1, 2 and 3 to keep a watch on the Nazir in this regard. It was neither expected nor it could be done by the petitioner and respondents No. 1, 2, and 3 to see whether this amount was deposited by the Nazir in the Treasury or not. It was an official act which ought to have been done by the Nazir and the concerned official who were responsible to look into the affairs of the Nazir ought to have seen the act of the Nazir whether he has deposited the amount in the Treasury or not. In these circumstances, for the act of the Nazir, the State is vicariously liable to make payment of the aforesaid amount to the petitioner. However, the State after payment of the amount can recover the amount from the estate of Nazir who is stated to be dead.

It is submitted by the learned counsel for respondent No. 4 that a due enquiry was initiated against the Nazir and an amount of Rs. 1,54,000/- was recovered from him during the life time of Nazir but after his death the proceedings were initiated for recovery of the amount from the estate of Nazir and from the persons who were liable for such defalcation. Two circulars are produced before this Court by the respondent No. 4 in support of his contention that in such circumstances even when there is defalcation by an employee what recourse should be taken by the State. For ready reference, both the circulars are quoted verbatim:-

(i) राज्य शासन आदेश

विषय : गबन, चोरी इत्यादि से हुई शासकीय हानि राशि का कोषालय से पुनः आहरण।

शासन के ध्यान में यह बात आयी है कि गबन, चोरी, लूट आदि के प्रकरणों में आहरित शासकीय धनराशि अनुपलब्ध हो जाने पर, शासकीय कर्मचारियों के वेतन आदि स्वत्वों का भुगतान बिना उनकी किसी गलती के लम्बे समय के लिये रुक जाता है, जिसके कारण उन्हें आर्थिक कठिनाईयों का सामना करना पड़ता है।

(2) इस प्रकार खोई हुई राशि वित्त विभाग के ज्ञापन क्रमांक 1202/चार/बी. 6/72, दिनांक 2.11.72 प्रतिलिपि संलग्न में प्रसारित निर्देशों के अनुसार कोषालय से पुनः आहरित कर ली जाने का प्रावधान है। आदेश क्रमांक एफ. ई 3/2/89/नि. 5/चार, दिनांक 12.7.89 को निरस्त करते हुए निर्देश दिये जाते है कि इन प्रकरणों में आहरण के पहले विभागाध्यक्ष प्रशासकीय विभाग से अनुमति प्राप्त करेंगे।

(3) राज्य शासन चाहता है कि इस प्रकार के प्रकरणों में तीन सप्ताह के अन्दर कोषालय से राशि के पुनः आहरण की व्यवस्था कर उसका वितरण कर दिया जाना चाहिए।

वित्त विभाग क्रमांक ई. 3/2/89/सी/चार, दिनांक 30.12.1995

(2) "Copy of M.P. F.D. Memo No. 1220/IV-B-6/72, dated 2.11.1972 addressed to all departments of Govt., All H.O.D., All Collectors.

Sub:- Regarding issue of instructions in respect of procedure to be followed for adjustment etc. of the redrawal of an amount lost through misappropriation or defalcation, embezzlement etc.

Under advice of the C.A.G. of India, it has been decided that the redrawal of the amount lost through misappropriation, defalcation, embezzlement, and the like, should be debited to the head "S-Special Advances" sub-ordinate to the major head "Departmental Advances", in Section T-Deposit and Advance Part-III "Advances not bearing interest." Under specific sanction of the Government pending investigation of the loss, fixation of responsibility and finalisation of the action for recovery of the amount lost if possible. The loss will have to be reported in accordance with the provisions contained in Rules 22 and 23 of the MPFC Vol. I. Any amount subsequently recovered may be credited to the above head

and the balance, if found irrecoverable, will have to be adjusted as a loss under the relevant service head after obtaining Govt. sanction."

It is apparent that in case of defalcation or misappropriation of the amount, such amount has to be paid by the State by debeting it to the Head "S-Special Advance" and thereafter the aforesaid amount shall be recovered and deposited in the said head by the said Government officials. In view of the aforesaid circular, the contention of learned Dy. A.G. that the amount should be recovered from the estate of the deceased has no legs to stand. Apart from this under Rules 22 and 25 which are referred by learned Dy. A.G. though provides that such loss can be recovered from the employees but it is an internal procedure which can be followed by the State against the employee but the person who is entitled for the refund of the amount cannot be directed to file a civil suit for the recovery of the aforesaid amount from the estate of such employee. So State, itself, has explained Rules 22 and 25 by issuing aforesaid circulars of which correctness has not been disputed, so the contention of the State cannot be accepted.

In view of the aforesaid, this petition is allowed.

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**45. HINDU MARRIAGE ACT, 1955 – Sections 13 and 13-B**
**Customary dissolution of marriage – The appellant husband filed a petition under Section 13 of the 1955 Act seeking divorce on the ground of desertion and cruelty and also pleaded customary dissolution of marriage through Panchayat –The Family Court decreed the suit mainly on the ground that marriage stood dissolved through Panchayat – It is held that dissolution of marriage through Panchayat as per custom cannot be a ground for divorce under Section 13 of the Act.**

**Mahendra Nath Yadav v. Sheela Devi**
**Judgment dated 25.08.2010 passed by the Supreme Court in Civil Appeal No. 1801 of 2007, reported in (2010) 9 SCC 484**

Held:

According to the appellant, it was customary in the locality and in the community to which both parties belong to have a divorce through the Panchayat. Thus, the Panchayat was convened on 07.06.1997. The said Panchayat decided that the appellant should pay a sum of ₹ 30,000/- to the respondent's family. It was paid and a document was prepared which was duly signed by the parties. Thus, the marriage came to an end. In order to give legal effect to the said customary divorce, the appellant tried to persuade the respondent to get divorce from the Family Court under Section 13-B of the 1955 Act, by consent. However, she did not agree. Thus, the appellant approached the Family Court by filing Petition No. 370 of 1998 under Section 13 of the 1955 Act, seeking divorce on the ground of desertion and cruelty.

The respondent filed the counter-case i.e. Petition No. 57 of 1999 under Section 9 of the 1955 Act, for restitution of conjugal rights. The Family Court decreed the suit mainly on the ground that the marriage stood dissolved through Panchayat and dismissed the petition filed by the wife for restitution of conjugal rights vide order dated 15.09.2000. Being aggrieved, the respondent preferred appeals against both the orders before the High Court and the High Court has reversed the said order in both the cases. Hence this appeal.

The High Court has rightly held that dissolution of marriage through Panchayat as per custom prevailing in that area and in that community permitted cannot be a ground for granting divorce under Section 13 of the 1955 Act. We fully agree with the said decision for the reason that in case the appellant wanted a decree on the basis of customary dissolution of marriage through Panchayat held on 07.06.1997, he would not have filed a petition under Section 13 of the 1955 Act. Filing this petition itself means that none of the parties was of the view that the divorce granted by the Panchayat was legal. In view of the above, we do not see any reason to interfere with the well-reasoned judgment of the High Court.

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*46. **HINDU MARRIAGE ACT, 1955 – Sections 13 and 13-B**
**Divorce – Where marriage solemnized in accordance with the Hindu religious rights – A Hindu marriage can be dissolved only on any of the grounds plainly and clearly enumerated under Section 13 of the Hindu Marriage Act – The law does not permit the purchase of a decree of divorce for consideration, with or without the consent of the other side – No Court can assume jurisdiction to dissolve a Hindu marriage simply on the basis of the consent of the parties dehors the grounds enumerated under Section 13 of the Act, unless of course the consenting parties proceed under Section 13-B of the Act.**

**Sanjeeta Das v. Tapan Kumar Mohanty**
**Judgment dated 22.09.2010 passed by the Supreme Court in Civil Appeal No. 6196 of 2010, reported in (2010) 10 SCC 222**

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47. **HINDU SUCCESSION ACT, 1956 – Section 14 (1) (2)**
**Absolute right of a Hindu female in a property – Acquisition thereof – If a Hindu woman had any existing interest in the property prior to the Act of 1956, the same would blossom into full-fledged right by virtue of Section 14 (1), but if such a right was so acquired for the first time in an instrument, after the commencement of the Act, the provisions of Section 14 (2) would be attracted and would not convert such right into a full-fledged right of ownership on the property – Position reiterated.**

## Gaddam Ramakrishnareddy and others v. Gaddam Ramireddy and another

**Judgment dated 14.09.2010 passed by the Supreme Court in SLPs (C) Nos. 30004 of 2008, reported in (2010) 9 SCC 602**

Held:

Despite the elaborate submissions made on behalf of the respective parties, the scope of the special leave petition is confined to the question as to whether the life estate created by Pullareddy in favour of his wife, Sheshamma, by the deed of gift dated 21.12.1952 could be said to be an interest in lieu of maintenance which subsequently became enlarged into a full-fledged right of ownership under Section 14 (1) of the Hindu Succession Act, 1956, or whether the same amounted only to a life estate for the purpose of managing the properties and enjoying the fruits thereof till G. Ramireddy, the second son of Pullareddy, who was then a minor, attained majority.

