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

JOTI JOURNAL FEBRUARY - 2012

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FROM THE PEN OF THE EDITOR

Manohar Mamtani,
Director, JOTRI

Esteemed Readers

It is indeed a matter of great privilege for me to have the maiden opportunity of sharing my views through this column of our prestigious bi-monthly journal. Moreover, it is also the first issue of leap year 2012 in which we still got a day more to introspect ourselves regarding our duties towards dispensation of justice and to strengthen our judicial acumen. I took over the charge of Director on 07.03.2012. Due to continuous trainings, this issue of JOTI Journal has been delayed.

Let me assure you at the very outset that this Institute would continue to make efforts to carry forward the task of providing judicial education with common platform for introspection to the members of the district judiciary of Madhya Pradesh as was started by my illustrious and dedicated predecessors. I also know that Institutional excellence enhancement task cannot be materialized without the active and purposeful co-operation of its esteemed readers to whom I solicit.

Recently, Hon'ble the Chief Justice of India Mr. S.H. Kapadia, as head of our institution has given a thought to the Judges – *"live like a hermit and work like a horse"*. The object behind this call to all the concerned having a pivotal role in the justice delivery system is to sensitize themselves and develop judicial excellence enhancement skill to confront with the huge pendency of cases within the available resources because the role of a Judge is different from others.

To achieve the goal of justice as mandated in the Constitution of India, a practicable, effective and result oriented approach is required for tackling arrears and to establish an efficient judicial system, which delivers prompt and qualitative justice for reinforcing the confidence of the people in the rule of law. Article 51 A (j) of the Constitution of India lays down 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.

As experienced, the response to the scheme of bi-monthly training programme at district level through discussion amongst Judicial Officers on legal topics has not yet attained perfection as articles received from some of the districts seem to be sent for fulfillment of just formality whereas articles called for should reflect the quality on the issue discussed therein and fit for publication. Similarly, the response to another scheme of *Samasya Samadhan* also requires more participativeness.

Before coming to the end of this month's Editorial, let me give you a glimpse of the activities of the Institute in the months of January and February. We imparted Refresher Course training to the Third Batch of Civil Judges Class II of 2008 from 09.01.2012 to 13.01.2012. The Foundation Course Training/ Advance Course Training for the Directly appointed Additional District Judges/ Promoted through Limited Competitive Exam/ Just promoted Additional District Judges commenced in the Institute on 21.02.2012 and continued till 03.03.2012.

In the recent past, with the guidance of Hon'ble the Acting Chief Justice, we have included in all our regular training programmes, a separate session for ADR Mechanism, specially Court-annexed Mediation to motivate referral judges in context of Section 89 CPC.

Apart from the above training programmes, the Institute under the approved Scheme of Grant-in-Aid provided under the recommendations of the XIII Finance Commission, also conducted Regional Training Progammes on *Protection of Women from Domestic Violence Act, 2005* and *Negotiable Instruments Act, 1881* at Mandla, Mandsaur, Ujjain, Shahdol, Sidhi, Chhindwara, Chhatarpur, Sagar, Dhar and Shajapur as also Specialised Training at State Medico-legal Institute, Bhopal, Specialised Training at State Forensic Science Laboratory, Sagar and Tours for Study of Best Practices to other States namely Maharashtra and Tamil Nadu.

As Judicial Officers are given training to refresh their knowledge in the field of law, similarly, it was felt that the ministerial staff which forms the backbone of the District Judiciary also needs some sort of training to enhance their working skills. Keeping this in mind, under the approved Scheme of Grant-in-Aid provided under the recommendations of the XIII Finance Commission, the employees of Dindori, Burhanpur, Umariya, Sheopur, Harda, Alirajpur, Katni, Narsinghpur, Seoni, Khandwa and Damoh districts were also imparted training at their respective headquarters.

In this opening issue of 2012, in Part I we are including Articles on important topics and Part II is abound with pronouncements of Supreme Court and our High Court. Part III and Part IV contain as usual, Notification and Amendment portions.

Our former Editor in his last issue of December, 2011 has already shared the New Year Wishes in a poetic manner. Yet again I wish the Readers a *HAPPY & PURPOSEFUL NEW YEAR.* Let the New Year be a new experience of achievement to all the justice delivery functionaries and all those having thrust of justice.

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TRAINING PROGRAMMES CONDUCTED BY THE INSTITUTE UNDER THE APPROVED SCHEMES FOR UTILIZATION OF GRANT-IN-AID RECOMMENDED BY THE XIII FINANCE COMMISSION

Regional Training Programme on – Protection of Women from Domestic Violence Act, 2005 at Mandla on 08.01.2012

Specialized Training Programme at Medico-Legal Institute, Bhopal from 21.01.2012 to 23.01.2012

HON'BLE SHRI JUSTICE I.S. SHRIVASTAVA DEMITS OFFICE

Hon'ble Shri Justice I.S. Shrivastava demitted office on His Lordship's attaining superannuation. Was born on 16.12.1949 at Bhind in the family of Advocates. Having taken B.Sc. and LL.B. Degrees, practiced as an Advocate for three and half years. Joined Judicial Services as Civil Judge Class-II on 14.08.1978. Was promoted as Additional District Judge in the year 1991. Worked in different capacities as Registrar, M.P. State Administrative Tribunal, Jabalpur, District Judge and District Judge (Inspection and Vigilance), Gwalior Zone. Took oath as Additional Judge of the High Court of Madhya Pradesh on 25.08.2009. Was accorded farewell ovation on 15.12.2012 in the High Court of Madhya Pradesh, Bench Gwalior.

We, on behalf of JOTI Journal wish His Lordship a healthy, happy and prosperous life.

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The peace is not merely the absence of conflict : it is the presence of justice.

– Martin Luther King Jr.

PART - I

ADR – MEDIATION/CONCILIATION : NEW HOPE TOWARDS INEXPENSIVE AND SPEEDY DISPUTE RESOLUTION

Manohar Mamtani
Director, JOTRI

> "We should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, with the minimum stress on the participants. That is what justice is all about"
>
> – **Warren E. Burger,** former Chief Justice of the US Supreme Court

We cannot stop the inflow of cases and nor should we. The doors of justice cannot and must not be closed. There are two ways to increase the outflow. We can strengthen both qualitatively and quantitatively the capacity of the existing system. Congestion in courts, lack of adequate manpower and resources and the consequent delay, cost, rigidity of procedure and lack of participatory roles, also spawn the need to look at better options, approaches and avenues.

Litigation in Courts is costly, time consuming and full of complications. Litigation destroys both the parties in terms of money, time, energy and good relations, whereas if parties redress their disputes through ADR, their disputes resolve forever and moreso in happy atmosphere. Therefore, evolution of new alternative principles for dispute resolution is not only important but also imperative.

ADR represents only a change in forum, not in the substantive rights of the parties. ADR is not intended to supplant altogether the traditional means of resolving disputes by means of litigation. The primary object of ADR system is avoidance of vexation, expense, and delay and the promotion of the ideal of "access to justice".

The philosophy of Alternate Dispute Resolution systems is well stated by Abraham Lincoln in these terms:

> "Discourage litigation, persuade your neighbours to compromise whenever you can. Point out to them how the normal winner is often a loser in fees, expense, cost and time."

New methods of dispute resolution such as ADR facilitate parties to deal with the underlying issues in dispute in a more cost-effective manner and with increased efficacy. In addition, these processes have the advantage of providing parties with the opportunity to reduce hostility, regain a sense of control, gain acceptance of the outcome, resolve conflict in a peaceful manner and achieve

a greater sense of justice in each individual case. The resolution of disputes takes place usually in private and is more viable, economic and efficient manner. Emphasis must be laid on the need of establishing a culture of amicable settlement of disputes whether at a post-litigation stage or pre-litigation one.

The framework of ADR mechanism that has emerged is comprehensive. But its success depends much on the will of the people to work it up in the right spirit and with good faith. Serious efforts for shifting to ADR deserve to be made. The parties have to be made aware and educated about the advantage of adopting ADR mechanism. Unfortunately, one or the other party is usually interested in delay and is not bothered about the cost or consequences and would not hesitate in taking a palpably false, dishonest, unethical and wholly unprincipled stand so as to take the benefit of delay. For this reason, they offer strict opposition and resistance to ADR. Such parties have to be made to realize that at the end, litigation in court may prove very costly to both of them in terms of cost as also the consequences. These results can be achieved by imposing on such parties exorbitant costs including the actual costs incurred by the winning party both in terms of time, money, travel and other expenses incurred besides penal costs as also other serious consequences including immediate penal action.

Long back, the Apex Court started issuing various directions so as to see that the public sector undertakings of the Central Government and the Union of India and their counterparts in the States should not fight their litigation in court by spending money on fees of counsel, court fees, procedural expenses and wasting public time. [See: *Oil and Natural Gas Commission v. Collector of Central Excise, 1992 Supp (2) SCC 432 and Oil and Natural Gas Commission v. Collector of Central Excise, 1995 Supp (4) SCC 541*]. Recent guidelines issued by the 3-Judge Bench of the Apex Court in *Damodar S. Prabhu v. Sayed Babalal H., AIR 2010 SC 1907* in cases of disonour of cheques under Section 138 of Negotiable Instruments Act, 1881 are examples of how the judiciary is concerned for this noble cause.

Alternate Dispute Resolution Mechanism in India :

In India the ADR techniques mainly consist of arbitration, conciliation, mediation, judicial settlement and Lok Adalat settlement. Arbitration is adjudicatory and its result in form of arbitral award is binding to the parties concerned unless challenged and set aside as per law. Whereas conciliation is consensual and very helpful in making the parties in settling their disputes usually with the help of a neutral third person. The success of conciliation depends on the mental attitude of the parties, the skill of the conciliator, and creation of proper environment.

The mechanism of conciliation has also been introduced for settling industrial disputes under the Industrial Disputes Act, 1947 and in Part III of the Arbitration and Conciliation Act, 1996. The expression 'conciliation' is not defined in the Arbitration and Conciliation Act, 1996. It only states that conciliation could take place not only in contractual and commercial disputes but also in all disputes arising out of legal relationship. This expression 'conciliation' is defined by the

International Labour Organisation which is adopted by the Advisory, Conciliation and Arbitration Service which reads as follows:-

> "The practice by which the services of a neutral third party are used in a dispute as a means of helping the disputing parties to reduce the extent of their difference and to arrive at an amicable settlement or agreed solution. It is a process of orderly or rational discussion under the guidance of the conciliator."

A conciliation proceeding could be initiated in India when one of the parties to the dispute arising out of legal relationship invites the other parties to get the dispute resolved through conciliation and the said request is accepted by the other party. If, however, the other party rejects the invitation for settlement through conciliation, no such proceeding would get initiated. Even if no response is sent within thirty days to the invitation, it would be deemed that the said request is rejected.

Judicial settlement is a procedure resorted to by the parties for arriving at a negotiated settlement in Courts. Lok Adalat is a well recognized ADR technique through which on reference by the Court, conciliators as per Section 19 of the Legal Services Authorities Act, 1987 by negotiation and conciliation settle various civil as well as compoundable criminal cases through compromise or settlement by the litigant parties. Recognising the importance of counseling, specific provisions in this regard have been made in the Protection of Women from Domestic Violence Act, 2005 and Gram Nyayalayas Act, 2008.

Mediation is a decision making process in which the parties are assisted by a third party– the mediator. A mediator acts as a catalyst to bring the two disputing parties together by defining issues and limiting obstacles to communication and settlement. Mediator's role is pivotal in the sense that not only he should have skills of mediation but he must also have thorough knowledge about the case he is going to mediate as well as the possible solutions from the best to the worst. An ability to read the psychology of the parties is also necessary. The mediator attempts to improve the process of decision making and to assist the parties reach an outcome to which each of them can consent.

COURT ANNEXED ADR IN INDIA:

For effective implementation of ADR mechanism, Parliament has enacted three Acts: (1) Legal Services Authorities Act, 1987 which has been amended by Legal Services Authorities (Amendment) Act, 2002; (2) Arbitration and Conciliation Act, 1996; and (3) The Code of Civil Procedure (Amendment) Act, 1999.

Parliament had however felt that the Legal Services Authorities Act, 1987 or Arbitration and Conciliation Act, 1996 would not be enough to confer power upon the courts to take recourse to ADR mechanism and with this background, the Civil Procedure Code was amended in the year 1999 incorporating the

recommendations made by the Malimath Committee, which came into effect from 01.07.2002. After amendment of C.P.C. w.e.f. 01.07.2002 new Section 89 and Rules 1A to 1C in Order X has been introduced for settlement of dispute before the commencement of trial outside the court. Amendment now imposes an obligation upon the court to refer the disputes for settlement to appropriate ADR forum, except certain recognized excluded categories of cases.

Section 89 has been inserted with the intention to see that all the cases which are filed in court need not necessarily be decided by the court itself. The Alternative Dispute Resolution (ADR) Mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through Lok Adalat or mediation. Sub-section (2) of Section 89 refers to different Acts in relation to arbitration, conciliation or settlement through Lok Adalat, but with regard to the judicial settlement under Clause (c) and Mediation under clause (d) of Section 89 (2), there was apparent error as noticed by the Apex Court in *Afcons Infrastructure Limited and another v. Cherian Varkey Construction Company Private Limited and others, (2010) 8 SCC 24* and the Court made proper interpretation of Section 89 CPC by observing that firstly, it is not necessary for the court, before referring the parties to an ADR process to formulate or re-formulate the terms of a possible settlement. It is sufficient if the court merely describes the nature of dispute (in a sentence or two) and makes the reference. Secondly, the definitions of 'judicial settlement' and 'mediation' in clauses (c) and (d) of Section 89(2) shall have to be interchanged to correct the draftsman's error. It was also observed that above nature and change in Clauses (c) and (d) of Section 89 (2) CPC shall remain in force till the legislature corrects the mistakes so that Section 89 is not rendered meaningless and infructuous.

The Apex Court in *Afcons Infrastructure Limited case* (supra) has also held that ordinarily civil Court should invariably refer cases to ADR process, but only in certain recognized excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR process, the Court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under Section 89 CPC. Therefore, having a hearing after completion of pleadings to consider recourse to ADR process under section 89 of the Code, is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be reference to ADR process. In all other cases, reference to ADR process is a must. The Apex Court has given both the categories of cases which are normally concerned to be not suitable or suitable for ADR process having regard to their nature and also summarized the procedure to be adopted in a Court under Section 89 of the CPC.

Apart from Lok Adalat, the scheme of ADR mechanism has not yet picked up momentum. In *Salem Bar Association, T.N. v. Union of India, AIR 2005 SC 3353,* draft ADR and Mediation Rules were approved and thereafter the process of mediation got impetus. *Afcons Infrastructure Limited case* (supra) has cleared the

clouds from interpretation, implementation and procedure to be followed by the Court under Section 89 CPC. Now it is high time to take the scheme with all its seriousness and implement it so as to make the justice delivery system a complete and wholesome one meeting the needs and aspirations of people waiting for justice.

JOURNEY TOWARDS MEDIATION/CONCILIATION FROM ARBITRATION:

When we consider ADR through arbitration, it shows that in practice it is unavailable in most of the disputes because its costs are too high. Arbitration agreement (clause) finds place mostly in commercial transactions and when parties face ADR through arbitration, they expend huge money for these procedures. It is common to all that how huge money is being paid for these procedures regularly by well recognized commercial organizations – whether Government or private where as the number of disputes are not very much and impliedly it shows that ratio of litigation cost by adopting these arbitration proceedings with pending litigations or disposed off litigations is on a higher side.

Apart from that of huge expenditure on arbitration proceedings, another difficulty is delay in the final disposal of these cases because firstly, whenever dispute arise, much time is consumed in preliminary correspondence, for appointment of arbitrators, arbitral proceedings and after passing of the award, one of the party who is not satisfied or otherwise tried to delay, again challenges this award under Section 34 of the Arbitration and Conciliation Act, 1996 before the competent Court concerned and such Court takes their own time to dispose of such application under Section 34. The matter does not end here and again the order of the Court can be challenged under Section 37 of the Act, 1996 by way of appeal and again after disposal of the appeal it can be challenged before the Hon'ble Supreme Court and hence the main, spoke of ADR mechanism i.e. arbitration shows delay and expenditure on it – almost or sometimes more than the general litigation in Courts.

One of the main lacuna of arbitration proceedings is even after passing of the award if aggrieved person has challenged it under Section 34 of the Arbitration and Conciliation Act, 1996 before the competent Court, then winning party cannot get any relief not even interim relief in regard to the said award because as soon as the award is challenged under Section 34, its execution as per Section 36 stays automatically.

Hon'ble the Supreme Court has noticed this anomaly in *N. Aluminium Company Ltd. v. Pressteel and Fabricators Pvt. Ltd., AIR 2005 SC 1514* and opined that this situation defeats the very objective of the ADR system to which arbitration belongs. The Apex Court has also suggested to the concerned authorities to take necessary steps to bring about the required change in law. But still no change in this regard has been made by the legislation. Thus, the arbitration proceedings practically seems to be not very useful for dispute resolutions.

In these circumstances the other two major ADR techniques – mediation and conciliation can be considered as effective and meaningful alternatives to litigation through courts for resolution of disputes.

Basically, mediation and conciliation both contemplate involvement of a neutral third party trying to bring together disputing parties to help them reconcile their differences. Both are recognised as two important and effective modes of alternative dispute resolution system. These are considered as effective and meaningful alternatives to litigation through courts for resolution of disputes with the guidance and assistance of a neutral and impartial third party.

So far conciliation is concerned, it can be an effective measure to resolve disputes like mediation. The provisions of conciliation are recognized under the Arbitration and Conciliation Act, 1996. So, whenever consensus arise between both the parties in conflict, they can agree as per law, for conciliation and go for an amicable settlement even where Court cases are already pending. If both the parties agree, they can approach the Court for referring the matter accordingly under Section 89 of the CPC for out of Court settlement.

Similarly, mediation is a remedial attempt to resolve disputes through settlement, rather than the mere disposal of a case, which nevertheless may still leave one party to the lis dissatisfied, resulting into appeals and revisions. A mediator does not impose a solution, but creates an atmosphere under which parties can resolve their disputes, often much beyond the ambit of that particular litigation, by reaching the underlying root cause of disharmony and discontent between the parties, by assisting the parties to cultivate a thought process, through a non coercive, confidential negotiation, to come forth with creative remedies which would be helpful to both the parties through the ultimate resolved solution. Looking to its importance in every High Court and District Court Mediation Centres are being established and Judicial Officers as well as Advocates are also being given training of Mediators to streamline this concept in right perspective at the earliest.

By switching over from arbitration to mediation/conciliation definitely, two main issues namely delay and cost will be controlled and speedy disposal of the dispute with low cost can be achieved. To make mediation/conciliation successful, all concerned with the justice delivery system should understand and accept the relevance and importance of these newly popularized ADR techniques particularly mediation, so that reference to adequate number of suitable cases for disposal through these techniques can be ensured.

Finally, having a smile on your face is a good compliment to life, but putting a smile on others'(litigants and needy persons) face by your efforts is the best compliment to life.

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COUNTERFEITING OF CURRENCY NOTES : THE OFFENCE OF A GUILTY MIND

Ramkumar Choubey
O.S.D., J.O.T.R.I.

The Indian Penal Code, 45 of 1860, (for brevity –"the IPC") was enacted prior to the existence of paper currency in our country, perhaps, reason thereby the provisions relating to currency-notes could not be included in the IPC at the time of its enactment. Although, general provisions applicable to forgery of valuable securities are there but no specific provisions exist in this regard. Subsequently, Sections 489-A to 489-D were introduced to Chapter XVIII of IPC by the Currency Notes Forgery Act, 1899, which specifically provide for offences relating to currency-notes and bank-notes. Whereas, Section 489-E was inserted by the Indian Penal Code (Amendment) Act, 1943 with the object to fill the lacuna as there was no provision pertaining to photo-prints and other reproductions of currency-notes and bank-notes, although printed for innocent purpose, have passed into circulation. The manifest purpose of these provisions is that the citizens, who deal with and transact business with each other through the medium of currency, should be protected from being deceived or cheated. In recent times, due to some internal and cross-border vicious activities, the offences pertaining to counterfeit currency-notes have increased to alarming proposition. Therefore, it is time to examine various facets of this legal arena so that the law, with pertinence, can be applied in an intelligent manner to resolve the cases relating to counterfeiting of currency-notes.

Penal provisions

In order to provide adequate protection of currency-notes and bank-notes from forgery, Section 489-A of IPC provides punishment for counterfeiting any currency-notes or bank-notes. Section 489-B relates to use of forged or counterfeit currency-notes or bank-notes as genuine. The object of enacting this section is to stop the circulation of forged notes by punishing all persons who, knowingly or having sufficient cause to believe them to be forged, do any act which could lead to their dispersion. Section 489-C deals with possession of a forged or counterfeit currency-note or bank-note. Whereas the making or possessing instruments or materials for forging or counterfeiting currency-notes or bank-notes has been made punishable under Section 498-D.

Section 489-E of IPC, which was added later on, is an attempt to stop the practice of making or using documents resembling currency-notes or bank-notes. This section does not say about forging or counterfeiting the currency-notes. As prior to it, there was no legal provision prohibiting the reproduction, or the production of imitations of currency-notes for such purposes as advertisement and the like where there was no intention to practise deception of any one, nor even a knowledge that deception was likely to be practised with the help of

imitations. Thus, the section fill the lacuna. (See-*Ratanlal & Dhirajlal's Law of Crimes: 23rd Edn., p. 1904*).

Definition of "currency-note"

Explanation to Section 489-A of IPC defines "bank-note" that means a promissory note or engagement for the payment of money issued by a person carrying on the banking business or issued by or under the authority of the State, and intended to be used as equivalent to, or as a substitute for, money. However, the term "currency-note" has not been defined. The literal meaning of currency-note is that a paper money in circulation. In the context, the expression "any currency-note" is not restricted to refer to only Indian currency-notes but it includes currency-notes of any country. This issue was considered by the Supreme Court, in *State of Kerala v. Mathai Varghese, AIR 1987 SC 33 : 1987 Cri L J 308*, wherein it has been held that analysis of Section 489-A reveals that the legislative embargo against counterfeiting envelopes and takes within its sweep 'currency-notes' of all countries. The embargo is not restricted to 'Indian' currency-notes. The legislature could have, but has not, employed the expression 'Indian currency-note'. If the legislative intent was to restrict the parameters of prohibition to 'Indian currency' only, the legislature could have said so unhesitatingly. The expression 'currency-note' is large enough in its amplitude to cover the currency-notes of 'any' country.

In *Re: Md. Yusuff, 1986 Cri L J 2011*, the Madras High Court has held that words "any currency" would include the dollar bills also. Therefore, the contention that these provisions will not apply to American Dollar bills is not well founded. It has been observed in *K. Hasim v. State of Tamil Nadu, AIR 2005 SC 128* that the provision of possession of counterfeit currency-notes is not restricted to Indian currency-notes alone.

Counterfeiting : What it is ?

The act of counterfeiting is the effect of producing another so as to resemble the original. The object of counterfeiting is to practise deception or knowing it to be likely that the deception will thereby be practised. "Counterfeiting" is an essential element to make a person liable for any of the offences described under Sections 489-A to 489-D of IPC.

Section 28 of IPC defines "counterfeit" as causing one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised, is counterfeiting. The contrivers of IPC have not only defined the word "counterfeit" in very wide terms in Section 28, but they have also prescribed a rule of evidence in Explanation 2 thereof so as to draw an adverse presumption against the maker of the counterfeit article as is evident from the above definition of the term "counterfeit". Explanation 1 to Section 28 of IPC clarifies that exact imitation is not necessary.

The definition of the word 'counterfeit' indicates that it is a process by which one thing is caused to resemble another thing. It supposes that there is an original. For the act of counterfeiting, resemblance with original is sufficient and exact reproduction is not necessary. To constitute the offence, there can be counterfeiting even though the imitation is not exact. The existence of resemblance which might cause deception is enough to raise presumption of intention to deceive. In this regard, the Apex Court in the matter of *State of U. P. v. Hafiz Mohd. Ismail, AIR 1960 SC 669* laid down the proposition that ordinarily counterfeiting implies the idea of an exact imitation; but for the purpose of the Indian Penal Code there can be counterfeiting even though the imitation is not exact and there are differences in detail between the original and the imitation so long as the resemblance is so close that deception may thereby be practised. Explanation 2 to Section 28 lays down a rebuttable presumption where the resemblance is such that a person might be deceived thereby. In such a case, the intention to deceive or knowledge of likelihood of deception would be presumed.

Similarly, it is not necessary that deception actually took place. Intention to practice deception by causing one thing to resemble another is sufficient to make out offence under Section 489-A. The pith of the offence is that it is not necessary to show the deception actually took place, rather the intention to practise deception by causing one thing to resemble another is quite sufficient and the counterfeit must be of such a character that it would be possible to palm it off as genuine. (See - *Golo Mandla Ram Rao v. State of Jharkhand, 2004 Cri L J 1738*). The provisions not only deal with complete act of counterfeiting but also covers cases where accused performs any part of process of counterfeiting as observed in *K. Hasim's case* (supra).

***Mens rea* as an element**

The maxim *actus non facit reum, nisi mens sit rea*; the act itself does not constitute offence unless done with a guilty intent, leads to a presumption that *mens rea* is an essential ingredient in every criminal offence. But *mens rea* can be displaced by the words of the statute defining the offence. Thus, the doctrine of *mens rea* is wholly out of place in construing the provisions of penal law which itself uses words like 'intentionally', 'knowingly', 'willingly', 'fraudulently', 'maliciously', 'negligently' and so on. In every offence the prosecution must prove criminal intention on the part of the accused unless from the language used in the statute creating the offence it is clear that an offence is committed irrespective of the intention. In other words, unless the statute either clearly or by necessary implication ruled out *mens rea* as a constituent part of a crime, a person cannot be held guilty of an offence unless he got a guilty mind. (See- *Sriniwas Mal v. Emperor, AIR 1947 PC 135* and *Hariprasad Rao v. The State, AIR 1951 SC 204*).

An offence of counterfeiting currency-notes is the offence of a guilty mind. Section 489-A contains words "knowingly perform any part of the process of counterfeiting". The words "knowing or having reason to believe the same to be

forged or counterfeit" are used in Section 489-B. Similar words occur in Section 489-C. Section 489-D also contains words "knowing or having reason to believe that". All these shows that *mens rea* has been displaced by the words itself used in the statute creating the offence of counterfeiting and forgery of currency-notes or bank-notes. The proposition of law in this regard is that in the case of a crime which is defined to 'contain in words' a provision as to the state of mind of the accused, it is for the prosecution to prove *mens rea* while in a case where words describing *mens rea* do not appear in the definition of the crime, it is for the accused to show that he acted without *mens rea.* (See – *State v. Muni Lal, AIR 1953 Punj. 204*).

Under the penal provisions, guilt is sought to be fastened either on the ground of intention or knowledge or reason to believe. As far as the offence of counterfeit currency-notes is concerned, it is by "knowledge" or "reason to believe" as is evident from Sections 489-A to 489-D of IPC. Section 26 of IPC defines "reason to believe" by stating that a person is said to have reason to believe a thing if he has sufficient cause to believe that thing but not otherwise. It is clear that suspicion will not amount to sufficient cause to believe.

The "suspicion" or "doubt" cannot be raised to the level of "reason to believe". As discussed in *Hamid Ali v. State, 1961 (2) CriLJ 801,* the word "believe" is a much stronger word than "suspect" and that it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the note with which he was dealing was a forged one and that it was not sufficient to show that the accused was careless or he had reason to suspect or that he did not make sufficient enquiry to ascertain the fact.

Therefore, it is very significant in case of counterfeit or forged currency-notes that the accused is knowing or having reason to believe that the currency-notes are forged or counterfeit. The Supreme Court in *Umashanker v. State of Chhattisgarh, AIR 2001 SC 3074* categorically held that a perusal of the provisions shows that *mens rea* of offences under Sections 489-B and 489-C is, "knowing or having reason to believe the currency-notes or bank-notes are forged or counterfeit." Without the aforementioned *mens rea*, selling, buying or receiving from another person or otherwise trafficking in or using as genuine forged or counterfeit currency-notes or bank-notes is not enough to constitute offence under Section 489-B of IPC. So also possessing or even intending to use any forged or counterfeit currency-notes or bank-notes is not sufficient to make out a case under Section 489-C in the absence of *mens rea.*

Knowledge or belief of falsity & conscious possession

The criminal liability with regards to deal with counterfeit or forged currency-notes is the outcome of accused's knowledge or belief of falsity of such notes. In other words, what is essential is that apart from possessing the counterfeit currency-note, the accused must know of its falsity and after having known, uses it. Similarly, the possession of counterfeit currency-notes must have the

element of consciousness. The accused, at the time of his possession knew or had reason to believe that notes were forged or counterfeit.

In *Ganesh alias Karan Mali v. State of M.P., 2004 (1) MPJR 263,* wherein the accused was prosecuted for offences punishable under Sections 489-B and 489-C of IPC, Madhya Pradesh High Court by placing reliance on *M. Mammutti v. State of Karnataka, AIR 1979 SC 1705,* held that in order to prove the offence under Section 489-B, the prosecution must prove by cogent evidence that the currency-notes in question was forged or counterfeit, the accused sold to, or brought or received from some person, or trafficked in, or used as genuine, such currency-notes and when he did so, the accused knew or had reason to believe that it was forged or counterfeit. The Court, further held that, in order to prove the offence under Section 489-C, the prosecution must establish by placing reliable evidence that the currency-notes have been forged or counterfeited, the accused must be in its possession, he at the time of his possession knew or had reason to believe that it was forged or counterfeit and that he intended to use it as a genuine or that it might be used as genuine.

It has been held in a number of decisions that in a prosecution under Section 489-C IPC, the ingredients of the offence *viz.*, that the accused knew or had reason to believe the currency-notes to be counterfeit and his intention to use the same as genuine or that it might be used as genuine, should be proved by the prosecution. It is however not necessary that such proof should be by direct evidence. (See– *In re Satyanarayana, 1961 (1) Cri L J 617, Liyakat Ali v. State of Rajasthan, 2010 Cri L J 2450* and *Prabhakar Narayan Patlola v. State of Maharashtra, 2011 Cri L J 738*).

The Apex Court in *M. Mammutti* (supra), is of the view that where the accused is found in possession of counterfeit notes, the knowledge of the accused can be presumed if the notes were of such a nature that a mere look at them would convince any person of average intelligence that it was counterfeit, otherwise not. The Chhattisgarh High Court in *Reman alias Raman and Anr. v. State of Chhattisgarh, 2008 Cri L J 4755,* upheld the conviction by observing that where counterfeit currency-notes found to be in possession of accused and the accused failed to explain as to why they were possessing those counterfeit currency-notes, it was held, thus, it can be inferred that they were possessing counterfeit currency-notes knowing them to be so with intention of using the same as genuine.

In *Laxmi Narayan v. State of M.P., 2009 (1) MPHT 478,* it has been expressed that only on the basis of seizure of one counterfeit currency-note, it cannot be concluded that the accused was having any knowledge that he is in possession of counterfeit-currency note or he had any intention to use the same as genuine or it may be used as genuine. One of the essential requirements to constitute the offence is that the person in possession of or using the counterfeit currency-notes must know or should have reason to think that the same are counterfeit notes. "Possession" referred to in Section 489-C of the IPC should have the element of consciousness. These provisions are not meant to punish unwary

possessors or users. (See – *Ramlath v. Nasar Abdul Razak , 2010 Cri L J 80*). In *Karunakaran Nair v. State of Kerala, 2000 Cri L J 3748* it was held that mere possession of forged notes is not sufficient to constitute an offence under Section 489-C of IPC and that it is necessary to show that the person in such possession knew that such notes are forged and he intended to use it as genuine, knowing the same to be counterfeit or forged notes. Mere possession of forged note is not an offence.