The law in this regard has been crystallized in *V. Tulasamma v. Sesha Reddy, (1977) 3 SCC 99* and the same has been consistently followed over the years. The ratio of the said decision in simple terms is that if a Hindu woman had any existing interest in a property, howsoever small, prior to the enactment of the Hindu Succession Act, 1956, the same would blossom into a full-fledged right by virtue of the operation of Section 14 (1) thereof. On the other hand, if such a right was so acquired for the first time under an instrument, after the Act came into force, the provisions of Section 14 (2) of the above Act would be attracted and would not covert such a right into a full-fledged right of ownership of the property.

In the instant case, Pullareddy created a life interest in favour of his wife, Sheshamma, in respect of the plaint scheduled property, but also gifted the property in question to Respondent 1 herein, G. Ramireddy, who was then a minor. The principal object of the deed of gift executed by Pullareddy was that the property should ultimately go to G. Ramireddy, Respondent 1 herein. The question which we have to consider in this case is whether in view of the intervention of the Hindu Succession Act in 1956, after the execution of the deed of gift, can it be said that the gift intended in favour of G. Ramireddy stood extinguished by operation of Section 14 (1) of the Act?

The consistent view which has been taken by this Court since the decision in *V. Tulsamma case* (supra) is that the provisions of Section 14 (1) of the Hindu Succession Act, 1956 would be attracted if any of the conditions contained in the Explanation stood fulfilled. If, however, a right is created in a Hindu female for the first time in respect of any property under any instrument or under a decree of order of a civil court or under an award, where a restricted estate in such property is prescribed, the provisions of sub-section (1) of Section 14 would have no application by virtue of sub-section (2) thereof.

The aforesaid provision has been considered by both the courts below which have concurrently held that the life estate created by Pullareddy in favour of Sheshamma was not in lieu of her maintenance as she was already managing the properties in question and in no uncertain terms it was the donee's desire that the said properties should ultimately go to his son Ramireddy, Respondent 1 herein. Once that is established, apart from other surrounding circumstances, the immediate fallout is that Sheshamma's rights in the properties came to be governed by sub-section (2) of Section 14 of the Hindu Succession Act, 1956, and her right does not blossom into an absolute estate as contemplated under sub-section (1)

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

*Defence of insanity* – **It has to be proved that by reason of unsoundness of mind the accused is incapable of knowing the nature of the act committed by him – Mere suffering from paranoid schizophrenia is not sufficient to show that the accused was insane.**

**The crucial point of time at which unsoundness of mind should be established is the time when the crime was actually committed – Burden of proving this lies on the accused person who claims so – Presumption regarding standard and burden of proof required to be discharged by the accused for getting benefit under Section 84 IPC restated.**

## Sudhakaran v. State of Kerala

**Judgment dated 26.10.2010 passed by the Supreme Court in Criminal Appeal No. 389 of 2007, reported in (2010) 10 SCC 582**

Held:

The defence of insanity has been well known in the English Legal System for many centuries. In the earlier times, it was usually advanced as a justification for seeking pardon. Over a period of time, it was used as a complete defence to criminal liability in offences involving mens rea. It is also accepted that insanity in medical terms is distinguishable from legal insanity. In most cases, in India, the defence of insanity seems to be pleaded where the offender is said to be suffering from the disease of Schizophrenia.

The plea taken in the present case was also that the appellant was suffering from "paranoid schizophrenia". The term has been defined in Modi's Medical Jurisprudence and Toxicology [23rd Ed. Page 1077] as follows:

> *"Paranoid schizophrenia, paranoia and paraphrenia:* Paranoia is now regarded as a mild form of paranoid schizophrenia. It occurs more in males than in females. The main characteristic of this illness is a well-elaborated delusional system in a personality that is otherwise well preserved. The delusions are of persecutory type. The true nature of this illness may go unrecognized for a long time

> because the personal... is well preserved, and some of these paranoiacs may pass off as a social reformers or founders of queer pseudo-religious sects. The classical picture is rare and generally takes a chronic course.
>
> Paranoid Schizophrenia, in the vast majority of case, starts in the fourth decade and develops insidiously. Suspiciousness is the characteristic symptom of the early stage. Ideas of reference occur, which gradually develop into delusions of persecution. Auditory hallucinations follow which in the beginning, start as sound or noises in the ears, but later change into abuses or insults. Delusions are at first indefinite, but gradually they become fixed and definite, to lead the patient to believe that he is persecuted by some unknown person or some superhuman agency. He believes that his food is being poisoned, some noxious gases are blown into his room, and people are plotting against him to ruin him. Disturbances of general sensation give rise to hallucinations, which are attributed to the effects of hypnotism, electricity, wireless telegraphy or atomic agencies. The patient gets very irritated and excited owing to these painful and disagreeable hallucinations and delusions."

The medical profession would undoubtedly treat the appellant herein as a mentally sick person. However, for the purposes of claiming the benefit of the defence of insanity in law, the appellant would have to prove that his cognitive faculties were so impaired, at the time when the crime was committed, as not to know the nature of the act.

Section 84 of the Indian Penal Code, 1860 recognizes the defence of insanity. It is defined as under:-

> "*84. Act of a person of unsound 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."

A bare perusal of the aforesaid section would show that in order to succeed, the appellant would have to prove that by reason of unsoundness of mind, he was incapable of knowing the nature of the act committed by him. In the alternate case, he would have to prove that he was incapable of knowing that he was doing what is either wrong or contrary to law.

The aforesaid section clearly gives statutory recognition to the defence of insanity as developed by the Common Law of England in a decision of the House of Lords rendered in the case of *R. v. Daniel Mc Naughten, (1843-60)* AllER Rep 229 (HL).

In *Dayabhai Chhaganbhai Thakkar v. State of Gujarat, AIR 1964 SC 1563,* this Court considered the relevant aspects of the law and the material provisions relating to the plea of insanity and observed as follows: –

> "It is a fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and, therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite intention described in Section 299 of the Penal Code. This general burden never shifts and it always rests on the prosecution. But, as Section 84 of the Penal Code provides that nothing is an offence if the accused at the time of doing that act, by reason of unsoundness of mind was incapable of knowing the nature of his act or what he was doing was either wrong or contrary to law. This being an exception, under Section 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within the said exception lies on the accused, and the court shall presume the absence of such circumstances. Under Section 105 of the Evidence Act, read with the definition of "shall presume" in Section 4 thereof, the court shall regard the absence of such circumstances as proved unless, after considering the matters before it, it believes that said circumstances existed or their existence was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist. To put it in other words, the accused will have to rebut the presumption that such circumstances did not exist, by placing material before the court sufficient to make it consider the existence of the said circumstances so probable that a prudent man would act upon them. The accused has to satisfy the standard of a "prudent man". If the material placed before the court, such as, oral and documentary evidence, presumptions, admissions or even the prosecution evidence, satisfies the test of "prudent man", the accused will have discharged his burden. The evidence so placed may not be sufficient to discharge the burden under Section 105 of the Evidence Act, but it may raise a reasonable doubt in the mind of a judge as regards one or other of the necessary ingredients of the offence itself. It may, for instance, raise a reasonable doubt in the mind of the judge whether the accused had the requisite intention laid down in Section 299 of the Penal Code. If the judge has such reasonable doubt,

> he has to acquit the accused, for in that event the prosecution will have failed to prove conclusively the guilt of the accused. There is no conflict between the general burden, which is always on the prosecution and which never shifts, and the special burden that rests on the accused to make out his defence of insanity."

Thereafter, upon further consideration, this Court defined the doctrine of burden of proof in the context of the plea of insanity in the following propositions (*Dahyabhai Chhaganbhai Thakkar case* (supra) (AIR P. 1568, Para7):-

> "(1) The prosecution must prove beyond reasonable doubt that the [appellant] had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial.
>
> (2) There is a rebuttable presumption that the [appellant] was not insane, when he committed the crime, in the sense laid down by Section 84 of the Penal Code: the [appellant] may rebut it by placing before the court all the relevant evidence - oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings.
>
> (3) Even if the [appellant] was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the [appellant] or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the [appellant] and in that case the court would be entitled to acquit the [appellant] on the ground that the general burden of proof resting on the prosecution was not discharged."

It is also a settled proposition of law that the crucial point of time for ascertaining the existence of circumstances bringing the case within the purview of Section 84 is the time when the offence is committed. We may notice here the observations made by this Court in *Ratan Lal v. State of Madhya Pradesh, (1970) 3 SCC 533.* In para 2 of the aforesaid judgment, it is held as follows: (SCC p. 533)

> "It is now well-settled that the crucial point of time at which unsoundness of mind should be established is the time when the crime is actually committed and the burden of proving this lies on the [appellant]."