The offence is directed against trafficking in fake notes and what is essential is that apart from possessing the fake notes, the accused must know of its falsity and after having known, uses them. The accused must have known or at least must have had reason to believe that the notes were counterfeited. It is also the requirement of law that the possession must be accompanied by intention to use it as genuine. (See – *Panna Lal Gupta v. State of Sikkim, 2010 Cri L J 825*). Where CBI recovered huge amount of counterfeit currency-notes from the accused in presence of independent witnesses and report of expert sufficiently corroborated that those notes were really counterfeit notes, it was held by the Calcutta High Court that the accused had real intention to put those currency notes into circulation for his material gain. (See – *Narayan Prasad Sen v. State of W. B., 2007 Cri L J 1*). Where, accused was caught with fake currency-notes and he also showed how he prepared fake notes by using xerox machine and other material, bundle of fake currency-notes and xerox machine along with other materials used for preparing counterfeit notes were recovered from the accused, involvement of accused in commission of offence, held, clearly proved. (See – *Jayeshkumar Kantilal Panchal v. State of Gujarat, 2007 Cri L J 2254*).

The knowledge of accused persons that notes were fake could be presumed because mere look at them convinced police officials that they were counterfeit. Fruit-seller refused to accept note given to him by accused because it appeared to him different from original. Accused found to be in possession of number of other counterfeit notes, intention to use counterfeit currency or that same may be used as genuine may be presumed in facts and circumstances of the case.(See – *Md. Raja alias Raju v. State of W. B., 2009 Cri L J 410*). In *Golo Mandla Ram Rao* (supra), it was opined that where there is total lack of evidence on the record that accused had counterfeited the currency-notes or knowingly performed any part of the process of counterfeiting it, their conviction under Section 489-A cannot be maintained unless it is proved that the accused really intended to counterfeit and either did counterfeit or performed any part of the process of counterfeiting.

Conclusion

The legal position on the issue emerging from the above discussion may be summarized as under :

i. The penal provisions are not restricted to Indian currency-notes alone, but the expression 'currency-note' covers the currency-notes of any country.

ii. To constitute the offence, there can be counterfeiting even though the imitation is not exact.

iii Where the resemblance is such that a person might be deceived thereby, in such a case, the intention to deceive or knowledge of likelihood of deception would be presumed.

iv. It is not necessary that deception actually took place. Intention to practice deception by causing one thing to resemble another is sufficient to make out the offence.

v. The provisions not only deals with complete act of counterfeiting but also covers cases where accused performs any part of process of counterfeiting

vi. *Mens rea* of offences under Sections 489-B and 489-C is, "knowing or having reason to believe the currency-notes or bank-notes are forged or counterfeit".

vii. In order to prove the offence under Section 489-B, the prosecution must prove that the currency-notes in question was forged or counterfeit, the accused sold to, or brought or received from some person, or trafficked in, or used as genuine such currency-notes and when he did so, the accused knew or had reason to believe that it was forged or counterfeit.

viii. In order to prove the offence under Section 489-C, the prosecution must establish that the currency-notes have been forged or counterfeited, the accused must be in its possession, he at the time of his possession knew or had reason to believe that it was forged or counterfeit and that he intended to use it as genuine or that it might be used as genuine.

ix. The word "possession" used to in Section 489-C should have the element of consciousness.

x. What is essential is that apart from possessing the fake notes, the accused must know of its falsity and after having known, uses them.

xi. Where the accused is found in possession of counterfeit notes, the knowledge of the accused can be presumed if the notes were of such a nature that a mere look at them would convince any person of average intelligence that it was counterfeit. Quantity of counterfeit notes found in the possession of accused, conduct of accused and other circumstances of the case are also considerable facts to presume knowledge of accused.

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सह–स्वामी द्वारा अचल संपत्ति के अंतरण की विधि एवं विस्तार

न्यायिक अधिकारीगण
जिला राजगढ़ (ब्यावरा) एवं पन्ना

संपत्ति अंतरण अधिनियम,1882 की धारा 7 के अनुसार, प्रत्येक व्यक्ति जो संविदा करने के लिए सक्षम है और अंतरणीय संपत्ति का हकदार है या व्ययन करने के लिए प्राधिकृत है, संपत्ति अंतरित कर सकता है। एक सह–स्वामी भी संयुक्त संपत्ति में अपने हित का अंतरण विक्रय, बंधक, पट्टा आदि द्वारा कर सकता है।

संपत्ति अंतरण अधिनियम की धारा 44 सह–स्वामी द्वारा अपने हित को अंतरित किये जाने के संबंध में प्रावधान करती है जो इस प्रकार है :–

> **44. एक सहस्वामी के द्वारा अंतरण** – जहां कि स्थावर संपत्ति के दो या अधिक सहस्वामियों में से एक, जो ऐसा करने के लिये वैध रूप से सक्षम है, ऐसी संपत्ति में का अपना अंश या कोई हित अंतरित करता है, वहां अंतरिती ऐसे अंश या हित के बारे में और वहां तक, जहां तक उस अंतरण को प्रभावशील करने के लिये आवश्यक हो, संपत्ति पर संयुक्त कब्जा रखने का या संपत्ति का अन्य सामान्य या भागिक उपभोग करने का और उस संपत्ति का विभाजन कराने का अंतरक का अधिकार अर्जित करता है, जो ऐसे अंतरित अंश या हित पर अंतरण की तारीख को प्रभाव डालने वाली शर्तो और दायित्वों के अध्यधीन हैं।
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> जहां कि किसी अविभक्त कुटुम्ब के निवास गृह के किसी अंश का अंतरिती उस कुटुम्ब का सदस्य नहीं है, वहां इस धारा की कोई भी बात उसे उस गृह पर संयुक्त कब्जा रखने का या कोई दूसरा सामान्य या भागिक उपभोग करने का हकदार करने वाली नहीं समझी जायेगी।

अविभाजित संपत्ति और सह–स्वामी

धारा 44 के अंतर्गत "अविभक्त कुटुम्ब" एवं "निवास गृह" शब्दों का प्रयोग हुआ है जिनका उदारतापूर्वक निर्वचन किये जाने की आवश्यकता है। उच्चतम न्यायालय ने ***दोराव कवासजी वार्डन विरुद्ध कूमी सोराव वार्डन, ए.आई.आर. 1990 एस.सी. 867*** में मत व्यक्त किया है कि विभाजन अधिनियम की धारा 4 एवं संपत्ति अंतरण अधिनियम की धारा 44 में शब्द "अविभक्त परिवार" एवं "निवास गृह" एक ही अर्थ में प्रयुक्त किये गये है। शीर्ष न्यायालय नें उड़ीसा उच्च न्यायालय के ***भीमसिंह विरुद्ध रतनाकर, ए.आई.आर. 1971 उड़ीसा 198*** में प्रगट इस मत से सहमति व्यक्त की है कि यदि परिवार प्रस्थिति के संदर्भ में विभाजित हो चुका है तथा परिवार के सदस्य सह–स्वामी के रूप में संपत्ति धारित करते हैं किन्तु संपत्ति सीमा रेखा द्वारा भौतिक रूप से विभाजित नहीं हुई है तब उक्त स्थिति में भी धारा 44 लागू होगी।

धारा 44 में प्रयुक्त शब्द "अविभक्त परिवार" का तात्पर्य केवल उस परिवार से नहीं है, जो हिन्दू नियम के अनुसार संयुक्त रूप में रहता है, बल्कि हिन्दू, मुस्लिम या ईसाई सभी परिवारों जो निवास

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* राजगढ़ एवं पन्ना जिलों से प्राप्त मूल लेख को संस्थान द्वारा सारभूत रूप से संपादित किया गया हैं।

गृह में संयुक्त रूप में रहते हैं तथा उनमें वास्तविक रूप से विभाजन नहीं हुआ है, के लिए यह प्रावधान लागू होता है। विभाजन अधिनियम, 1893 की धारा 4 में "अविभक्त परिवार" शब्द जो संपत्ति अंतरण अधिनियम की धारा 44 से लिया गया है, में यदि विधायिका का आशय उसे किसी विशिष्ट वर्ग तक सीमित करना होता तो धारा में उस प्रकार के शब्द अवश्य प्रयोग किये गये होते उदाहरण स्वरूप अविभक्त परिवार के स्थान पर "अविभक्त हिन्दू परिवार"। "अविभक्त परिवार" का तात्पर्य व्यक्तियों का ऐसा समूह है, जो रक्त–संबंधी है और एक ही निवास गृह में रहते हैं। "परिवार" केवल ऐसे व्यक्तियों तक सीमित नहीं है, जो एक ही पूर्वज के वंशज है। न्यायिक निर्णयों के अनुसार धारा 44 के अंतर्गत शब्द "अविभक्त परिवार" का आशय केवल हिन्दू परिवार या केवल पुरूष सदस्यों तथा वंशजों से नहीं, बल्कि सभी धर्मों के अविभक्त परिवार से है। तथा ऐसे अविभक्त परिवार का प्रत्येक सदस्य उस अविभक्त परिवार की संपत्ति का, उसे लागू होने वाली स्वीय विधि के अंर्तगत, सह–स्वामी होता है।

उच्चतम न्यायालय ने ***हरदेव राय विरुद्ध शकुन्तला देवी, ए.आई.आर. 2008 एस.सी. 2489*** में यह मत व्यक्त किया है कि "मिताक्षरा सहदायिकी संपत्ति" तथा "संयुक्त परिवार" में अंतर है।

संयुक्त संपत्ति में हित का अंतरिती

कानून का यह मान्य सिद्धांत है कि सह–स्वामित्व में एक का आधिपत्य सभी का आधिपत्य माना जावेगा जब तक अन्यथा सिद्धः नहीं कर दिया जावे। एक सह– स्वामी दूसरे सह–स्वामी के विरूद्ध संपत्ति का ऐसे उपभोग या अंतरण नहीं करेगा जिससे दूसरे सह–स्वामी को क्षति हो। सह–स्वामी को उसके अपने हिस्से के अतिरिक्त शेष हिस्से को अंतरित करने का अधिकाइ नहीं हैं। ऐसा अंतरण शेष सह–स्वामी के लिये बंधनकारी नहीं हैं।

धारा 44 उस अंतरिती की स्थिति स्पष्ट करती है जो संयुक्त संपत्ति के एक सह–स्वामी से उसका हिस्सा अंतरण में प्राप्त करता है। संयुक्त संपत्ति में प्रत्येक सह–स्वामी को समान अधिकार होता है जैसे संयुक्त आधिपत्य का, अन्य सामान्य या भागिक उपभोग करने का और उस संपत्ति का विभाजन कराने का। ये सभी अधिकार अंतरिती को प्राप्त होते है। वास्तव में धारा 44 अंतरिती के अधिकारों को सुरक्षा प्रदान करने से संबंधित है। तात्पर्य यह है कि अंतरिती अंतरणकर्ता का स्थान ग्रहण कर लेता है, वह अंतरणकर्ता के अधिकार प्राप्त करते हुए अंतरणकर्ता के दायित्व को भी ग्रहण करता है। जैसा कि ***दिवानसिंह विरूद्ध भैय्यालाल, 1997 (2) एम.पी.एल.जे. 202 = ए.आई.आर. 1997 एम. पी. 210*** में कहा गया हैं।

धारा 44 के परन्तुक में इसका अपवाद दिया है। जहां अंतरण की विषय वस्तु अविभक्त कुटुम्ब का निवास गृह है वहां अंतरिती को, जबकि वह उस कुटुम्ब का सदस्य नहीं है, उसमें अन्य सह–स्वामियों के साथ संयुक्त आधिपत्य का या कोई दूसरा सामान्य या भागिक उपभोग करने का वह अधिकार प्राप्त नहीं होगा, जो अंतरक सह–स्वामी को प्राप्त था। इसका कारण स्पष्ट करते हुये उड़ीसा उच्च न्यायालय ने ***भीमसिंह विरुद्ध रतनाकर***, (पूर्वोक्त) में प्रतिपादित किया है कि इस उपबंध का उद्देश्य निवास गृह में अजनबी व्यक्ति के हस्तक्षेप को प्रतिबंधित कर केवल परिवार के सदस्यों के आधिपत्य एवं उपभोग के लिये सुरक्षित रखना है, भले ही उसके कुछ भाग का अंतरण किसी अन्य व्यक्ति को कर दिया गया हो, क्योंकि तथ्य यह है कि संयुक्त निवास गृह के एक अंश का अंतरण

हो जाने के उपरांत भी शेष हिस्सा अविभक्त परिवार की अविभक्त संपत्ति बना रहता है जिसका उपभोग केवल उस परिवार के सदस्यों तक ही सीमित होगा।

संयुक्त संपत्ति में हित और विभाजन अधिनियम, 1893

संपत्ति अंतरण अधिनियम की धारा 44 के संदर्भ में विभाजन अधिनियम, 1893 की धारा 4 भी उल्लेखनीय हैं, जो यह उपबंध करती है कि (1) जब अविभक्त परिवार के निवास गृह का कोई अंश ऐसे व्यक्ति को अंतरित किया जाता है जो उस परिवार का सदस्य नहीं है और वह अंतरिती विभाजन के लिये दावा करता है, और यदि अविभक्त परिवार का कोई सदस्य उक्त अंतरित अंश को क्रय करने की इच्छा व्यक्त करता है तब न्यायालय उस अंश का मूल्यांकन ऐसी रीति से करेगा, जो वह उचित समझे तथा उक्त अंश को क्रय करने की इच्छा रखने वाले अंशधारी को विक्रय करने का निर्देश देगा या अन्य दिशानिर्देश जो वह उचित समझे देगा। (2) यदि अंतरित अंश को क्रय करने की इच्छा दो या अधिक सह–स्वामियों द्वारा व्यक्त की जाती है तो उस समय न्यायालय धारा 2 में उपबंधित प्रक्रिया का अनुसरण करेगा, जो यह उपबंध करती है कि उक्त स्थिति में न्यायालय ऐसे अंशधारी को विक्रय करने का निर्देश देगा, जो न्यायालय द्वारा निर्धारित मूल्य से सबसे अधिक मूल्य अदा करेगा। इस संबंध में दोराव कावसजी वार्डन विरूद्ध कूमी सोराब वार्डन (पूर्वोक्त) उल्लेखनीय है जिसमें कहा गया है कि विभाजन अधिनियम की धारा 4 एवं संपत्ति अंतरण अधिनियम की धारा 44 एक दूसरे के पूरक हैं।

सह–स्वामी के हित के अंतरिती के अधिकार

अविभाजित संपत्ति में एक सह–स्वामी के हित के अंतरिती को दो प्रकार के अधिकार प्राप्त होते है :–

1. संपत्ति का संयुक्त आधिपत्य रख सकता है।
2. संपत्ति का विभाजन करा सकता हैं।

यदि अचल संपत्ति के सह–स्वामियों में से, एक स्वामी ने निवास गृह के किसी अंश का अंतरण किया है जो किसी कुटुम्ब की शामिल संपत्ति का अंश है, तो ऐसी स्थिति में अंतरिती संयुक्त रूप से आधिपत्य नहीं रख सकेगा तथा न ही उसे संयुक्त रूप से दूसरे सह–स्वामियों के साथ उक्त निवास गृह में रहने अथवा उसे उपयोग करने का अधिकार होगा। ***हजारीलाल विरूद्ध जुगल किशोर व अन्य 1998 (2) जे.एल.जे. 177 = ए.आई.आर. 1999 एम. पी. 104*** में यह अवधारित किया गया है कि अविभक्त संपत्ति के क्रेता को अपने अंश के अभिनिश्चयन के लिये सामान्य विभाजन की मांग करना होगी और कब्जा प्राप्त करने हेतु विनिर्दिष्ट आवंटन की प्रार्थना करना होगी। उच्चतम न्यायालय ने ***सिद्धेश्वर मुखर्जी विरूद्ध भुवनेश्वर प्रसाद, नारायण सिंह, ए.आई.आर. 1953 एस.सी. 487*** में यह अवधारित किया है कि जब अंतरिती सह–स्वामी से उसका अविभक्त अंश क्रय करता है तब वह संपत्ति के किसी निश्चित भाग पर कोई स्वामित्व प्राप्त नहीं करता है और न ही क्रय करने के पश्चात् से उस पर संयुक्त कब्जे का अधिकार ही अर्जित करता है। वह अपने अधिकार को केवल विभाजन का वाद लाकर ही क्रियाशील कर सकता है तथा कब्जे का अधिकार उस तिथि से प्रभावी होगा जब विभाजन के पश्चात् संपत्ति का कोई विशिष्ट हिस्सा उसे आबंटित कर दिया जाता है। ***एम. वी.एस. मानिक्याला राव विरूद्ध एम. नरसिम्हास्वामी, ए.आई.आर. 1966 एस.सी. 470*** में यह मत

व्यक्त किया गया है कि सहदायिक के अंश का क्रेता संपत्ति के किसी विशिष्ट हिस्से के कब्जे का दावा नहीं कर सकता जब तक कि संपूर्ण संपत्ति का विभाजन न हो जाये। विभाजन होने पर अंतरिती अंतरक सह–स्वामी का वहीं अंश प्राप्त करेगा जिसके अंश का अंतरक विभाजन की तिथि पर हकदार था, न कि अंतरण की तिथि पर। मध्यप्रदेश उच्च न्यायालय ने भी ***ललिता जेम्स विरूद्ध अजित कुमार, ए.आई.आर. 1991 एम. पी. 15*** में यह प्रतिपादित किया गया है कि जहां क्रेता सह–स्वामी का अविभक्त अंश क्रय करता है वहां अंतरिती संयुक्त संपत्ति के किसी विशिष्ट भाग पर कब्जा पाने का अधिकारी नहीं है। अगर उसका कोई अधिकार है तो वह संयुक्त संपत्ति में सहस्वामित्व का, न कि संयुक्त संपत्ति के किसी भाग विशेष पर अनन्य कब्जे का। ऐसी स्थिति में अंतरिती संयुक्त संपत्ति का विभाजन कराने का हकदार हैं। यदि कोई अपरिचित अंतरिती बिना विभाजन कराये कब्जा स्थापित करता है तो उसका कब्जा अवैध है तथा अन्य सह–स्वामियों को ऐसे अंतरिती को रोकने के लिये बेदखली का तथा व्यादेश के माध्यम से प्रतिबंधित करने के लिए दावा लाने का भी अधिकार है।

विभाजन के लिए वाद हेतु परिसीमा

अंतरिती द्वारा विभाजन के लिए वाद संस्थित करने के संबंध में परिसीमा अधिनियम, 1963 के अंतर्गत कोई विशिष्ट प्रावधान नहीं है। स्पष्ट है कि अनुच्छेद 65 के प्रावधान ऐसे वादों में लागू नहीं होगे, क्योंकि अंतरिती द्वारा संस्थित वाद उसे अंतरण में प्राप्त हित के विभाजन का नहीं, बल्कि संपूर्ण संपत्ति के विभाजन का होता है जिसके संबंध में कोई परिसीमा अधिनियम में उल्लिखित नहीं है।

हिन्दु सहदायिकी संपत्ति में सह–स्वामी के हित का अंतरण

धारा 44 के संबंध में यह भी विचारणीय है कि इसमें उल्लिखित अधिकार अंतरिती को तभी प्राप्त होगा जब कि अंतरणकर्त्ता सह–स्वामी अंतरण करने के लिए विधिक रूप से सक्षम हो, अर्थात यदि अंतरणकर्त्ता अपना अंश अंतरित करने के लिये सक्षम नहीं है तो अंतरिती को कोई अधिकार प्राप्त नहीं होगा। मिताक्षरा हिन्दू विधि के कुछ स्कूल अन्य सह–स्वामियों की सहमति के बिना एक सह–स्वामी को अपने हिस्से का अंतरण करने से निषेधित करते हैं। जैसे मिताक्षरा विधि के बनारस स्कूल के तहत यह आवश्यक है कि सह–स्वामी अपने हिस्से को विक्रय करने के पूर्व अन्य सह–स्वामियों की सहमति प्राप्त करें। जबकि बाम्बे स्कूल में ऐसा नहीं हैं। ***दिवानसिंह विरूद्ध मैय्यालाल*** (पूर्वोक्त) में मध्यप्रदेश उच्च न्यायालय की पूर्ण पीठ ने प्रतिपादित किया है कि हिन्दु मिताक्षरा विधि के किसी स्कूल की पक्षकारों के लिए प्रयोज्यता प्रत्येक मामले में किए गये अभिवचनों और उसके तथ्यों एवं परिस्थितियों पर निर्भर करेगा। मध्यप्रदेश के किसी क्षेत्र विशेष के लिए इस विषय में विधि का कोई सामान्य नियम नहीं हो सकता है।

बैतालसिंह व अन्य विरूद्ध श्रीलाल, 2007 (4) एम.पी.एल.जे. 477 में कहां गया है कि ऐसी सहदायिकी संपत्ति जिस पर मिताक्षरा विधि का बनारस स्कूल लागू होता है वहां सहदायक अन्य सहदायिकों की सम्मति के बगैर सहदायिक संपत्ति में उसके अविभक्त हित का अन्य संक्रमण नहीं कर सकता है।

हिन्दू मिताक्षरा विधि की शाखा जो मध्यप्रदेश, बम्बई, मद्रास में प्रचलित है में एक सहदायिक अपने अविभक्त अंश का अंतरण करने के लिए सक्षम है (***मुल्ला "प्रिंसिपल ऑफ हिन्दू लॉ 12वां संस्करण पैरा नंबर 261***)। यद्यपि वह किसी विशिष्ट संपत्ति का अंतरण नहीं कर सकता है, क्योंकि वास्तविक विभाजन से पूर्व कोई भी सहदायिक यह दावा नहीं कर सकता कि अमुक विशिष्ट संपत्ति

उसके हिस्से की है। यदि ऐसी कोई संपत्ति अंतरित करता है तो ऐसा अंतरण उक्त संपत्ति में उसके हित/अंश की सीमा तक ही वैध होगा। उत्तरप्रदेश, पश्चिम बंगाल, अवध, पंजाब, बिहार, उड़ीसा में प्रचलित मिताक्षरा विधि की शाखा में एक सहदायिक अन्य सहदायिक की सम्मति के बिना अपने अविभक्त अंश का अंतरण करने के लिए सक्षम नहीं है। ऐसा अंतरण वह केवल दो परिस्थितियों में कर सकता है– (1) विधिक आवश्यकता के लिए और (2) पिता द्वारा पूर्व में लिये गये ऋण के भुगतान हेतु। (मुल्ला "प्रिंसिपल ऑफ हिन्दू लॉ" 12वां संस्करण, पैरा 260).

भारतीय राज्य पुनर्गठन अधिनियम, 1956 के अंतर्गत विंध्यप्रदेश क्षेत्र का वर्तमान मध्यप्रदेश राज्य में विलय हुआ था। तत्समय विंध्यप्रदेश उच्च न्यायालय संगठन, 1948 का अध्यादेश नंबर 05 लागू था, जो विंध्य राज्य के अतिविशिष्ट गजट में 12 अगस्त, 1948 को प्रकाशित हुआ। अध्यादेश की धारा 28 यह उपबंध करती है कि उच्च न्यायालय और अधीनस्थ न्यायालय में सभी प्रकरण उन्हीं विधियों के अनुसार निर्णीत होंगे जो उस समय संयुक्त प्रांत विंध्यप्रदेश में लागू है तथा जहां कोई विधि नहीं है वहां संयुक्त प्रांत आगरा और अवध में लागू विधि के अनुसार जहां तक कि वे लागू की जा सके, के अनुसार निर्णीत किये जायेंगे तथा यदि वहां भी कोई विधि नहीं है तब उन्हें साम्या और न्याय के सिद्धांतों के अनुसार निर्णीत किया जायेगा।

इस प्रकार उक्त अध्यादेश के द्वारा हिन्दू मिताक्षरा विधि की शाखा जो उत्तरप्रदेश में प्रचलित है वही विंध्यप्रदेश क्षेत्र में भी लागू की गयी थी। ***रामिलन विरुद्ध भागवती, 1963 एम.पी.एल.जे. शार्ट नोट 166*** में मध्यप्रदेश उच्च न्यायालय ने भी यह मत व्यक्त किया है कि उत्तरप्रदेश में प्रचलित मिताक्षरा विधि विंध्यप्रदेश में भी लागू होगी, क्योंकि उक्त अध्यादेश किसी सक्षम विधायन द्वारा संशोधित या निरसित नहीं किया गया है। अतः संविधान के अनुच्छेद 372 के प्रभाव से विंध्यप्रदेश क्षेत्र के नागरिकों की सम्पत्ति उत्तर प्रदेश में प्रचलित मिताक्षरा शाखा के अनुसार शासित होगी यद्यपि कि उक्त क्षेत्र मध्यप्रदेश में विलीन हो गये हैं। ***भगवती प्रसाद विरुद्ध चन्द्रभानु, 1990 जे.एल.जे. 569*** में भी मध्यप्रदेश उच्च न्यायालय ने यह स्पष्ट किया है कि विंध्यप्रदेश में आने वाले क्षेत्र जो मध्यप्रदेश में शामिल हो गये हैं उनमें उत्तर प्रदेश में प्रचलित मिताक्षरा विधि की शाखा प्रचलित रहेगी। इस आधार पर उच्च न्यायालय ने एक सह–स्वामी द्वारा सहदायिकी संपत्ति में अपने अंश का अंतरण अन्य सहदायकों की सहमति के बिना किये जाने के कारण शून्य माना है।

उपसंहार

निष्कर्ष में, एक सह–स्वामी संयुक्त संपत्ति में अपने अविभक्त अंश का अंतरण करने के लिए सक्षम है तथा अंतरिती उक्त अंश पर उन्हीं अधिकारों का प्रयोग करेगा जो अंतरणकर्त्ता सह–स्वामी रखता था। किन्तु अविभक्त कुटुम्ब के निवास गृह के संबंध में अंतरिती अपने अधिकारों का प्रयोग न्यायालय से विभाजन कराने के उपरांत ही कर सकेगा अन्यथा नहीं। सह–स्वामी अपने अंश का अंतरण करने के लिए विधितः सक्षम होना भी आवश्यक है। मध्यप्रदेश के विंध्यप्रदेश में आने वाले क्षेत्रों में सहदायिकी संपत्ति का सह–स्वामी अन्य सहदायिक की सम्मति के बिना अपने अंश का अंतरण करने के लिए सक्षम नहीं है इसलिए विंध्यप्रदेश क्षेत्र में किसी सह–स्वामी द्वारा सहदायिकी संपत्ति में अपने अविभक्त अंश का अंतरण अन्य सहदायिक की सम्मति के बिना किये जाने की दशा में अंतरण की धारा 44 के प्रावधान का लाभ अंतरिती को प्राप्त नहीं होगा और ऐसा अंतरण शून्य होगा।

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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)

समस्या : लोक अदालत में निराकृत सिविल मामलों में न्यायालय फीस की वापसी के संबंध में विधिक स्थिति क्या है?

समाधान : इस प्रश्न के संबंध में न्यायालय फीस अधिनियम, 1870 की धारा – 16 सुसंगत है जो निम्नवत् है–

> "**फीस का प्रतिदाय.**– जहां न्यायालय वाद के पक्षकारों को सिविल प्रक्रिया संहिता, 1908 (1908 का 5) की धारा 89 में निर्दिष्ट विवाद के निपटारे के ढंगों में से कोई ढंग निर्देशित करता है, वहां वादी न्यायालय से ऐसा प्रमाणपत्र प्राप्त करने का हकदार होगा जिसमें कलेक्टर से ऐसे वाद के संबंध में संदत्त फीस की पूरी रकम वापस प्राप्त करने के लिए प्राधिकृत किया गया हो।"

वर्ष 2002 में अंतःस्थापित इस प्रावधान के अधीन जहाँ न्यायालय द्वारा सिविल प्रक्रिया संहिता, 1908 की धारा–89 में निर्दिष्ट विवाद के निपटारे की प्रविधियों में से, जिसके अधीन लोक अदालत के माध्यम से समझौता भी सम्मिलित है, किसी के भी अधीन निराकरण के लिए निर्दिष्ट किया जाता है तो ऐसे सिविल विवाद के निराकरण पर वादी न्यायालय से ऐसे प्रमाणपत्र को प्राप्त करने का अधिकारी होगा जिसमें उसे कलेक्टर से उस मामले में संदत्त की गई सम्पूर्ण न्यायालय फीस के लिए प्राधिकृत किया गया हो।

इस प्रावधान के अतिरिक्ति विधिक सेवा प्राधिकरण अधिनियम, 1987 की धारा 21 भी सुसंगत है। यह धारा निम्नलिखित है–

> "**लोक अदालत का अधिनिर्णय** – (1) लोक अदालत का प्रत्येक अधिनिर्णय, किसी सिविल न्यायालय की एक डिक्री या, यथास्थिति, किसी अन्य न्यायालय का कोई आदेश माना जाएगा और जहाँ धारा 20 की उपधारा (1) के अधीन उसे निर्देशित किसी मामले में किसी लोक अदालत

द्वारा कोई समझौता या परिनिर्धारण किया जाता है, तो ऐसे मामले में संदत्त न्यायालय फीस, न्यायालय फीस अधिनियम, 1870 (1870 का 7) के अधीन उपबंधित रीति में वापस की जाएगी।

(2) किसी लोक अदालत द्वारा दिया गया प्रत्येक अधिनिर्णय, अन्तिम एवं विवाद के समस्त पक्षकरों पर आबद्धकर होगा, और अधिनिर्णय के विरूद्ध किसी न्यायालय में कोई अपील नहीं की जाएगी।"

इस प्रकार यह स्पष्ट है कि लोक अदालत में निराकृत सिविल मामले में पक्षकार मामले में संदत्त की गई न्यायालय फीस की सम्पूर्ण धनराशि वापस प्राप्त करने का अधिकारी होता है तथा इस राशि में से किसी भी प्रकार की कटौती किया जाना अनुज्ञात नहीं है। अतएव यह ***ध्यातव्य*** है कि ***प्रथमतः*** ऐसे मामलों में न्यायालय, न्यायालय फीस के स्टाम्प वापस नहीं करेगा वरन् न्यायालय फीस को कलेक्टर से वापस प्राप्त करने बाबत् एक प्रमाणपत्र पक्षकार को प्रदान करेगा। ***द्वितीयतः*** यह प्रमाणपत्र पक्षकार को उस मामले में संदत्त सम्पूर्ण न्यायालय फीस की वापसी हेतु अधिकृत करेगा। दूसरे शब्दों में ऐसे प्रमाणपत्र के अधीन पक्षकार कलेक्टर से मामले में संदत्त सम्पूर्ण न्यायालय फीस वापस पाने का अधिकारी होगा।

इस संबंध में ***रमेशचंद्र वि. म.प्र. राज्य एवं अन्य W.P.No. 7282/10 निर्णय दिनांक 01-11-2011*** (खण्डपीठ) के न्यायदृष्टांत में प्रतिपादित किया गया है कि सिविल प्रक्रिया संहिता, 1908 की धारा 89 के अधीन लोक अदालत को निर्दिष्ट विवाद के समायोजन उपरांत याची/अपीलार्थी न्यायालय से ऐसा प्रमाणपत्र प्राप्त करने का अधिकारी होता है जिसमें उसे मामले में संदत्त की गई न्यायालय फीस की सम्पूर्ण राशि कलेक्टर से वापस प्राप्त करने के लिए अधिकृत किया गया हो। इस राशि में प्राधिकारियों द्वारा कोई कटौती नहीं की जा सकती है।

इसी विषय पर बल्लभ दास गुप्ता वि. श्रीमती गीताबाई, 2004 (3) MPHT 89 (खण्डपीठ) केशरीमल वि. धनराज, 2010 (III) MPWN 54 (at Page 152) तथा विपिन त्रिवेदी वि. मोहनलाल शर्मा, 2011 (5) MPHT 102 के न्यायदृष्टांतों में प्रतिपादित विधि भी अवलोकनीय है।

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PART - II

NOTES ON IMPORTANT JUDGMENTS

1. **ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 2(e) Whether the expression "living jointly with" appearing in the Section qualifies only the words brother's son or unmarried daughter or any other relation dependant on landlord or it qualifies all relations enumerated therein? Held, the expression "living jointly with", shall be applicable only in the case of brother's son or unmarried daughter and the expression "dependant on him", shall be applicable only in case of any other relatives.**

Govindrao and others v. Bhavarlal and others

Judgment dated 17.11.1992 passed by the High Court of Madhya Pradesh in S. A. No. 166 of 1985, reported in 2011 (4) MPLJ 362 (FB)

Held :

The main controversy in view of the two decisions *[Lalta Prasad v. Ramcharan, 1989 MPLJ 233* and *Omprakash v. Gopaldas, S.A. No. 808 of 82 decided on 01.08.1986 (IB)]* is about the extent of the applicability of the qualifying clauses "living jointly" and "dependent on him". This controversy arose because of treating the member of the family, named in the definition in three categories according to Shri P.C. Pathak, J. and in two categories according to Dr. T.N. Singh, J. According to Dr. T.N. Singh, J. the term "living jointly with" governs all the members of the family specifically named in the definition and the term "dependent on him" qualifies only any other relation. As such it appears that the conjunction "or" has to be held to be disjunctive, according to Dr. T.N. Singh, J. when he held that the term "dependent on him" will govern any other relation. This leads automatically to a question that why The "or" used after the widow and brother's son should not be held to be disjunctive.