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**49. INDIAN PENAL CODE, 1860 – Sections 107, 306 and 498-A**
**EVIDENCE ACT, 1872 – Sections 32 (1) and 113-A**
**Abetment of suicide and cruelty – If degree of cruelty is such as to warrant a conviction under Section 498-A IPC, it may be sufficient for a presumption to be drawn under Section 113-A of Evidence Act in harmony with Section 107 IPC – In the given circumstance where victim committed suicide in fourth year of marriage when she was six months' pregnant, ordinarily a woman in an advanced stage of pregnancy would not commit suicide even when treated with cruelty – Only in extreme circumstance, may a woman decides to take her life and that of her unborn child when she reaches a point of no return and is in a mental state to take her own life.**

**Thanu Ram v. State of Madhya Pradesh (now Chhattisgarh)**
**Judgment dated 05.10.2010 passed by the Supreme Court in SLP (Crl.) No. 5885 of 2009, reported in (2010) 10 SCC 353**

Held:

Section 107 IPC clearly defines abetment to mean that a person abets the doing of a thing who instigates a person to do that thing. The question with which we are confronted is whether there is sufficient evidence on record to indicate that by any of the acts of cruelty attributed to the petitioner, there was an intention to instigate Hirabai into committing suicide. There is no getting away from the fact that Hirabai committed suicide in the 4th year of her marriage when she was six months' pregnant. Ordinarily, a woman in an advanced stage of pregnancy would not commit suicide even when treated with cruelty. It is only in extreme circumstances that a woman may decide to take her life and that of her unborn child when she reaches a point of no return and is in a mental state to take her own life.

In the instant case, we have the dying declaration of the victim Hirabai, which we are inclined to rely upon, notwithstanding the objections raised by Advocate for the petitioner regarding its veracity. We see no reason to disbelieve either P.W.9, J.R. Lahre, Naib Tahsildar and Executive Magistrate, or P.W.11, Dr. K. Vinay Kumar, who attended to Hirabai in the hospital.

As is well-established, a dying declaration has to be treated with caution, since the accused does not get a chance to cross-examine the victim. In this case, however, there is no ambiguity or irregularity as far as the dying declaration is concerned and it has been stated in clear and simple language that the victim had been treated with both mental and physical cruelty and the victim has stated quite candidly how she poured kerosene on her body and set herself on fire.

The evidence of P.W.13, Uttam Kumar, the younger brother of the deceased, corroborates the story of the prosecution as to the manner in which Hirabai was treated by the petitioner, which triggered her immediate intention to commit suicide which was the culminating point of ill-treatment meted out to her by the petitioner and his mother.

In our view, the element of instigation as understood within the meaning of Section 107 IPC is duly satisfied in this case in view of the provisions of Section 113-A of the Indian Evidence Act, 1872, which provides for a presumption to be arrived at regarding abetment of suicide by a married woman and certain criteria are also laid down therein. The first criterion is that such suicide must have been committed within 7 years from the date of the victim's marriage. Since Hirabai committed suicide in the 4th year of her marriage, such condition is duly satisfied. The second condition is that the husband or such relative of the husband had subjected the victim to cruelty which led to the commission of suicide by the victim. Section 113-A indicates that in such circumstances, the Court may presume, having regard to all the circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

In the Explanation to Section 113-A it has also been indicated that for the purpose of the said Section, the expression "cruelty" would have the same meaning as in Section 498-A IPC. Accordingly, if the degree of cruelty is such as to warrant a conviction under Section 498-A IPC, the same may be sufficient for a presumption to be drawn under Section 113-A of the Evidence Act in harmony with the provisions of Section 107 IPC.

Section 113-A of the Evidence Act establishes a link between an offence under Sections 498-A IPC, 107 IPC and 306 IPC, thereby permitting the Court to presume the commission of an offence under Section 107 IPC on the basis of evidence adduced to prove an offence under Section 498-A IPC.

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***50. INDIAN PENAL CODE, 1860 – Sections 302 and 304 Part II**
**Intention to cause death – How to be gathered? As nobody can enter into the mind of the accused, his intention has to be gathered from the weapon used, the part of the body chosen for the assault and the nature of the injuries caused – Here, the appellant had chosen a crowbar as the weapon of offence – He has further chosen a vital part of the body i.e. head for causing the injury which had caused multiple fractures of skull – This clearly shows the force with which the appellant had used the weapon – The cumulative effect of all these factors irresistibly leads to one and the only conclusion that the appellant intended to cause death of the deceased.**

**Sungapagu Anjaiah v. State of Andhra Pradesh**
**Judgment dated 06.09.2010 passed by the Supreme Court in Criminal Appeal No. 1166 of 2010, reported in (2010) 9 SCC 799**

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**51. INDIAN PENAL CODE, 1860 – Sections 302 and 376**

**(i) Onus to establish and prove the documents on record, that might add defence, would be upon the defence and not upon the prosecution – It was also held that the false plea taken by an accused in a case of circumstantial evidence is another link in the chain.**

**(ii) Whether in a case of rape and murder in a single incident, the charge of murder automatically fails if commission of rape is not proved? Held, No – If some uncertainty about the rape, the culpability of the accused for the murder is nevertheless writ large.**

**(iii) Function of an expert – Court's approach – The Court cannot substitute its own opinion for that of an expert, more particularly in science such as DNA profiling which is a recent development – Position explained.**

**(iv) Rape and murder case – Choice between death sentence and life imprisonment – If Court itself feels some difficulty in awarding one or the other, it is only appropriate that the lesser sentence should be awarded – Position explained.**

## Santosh Kumar Singh v. State through CBI

**Judgment dated 06.10.2010 passed by the Supreme Court in Criminal Appeal No. 87 of 2007, reported in (2010) 9 SCC 747**

Held:

We are indeed astonished at these remarkably confusing and contradictory observations, as CBI was not called upon to prove the defence of the appellant. CBI had fairly secured the documents which could prove the appellant's case and they were put on record and it was for the defence to use them to its advantage, No such effort was made. Moreover, we are unable to see as to how these documents could have been exhibited as no one has come forward to prove them. It has to be kept in mind that the appellant was a lawyer and his father a very senior police officer, and we are unable to understand as to why no evidence in defence to prove the documents or to test their veracity, had been produced. In this background, we find that the medical evidence clearly supports the version that the injury had been sustained by the appellant on 24-01-1996 during the course of the rape and murder.

This finding raises yet another issue. It has been held time and again that a false plea taken by an accused in a case of circumstantial evidence is another link in the chain. (See : *Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681)*

At the very outset, we must dispel Senior Advocate for the Appellant rather broad argument that the primary allegations were of rape whereas murder was a secondary issue in the facts of the case and that the proof of murder would depend on proof of rape. We see from the record that there is very substantial evidence with regard to the allegations of murder simpliciter and have been

dealt with under Circumstance 11. (The deceased got 19 injuries on her person besides three broken ribs. These injuries were suggestive of force used for rape. A tear mark over the area of left breast region on the T-shirt of the deceased suggested that the force was used for molestation).

We first see that right from the year 1994 to January 1996, that is, a few days before the murder, the appellant had been continuously harassing the deceased and that this allegation has been proved by ocular and documentary evidence. We also see that the appellant had been seen in the Faculty of Law, University of Delhi on the morning of the incident and had no business to be present at that place as he had passed out in the year 1994. He was also seen by PW 2 Shri Kuppuswami outside the house of the deceased at about 5 p.m. and was carrying a helmet with an intact fixed visor, and was seen moving out of Vasant Kunj Colony by two witnesses soon after 5 p.m. (though these witnesses ultimately turned hostile). The only argument against PW 2 is that his statement under Section 161 of the Code of Criminal Procedure had been recorded after three days. We find nothing adverse in this matter as there was utter confusion in the investigation at the initial stage. Moreover, PW 2 was a next neighbour and a perfectly respectable witness with no bias against the appellant.

In addition, the recovery of the helmet with a broken visor and the recovery of glass pieces apparently of the visor from near the dead body and the fact that the appellant himself sustained injuries while mercilessly beating the deceased with his helmet (as per the FSL Report, Ext. PW-50/H4) and causing 19 injuries including three fractured ribs, are other circumstances with regard to the murder. Assuming, therefore, for a moment, that there was some uncertainty about the rape, the culpability of the appellant for the murder is nevertheless writ large and we are indeed surprised at the decision of the trial Judge in ordering an outright acquittal.

We now come to the circumstance with regard to the comparison of the semen stains with the blood taken from the appellant. The trial court had found against the prosecution on this aspect. In this connection, we must emphasize that the court cannot substitute its own opinion for that of an expert, more particularly in a science such as DNA profiling which is a recent development.

Dr. Lalji Singh in his examination-in-chief deposed that he had been involved with the DNA technology ever since the year 1974 and he had returned to India from the UK in 1987 and joined CCMB, Hyderabad and had developed indigenous methods and techniques for DNA fingerprinting which were now being used in this country. We also see that the expertise and experience of Dr. Lalji Singh in his field has been recognized by this Court in *Kamalanantha v. State of T.N., (2005) 5 SCC 194.* We further notice that CW 1 Dr. G.V. Rao was a scientist of equal repute ad he had in fact conducted the tests under the supervision of Dr. Lalji Singh. It was not even disputed before us during the course of arguments that these two scientists were persons of eminence and that the laboratory in question was also held in the highest esteem in India.

The statements of Dr. Lalji Singh and Dr. G.V. Rao reveal that the samples had been tested as per the procedure developed by the laboratory, that the samples were sufficient for the purposes of comparison and that there was no possibility of the samples being contaminated or tampered with. The two scientists gave very comprehensive statements supported by documents that DNA of the semen stains on the swabs and slides and the underwear of the deceased and the blood samples of the appellant was from a single source and that source was the appellant.