To understand the above problem properly let us look at the definition of the 'member of family' as given in section 2(e) of the Act. It reads as under:

> "(e) "member of the family" in case of any person means the spouse, son, unmarried daughter, father, grandfather, mother, grandmother, brother, unmarried sister, paternal uncle, paternal uncle's wife or widow, or brother's son or unmarried daughter living jointly with, or any other relation dependent on him;"

A plain reading of this definition would show that the Legislature intended to create three categories of relations of the landlord – one category being of those persons who are dependent (sic) members of the family i.e. spouse, son, unmarried daughter, father, grandfather, mother, grandmother, brother, unmarried sister, paternal uncle, paternal uncle's wife or widow. Thereafter the word "or" is used and brother's son or unmarried daughter have been included

in the definition for which a condition had been imposed of 'living jointly with' and a third category has been provided, which speaks of other relation, but for that also a condition has been imposed that they have to be 'dependent on him'. As such the Legislature in its wisdom has used the word "or" after enumerating the first category and then brother's son or unmarried daughter living jointly with have been named and thereafter the word "or" is again used to indicate any other relation with the condition of dependency on the landlord. As such in the context and the scheme of the Act the aforesaid use of "or" at two places is clearly disjunctive, thus creating three different categories of members of the family. Therefore, the qualifying words used after each category shall govern that category only for which the qualifying terms are used in view of the Rule of Last Antecedent.

It is a settled position of law that the relative and qualifying words, phrases and clauses are applied to the antecedent immediately preceding. In the *Principles of Statutory Interpretation* by Justice Shri G.P. Singh (4th Edn.) page 199 there is a very useful discussion on the Rule of Last Antecedent. The learned Author has based his opinion on the decided cases of the Federal Court and the Supreme Court in *Mahadeolal Kanodia vs. Administrator General of W.B., AIR 1960 SC 935, (939), Ashwani Kumar Ghosh vs. Arabindo Bose, AIR 1952 SC 369 (376)* and *GG in Council vs. Shiromani Sugar Mills Lts., AIR 1946 FC 16 (23).* In the subsequent judgments of the Supreme Court this principle has been reiterated with a further elucidation that the basic principles of interpretation should not be lost sight of, which require that the interpretation put by the Court should not lead to absurdity or which may frustrate the policy of the Legislature. It has also to be kept in view that the interpretation of any term has to be made in the context in which it is used. Even when a Court may seek aid from the Dictionary meaning of a particular word out of many meanings of the Dictionary the one which is consistent with the policy of the Legislature and the context of the main text has to be adopted. It is true that the Act is a beneficial legislation brought on the Statute Book for affording protection to the tenants, but in the same Act rights have been given to the landlord to get the suit accommodation vacated for the bona fide need and on other grounds also. Now the Legislature in its wisdom allowed the landord to get the house evicted not only for the bona fide need of himself, but also for the members of his family and for that purpose in the definition of the member of family certain categories of the relatives have been named. Reading the definition as a whole one cannot conceive that all the relations named in the definition falls in the same category.

Dr. T. N. Singh, J. has also gone through the report of the Select Committee and Bill as it was originally presented before the House to seek external aid for interpretation and is right when he says that the initial idea of the family consisting of the joint Hindu Family was given up and instead the present definition was substituted to make it applicable to all the citizens. But the Indian tradition and culture of the families living together even after marriage and even being separate by mess has not been given a go-bye. The definition shows that this idea was

very much in the mind of the Legislature when this Bill was converted into an act. As such, if we read the relations named in the definition minutely, we find, that in the first category the persons who are naturally supposed to live together in one family have been put in a separate class because after the words paternal uncle's wife or widow a comma has been put and thereafter the word "or" is used and then brother's son or unmarried daughter have been named with a condition that they were living jointly with the landlord, and thereafter again the word "or" is used and the words any other relations dependent on him have been inserted. As such in the aforesaid context the conjunction "or" used in the aforesaid definition at two places is manifestly disjunctive and, therefore, if the Rule of Last Antecedent is made applicable, we find that the qualifying term "living jointly" shall be applicable only in the case of brother's son or unmarried daughter and the term "dependent on him" shall be applicable in the case of only any other relations.

To conclude, in the definition of 'member of the family' there are three categories – one consisting of spouse, son, unmarried daughter, father, grand father, mother, grand mother, brother, unmarried sister, paternal uncle, paternal uncle's wife or widow; the second category is that of brother's son or unmarried daughter and the third category is of any other relations and in view of the Rule of Last Antecedent the term "living jointly with" qualifies only brother's son or unmarried daughter and that term "dependent on him" qualifies only any other relation. The term "living jointly with" or "dependent on him" does not govern the relations enumerated in category one above. The reference is answered accordingly.

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2. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (a)
ACCOMMODATION CONTROL RULES, 1966 (M.P.) – Rule 15
GENERAL CLAUSES ACT, 1957 (M.P.) – Section 28
Mode of service of notice for demand of arrears of rent – The notice was sent on the address of tenanted premises by Regd. A/D and was returned with an endorsement that premises is found locked – Suit filed mentioning different address in plaint because the defendant started living on that address – Held, the notice of demand has been validly served upon the tenant.

Rajkamal and others v. Smt. Prabha Grover
Judgment dated 06.09.2011, passed by the High Court of M.P. in S.A. No. 86 of 1994, reported in 2011 (5) MPHT 124

Held :

Admittedly, the tenanted premises is the same on which the notice of demand of arrears of rent (Exh. P-9) was sent. On bare perusal of Rule 15 of the Rules this Court finds that mode of service of notice has been given.

On bare perusal of Rule 15 this Court finds that a notice shall be deemed to be served if it is sent by forwarding it to the person by registered AD post. Needless to say that Exh. P-9 has been sent by registered post with

acknowledgment due. It is not the case of defendant that the address on which the said notice was sent is not the tenanted premises and, therefore, I am of the view that notice of demand of arrears of rent has been validly served upon the tenant. Since the defendant started living at different place, in the plaint by mentioning that address the suit was filed. The decision of *Babulal and others v. Mahendra Swarup Saxena, 1983 JLJ 287,* placed reliance by learned Counsel for appellants is not applicable in the present case because in that case it was held that address was not proper. However, in the present case on the proper address where the tenanted premises is situated, the notice was served.

At this juncture, I would like to place reliance on Section 28 of the M.P. General Clauses Act, 1957, which throws sufficient light on the meaning of service by post.

Under this provision also, the service shall be deemed to be effected if the same has been sent on proper address by registered post. Since Exh. P-9 has been sent by registered AD post on the tenanted premises and when it is not the case of tenant-defendant that the address on which said notice was sent was not proper, it shall be deemed that notice was served in terms of Rule 15 of the Rules.

The substantial question of law is thus answered that the notice of demand as required under Section 12 of the Act was served on the tenant. Admittedly, the defence of the defendants has been struck off as he did not deposit the rent in the Trial Court as envisaged under Section 13 of the Act and hence a decree of eviction under Section 12 (1) (a) was rightly passed by learned Trial Court and affirmed by learned First Appellate Court.

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3. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 (1) (h) and 12 (7)

No pleading that plaintiff is having a plan or estimate for reconstruction and she is also having necessary funds with her – In absence of such a pleading and further, by not proving those ingredients by any documentary evidence like filing of plans and estimates, the bank account etc., it can be held that learned two Courts below have grossly erred in passing the decree of eviction u/s 12(1)(h) of the Act – Appeal allowed.

Santosh Kumar and Anr. v. Smt. Parwatibai

Judgment dated 26.07.2011, passed by the High Court of M.P. in S.A. No. 105 of 1996 reported in I.L.R. (2011) M.P. 2818

Held:

On bare perusal of the plaint (para 3) only this much is gathered that the tenanted premises is in dilapidated condition and it can fall at any moment of time and the plaintiff has sent the notice in this regard which is Ex. P/1 but the said premises has not been vacated by the defendants. By refuting the averments made in para 3 of the plaint, it has been pleaded by the defendants in their written statement denying the fact that the suit premises is in dilapidated condition and can fall at any moment. They have also denied that any notice was ever

given to them. However there is no pleading of plaintiff in respect to the ingredients of Section 12 (7) of the Act. According to this provision, no order for eviction of a tenant can be made on the ground specified in clause (h) of sub-section (1) of Section 12 of the Act unless the Court is satisfied that the proposed reconstruction will not radically alter the purpose for which the accommodation was let or that radical alteration is in the public interest, and that the plans and estimates of such reconstruction have been properly prepared and that necessary funds for the purpose are available with the landlord. There is no pleading that the plaintiff is having any such plan or estimate of reconstruction and she is also having necessary funds available with her. In absence of such a pleading which is the essential requirement to obtain a decree under Section 12(1)(h) of the Act and further by not proving those ingredients by any documentary evidence like filing of plans and estimates and the bank account etc. to prove that she is having necessary funds to get the premises reconstructed, according to me, learned two Courts below had grossly erred in passing the decree of eviction under Section 12(1)(h) of the Act. The decree under this clause is accordingly set aside.

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*4. **ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 23-A (b) Eviction ordered on the ground of personal *bona fide* need of Dr. 'R' to open dispensary in the premises – Such need completely eclipsed on account of his death, during the pendency of the present revision – None of the legal heirs came forward expressing *bona fide* need of any kind and no such application for amendment of pleadings in the application for eviction was submitted before the High Court – Held, on account of this subsequent event, the order of eviction cannot be permitted to be kept alive – Revision petition allowed.**

Amritlal v. Dr. Ravishchandra Pandey (Deceased) & Ors.
Judgment dated 24.08.2011, passed by the High Court of M.P. in C.R. No. 723 of 2000, reported in I.L.R. (2011) M.P. S.N. 135

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5. **ARBITRATION AND CONCILIATION ACT, 1996 – Sections 2 (9), 11 and 23**
   (i) **Counter-claim before Arbitrator – Unless the parties have otherwise agreed, a counter-claim can be raised directly before Arbitrator though it has not been raised before claimant nor in reply of application under Section 11 of the Act.**
   (ii) **The Chief Justice or His designate is only required to appoint the Arbitrator(s) under Section 11 of the Act – He does not require to identify the disputes or refer them to the Arbitral Tribunal for adjudication.**

State of Goa v. Praveen Enterprises
Judgment dated 04.07.2011 passed by the Supreme Court in Civil Appeal No. 4987 of 2011, reported in AIR 2011 SC 3814

Held:

Section 23 of the Arbitration and Conciliation Act, 1996 makes it clear that when the arbitrator is appointed, the claimant is required to file the statement and the respondent has to file his defence statement before the Arbitrator. The claimant is not bound to restrict his statement of claim to the claims already raised by him by notice, "unless the parties have otherwise agreed as to the required elements" of such claim statement. It is also made clear that "unless otherwise agreed by the parties" the claimant can also subsequently amend or supplement the claims in the claim statement. That is, unless the arbitration agreement requires the Arbitrator to decide only the specifically referred disputes, the claimant can while filing the statement of claim or thereafter, amend or add to the claims already made. Similarly Section 23 read with Section 2(9) makes it clear that a respondent is entitled to raise a counter claim "unless the parties have otherwise agreed" and also add to or amend the counter claim, "unless otherwise agreed". In short, unless the arbitration agreement requires the Arbitrator to decide only the specifically referred disputes, the respondent can file counter claims and amend or add to the same, except where the arbitration agreement restricts the arbitration to only those disputes which are specifically referred to arbitration, both the claimant and respondent are entitled to make any claims or counter claims and further entitled to add to or amend such claims and counter claims.

Once the claims and counter-claims are before the arbitrator, the arbitrator will decide whether they fall within the scope of the arbitration agreement and whether he has jurisdiction to adjudicate on those disputes (whether they are claims or the counter-claims) including the issue of limitation, and if the answer is in the affirmative, proceed to adjudicate upon the same.

After observing the law laid down in its previous pronouncements in *SBP & Co. v. Patel Engineering Ltd., AIR 2006 SC 450, National Insurance Co. Ltd. v. Boghara Polyfab Private Ltd., AIR 2009 SC 170* and *Indian Oil Corporation Ltd. v. M/s. SPS Engineering Ltd., AIR 2011 SC 987,* the Apex Court summed up the emerging position as follows:

(a) Section 11 of the Act requires the Chief Justice or his designate to either appoint the arbitrator/s or take necessary measures in accordance with the appointment procedure contained in the arbitration agreement. The Chief Justice or the designate is not required to draw up the list of disputes and refer them to arbitration. The appointment of Arbitral Tribunal is an implied reference in terms of the arbitration agreement.

(b) Where the arbitration agreement provides for referring all disputes between the parties (whether without any exceptions or subject to exceptions), the arbitrator will have jurisdiction to entertain any counter claim, even though it

was not raised at a stage earlier to the stage of pleadings before the Arbitrator.

(c) Where, however, the arbitration agreement requires specific disputes to be referred to arbitration and provides that the arbitrator will have the jurisdiction to decide only the disputes so referred, the arbitrator's jurisdiction is controlled by the specific reference and he cannot travel beyond the reference, nor entertain any additional claims or counter claims which are not part of the disputes specifically referred to arbitration.

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6. **BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988 – Section 4 (1) Plea of benami – Plaint allegation itself is evident that suit property was purchased benami – No evidence was required to be recorded for deciding the preliminary issue – Suit is not maintainable.**

Mukesh & Anr. v. Shantilal & Ors.

Judgment dated 10.08.2011, passed by the High Court of M.P. in C.R. No. 262 of 2007 reported in I.L.R. (2011) M.P. 2893

Held :

In the present case from the plaint allegation itself it is evident that suit property was purchased by grand father of respondent No. 1 in the name of father of respondent No. 1 before 20 years as Benami which was sold by the father of respondent No. 1 to the petitioner and other respondent on 03.11.03. After coming into force of the Act no evidence was required to be recorded for deciding the preliminary issue as in view of Section 4 (1) of the Act the suit itself was not maintainable. Learned Trial Court was not justified in holding that the issue cannot be decided without recording the evidence. On the contrary, issue ought to have been decided on the basis of plaint allegations and keeping in view the provisions of law. In view of the facts stated hereinabove and keeping in view the position of law the petition filed by the petitioners is allowed and the impugned order passed by the learned Court below is set aside holding that the suit filed by respondent No. 1 is barred under Section 4 (1) of the Act.

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7. **CIVIL PRACTICE :**

(i) **Court should be cautious and extremely careful while granting ex parte ad interim injunction.**

(ii) **Delay in civil litigation – Steps for curbing prevailing delay in civil litigation in trial court suggested.**

Ramrameshwari Devi and others v. Nirmala Devi and others

Judgment dated 04.07.2011 passed by the High Court of Madhya Pradesh in C. A. No. 4912 of 2011, reported in 2011 (4) MPLJ 281 (SC)

Held:

We would briefly deal with the aspect of delay in disposal of civil cases and some remedial measures and suggestions to improve the situation. According to our considered view, if these suggestions are implemented in proper perspective, then the present justice delivery system of civil litigation would certainly improve to a great extent.

Usually the court should be cautious and extremely careful while granting ex-parte ad interim injunctions. The better course for the court is to give a short notice and in some cases even dasti notice, hear both the parties and then pass suitable biparte orders. Experience reveals that ex-parte interim injunction orders in some cases can create havoc and getting them vacated or modified in our existing judicial system is a nightmare. Therefore, as a rule, the court should grant interim injunction or stay order only after hearing the defendants or the respondents and in case the court has to grant ex-parte injunction in exceptional cases then while granting injunction it must record in the order that if the suit is eventually dismissed, the plaintiff or the petitioner will have to pay full restitution, actual or realistic costs and mesne profits.

If an ex-parte injunction order is granted, then in that case an endeavour should be made to dispose of the application for injunction as expeditiously as may be possible, preferably as soon as the defendant appears in the court.