It is significant that not a single question was put to PW Dr. Lalji Singh as to the accuracy of the methodology or the procedure followed for the DNA profiling. The trial court has referred to a large number of textbooks and has given adverse findings on the accuracy of the tests carried out in the present case. We are unable to accept these conclusions as the court has substituted its own opinion ignoring the complexity of the issue on a highly technical subject, more particularly as the questions raised by the court had not been put to the expert witnesses. In *Bhagwan Das v. State of Rajasthan, AIR 1957 SC 589,* it has been held that it would be a dangerous doctrine to lay down that the report of an expert witness could be brushed aside by making reference to some text on that subject without such text being put to the expert.

The observations in *Gambhir v. State of Maharashtra, AIR 1982 SC 1157* are even more meaningful insofar as we are concerned. In this case, the doctors who had conducted the post-mortem examination could not give the time of death. The High Court, in its wisdom, thought it proper to delve deep into the evidence and draw its own conclusions as to the time of death and at the same time, made some very adverse and caustic comments with regard to the conduct of the doctors, and dismissed the appeal of the accused. This Court (after the grant of special leave) allowed the appeal and reverting to the High Court's opinion of the doctors observed : (SCC pp. 359-60, para 30)

> "30. ... The High Court came to its own opinion when the doctors failed to give opinion. The Court has to draw its conclusion on the basis of the materials supplied by the expert opinion. The High Court has tried to usurp the functions of an expert."

This is precisely the error into which the trial court has fallen.

It is significant that at the initial stage only Dr. Lalji Singh had been summoned to prove the DNA report and it was during the course of final arguments that the court thought it fit to summon Dr. G.V. Rao as a court witness. This witness was subhjected to an extraordinarily detailed examination-in-chief and even more gruelling and rambling a cross-examination running into a hundred or more pages spread over a period of time. The trial court finally, and in frustration, was constrained to make an order that the cross-examination could not go on any further. We are of the opinion that the defence counsel had attempted to create confusion in the mind of CW 1 and the trial court has been

swayed by irrelevant considerat:. s it could hardly claim the status of an expert on a very complex subject.

We feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in *Kamti Devi v. Poshi Ram, AIR 2001 SC 2226.* In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on Circumstance 9. (DNA fingerprinting test conclusively establishes the guilt of the accused)

Undoubtedly, the sentence part is a difficult one and often exercises the mind of the court but where the option is between life sentence and a death sentence, the options are indeed extremely limited and if the court itself feels some difficulty in awarding one or the other, it is only appropriate that the lesser sentence should be awarded. This is the underlying philosophy being "the rarest of the rare" principle.

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***52. INDIAN PENAL CODE, 1860 – Section 498-A**

**Section 498-A IPC being a penal provision deserves strict construction, hence only the husband or his relative could be proceeded against for subjecting the wife to "cruelty" which has been specifically defined in the explanation thereto – Neither a girlfriend nor a concubine is the relative of a husband for this purpose since they are not connected by blood or marriage or adoption to the husband.**

**Sunita Jha v. State of Jharkhand and another**

**Judgment dated 13.09.2010 passed by the Supreme Court in Criminal Appeal No. 1745 of 2010, reported in (2010) 10 SCC 190**

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**53. LAND ACQUISITION ACT, 1894 – Sections 21 (1-A), 23 (2) and 34**
**CIVIL PROCEDURE CODE, 1908 – Section 47**

**Executing court cannot examine reasons so as to go behind decree, but if in award passed, Reference Court makes a specific reference to payment of interest but without any such reference to payment of interest on solatium and merely payment of interest on compensation is granted, then it would be open to executing court to declare that compensation awarded includes solatium, and consequently, interest on amount could be directed to be deposited in execution – Where interest on solatium is claimed in old pending execution, the executing court will be entitled to permit its recovery from the date of judgment.**

## Chimanlal Kuberdas Modi (dead) by LRs. v. Gujarat Industrial Development Corporation and others

**Judgment dated 22.10.2010 passed by the Supreme Court in Civil Appeal No. 1385 of 2004, reported in (2010) 10 SCC 635**

Held:

The Reference Court in the decree has allowed the prayer for compensation towards the market value of the land as also solatium at the rate of 30% and also granted increase of 12% from the date of publication, as also an increase in compensation in terms of Section 23 (1-A) of the Act.

The claimants were also held to be entitled to interest at the rate of 9% and thereafter at 15% per annum on the entire amount payable. In the decree, it was also mentioned that the claimants would be entitled to get compensation as stated in the schedule attached therein. The schedule is attached with the decree. A bare perusal of the same indicates that in addition to the amount shown as compensation towards market value, solatium at the rate of 30% and increase of compensation at the rate of 12% per annum are also shown in the said schedule. The amount awarded in terms of the interest at the rate of 9% per annum which is shown to be included in the decree is, for reasons unclear, not indicated in the said schedule, but is specifically mentioned in the decree itself. Since a direction is made for payment of interest at the rate of 9% per annum and thereafter at 15% per annum in the decree, the appellant cannot be denied the benefit of the interest on market value, which also includes solatium and for that purpose the decisions in the case of *Sunder v. Union of India, (2001) 7 SCC 211 and Gurpreet Singh v. Union of India, (2006) 8 SCC 457* would become relevant.

In *Sunder* (supra), this Court in paragraph 23 has stated thus:-

> "23. .....We make it clear that the compensation awarded would include not only the total sum arrived at as per sub-section (1) of Section 23 but the remaining sub-sections thereof as well. It is thus clear from Section 34 that the expression "awarded amount" would mean the amount of compensation worked out in accordance with the provisions contained in Section 23, including all the sub-sections thereof."

In paragraph 24, the Court further held as follows:- [*Sunder case* (supra), SCC p. 230]

> "24. The proviso to Section 34 of the Act makes the position further clear. The proviso says that "if such compensation" is not paid within one year from the date of taking possession of the land, interest shall stand escalated to 15% per annum from the date of expiry of the said period of one year "on the amount of compensation or part thereof which has not been paid or deposited before the date of such expiry". It is inconceivable that the solatium amount would attract only the

escalated rate of interest from the expiry of one year and that there would be no interest on solatium during the preceding period. What the legislature intended was to make the aggregate amount under Section 23 of the Act to reach the hands of the person as and when the award is passed, at any rate as soon as he is deprived of the possession of his land. Any delay in making payment of the said sum should enable the party to have interest on the said sum until he receives the payment. Splitting up the compensation into different components for the purpose of payment of interest under Section 34 was not in the contemplation of the legislature when that section was framed or enacted."

The aforesaid decision of *Sunder* (supra) came to be considered once again by this Court in the case of *Gurpreet Singh* (supra) and in paragraph 54 of the said judgment, this Court held thus (*Gurpreet Singh case* (supra) scc p. 485):

"54. One other question also was sought to be raised and answered by this Bench though not referred to it. Considering that the question arises in various cases pending in courts all over the country, we permitted the counsel to address us on that question. That question is whether in the light of the decision in *Sunder* (supra), the awardee/decree-holder would be entitled to claim interest on solatium in execution though it is not specifically granted by the decree. It is well settled that an execution court cannot go behind the decree. If, therefore, the claim for interest on solatium had been made and the same has been negatived either expressly or by necessary implication by the judgment or decree of the Reference Court or of the appellate court, the execution court will have necessarily to reject the claim for interest on solatium based on *Sunder* (supra) on the ground that the execution court cannot go behind the decree. But if the award of the Reference Court or that of the appellate court does not specifically refer to the question of interest on solatium or in cases where claim had not been made and rejected either expressly or impliedly by the Reference Court or the appellate court, and merely interest on compensation is awarded, then it would be open to the execution court to apply the ratio of *Sunder* (supra) and say that the compensation awarded includes solatium and in such an event interest on the amount could be directed to be deposited in execution. Otherwise, not. We also clarify that such interest on solatium can be claimed only in pending executions and not in closed executions and the execution court will be entitled to permit

its recovery from the date of the judgment in *Sunder* (19.9.2001) and not for any prior period. We also clarify that this will not entail any reappropriation or fresh appropriation by the decree-holder. This we have indicated by way of clarification also in exercise of our power under Articles 141 and 142 of the Constitution of India with a view to avoid multiplicity of litigation on this question."

It is no doubt true that the execution court cannot examine the reasons so as to go behind the decree but if in the Award passed, the Reference Court makes a specific reference to payment of interest but without any such reference to the payment of interest on solatium and merely payment of interest on compensation is granted, then it would be open to the executing court to apply the ratio of *Sunder* (supra) and declare that the compensation awarded includes solatium, and consequently, interest on the amount could be directed to be deposited in execution. That being the legal position as prevailing today, we cannot ignore the observations made in paragraph 54 of the aforesaid judgment in *Gurpreet Singh* (supra) and we order accordingly that compensation awarded includes solatium and therefore interest on the said amount shall be paid by the respondent in the pending execution.

In our considered opinion, the ratio of the aforesaid decision is also applicable in view of the fact that such interest on solatium is claimed by the appellant herein in the pending adjudication and therefore, we observe that the executing court was justified to permit recovery of interest on solatium from the date of judgment in *Sunder* (supra), i.e., 19.9.2001 and not for any prior period.