It is also a matter of common experience that once an ad interim injunction is granted, the plaintiff or the petitioner would make all efforts to ensure that injunction continues indefinitely. The other appropriate order can be to limit the life of the ex-parte injunction or stay order for a week or so because in such cases the usual tendency of unnecessarily prolonging the matters by the plaintiffs or the petitioners after obtaining ex-parte injunction orders or stay orders may not find encouragement. We have to dispel the common impression that a party by obtaining an injunction based on even false averments and forged documents will tire out the true owner and ultimately the true owner will have to give up to the wrongdoer his legitimate profit. It is also a matter of common experience that to achieve clandestine objects, false pleas are often taken and forged documents are filed indiscriminately in our courts because they have hardly any apprehension of being prosecuted for perjury by the courts or even pay heavy costs. In *Swaran Singh v. State of Punjab, (2000) 5 SCC 668* this court was constrained to observe that perjury has become a way of life in our courts.

In a recent judgment in the case of *Mahila Vinod Kumari v. State of Madhya Pradesh, (2008) 8 SCC 34* this court has shown great concern about alarming proportion of perjury cases in our country.

While granting ad interim ex-parte injunction or stay order the court must record undertaking from the plaintiff or the petitioner that he will have to pay mesne profits at the market rate and costs in the event of dismissal of interim application and the suit.

The courts have to be extremely careful in granting ad-interim ex-parte injunction. If injunction has been granted on the basis of false pleadings or forged documents, then the concerned Court must impose costs, grant realistic or actual mesne profits and/or order prosecution. This must be done to discourage the dishonest and unscrupulous litigants from abusing the judicial system. In substance, we have to remove the incentive or profit for the wrongdoer.

Framing of issues is a very important stage in the civil litigation and it is the bounden duty of the Court that due care, caution, diligence and attention must be bestowed by the learned Presiding Judge while framing of issues.

In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that Court's otherwise scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases.

The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed ? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial Courts while dealing with the civil trials.

A. Pleadings are foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.

B. The Court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Code. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the Court in arriving at truth of the matter and doing substantial justice.

C. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the Courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

D. The Court must adopt realistic and pragmatic approach in granting mesne profits. The Court must carefully keep in view the ground realities while granting mesne profits.

E. The Courts should be extremely careful and cautious in granting ex-parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the defendants

or respondents and only after hearing concerned parties appropriate orders should be passed.

F. Litigants who obtained ex-parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No one should be allowed to abuse the process of the Court.

G. The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.

H. Every case emanates from a human or a commercial problem and the Court must make serious endeavour to resolve the problem within the framework of law and in accordance with the well settled principles of law and justice.

I. If in a given case, ex parte injunction is granted, then the said application for grant of injunction should be disposed of on merits, after hearing both sides as expeditiously as may be possible on a priority basis and undue adjournments should be avoided.

J. At the time of filing of the plaint, the trial Court should prepare complete schedule and fix dates for all the stages of the suit, right from filing of the written statement till pronouncement of judgment and the Courts should strictly adhere to the said dates and the said time table as far as possible. If any interlocutory application is filed then the same be disposed of in between the said dates of hearings fixed in the said suit itself so that the date fixed for the main suit may not be disturbed .

According to us, these aforementioned steps may help the Courts to drastically improve the existing system of administration of civil litigation in our Courts. No doubt, it would take some time for the Courts, litigants and the advocates to follow the aforesaid steps, but once it is observed across the country, then prevailing system of adjudication of Civil Courts is bound to improve.

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

An order passed without jurisdiction would be a nullity – It will be a *coram non judice* and *non est* in the eye of law and the principles of *res judicata* would not apply to such an order even if it attains finality in favour of some parties by virtue of not being appealed against (*Chandrabhai K. Bhoir v. Krishna Arjun Bhoir, (2009) 2 SCC 315* referred).

Union of India and another v. Association of United Telecom Service Providers of India and others

Judgment dated 11.10.2011 passed by the Supreme Court in Civil Appeal No. 5059 of 2007, reported in (2011) 10 SCC 543

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9. **CIVIL PROCEDURE CODE, 1908 – Section 144 and Order 39 Rules 1 & 2**
LEGAL MAXIM:
Restoration of possession – Plaintiff was not in possession of the suit land on the date of suit – The possession was obtained by him under the garb of temporary injunction – Held, the possession of the property can be given back to the defendant without there being any cross suit or counter-claim filed by him.
Legal Maxim *Actus curiae neminem gravabit*, application of.

Surya Din v. Narayan Das
Judgment dated 06.09.2011 passed by the High Court of M.P. in Second Appeal No. 481 of 1994, reported in 2011(5) MPHT 467

Held :

On perusal of the impugned judgment, this Court finds that after issuance of temporary injunction order in favour of the plaintiff, he by taking law in his hands, by unlawful means and dehors to the law and procedure prescribed under the law has taken the possession of the suit property. Thus, this type of practice should not only be deprecated but if it is affirmed, it would jeopardize the judicial system and people will lose faith from the Court. Since, the plaintiff was not at all in possession of the suit property on the date of filing of the suit and he took possession by illegal means under the garb of temporary injunction, I am of the view that the possession of the suit property can be given back to the defendant without there being any cross suit or counter-claim filed by him. In this context, I may profitably place reliance on the legal maxims "*actus curiae neminem gravabit*", which means that a party should not be prejudiced by the action or inaction of any Court. In the facts and circumstances of the present case, this maximum is squarely applicable. Hence, I am of the view that the learned First Appellate Court did not err in passing the order in the impugned judgment that the plaintiff should deliver the possession of the suit property to the defendant-respondent. Indeed the plaintiff-appellant cannot take advantage of his own wrong.

This Court in *Bhagwan v. Manibai, 1994 (II) MPWN 36,* has also taken the same view. In the said case, similar type of substantial question of law was framed and I would like to apt to quote the said question of law which reads thus :-

> "Whether in a suit for declaration and injunction, the Court can pass a decree for possession against the plaintiff without there being any cross suit or counter-claim by the defendants ?"

While answering the said substantial question of law, R. C. Lohati, J., as His Lordship then was, answered the question by holding that :

> "It is well settled that no person shall suffer by a wrong order of the Court. The Lower Appellate Court has formed an unhesitating opinion that the plaintiff appellant did not

deserve any interim injunction order being passed in his favour as he was certainly not in possession of the suit property on the date of the suit. It is the wrong injunction order of the Trial Court which became instrumental in plaintiff depriving the defendants of their possession over the suit property. When the Court superseded that interim injunction order it was not only empowered but was duty-bound to undo the wrong done under its order which had ceased to exist. No exception can be taken to the relief allowed by the Court to the defendants."

The substantial question is thus answered that without filing any counter-claim or cross-suit seeking relief of possession of the suit property by the defendant-respondent, the learned First Appellate Court has rightly passed the order to deliver the possession of the suit property to the defendant while allowing this appeal.

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***10. CIVIL PROCEDURE CODE, 1908 – Section 151 and Order 9 Rules 6 & 13 Proceeding *ex parte* – Court before proceeding *ex parte* against defendant, must cautiously see the process and the report of service of the summons and should not formally use the words that the defendant was served, but was absent.**

The Court shall always be justified by recording cogent reasons in proceeding *ex parte,* provided, it is convinced that the defendant despite lawful service of summons and knowledge of the pendency of the proceedings had chosen to remain absent before proceeding *ex parte* – The Court must advert itself and follow the legal requirements regarding service of summons as provided under Order 5 of CPC.

Application filed under Order 9 Rule 13 r/w/s 151 would not become infructuous on the ground that the plaintiff/appellant had re-married after passing of the ex parte decree for divorce.

Applicability of Proviso to Order 9 Rule 13 – If the plaintiff satisfies the Court that summons were in fact served in accordance with law but certain directive provision was not observed, only in such a case, the Court may on being satisfied that the defendant had sufficient time to approach the Court on the date of hearing, can refuse to set aside the *ex parte* decree.

Brijendra Singh Bhadauria v. Usha Singh Alias Deepa (Smt.)
Judgment dated 22.09.2011, passed by the High Court of M.P. in F.A. No. 228 of 2009, reported in I.L.R. (2011) M.P. S.N. 136 (DB)

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11. **CIVIL PROCEDURE CODE, 1908 – Order 2 Rule 2**

Bar to subsequent suit on same cause of action – In earlier suit, the question for consideration was whether the transaction in question was sale or mortgage while in subsequent suit the matter in issue was whether the entire property of HUF in which plaintiffs have right could have been sold by karta – Held, bar of Order 2 Rule 2 of CPC would not apply because both the suits were based on different causes of action.

Renka Bai and others v. Itiya Bai (since deceased) through her LRs. Sarmanlal and others

Judgment dated 18.08.2011 passed by the High Court of Madhya Pradesh in S. A. No. 71 of 1994, reported in 2011 (4) MPLJ 442

Held :

On bare perusal of the finding recorded by the learned two Courts below as well as the judgment passed in earlier suit, this Court finds that earlier suit was filed on altogether distinct cause of action. In the earlier suit the question for consideration was whether plaintiff of that suit namely Harilal sold the suit property to Panchamlal or the transaction was a mortgage transaction. However, the present suit has been filed on altogether distinct cause of action. The matter in issue in this appeal is whether the entire property of HUF in which plaintiffs are having right could have been sold by Harilal and therefore, I am of the view that bar of Order 2, Rule2, Civil Procedure Code would also not come into play in the present case. In this context, I may profitably place reliance on the decision of Supreme Court *State of Maharashtra and another v. M/s National Construction Company, Bombay and another, AIR 1996 SC 2367* placed reliance by learned counsel for the respondents. The decision of Privy Council *Naba Kumar Hazra and another v. Radhashyam Mahish and others, AIR 1931 Privy Council 229* placed reliance by learned counsel for the appellants is not applicable for the simple reason that cause of action of two cases are quite distinct to each other and therefore for the same reason the Single Bench decision of Delhi High Court in *Kamal Kishore Saboo v. Nawabzada Hamayun Kamal Hasan Khan, 2001 (4) Civil Law Journal 177* is also not applicable.

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12. **CIVIL PROCEDURE CODE, 1908 – Order 9 Rules 8 & 9 and Order 17 Rules 2 & 3**

Restoration of proceeding – If a decision is rendered (whether on merits or otherwise) in absence of plaintiff or petitioner, he has a right to apply for restoration of the case, provided ofcourse that the litigant is able to establish that there was sufficient cause for non-appearance when the case was called for hearing – This right is not curtailed only because the Court or the Tribunal has examined the merits of the matter.

Narendra Kumar Rathor v. State of M.P. & Ors.
Judgment dated 12.08.2011, passed by the High Court of M.P. in W.A. No. 386 of 2008, reported in I.L.R. (2011) M.P. 2322 (DB)

Held :

Unless the order has been passed and is permissible to be passed under Order XVII Rule 3 C.P.C. the provisions of Order IX apply. [*See Panna Lal Mandwari v. Mt. Bishen Dei, AIR 1946 All. 353 (FB)* and also *Seth Munna Lal v. Seth Jai Prakash, AIR 1970 All 257 (FB)*]. The decision in *Tirumalaisami Naidu v. Subramaniam Chettiar, AIR 1918 Mad 143 (FB)* is a departure only to the limited extent that when the order purports to be passed under Order XVII Rule 3, Order IX cannot be invoked on the ground that the circumstances did not justify passing of the order under that provision. But even this decision of Madras says that if the order passed is not under Order XVII Rule 3 then Order IX will apply.

Thus the law is that if a decision is rendered (whether on merits or otherwise) **in absence of the plaintiff** or petitioner, he has a right to apply for restoration of the case, provided of course that the litigant is able to establish that there was sufficient cause for non-appearance when the case was called on for hearing. This right is not curtailed only because the Court or the Tribunal has examined the merits of the matter. **Rules 8 and 9 of Order IX and Rules 2 and 3 of Order XVII C.P.C.** may not apply in terms to writ proceedings, but the principles apply.

The litigant also has the right to apply for review if any ground for review permissible in law, exists.

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***13. CIVIL PROCEDURE CODE, 1908 – Order 9 Rule 13**
Setting aside of *ex parte* decree – Show cause notice was issued on the application filed by the respondent No. 2 under Order 39 Rules 1 & 2 CPC on which Court proceeded *ex parte* against respondent No. 1 – No copy of the plaint was pasted alongwith summons – Process server who served notice by affixture admitted that he did not record the statement or obtained signature of the witnesses in whose presence summons were served by affixture – Held, the second proviso to Rule 13 of Order 9 not applicable – No satisfaction can be drawn that respondent No. 1 had notice of the date of hearing and had sufficient time to appear and answer the claim of respondent No. 2.

Parvatibai (Smt.) v. Mohd. Sharif & Anr.
Judgment dated 04.07.2011, passed by the High Court of M.P. in C.R. No. 11 of 2011 reported in I.L.R. (2011) M.P. 2888

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14. **CIVIL PROCEDURE CODE, 1908 – Order 14 Rule 1**
SPECIFIC RELIEF ACT, 1963 – Section 41

(i) **Framing of issues – Suit merely for perpetual injunction – Plaintiff asserted his own title as well as possession – Defendant in written statement denied plaintiff's title as well as possession – It was obligatory on the part of trial Judge to raise specific issue whether the plaintiff is in exclusive possession of the disputed property on the date of institution of the suit – Without raising such an issue, the suit instituted by the plaintiff for perpetual injunction on the basis of his possession cannot be legally decided – Judgment of Courts below granting decree for perpetual injunction in the absence of such issue stands vitiated.**

(ii) **Perpetual Injunction – Section 41 of the Specific Relief Act lays down when an injunction cannot be granted – This section does not prohibit Civil Court from granting decree for perpetual injunction in absence of relief regarding declaration of title.**

Municipal Council, Jaora v. Chand Khan

Judgment dated 24.08.2011, passed by the High Court of M.P. in S.A. No. 112 of 1996, reported in I.L.R. (2011) M.P. 2493

Held

Perusal of the plaint shows that the suit is merely for perpetual injunction. Plaintiff has asserted his own title as well as possession. Defendant in its written statement has clearly denied plaintiff's title as well as possession. Suit for permanent injunction merely proceeds on the consideration of factual position with regard to possession of the plaintiff on the suit property on the date of institution of the suit. Although this was so pleaded by the plaintiff, but the same was denied in specific by the defendant in its written statement. Additionally, it was stated that the disputed piece of land is municipal lane and has been so shown in the Municipal Plan of the city for the year 1959. This being so, it was obligatory on the part of the learned trial Judge to raise specific issue whether the plaintiff is in exclusive possession of the disputed property on the date of institution of the suit.

This Court has gone through the issues raised by the learned trial Judge. Issues No. 1 and 2 are about title of the plaintiff and his predecessor. Issue No. 3 is about purchase by the plaintiff's predecessor in the year 1904. Issue No. 4 does not deal with the factual position about possession of plaintiff on the date of the suit. Other issues also are not in respect of plaintiff's possession on the suit land on the date of institution of the suit. Thus, it is clear that there was no issue about requiring the trial Court to decide the factual position of possession of plaintiff on the suit property on the date of institution of the suit. Without raising such an issue, the suit instituted by the plaintiff for perpetual injunction on the basis of his possession cannot be legally decided and the judgment of Courts below granting decree for perpetual injunction in the absence of such issue stand vitiated.

Chapter 8 of the Specific Relief Act, 1963 (hereinafter referred to as the Act, for brevity) provides for grant of perpetual injunction and mandatory injunction.

> "Proviso to Section 34 of the Act prohibits a Court from making any declaration where the plaintiff if able to seek further relief than merely declaration of title omits to do so. No such proviso is found in Chapter 8 which provides for perpetual injunction. Section 41 of the said Act lays down that when an injunction cannot be granted. This section does not prohibit civil Court granting decree for perpetual injunction in the absence of the relief regarding declaration of title. This Court in the case of *Ramkaran v. Pyaribai & others, 1997 RN 38* has observed that if the plaintiff's title to the land in question is challenged seriously right from the beginning, the plaintiff in such a circumstance ought to have brought a suit not only for injunction simplicitor, but also for declaration of his title to the land. Since the matter is being remitted back to trial Court in view of answer to substantial question of law No. 1, if so advised, the plaintiff may seek the relief of declaration of his title by way of amendment and the learned trial Judge may grant such an opportunity to the plaintiff in the facts and circumstances of the case.

In the result, the appeal is allowed in part. Judgment and decree of Courts below are hereby set aside. Matter is remitted back to the learned trial Judge to re-decide the suit, in aforesaid manner. Trial Court is further directed to raise specific issue about possession on the suit property on the date of institution of the suit, and further, to re-decide the suit afresh, after granting sufficient opportunity for evidence to both the parties.

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15. CIVIL PROCEDURE CODE, 1908 – Order 17 Rules 1 and 3 Adjournment – Cap of three adjournments provided in Proviso to Rule 1 of Order 17 – Although not mandatory, ordinarily should be maintained – It may be relaxed only in suitable case on "justifiable cause" i.e. cause which is not only "sufficient cause" as contemplated in Rule 1 but one which makes request for further adjournment unavoidable and a sort of compelling necessity – Legal position explained.

Shiv Cotex v. Tirgun Auto Plast Private Limited and others
Judgment dated 30.08.2011 passed by the Supreme Court in Civil Appeal No. 7532 of 2011, reported in (2011) 9 SCC 678

Held:

The High Court observed that the stakes in the suit being very high, the

plaintiff should not be non-suited on the basis of no evidence. But, who is to be blamed for this lapse? It is the plaintiff alone. As a matter of fact, the trial court had given more than sufficient opportunity to the plaintiff to produce evidence in support of its case. As noticed above, after the issues were framed on 19.07.2006 on three occasions, the trial court fixed the matter for the plaintiff's evidence but on none of these dates any evidence was let in by it. What should the court do in such circumstances? Is the court obliged to give adjournment after adjournment merely because the stakes are high in the dispute? Should the court be a silent spectator and leave control of the case to a party to the case who has decided not to take the case forward?

It is sad, but true, that the litigants seek – and the courts grant – adjournments at the drop of the hat. In the cases where the judges are little pro-active and refuse to accede to the requests of unnecessary adjournments, the litigants deploy all sorts of methods in protracting the litigation. It is not surprising that civil disputes drag on and on. The misplaced sympathy and indulgence by the appellate and revisional courts compound the malady further. The case in hand is a case of such misplaced sympathy. It is high time that courts become sensitive to delays in justice delivery system and realize that adjournments do dent the efficacy of judicial process and if this menace is not controlled adequately, the litigant public may lose faith in the system sooner than later. The courts, particularly trial courts, must ensure that on every date of hearing, effective progress takes place in the suit.

No litigant has a right to abuse the procedure provided in the CPC. Adjournments have grown like cancer corroding the entire body of justice delivery system. It is true that cap on adjournments to a party during the hearing of the suit provided in proviso to Order XVII Rule 1 CPC is not mandatory and in a suitable case, on justifiable cause, the court may grant more than three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to Order XVII Rule 1 CPC should be maintained. When we say 'justifiable cause' what we mean to say is, a cause which is not only 'sufficient cause' as contemplated in sub-rule (1) of Order XVII CPC but a cause which makes the request for adjournment by a party during the hearing of the suit beyond three adjournments unavoidable and sort of a compelling necessity like sudden illness of the litigant or the witness or the lawyer; death in the family of any one of them; natural calamity like floods, earthquake, etc. in the area where any of these persons reside; an accident involving the litigant or the witness or the lawyer on way to the court and such like cause. The list is only illustrative and not exhaustive.

However, the absence of the lawyer or his non-availability because of professional work in other court or elsewhere or on the ground of strike call or the change of a lawyer or the continuous illness of the lawyer (the party whom he represents must then make alternative arrangement well in advance) or similar

grounds will not justify more than three adjournments to a party during the hearing of the suit. The past conduct of a party in the conduct of the proceedings is an important circumstance which the courts must keep in view whenever a request for adjournment is made. A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit – whether plaintiff or defendant – must cooperate with the court in ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril.

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16. CONSTITUTION OF INDIA – Article 226
COURT FEES ACT, 1870 – Section 17
Payment of court fees on petition – Where more than one person have joined in one petition and are seeking relief on distinct and separate causes of action, then each of the petitioner is required to make payment of separate court fees.

Rakesh Gautam & ors. v. State of M.P. & ors.
Judgment dated 27.07.2011, passed by the High Court of M.P. in W. P. No. 10755 of 2009, reported in I.L.R. (2011) M.P. 2734 (DB)

Held:

Cause of action may be common if the liability or the relief sought is to be granted individually and separately in that event each petitioner's combining together in one petition would be liable to pay separate court-fees, because each petitioner has his own independent cause of action and, therefore, though they have filed the petition together but that is a separate and independent petition. Separate court-fees can be demanded from each of the petitioners only when it appears to the Court that causes of action are distinct and separate. For instance, ten persons are transferred by a common order and they file a joint petition challenging the order of transfer, the relief claimed by them is based on separate causes of action and, therefore, in such a case they are liable to pay separate set of court-fees.

For the aforementioned reasons, we are of the considered opinion that in a joint petition where each of the petitioner has his separate cause of action which may or may not arise out of the same act or transaction, each of the petitioner is required to pay separate court-fees on the principle underlying Section 17 of the Act. Thus, our answer to the reference is where more than one person have joined in one petition and are seeking relief on distinct and separate causes of action, then each of the petitioner is required to make payment of separate court-fees.

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17. **CONSUMER PROTECTION ACT, 1986 – Sections 12, 18, 22 and 28-A Representation by authorised agent before the Consumer Fora – Authorised agents, who are not Advocates, may file complaint and represent aggrieved consumers before the Consumer Fora – Legal position explained.**

C. Venkatachalam v. Ajitkumar C. Shah and others
Judgment dated 29.08.2011 passed by the Supreme Court in Civil Appeal No. 868 of 2003, reported in (2011) 9 SCC 707 (3 Judge Bench)

Held:

The Consumer Protection Act, 1986 was enacted with the object and intention of speedy disposal of consumer disputes at a reasonable cost, which is otherwise not possible in ordinary judicial/court system.

The agent has been defined both in the Consumer Protection Rules, 1987 and under the Maharashtra Consumer Protection Rules, 2000. The agents have been permitted to appear before the consumer forums.

The legislature in its wisdom has granted permission to the authorized agents because most of the cases before the Consumer Forums are small cases of relatively poor people where legal intricacies are not involved and great legal skills are not required, which may be handled by the authorized agents. The other reason is that a large number of litigants may not be able to afford heavy professional fees of trained advocates, therefore, authorized agents have been permitted.

It is the bounden duty and obligation of the Court to carefully discern the legislative intention and articulate the same. In the instant case we are not really called upon to discern legislative intention because there is specific rule defining the agents and the provisions of permitting them to appear before the Consumer Forums. The agents have been permitted to appear to accomplish the main object of the act of disposal of consumers' complaints expeditiously with no costs or small costs.

In our considered view the High Court was fully justified in observing that the authorised agents do not practise law when they are permitted to appear before the District Forums and the State Commissions.

In the impugned judgment the High Court aptly observed that many statutes, such as, Sales Tax, Income Tax and Competition Act also permit non-advocates to represent the parties before the authorities and those non-advocates cannot be said to practise law. On the same analogy those non-advocates who appear before Consumer fora also cannot be said to practise law. We approve the view taken by the High Court in the impugned judgment.

The legislature has given an option to the parties before the Consumer Forums to either personally appear or be represented by an 'authorized agent' or by an advocate, then the court would not be justified in taking away that option or interpreting the statute differently.

The functioning, conduct and behaviour of authorized agents can always be regulated by the Consumer Forums. Advocates are entitled as of right to practise before Consumer Fora but this privilege cannot be claimed as a matter of right by anyone else.

When the legislature has permitted authorized agents to appear on behalf of the complainant, then the courts cannot compel the consumer to engage the services of an advocate.

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18. CONSUMER PROTECTION ACT, 1986 – Sections 22 and 22-A Jurisdiction and powers of Consumer Forum – Tribunals are creature of the Statute and derive their power from the express provisions of the Statute – The District Consumer Forum and the State Commission has not been given any powers to set aside ex parte orders and the power of review – Powers which have not been given expressly by the Statute cannot be exercised. [*Jyotsna Arvindkumar Shah v. Bombay Hospital Trust, (1999) 4 SCC 325* approved and *New India Assurance Co. Ltd. v. R. Srinivasan, (2000) 3 SCC 242* overruled.]

Rajeev Hitendra Pathak and others v. Achyut Kashinath Karekar and another

Judgment dated 19.08.2011 passed by the Supreme Court in Civil Appeal No. 4307 of 2007, reported in (2011) 9 SCC 541 (3-Judge Bench)

Held:

According to the counsel for the appellants, in *New India Assurance Co. Ltd. v. R. Srinivasan, (2000) 3 SCC 242*, this Court did not notice the earlier decision in *Jyotsana Arvindkumar Shah v. Bombay Hospital Trust, (1999) 4 SCC 325* case. He submitted that the Tribunals constituted under the Consumer Protection Act, 1986 exercise only such powers as are expressly conferred by the provisions of the said Act and Rules framed thereunder. Since no power of review and recall was conferred on the District Forums and the State Commissions, they can exercise no such power.

The counter affidavit was filed by the respondents stating that the Commission was justified in setting aside the ex parte order and restoring the respondents' complaint. The counter affidavit also states that the respondents cannot be deprived of their right without contest on the basis of trivial technicalities.

The respondents relied upon the judgment of this Court in *New India Assurance Co. Ltd.* (supra) in which this Court held that the Consumer Courts have inherent powers to restore the complaints dismissed for default. It is also stated in the counter affidavit that due to old age, respondent no.1 lost track of the case and therefore, the State Commission was justified in setting aside the ex parte order in order to ensure that justice is done to the parties.

On careful analysis of the provisions of the Consumer Protection Act, 1986 it is abundantly clear that the Tribunals are creatures of the Statute and derive

their power from the express provisions of the Statute. The District Forums and the State Commissions have not been given any power to set aside ex parte orders and power of review and the powers which have not been expressly given by the Statute cannot be exercised.

The legislature chose to give the National Commission power to review its ex parte orders. Before amendment, against dismissal of any case by the Commission, the consumer had to rush to this Court. The amendment in Section 22 and introduction of Section 22-A were done for the convenience of the consumers. We have carefully ascertained the legislative intention and interpreted the law accordingly.

In our considered opinion, the decision in *Jyotsana's case* (supra) laid down the correct law and the view taken in the later decision of this Court in *New India Assurance Co. Ltd.* (supra) is untenable and cannot be sustained.

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19. CONTRACT ACT, 1872 – Section 25

Consideration – Proof of – Consideration for the purpose of mortgage – May be even for the money advanced in past – Past liability on the mortgagor would serve the purpose of consideration, which is permissible under law.

Rama Sharma (Sushri) v. Tajbi @ Badbi (Smt.) & ors.

Judgment dated 24.08.2011, passed by the High Court of M.P. in F.A. No. 301 of 2002 reported in I.L.R. (2011) M.P. 2830

Held:

On perusal of the registered mortgage deed marked as Ex. P-1, it is observed that it contains a recital that Abdul Wajid Khan had received loan in the past from the plaintiff. It is also recited that Abdul Wajid Khan purchased the property under mortgage from his brother for which he needed loan to meet the expenses of registering the same. On account of non-payment, the earlier loan accumulated to the tune of ₹ 52,400 which has been acknowledged and accepted to be subsisting at the time of execution of Ex. P-1. Thus, the learned trial Judge has committed grave error in dismissing the suit merely on the basis that payment of money in cash was not made on the date of execution of the registered mortgage deed Ex. P-1. According to Section 58 of the Transfer of Property Act, 1882, a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

Keeping in view the aforesaid definition, it may be conveniently observed that the past liability on the mortgagor would serve the purpose of consideration, which is permissible under law. Thus, acceptance of Abdul Wajid Khan about the past liability of ₹ 52,400 on account of earlier loan is a consideration for the purpose of mortgage which has been ignored by the learned trial Judge. Case

of the defendant/respondents is merely that no payment of money was made by the plaintiff to Abdul Wajid Khan at the time of execution of Ex. P-1. Consideration for the purpose of mortgage as per the definition may be even the money advanced in past. The defendants did not lead any evidence at all to refute the past liability of ₹ 52,400. In the absence of any evidence in rebuttal, case of the plaintiff to the tune of ₹ 52,400 is found established and the plaintiff in turn is found entitled to recover the said amount from the mortgaged property described in Ex. P-1.

It may be further seen that the plaintiff had promised to pay a further sum of ₹ 35,600 to the defendent as mentioned in Ex.P-1. Out of the sum ₹ 30,000 is stated to have been paid to Abdul Wajid Khan by bank cheque. Plaintiff in her statement stated that in addition to the liability of ₹ 52,400, the plaintiff had given cheque to Abdul Wajid Khan for a sum of ₹ 30,000. ₹ 5,600 is also stated to have been advanced by the plaintiff in cash. However, the plaintiff has not summoned the bank record to prove that any such cheque was given by her to the defendant - Abdul Wajid Khan and that any such cheque was encashed by the mortgagee. Similarly, there is no cogent proof to reverse the finding of the trial Court that the plaintiff had failed to prove the advancement of ₹ 5,600 to Abdul Wajid Khan. Since, no evidence in rebuttal was adduced, adverse inference to the extent of the liability of ₹ 52,400 may be drawn against the defendants. However, learned trial Judge without considering the admitted past liability of ₹ 52,400 has dismissed the suit in its entirety, which is not sustainable in law. Accordingly, it is held that the plaintiff/appellant is entitled to recover a sum of ₹ 52,400 from the defendants. In case of failure of payment by them, it may be recovered by sale/auction of the mortgaged property described in registered mortgage deed marked as Ex. P-1. Since, the defendants are not proved to have inherited any other movable or immovable property (except the mortgaged property) from Abdul Wajid Khan, it is made clear that no recovery shall be made from the personal property belonging to defendants/respondents.

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20. CONTRACT ACT, 1872 – Section 25
LIMITATION ACT, 1963 – Section 18 and Articles 36 and 37

(i) Document executed after expiry of limitation – Loan amount taken against 12 *Hundis* between 03.10.1992 to 25.02.1993 – On 10.07.1999 the lonee executed a document acknowledging the non-payment of *Hundis* which comes to ₹ 62,116 and also agreed to pay the amount of debt by clearing payment of each *Hundi* on monthly basis – Held, though the debt was barred by law of limitation on the date when the document was executed, however, by this document appellant promised to pay the amount on account of debt which is a fresh contract, therefore, the Court below committed no error in decreeing the suit.

(ii) Limitation under – Document containing the terms of repayment in monthly installments executed on 10.07.1999 – Under the terms

of document, the amount was required to be repaid in twelve months – Held, since the amount was repayable in installments and the first installment was due on or before 10.08.1999 and last installment was due on 10.07.2000 and the suit was filed on 26.07.2002, therefore, the suit filed by the respondent was in time – Appeal dismissed.

Sardar Surendra Singh Bedi v. Dhannalal

Judgment dated 03.08.2011, passed by the High Court of M.P. in F.A. No. 215 of 2005 reported in I.L.R. (2011) M.P. 2824

Held:

In the present case by the document Ex. P/1 dated 10.07.1999 appellant agreed to pay the amount of debt for which the Hundis were executed by the appellant from time to time between 03.01.1992 to 25.02.1993 by clearing payment of each of the Hundi on monthly basis. Appellant also agreed that appellant undertook to clear the account in one stroke if possible. In the said letter appellant also stated that after payment of the amount reasonable amount of interest shall be paid as agreed mutually. From perusal of the aforesaid document Ex. P/1, it is evident that the debt was barred by law of limitation on the date when the document Ex. P/1 was executed, however, by this document appellant promised to pay the amount on account of debt which is a fresh contract, therefore, the learned Court below committed no error in decreeing the suit.

From perusal of the record, it is evident that Ex. P/1 is dated 10.07.1999 which contains 12 transactions which took place between the parties between 03.10.1992 to 25.02.1993. Suit was filed by the respondent on 26.10.2002 which is not within 3 years from the date of execution of document dated 10.07.1999. Since the document Ex. P/1 contains the terms of repayment in monthly installments, therefore, the amount was required to be repaid in twelve months. Articles 36 and 37 of Limitation Act deal with the law of limitation relating to money suit for recovery of money where the loan has to be repaid in installments.