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**54. LAND ACQUISITION ACT, 1894 – Sections 28-A and 18**
**Re-determination of amount of compensation on the basis of award of the Reference Court, is based on the ground of equality enshrined in the Preamble of the Constitution and Articles 38, 39 and 46 thereof – Section 28-A is aimed at removing inequality in the payment of compensation in lieu of acquisition of land under the same notification – Of course, this opportunity can be availed of by filing application within the prescribed period – Purpose of Section 28-A restated.**

**V. Ramakrishna Rao v. Singareni Collieries Company Limited and another**

**Judgment dated 05.10.2010 passed by the Supreme Court in Civil Appeal No. 7655 of 2004, reported in (2010) 10 SCC 650**

Held:

The provision of Section 28-A of the Land Acquisition Act represents the Legislature's determination to ensure that the goal of equality enshrined in the Preamble of the Constitution and Articles 38, 39 and 46 thereof is translated into reality, at least in the matter of payment of compensation to those who are

deprived of their land for the benefit of the State, its instrumentalities/agencies and even private persons. Section 28A also represents statutory embodiment of the doctrine of equality in matters relating to the acquisition of land. The Act which was enacted in 1894 and was amended after 90 years has the potential of depriving a large segment of the society i.e. the 'agriculturist' of their only source of livelihood. The scheme of Section 28-A provide some solace to this segment of the society by ensuring that such of the land owners whose land was acquired under the same notification but who could not, on account of poverty, ignorance and other disabilities join others in seeking reference under Section 18 get an opportunity to claim compensation at par with others. This section is aimed at removing inequality in the payment of compensation in lieu of acquisition of land under the same notification. To put it differently, this section gives a chance to the land owner, who may not have applied under Section 18 for determination of market value by the Court to seek re-determination of the amount of compensation, if any other similarly situated land owner succeeds in persuading the Reference Court to fix higher market value of the acquired land. Therefore, Section 28-A has to be interpreted in a manner which would advance the policy of legislation to give an opportunity to the land owner who may have, due to variety of reasons not been able to move the Collector for making reference under Section 18 of the Act to get higher compensation if market value is revised by the Reference Court at the instance of other land owners, whose land is acquired under the same notification. Of course, this opportunity can be availed by filing application within the prescribed period.

In *Union of India v. Pradeep Kumari, (1995) 2 SCC 736* a three-Judge Bench of this Court held that Section 28A is in the nature of a beneficent provision intended to remove inequality and to give relief to the inarticulate and poor land owners, who are not able to take advantage of the right of reference to the Civil Court under Section 18 of the Act and such a provision should be interpreted in a manner which advances the policy of legislation.

In *Union of India v. Munshi Ram, (2006) 4 SCC 538* a two-Judge Bench considered the meaning of the word 're-determination' appearing in Section 28A and held that compensation payable to the applicant under Section 28A should be at par with what is finally payable to those who sought reference under Section 18 of the Act and if the compensation payable to the latter category is reduced by the superior court, the one who gets higher compensation under Section 28A may be directed to refund the excess amount.

What was emphasized by the two-Judge Bench was that re-determination of the amount of compensation under Section 28A must be commensurate with the compensation payable to those who had sought reference under Section 18 and if the higher court reduces the amount of compensation payable in terms of the order of the Reference Court, then those making application under Section 28A must be asked to refund the excess amount. A somewhat similar view was expressed in *Kendriya Karamchari Sehkari Grah Nirman Samiti Limited v. State of U.P., (2009) 1 SCC 754* in the following words: (SCC p. 765, para 40)

"40. It is true that once the Reference Court decides the matter and enhances the compensation, a person who is otherwise eligible to similar relief and who has not sought reference, may apply under Section 28-A of the Act. If the conditions for application of the said provision have been complied with, such person would be entitled to the same relief which has been granted to other persons seeking reference and getting enhanced compensation. But, it is equally true that if the Reference Court decides the matter and the State or acquiring body challenges such enhanced amount of compensation and the matter is pending either before the High Court or before this Court (the Supreme Court), the Collector would be within his power or authority to keep the application under Section 28-A of the Act pending till the matter is finally decided by the High Court or the Supreme Court as the case may be. The reason being that the decision rendered by the Reference Court enhancing compensation has not attained "finality" and is sub judice before a superior court."

If sub-section (3) of Section 28A is interpreted keeping in view the object sought to be achieved by enacting the provision for removing inequality in the matter of payment of compensation, it must be held that a person who is not satisfied with an award made under Section 28A(2) can make an application to the Collector under Section 28A(3) for making a reference to the Court as defined in Section 3(d) of the Act and this right cannot be frustrated merely because as a result of re-determination made under Section 28A(2) read with Section 28A(1) the applicant becomes entitled to receive compensation at par with other land owners. There is nothing in the plain language of Section 28A(3) from which it can be inferred that a person who has not accepted the award made under Section 28A(2) is precluded from making an application to the Collector with the request to refer the matter to the Court. Of course, the Court to which reference is made under Section 28A(3) will have to bear in mind that a person who has not sought reference under Section 18 cannot get compensation higher than the one payable to those who had sought reference under that section.

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**55. LAW OF TORTS:**

**Liability of Municipal Corporation for negligence – Where Municipal Corporation failed to discharge its statutory duty in maintaining the road in safe condition and due to use of the same, plaintiff had suffered the accident – Municipal Corporation is responsible to pay compensation for the damage suffered by the plaintiff.**

**U.P. Sharma v. Jabalpur Corporation and others**

**Judgment dated 27.08.2009 passed by M.P. High Court in First Appeal No. 82 of 1995, reported in 2010 (5) MPHT 59**

Held:

Certain sand was lying on a public road and maintenance of the public road, in a condition, suitable for safe transport or use by public is the statutory duty of the Municipal Corporation. Even if for a moment it is assumed that said sand lying on the road was not put by Municipal Corporation or was not being used by Municipal Corporation in connection with any work being carried out by Municipal Corporation, the fact that the sand was lying on a public street being used by the public at large is evident from the fact that has come on record, that being so, it was the duty of the Municipal Corporation to ensure that obstructions and other hindrances in the safe passage on public street is removed, if the sand was lying on the road and if the officers and authorities of the Municipal Corporation have failed to remove them, then it is an act of negligence, breach of duty or fault on the part of the officers of the Municipal Corporation, in not maintaining the road in such a condition that it is safe for the general public to move on it. The provisions of Section 322 of M.P. Municipal Corporation Act mandates that no person should create obstruction in the street without written permission of the Commissioner, punishments are prescribed in case obstructions are created in the street by virtue of powers vested on the Municipal Commissioner under Sections 322, 323 and 326. It is, therefore, clear that the statute imposes statutory duty on the Municipal Corporation and provide for imposing penalty on a person, who commits breach of the provision.

The Municipal Corporation having failed to discharge its duty in maintaining properly the road in a safe condition and due to use of the same when plaintiff had suffered the accident/injuries this Court is of the considered view that Municipal Corporation is responsible to pay compensation for the loss or damage suffered by the plaintiff, as the accident arose due to failure on the part of the Municipal Corporation in discharging its general and specific duty with regard to maintaining roads and other places of public use in a safe condition, without there being any hindrance or obstruction.

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**56. MOTOR VEHICLES ACT, 1988 – Section 166**

**Claimant, aged 25 years, was final year engineering student in a reputed college with bright future – Suffered 70% permanent disability in a motor accident – Future earning assessed at ₹ 60,000/- per month taking salary and allowance payable to Assistant Engineer in public employment, 70% loss of future earnings to be ₹ 42,000/- per annum multiplied by 18 i.e. ₹ 7,56,000/-**

**Arvind Kumar Mishra v. New India Assurance Company Limited and another**

**Judgment dated 29.09.2010 passed by the Supreme Court in Civil Appeal No. 5510 of 2005, reported in (2010) 10 SCC 254**

Held:

The basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered.

In some cases for personal injury, the claim could be in respect of life time's earnings lost because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must ask whether the sum awarded is a fair and reasonable sum. The conventional basis of assessing compensation in personal injury cases - and that is now recognized mode as to the proper measure of compensation - is taking an appropriate multiplier of an appropriate multiplicand. [See *Kerala SRTC v. Susamma Thomas, (1994) 2 SCC 176*]

The appellant (claimant) at the time of accident was a final year engineering (Mechanical) student in a reputed college. He was a remarkably brilliant student having passed all his semester examinations in distinction. Due to the said accident he suffered grievous injuries and remained in coma for about two months. His studies got interrupted as he was moved to different hospitals for surgeries and other treatments. For many months his condition remained serious; his right hand was amputated and vision seriously affected. These multiple injuries ultimately led to 70% permanent disablement. He has been rendered incapacitated and a career ahead of him in his chosen line of mechanical engineering got dashed for ever. He is now in a physical condition that he requires domestic help throughout his life. He has been deprived of pecuniary benefits which he could have reasonably acquired had he not suffered permanent disablement to the extent of 70% in the accident.

On completion of Bachelor of Engineering (Mechanical) from the prestigious institute like B.I.T., it can be reasonably assumed that he would have got a good job. The appellant has stated in his evidence that in the campus interview he was selected by Tata as well as Reliance Industries and was offered pay package of ₹ 3,50,000/- per annum. Even if that is not accepted for want of any evidence in support thereof, there would not have been any difficulty for him in getting some decent job in the private sector. Had he decided to join government service and got selected, he would have been put in the pay scale for Assistant Engineer and would have at least earned ₹ 60,000/- per annum. Wherever he joined, he had a fair chance of some promotion and remote chance of some high position. But uncertainties of life cannot be ignored taking relevant factors into consideration. In our opinion, it is fair and reasonable to assess his future earnings at ₹ 60,000/- per annum taking the salary and allowances payable to an Assistant Engineer in public employment as the basis. Since he suffered 70% permanent disability, the future earnings may be discounted by 30% and,

accordingly, we estimate upo ..ie facts that the multiplicand should be ₹ 42,000/- per annum.

The appellant (claimant) has made his claim under Section 166. It is true that in *Reshma Kumari & Ors. v. Madan Mohan, (2009) 13 SCC 422* a two-Judge Bench of this Court has referred the question whether multiplier specified in the Second Schedule should be taken to be a guide for calculation of the amount of compensation payable in a case falling under Section 166 to the larger bench and the said question is not yet authoritatively decided. However, in a case such as the present case, we find no justification to await decision of the larger bench on the aforenoticed question as there are already few decisions of this Court taking a view that the Second Schedule has no application to the claim petition made under Section 166 of the 1988 Act.

The appellant at the time of accident was about 25 years. As per the decision of this Court in *Sarla Verma (Smt.) v. DTC, (2009) 6 SCC 121* the operative multiplier would be 18. The loss of future earnings by multiplying the multiplicand of ₹ 42,000/- by a multiplier of 18 comes to ₹ 7,56,000/-. The damages to compensate the appellant towards loss of future earnings, in our considered judgment, must be ₹ 7,56,000/-.

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**57. N.D.P.S. ACT, 1985 – Sections 20, 35, 54 and 56**

**(i) At the time of search and seizure, sample taken with the aid of weighing scale and weight brought from grocery shop and the same was weighed in laboratory with precision scale – 15 gms. more weight was found – Such difference in the given circumstances is not significant and does not impeach the credibility of prosecution case.**

**(ii)** *Conscious possession of contraband* **– Accused persons were travelling in private car from which charas was recovered – They knew each other – Therefore, it was established that they were in conscious possession thereof according to the presumption of Sections 35 and 54 of the Act until such presumption is rebutted.**

## Dehal Singh v. State of Himachal Pradesh

**Judgment dated 31.08.2010 passed by the Supreme Court in Criminal Appeal No. 1215 of 2005, reported in AIR 2010 SC 3594**

Held:

**(i)** It is evident that the weighing scale and the weight came from the grocery shop. It is common knowledge that weighing scale and weight kept in the grocery shop are not of such standard which can weigh articles with great accuracy and therefore difference of 15 gms. in weight, in the facts and circumstances of this case, is not of much significance. Sample was taken by a common weighing scale and weight found in a grocery shop, whereas the weight in the laboratory recorded with precision scale. This would be evident from the fact that the weight

of the sample recorded in the laboratory was 65.5606 gms. In this background, small difference in weight loses its significance, when one finds no infirmity in other part of the prosecution story. *Noor Aga v. State of Punjab and Anr., (2008) 16 SCC 417* and *Rajesh Jagdamba Avasthi v. State of Goa, AIR 2005 SC 1389* distinguished.

**(ii)** Both the appellants have been found travelling in the car from which Charas was recovered and, therefore, they were in possession there of. They were knowing each other. They were not travelling in a public transport vehicle. Distinction has to be made between accused travelling by public transport vehicle and private vehicle. It needs no emphasis that to bring the offence within the mischief of Section 20 of the Act possession has to be conscious possession. Section 35 of the Act recognizes that once possession is established the Court can presume that the accused had a culpable mental state, meaning thereby conscious possession. Further the person who claims that he was not in conscious possession has to establish it. Presumption of conscious possession is further available under Section 54 of the Act, which provides that accused may be presumed to have committed the offence unless he accounts for satisfactorily the possession of contraband. The view which we have taken finds support from a judgment of this Court in the case of *Madan Lal and Anr. v. State of H.P., AIR 2003 SC 3642* wherein it has been held as follows:

> "26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.
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> 27. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act."

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**58. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 20 and 138 Accused has admitted his signature on the disputed cheque – Presumption arises – Cheque had been issued by the Signatory/ Accused – No need for sending cheque for examination by hand-writing expert.**

**Satyendra Upadhyay v. Omprakash Rathore @ Japan Singh**

**Judgment dated 23.09.2010 passed by the High Court of M.P. in Misc. Cr. Case No. 5271 of 2010, reported in 2010 (5) MPHT 104**

Held:

The petitioner accused has admitted his signature on the disputed Cheque. Hence presumption arises as per provision of Section 20 of the NI Act with regard to fact that cheque had been issued by the signatory after filing it properly. In this case, the learned Trial Court as well as Revisional Court has rightly observed that since signature of petitioner on disputed Cheque is admitted by the petitioner himself, hence no need for sending disputed Cheque for examination by handwriting expert concerning other part of Cheque concerning name of the complainant and date which is alleged to be filled by complainant. So far as citations relied upon by the petitioner are concerned, facts of those cases are different as in those cases signature of accused on Cheques was disputed while facts of case at hand are altogether different. Considering the overall aspects of the matter so also the impugned orders and the documents on record, it is apparent that the orders of the Trial Court and Revisional Court are just, proper, impeccable and infallible and I do not find any perversity in the impugned orders. Accordingly, the petition being bereft of any substance, is dismissed.

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**59. PRACTICE AND PROCEDURE:**
**NATURAL JUSTICE:**
**Recording of reasons – Requirement of – The safeguards against an arbitrary exercise of powers – The application of mind in turn is best demonstrated by disclosure of the mind and disclosure of mind is best demonstrated by recording reasons in support of the order or conclusion – Legal position reiterated.**

## Maya Devi (dead) through LRs. v. Raj Kumar Batra (dead) through LRs and others

**Judgment dated 08.09.2010 passed by the Supreme Court in Civil Appeal No. 10249 of 2003, reported in (2010) 9 SCC 486**

Held:

The juristic basis underlying the requirement that courts and indeed all such authorities, as exercise the power to determine the rights and obligations of individuals must give reasons in support of their orders has been examined in a long line of decisions rendered by this Court. In *Hindustan Times Ltd. v. Union of India, (1998) 2 SCC 242* the need to give reasons has been held to arise out of the need to minimize chances of arbitrariness and induce clarity.

In *Arun v. Inspector General of Police, (1986) 3 SCC 696,* the recording of reasons in support of the order passed by the High Court has been held to inspire public confidence in administration of justice, and help the Apex Court to dispose of appeals filed against such orders.

In *Union of India v. Jai Prakash Singh, (2007) 10 SCC 712,* reasons were held to be live links between the mind of the decision-maker and the controversy in question as also the decision or conclusion arrived at.

In *Victoria Memorial Hall v. Howrah Gantantrik Nagrik Samity, (2010) 3 SCC 732,* reasons were held to be the heartbeat of every conclusion, apart from being an essential feature of the principles of natural justice, that ensure transparency and fairness, in the decision-making process.

In *Ram Phal v. State of Haryana, (2009) 3 SCC 258,* giving of satisfactory reasons was held to be a requirement arising out of an ordinary man's sense of justice and a healthy discipline for all those who exercise power over others.

In *Director, Horticulture, Punjab v. Jagjivan Parshad, (2008) 5 SCC 539,* the recording of reasons was held to be indicative of application of mind specially when the order is amenable to further avenues of challenge.

It is in the light of the above pronouncements unnecessary to say anything beyond what has been so eloquently said in support of the need to give reasons for orders made by courts and statutory or other authorities exercising quasi-judicial functions. All that we may mention is that in a system governed by the rule of law, there is nothing like absolute or unbridled power exercisable at the whims and fancies of the repository of such power. There is nothing like a power without any limits or constraints. That is so even when a court or other authority may be vested with wide discretionary power, for even discretion has to be exercised only along well-recognised and sound juristic principles with a view to promoting fairness, inducing transparency and aiding equity.

What then are the safeguards against an arbitrary exercise of power? The first and the most effective check against any such exercise is the well-recognised legal principle that orders can be made only after due and proper application of mind. Application of mind brings reasonableness not only to the exercise of power but to the ultimate conclusion also. Application of mind in turn is best demonstrated by disclosure of the mind. And disclosure is best demonstrated by recording reasons in support of the order or conclusion.

Recording of reasons in cases where the order is subject to further appeal is very important from yet another angle. An appellate court or the authority ought to have the advantage of examining the reasons that prevailed with the court or the authority making the order. Conversely, absence of reasons in an appealable order deprives the appellate court or the authority of that advantage and casts an onerous responsibility upon it to examine and determine the question on its own. An appellate court or authority may in a given case decline to undertake any such exercise and remit the matter back to the lower court or authority for a fresh and reasoned order. That, however, is not an inflexible rule, for an appellate court may notwithstanding the absence of reasons in support of the order under appeal before it examine the matter on merits and finally decide the same at the appellate stage. Whether or not the appellate court

should remit the matter is discretionary with the appellate court and would largely depend upon the nature of the dispute, the nature and the extent of evidence that may have to be appreciated, the complexity of the issues that arise for determination and whether remand is going to result in avoidable prolongation of the litigation between the parties. Remands are usually avoided if the appellate court is of the view that it will prolong the litigation.

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**60. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Sections 2 (f), 2 (s), 3 (a) and 3 (iv) (a)**
**CRIMINAL PROCEDURE CODE, 1973 – Section 125 (1), Explanation (b)**

**(i) Section 125 CrPC provides for giving maintenance to the wife and some other relatives – As per Explanation (b) thereto 'wife' includes a woman who has been divorced by or has obtained a divorce from the husband and has not remarried – However, under the law a second wife whose marriage is void on account of the survival of the first marriage is not a legally wedded wife and is therefore, not entitled to maintenance under this provision.**

**(ii) As against this Section 2 (f) of PWDVA, 2005 embraces a wider concept by affording protection not only to legally wedded wife but also to a woman who is having domestic relationship which may not strictly be marriage but is "in the nature of marriage."**

**(iii)** *'Live-in-relationship' – 'Wife', meaning of*
**'Relationship in the nature of marriage' – Essential conditions constituting such relationship – Live-in relationship as recognised in some jurisdictions in USA – Scope and its applicability in India – 'Keep'– Whether relationship with her is in the nature of marriage –'Relationship in the nature of marriage', held, is akin to a common law marriage which** *inter alia* **requires that the parties must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time – The parties should also have a 'shared household' as defined in Section 2(s) of the Act – Merely spending weekends or one night together does not constitute 'domestic relationship under Section 2 (f) of the Act – Further held, not all live-in relationships form a relationship 'in the nature of marriage' because several parameters have to be satisfied in order to constitute relationship in the nature of marriage – Lastly, held, a relationship with 'keep' whom a man uses for sexual purposes and/or as a servant, does not constitute relationship in the nature of marriage.**

**D. Velusamy v. D. Patchaiammal**
**Judgment dated 21.10.2010 passed by the Supreme Court in Criminal Appeal No. 2028 of 2010, reported in (2010) 10 SCC 469**

Held:

**(i)** A "relationship in the nature of marriage" is akin to a common law marriage. Common law marriages require that although not being formally married: (a) The couple must hold themselves out to society as being akin to spouses. (b) They must be of legal age to marry. (c) They must be otherwise qualified to enter into a legal marriage, including being unmarried. (d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time. A "relationship in the nature of marriage" under the 2005 Act must also fulfil the above requirements, and in addition the parties must have lived together in a "shared household" as defined in Section 2 (s) of the Act. Merely spending weekends together or one night would not make it a "domestic relationship". Not all live-in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005.

Section 125 Cr.P.C. provides for giving maintenance to the wife and some other relatives. The word 'wife' has been defined in Explanation (b) to Section 125(1) of the Cr.P.C. as follows:

> "Wife includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried."

In *Vimala v. Veeraswamy, (1991) 2 SCC 375,* a three-Judge Bench of this Court held that Section 125 of the Code of 1973 is meant to achieve a social purpose and the object is to prevent vagrancy and destitution. Explaining the meaning of the word 'wife' the Court held:

> "...the object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. When an attempt is made by the husband to negative the claim of the neglected wife depicting her as a kept-mistress on the specious plea that he was already married, the court would insist on strict proof of the earlier marriage. The term 'wife' in Section 125 of the Code of Criminal Procedure, includes a woman who has been divorced by a husband or who has obtained a divorce from her husband and has not remarried. The woman not having the legal status of a wife is thus brought within the inclusive definition of the term 'wife' consistent with the objective. However, under the law a second wife whose marriage is void on account of the survival of the first marriage is not a legally wedded wife, and is, therefore, not entitled to maintenance under this provision."

In a subsequent decision of this Court in *Savitaben Somabhati Bhatiya v. State of Gujarat, AIR 2005 SC 1809,* this Court held that however desirable it may be to take note of the plight of an unfortunate woman, who unwittingly enters into wedlock with a married man, there is no scope to include a woman not lawfully married within the expression of 'wife'. The Bench held that this inadequacy in law can be amended only by the Legislature.

Since we have held that the Courts below erred in law in holding that Lakshmi was not married to the appellant (since notice was not issued to her and she was not heard), it cannot be said at this stage that the respondent herein is the wife of the appellant. A divorced wife is treated as a wife for the purpose of Section 125 Cr.P.C. but if a person has not even been married obviously that person could not be divorced. Hence the respondent herein cannot claim to be the wife of the appellant herein, unless it is established that the appellant was not married to Lakshmi.

**(ii)** However, the question has also to be examined from the point of view of the Protection of Women from Domestic Violence Act, 2005.

Section 2(f) states:

> "2(f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family";

The expression 'domestic relationship' includes not only the relationship of marriage but also a relationship 'in the nature of marriage'. The question, therefore, arises as to what is the meaning of the expression 'a relationship in the nature of marriage'. Unfortunately this expression has not been defined in the Act. Since there is no direct decision of this Court on the interpretation of this expression we think it necessary to interpret it because a large number of cases will be coming up before the Courts in our country on this point, and hence an authoritative decision is required.

In our opinion Parliament by the aforesaid Act has drawn a distinction between the relationship of marriage and a relationship in the nature of marriage, and has provided that in either case the person who enters into either relationship is entitled to the benefit of the Act.

It seems to us that in the aforesaid Act of 2005 Parliament has taken notice of a new social phenomenon which has emerged in our country known as live-in relationship.

**(iii)** Some countries in the world recognize common law marriages. A common law marriage, sometimes called de facto marriage, or informal marriage is recognized in some countries as a marriage though no legally recognized marriage ceremony is performed or civil marriage contract is entered into or the marriage registered in a civil registry.

In our opinion a 'relationship in the nature of marriage' is akin to a common law marriage. Common law marriages require that although not being formally married:-

(a) The couple must hold themselves out to society as being akin to spouses.

(b) They must be of legal age to marry.

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

(See "Common Law Marriage" in Wikipedia on Google)

In our opinion a 'relationship in the nature of marriage' under the 2005 Act must also fulfill the above requirements, and in addition the parties must have lived together in a 'shared household' as defined in Section 2(s) of the Act. Merely spending weekends together or a one night stand would not make it a 'domestic relationship'.

In our opinion not all live in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence. If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage`

No doubt the view we are taking would exclude many women who have had a live in relationship from the benefit of the 2005 Act, but then it is not for this Court to legislate or amend the law. Parliament has used the expression 'relationship in the nature of marriage' and not 'live in relationship'. The Court in the garb of interpretation cannot change the language of the statute.

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**61. RENT CONTROL AND EVICTION:**

**Subletting/sub-tenancy comes into existence when the tenant voluntarily surrenders possession of the tenanted premises wholly or in part and put another person in exclusive possession there of without the knowledge of the landlord – Such arrangements take place behind the back of the landlord and the Court is required to draw its own inference upon the facts of the case.**

**Vinaykishore Punamchand Mundhada and another v. Shri Bhumi Kalpatru and others**

**Judgment dated 05.08.2010 passed by the Supreme Court in Civil Appeal No. 6299 of 2010, reported in (2010) 9 SCC 129**

Held:

It is well settled that sub-tenancy or sub-letting comes into existence when the tenant voluntarily surrenders possession of the tenanted premises wholly or in part and puts another person in exclusive possession thereof without the knowledge of the landlord. In all such cases, invariably the landlord is kept out of the scene rather, such arrangement whereby and whereunder the possession

is parted away by the tenant is always clandestine and such arrangements take place behind the back of the landlord. It is the actual physical and exclusive possession of the newly inducted person, instead of the tenant, which is material and it is that factor which reveals to the landlord that the tenant has put some other person into possession of the tenanted property.

It would be impossible for the landlord to prove, by direct evidence, the arrangement between the tenant and sub-tenant. It would not be possible to establish by direct evidence as to whether the person inducted into possession by the tenant had paid monetary consideration to the tenant. Such arrangements which may have made secretly, cannot be proved by affirmative evidence and in such circumstances, the court is required to draw its own inference upon the facts of the case proved at the enquiry. Delivery of exclusive possession by the tenant to a stranger to the landlord and without the prior permission of the landlord is one dominant factor based on which the court would infer as to whether the premises were sub-let. [Cases referred – *Parvinder Singh v. Renu Gautam, (2004) 4 SCC 794* and *Ram Saran v. Pyare Lal, (1996) 11 SCC 728*]

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**62. SPECIFIC RELIEF ACT, 1963 – Sections 15 and 16 (c)**
**EVIDENCE ACT, 1872 – Sections 60, 101, 106, 114 Ill. (g) and 118**
**POWERS OF ATTORNEY ACT, 1882 – Section 1-A**
**CIVIL PROCEDURE CODE, 1908 – Order 3 Rules 1 and 2**

**(i) Specific performance of contract – Plaintiff should not only plead and prove the terms of agreement but should also plead and prove his readiness and willingness to perform his obligation in terms of the contract.**

**To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered into by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract.**

**(ii) A plaintiff cannot examine in a place his power of attorney who does not have personal knowledge either to the transaction or of his readiness and willingness to perform his part of contract and subject himself to cross- examination on that issue – Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set-up by him is not correct – The legal position as to who should give evidence in regard to matters involving personal knowledge summarized.**

**(iii) It is not necessary that a contract should contain a specific provision that in the event of breach, the accused party will be entitled to specific performance – But where a provision naming**

**an amount to be paid in case of breach is intended to give to the party in default an option to pay money in lieu of specific performance, then specific performance may not be permissible.**

**Man Kaur (dead) by LRs. v. Hartar Singh Sangha**
**Judgment dated 05.10.2010 passed by the Supreme Court in Civil Appeal No. 147 of 2001, reported in (2010) 10 SCC 512**

Held:

**(i)** In a suit for specific performance, the plaintiff should not only plead and prove the terms of the agreement, but should also plead and prove his readiness and willingness to perform his obligations under the contract in terms of the contract.

To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract. If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross examination on that issue. A plaintiff cannot obviously examine in his place, his attorney holder who did not have personal knowledge either of the transaction or of his readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney holder of the person concerned.

**(ii)** This Court in *Janki Vashdeo Bhojwani v. Indusind Bank Ltd., (2005) 2 SCC 217,* held as follows: (SCC pp. 222-24, paras 13, 17-18 & 21)

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

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17. ....In the case of *Shambhu Dutt Shastri v. State of Rajasthan, (1986) 2 WLN 713 (Raj)* it was held that a general power of attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

18. The aforesaid judgment was quoted with the approval in *Ram Prasad v. Hari Narain, AIR 1998 Raj 185.* It was held that the word "acts" used in Rule 2 of Order III of the CPC does not include the act of power of attorney holder to appear as a witness on behalf of a party. Power of attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but be cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of the CPC. ....

21. We hold that the view taken by the Rajasthan High Court in *Shambhu Dutt Shastri* (supra) followed and reiterated in *Ramprasad* (supra) is the correct view."

The legal position as to personal knowledge can be summarized as under:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder *shall* be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of

principals carrying on business through authorized managers/ attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/ daughter living abroad.

**(iii)** Looking to the provisions of Sections 10, 21 and 23 of the Specific Relief Act, it is clear that for a plaintiff to seek specific performance of a contract of sale relating to immovable property, and for a court to grant such specific performance, it is not necessary that the contract should contain a specific provision that in the event of breach, the aggrieved party will be entitled to specific performance. The Act makes it clear that if the legal requirements for seeking specific enforcement of a contract are made out, specific performance could be enforced as provided in the Act even in the absence of a specific term for specific performance in the contract. It is evident from Section 23 of the Act that even where the agreement of sale contains only a provision for payment of damages or liquidated damages in case of breach and does not contain any provision for specific performance, the party in breach cannot contend that in view of specific provision for payment of damages, and in the absence of a provision for specific performance, the court cannot grant specific performance.

But where the provision naming an amount to be paid in case of breach is intended to give to the party in default an option to pay money in lieu of specific performance, then specific performance may not be permissible.

We may attempt to clarify the position by the following illustrations (not exhaustive):

(A). *The agreement of sale provides that in the event of breach by the vendor, the purchaser shall be entitled to an amount equivalent to the earnest money as damages. The agreement is silent as to specific performance.* In such a case, the agreement indicates that the sum was named only for the purpose of securing performance of the contract. Even if there is no provision in the contract for specific performance, the court can direct specific performance by the vendor, if breach is established. But the court has the option, as per Section 21 of the Act, to award damages, if it comes to the conclusion that it is not a fit case for granting specific performance.

(B). *The agreement provides that in the event of the vendor failing to execute a sale deed, the purchaser will not be entitled for specific performance but will only be entitled for return of the earnest money and/or payment of a sum named as liquidated damages.* As the intention of the parties to bar specific performance of the contract and provide only for damages in the event of breach, is clearly expressed, the court may not grant specific performance, but can award liquidated damages and refund of earnest money.

(C). *The agreement of sale provides that in the event of breach by either party the purchaser will be entitled to specific performance, but the party in breach will have the option, instead of performing the contract, to pay a named amount as liquidated damages to the aggrieved party and on such payment, the aggrieved party shall not be entitled to specific performance. In such a case, the purchaser will not be entitled to specific performance,* as the terms of the contract give the party in default an option of paying money in lieu of specific performance.

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NOTE: (*) Asterisk denotes short notes

# PART - III

## CIRCULARS/NOTIFICATIONS

## NOTIFICATION REGARDING SPECIFYING COURT OF SESSION AS CHILDREN'S COURT FOR TRIAL OF OFFENCES AGAINST CHILDREN OR VIOLATION OF CHILD RIGHTS

### मध्यप्रदेश शासन, विधि और विधायी कार्य विभाग

## अधिसूचना

भोपाल, दिनांक 07.01.2011

फा. क्र. 17(ई)./38/2010/21–ब (एक) – बाल अधिकार आयोग अधिनियम 2005 (2006 का 4) की धारा 25 द्वारा प्रदत्त शक्तियों को प्रयोग में लाते हुए राज्य सरकार, म.प्र. उच्च न्यायालय के मुख्य न्यायाधिपति की सहमति से, एतद् द्वारा, बालकों के विरूद्ध अपराधों अथवा बाल अधिकारों के अतिक्रमण के अपराधों का त्वरित विचारण का उपबंध करने के प्रयोजन के लिए राज्य के प्रत्येक सेशन खण्ड में, सेशन न्यायालय को, बाल न्यायालय के रूप विनिर्दिष्ट करता है।

F. No. 17(E) 38/2010/21-B(1) – In exercise of the powers conferred by Section 25 of the Commission for Protection of Child Rights Act 2005 (No. 4 of 2006) the State Government, with the concurrence of the Chief Justice of the High Court of Madhya Pradesh, hereby specifies Court of Session in each Session Division of the State as a Children's Court for the purpose of providing speedy trial of offences against Children or of Violation of Child Rights.

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार

सही/–

**(ए.के.मिश्रा)**

प्रमुख सचिव,

मध्यप्रदेश शासन, विधि और विधायी कार्य विभाग

## KNOWLEDGE OF COMPUTER OPERATION – EMPHASIS BY SUPREME COURT

The Indian judiciary is taking steps to apply e-governance for efficient management of courts. In the near future, all the courts in the country will be computerized.

In that respect, the new Judges who are being appointed are expected to have basic knowledge of the computer operation.

It will be unfair to overlook basic knowledge of computer operation to be an essential condition for being a judge in view of the recent development being adopted.

Therefore, requirement of having basic knowledge of computer operation should not be diluted.

– DR. M.K. SHARMA, J. in Vijendra Kumar Verma v. Public Service Commission, (2011) 1 SCC 150

**PART - IV**

# IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

## THE PERSONAL LAWS (AMENDMENT) ACT, 2010

The following Act of Parliament received the assent of the President on 31st August, 2010 and was published in the Gazette of India, Extraordinary, Part II, Section 1, No. 39, dated 1st September, 2010.

## INDIAN PARLIAMENT ACT NO. 30 OF 2010

An Act further to amend the Guardians and Wards Act, 1890 and the Hindu Adoptions and Maintenance Act, 1956.

Be it enacted by Parliament in the Sixty-first Year of the Republic of India as follows: –

### CHAPTER I
### PRELIMINARY

**1. Short title.** –This Act may be called the Personal Laws (Amendment) Act, 2010.

### CHAPTER II
### AMENDMENT TO THE GUARDIANS AND WARDS ACT, 1890

**2. Amendment of Section 19 of Act 8 of 1890.** – In Section 19 of the Guardians and Wards Act, 1890, for clause (b), the following clause shall be substituted, namely: –

> "(b) of a minor, other than a married female, whose father or mother is living and is not, in the opinion of the court, unfit to be guardian of the person of the minor, or".

### CHAPTER III
### AMENDMENT TO THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

**3. Substitution of new Section for Section 8.** – In the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956) (hereinafter in this Chapter referred to as the Hindu Adoption and Maintenance Act), for Section 8, the following Section shall be substituted, namely :–

"**8. Capacity of a female Hindu to take in adoption.–** Any female Hindu who is of sound mind and is not a minor has the capacity to take a son or daughter in adoption :

Provided that, if she has a husband living, she shall not adopt a son or daughter except with the consent of her husband unless the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.",

**4. Amendment of Section 9.–** In the Hindu Adoptions and Maintenance Act, in Section 9, –

(i) for sub-section (2), the following sub-section shall be substituted, namely: –

"(2) Subject to the provisions of sub-section (4), the father or the mother, if alive, shall have equal right to give a son or daughter in adoption:

Provided that such right shall not be exercised by either of them save with the consent of the other unless one of them has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.";

(ii) sub-section (3) shall be omitted.

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The Judges are not employees of the State. As members of the judiciary, they exercise sovereign judicial powers of the State. The Judges, at whatever level they may be, represent the State and its authority unlike the bureaucracy or the members of other services.

– SWATANTER KUMAR, J. in S.D. Joshi v. High Court of Bombay, (2011) 1 SCC 252