In the matter of *Bhagwant Rao v. Mohammad Khan, 1977 JLJ 751,* wherein the money was repayable in installments, this Court has held that plaintiff has no right to bring the suit for the whole amount before expiry of 10 months from the date of demand, therefore, the cause of action accrued by the plaintiff after expiry of 10 months. In the matter of *United Law Publisher v. Mohammad Hussain, 1986 II MPWN 146* this Court has held that right to sue accrues after expiry of full period of installments.

Since the amount was repayable in installment and the first installment was due on or before 10.08.1999 and last installment was due on 10.07.2000 and the suit was filed on 26.07.2002, therefore, the suit filed by the respondent was in time. In view of this appeal filed by the appellant deserves to be dismissed and is hereby dismissed.

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21. **CONTRACT ACT, 1872 – Sections 62 and 63**
EVIDENCE ACT, 1872 – Section 115
Estoppel – The doctrine of estoppel is applicable to do equity – Where the transaction stood concluded between the parties after extensive and exhaustive bilateral deliberations with a clear intention to bring about a quietus to the dispute, then it is not open to either of the parties to lay any claim/demand against the other party.

Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Limited
Judgment dated 13.09.2011 passed by the Supreme Court in Arbitration Petition No. 7 of 2009, reported in (2011) 10 SCC 420

Held:

In case, final settlement has been reached amicably between the parties even by making certain adjustments and without any misrepresentation or fraud or coercion, then, acceptance of money as full and final settlement/issuance of receipt or vouchers etc. would conclude the controversy and it is not open to either of the parties to lay any claim/demand against the other party.

In *R. N. Gosain v. Yashpal Dhir, AIR 1993 SC 352*, this Court has observed as under:

> "Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that 'a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage'."

A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. [Vide: *Nagubai Ammal v. B. Shama Rao, AIR 1956 SC 593; C.I.T. v. MR. P. Firm Maur, AIR 1965 SC 1216; Maharashtra SRTC v. Balwant Regular Motor Service, AIR 1969 SC 329; P.R. Deshpande v. Maruti Balaram Haibatti, AIR 1998 SC 2979; Babu Ram v. Indrapal Singh, AIR 1998 SC 3021; NTPC Ltd. v. Reshmi Constructions, Builders & Contractors, AIR 2004 SC 1330; Ramesh Chandra Sankla v. Vikram Cement, AIR 2009 SC 713* and *Pradeep Oil Corpn. v. MCD, (2011) 5 SCC 270*].

Thus, it is evident that the doctrine of election is based on the rule of estoppel – the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable

estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

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*22. **COURT FEES ACT, 1870 – Section 16**
CIVIL PROCEDURE CODE, 1908 – Section 89 and Order 23 Rule 3
Refund of court fees – An application for compromise was filed under Order 23 Rule 3 of C.P.C. with a request to place the matter before the Lok Adalat – Instead of placing the matter before the Lok Adalat, it was decided by the regular court with direction that parties shall bear their own costs – Held, where a matter is settled under any mode prescribed under Section 89 of C.P.C., the plaintiff is entitled for refund of court fees as per Section 16 of the Court Fees Act – Since the matter was settled in compromise and the suit was dismissed as per compromise, therefore, there was no justification on the part of the Court below in not directing for refund of court fees – Petition allowed.

Vipin Trivedi and another v. Mohanlal Sharma
Judgment dated 23.05.2011, passed by the High Court of M.P. in Civil Revision No. 125 of 2011, reported in 2011 (5) MPHT 102

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23. **CRIMINAL PROCEDURE CODE, 1973 – Sections 70, 71 and 476**
(i) **Whether the Courts can issue a 'non-bailable' warrant in absence of such terminology in the CrPC as well as in Form 2 of its Second Schedule? Held, Yes.**
(ii) **How to check possibility of misuse of an arrest warrant? Hon'ble the Supreme Court issued guidelines to be adopted in all cases where non-bailable warrants are issued by the Courts.**

Raghuvansh Dewanchand Bhasin v. State of Maharashtra & Anr.
Judgment dated 09.09.2011 passed by the Supreme Court in Criminal Appeal No. 1758 of 2011, reported in AIR 2011 SC 3393

Held:

It is true that neither Section 70 nor Section 71, appearing in Chapter VI of the Code, enumerating the processes to compel appearance, as also Form 2 uses the expression like "non-bailable". Section 70 merely speaks of form of warrant of arrest, and ordains that it will remain in force until it is cancelled. Similarly Section 71 talks of discretionary power of Court to specify about the security to be taken in case the person is to be released on his arrest pursuant to the execution of the warrant issued under Section 70 of the Code. Sub-section (2) of Section 71 of the Code specifies the endorsements which can be made on a warrant. Nevertheless, we feel that the endorsement of the expression "non-bailable" on a warrant is to facilitate the executing authority as well as the

person against whom the warrant is sought to be executed to make them aware as to the nature of the warrant that has been issued. In our view, merely because Form No.2, issued under Section 476 of the Code, and set forth in the Second schedule, nowhere uses the expression bailable or non-bailable warrant, that does not prohibit the Courts from using the said word or expression while issuing the warrant or even to make endorsement to that effect on the warrant so issued. Any endorsement/variation, which is made on such warrant for the benefit of the person against whom the warrant is issued or the persons who are required to execute the warrant, would not render the warrant to be bad in law. What is material is that there is a power vested in the Court to issue a warrant and that power is to be exercised judiciously depending upon the facts and circumstances of each case. Being so, merely because the warrant uses the expression like "non- bailable" and that such terminology is not to be found in either Section 70 or Section 71 of the Code that by itself cannot render the warrant bad in law.

(ii) We feel that in order to prevent such a paradoxical situation, we are faced with in the instant case, and to check or obviate the possibility of misuse of an arrest warrant, in addition to the statutory and constitutional requirements it would be appropriate to issue the following guidelines to be adopted in all cases where non-bailable warrants are issued by the Courts:-

(a) All the High Court shall ensure that the Subordinate Courts use printed and machine numbered Form No.2 for issuing warrant of arrest and each such form is duly accounted for;

(b) Before authenticating, the court must ensure that complete particulars of the case are mentioned on the warrant;

(c) The presiding Judge of the court (or responsible officer specially authorized for the purpose in case of High Courts) issuing the warrant should put his full and legible signatures on the process, also ensuring that Court seal bearing complete particulars of the Court is prominently endorsed thereon;

(d) The Court must ensure that warrant is directed to a particular police officer (or authority) and, unless intended to be open-ended, it must be returnable whether executed or unexecuted, on or before the date specified therein;

(e) Every Court must maintain a register (in the format given below), in which each warrant of arrest issued must be entered chronologically and the serial number of such entry reflected on the top right hand of the process;

(f) No warrant of arrest shall be issued without being entered in the register mentioned above and the concerned court shall periodically check/monitor the same to confirm that every such process is always returned to the court with due report and placed on the record of the concerned case;

(g) A register similar to the one in clause (e) supra shall be maintained at the concerned police station. The Station House Officer of the concerned Police Station shall ensure that each warrant of arrest issued by the Court, when received is duly entered in the said register and is formally entrusted to a responsible officer for execution;

(h) Ordinarily, the Courts should not give a long time for return or execution of warrants, as experience has shown that warrants are prone to misuse if they remain in control of executing agencies for long;

(i) On the date fixed for the return of the warrant, the Court must insist upon a compliance report on the action taken thereon by the Station House Officer of the concerned Police Station or the Officer In-charge of the concerned agency;

(j) The report on such warrants must be clear, cogent and legible and duly forwarded by a superior police officer, so as to facilitate fixing of responsibility in case of misuse;

(k) In the event of warrant for execution beyond jurisdiction of the Court issuing it, procedure laid down in Sections 78 and 79 of the Code must be strictly and scrupulously followed; and

(l) In the event of cancellation of the arrest warrant by the Court, the order cancelling warrant shall be recorded in the case file and the register maintained. A copy thereof shall be sent to the concerned authority, requiring the process to be returned unexecuted forthwith. The date of receipt of the unexecuted warrant will be entered in the aforesaid registers. A copy of such order shall also be supplied to the accused.

Format of the Register

S. No.	The number printed on the form used	Case title and particulars	Name & particulars of the person against whom warrant of arrest is issued (accused/ witness)	The officer/ person to whom directed	Date of judicial order directing Arrest Warrant to be issued	Date of issue	Date of concellention if any	Due date of return	Report returned on	The action taken as reported	Remarks

We expect and hope that all the High Courts will issue appropriate directions in this behalf to the Subordinate Courts, which shall endeavour to put into practice the aforesaid directions at the earliest, preferably within six months from today.

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*24. **CRIMINAL PROCEDURE CODE, 1973 – Section 154**
Whether cell-phonic information may amount to First Information Report? Held, Yes – If the information received by a police officer is not vague or cryptic but contained precise particulars of the offending acts by accused, it could be treated as First Information Report.

In Reference v. Maganlal
Judgment dated 12.09.2011, passed by the High Court of M.P. in Cri. Re. No. 1 of 2011, reported in 2011 (5) MPHT 364 (DB)

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25. **CRIMINAL PROCEDURE CODE, 1973 – Sections 154, 157 and 159**
M.P. POLICE REGULATIONS – Regulation 710
Sending copy of FIR – Effect of omission or delay – Inspite of the fact that any lapses on part of IO such as non-sending of FIR to Magistrate, would not confer any benefit on accused – Prosecution case may be seen with certain suspicion when FIR has not been sent, when examined with other contemporaneous circumstances involved in the case.
Regulation 710 of M.P. Police Regulations cannot override the statutory requirements under Section 157 (1) Cr.P.C. which provide for sending the copy of the FIR to the ilaqa Magistrate.

Shivlal and another v. State of Chhattisgarh
Judgment dated 19.09.2011 passed by the Supreme Court in Criminal Appeal No. 610 of 2007, reported in (2011) 9 SCC 561

Held:

This Court in *Bhajan Singh v. State of Haryana, (2011) 7 SCC 421,* has elaborately dealt with the issue of sending the copy of the FIR to the Illaqa Magistrate with delay and after placing reliance upon a large number of judgments including *Shiv Ram v. State of U.P., AIR 1998 SC 49;* and *Arun Kumar Sharma v. State of Bihar, (2010) 1 SCC 108,* came to the conclusion that Cr.P.C. provides for internal and external checks: one of them being the receipt of a copy of the FIR by the Magistrate concerned. It serves the purpose that the FIR be not ante-timed or ante-dated. The Magistrate must be immediately informed of every serious offence so that he may be in a position to act under Section 159 Cr.P.C., if so required. The object of the statutory provision is to keep the Magistrate informed of the investigation so as to enable him to control investigation and, if necessary, to give appropriate direction. However, it is not that as if every delay in sending the report to the Magistrate would necessarily lead to the inference that the FIR has not been lodged at the time stated or has been ante-timed or ante-dated or investigation is not fair and forthright. In a given case, there may be an explanation for delay. An unexplained inordinate delay in sending the copy of the FIR to Illaqa Magistrate may affect the prosecution case adversely. However, such an adverse inference may be drawn on the basis of attending circumstances involved in a case.

In the instant case, copy of the FIR was not sent to the Magistrate at all as required under Section 157 (1) Cr.P.C. In such a case, in the absence of any explanation furnished by the prosecution to that effect, would definitely cast shadow on the case of the prosecution. This Court dealt with the issue in *State of M.P. v. Kalyan Singh, (2011) 9 SCC 569*, wherein this Court was informed by the Standing Counsel that in Madhya Pradesh, police is not required to send the copy of the FIR to the Illaqa Magistrate, but it is required to be sent to the District Magistrate. It was so required by the provisions contained in Regulation 710 of the Madhya Pradesh Police Regulations. This Court held that Regulation 710 cannot override the statutory requirements under Section 157(1) Cr.P.C. which provide for sending the copy of the FIR to the Illaqa Magistrate.

The instant appeal has come from Chhattisgarh which has been carved out from the State of Madhya Pradesh. Learned Standing counsel for the State, is not in a position to throw any light on this issue at all. Thus, in such a fact-situation, we can simply hold that in spite of the fact that any lapses on the part of the I.O., would not confer any benefit on the accused, the case of the prosecution may be seen with certain suspicion when examined with other contemporaneous circumstances involved in the case.

In *State v. N. Rajamanickam, (2008) 13 SCC 303,* this Court dealt with a similar case wherein a lot of lapses had been noted on the part of the prosecution. In the said case, originally 16 persons were named in the chargesheet out of which one had died, one had absconded and the rest 14 persons faced trial. The Trial Court convicted only six out of them. Those six persons preferred the criminal appeal and the High Court found that there were certain vital factors which rendered the prosecution version improbable. One of the factors noted was delay in dispatch and receipt of the FIR and connected documents in the Court of Magistrate. The factional village rivalry was shown to be the cause of concern therein also. The High Court found that evidence of some of the prosecution witnesses lacked credibility and credence and, thus, all the persons were acquitted. This Court dismissed the appeal of the State observing as under:

> "Delay in receipt of the FIR and the connected documents in all cases cannot be a factor corroding the credibility of the prosecution version. But that is not the only factor which weighed with the High Court. Added to that, the High Court has noted the artificiality of the evidence of PW 1 and the non-explanation of injuries on the accused persons which were very serious in nature. The combined effect of these factors certainly deserved consideration and, according to us, the High Court has rightly emphasised on them to hold that the prosecution has not been able to establish the accusations. Singularly, the factors may not have an adverse effect on the prosecution version. But when a combined effect of the factors noted by the High Court are

taken into consideration, the inevitable conclusion is that these are cases where no interference is called for."

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26. CRIMINAL PROCEDURE CODE, 1973 – Section 166 (2) proviso (a) (i) CONSTITUTION OF INDIA – Article 22

(i) Default bail – Relevant date of counting 90 days for filing chargesheet is the date of first order of remand and not date of arrest.

Default bail is not an absolute or indefeasible right – It would be lost if chargesheet is filed and would not survive after filing chargesheet if such right has already not been availed of.

(ii) An accused may be entitled to be set at liberty if it is shown that the accused at that point of time is in illegal detention by the police–Such right is not available after the Magistrate remands the accused to custody – Right under Article 22 (2) is available only against illegal detention by the police – It is not available against custody in jail of a person pursuant to a judicial order – Article 22 (2) does not operate against the judicial order.

Pragyna Singh Thakur v. State of Maharashtra

Judgment dated 23.09.2011 passed by the Supreme Court in Criminal Appeal No. 1845 of 2011, reported in (2011) 10 SCC 445

Held:

As far as Section 167(2) of the Criminal Procedure Code is concerned this Court is of the firm opinion that no case for grant of bail has been made out under the said provision as charge sheet was filed before the expiry of 90 days from the date of first remand. In any event, right in this regard of default bail is lost once charge sheet is filed. This Court finds that there is no violation of Article 22(2) of the Constitution, because on being arrested on 23.10.2008, the appellant was produced before the Chief Judicial Magistrate, Nasik on 24.10.2008 and subsequent detention in custody is pursuant to order of remand by the Court, which orders are not being challenged, apart from the fact that Article 22(2) is not available against a Court i.e. detention pursuant to an order passed by the Court.

The appellant has not been able to establish that she was arrested on 10.10.2008. Both the Courts below have concurrently so held which is well founded and does not call for any interference by this Court.

Though this Court has come to the conclusion that the appellant has not been able to establish that she was arrested on 10.10.2008, even if it is assumed for the sake of argument that the appellant was arrested on 10.10.2008 claimed by her and not on 23.10.2008 as stated by the prosecution, she is not entitled to grant of default bail because this Court finds that the charge sheet was filed within 90 days from the date of first order of remand i.e. 24.10.2008. In other

words, the relevant date of counting 90 days for filing charge sheet is the date of first order of the remand and not the date of arrest. This proposition has been clearly stated in the *Chaganti Satyanarayana v. State of A.P., (1986) 3 SCC 141.*

If one looks at the said judgment one finds that the facts of the said case are set out in paragraphs 4 and 5 of the judgment. In paragraph 20 of the reported decision it has been clearly laid down as a proposition of law that 90 days will begin to run only from the date of order of remand. This is also evident if one reads last five lines of Para 24 of the reported decision. *Chaganti Satyanarayana* (supra) has been subsequently followed in the following four decisions of this Court :

(1) *CBI v. Anupam J. Kulkarni, (1992) 3 SCC 141,* para 13, placitum c, where it has been authoritatively laid down that :

"The period of 90 days or 60 days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police".

(2) *State v. Mohd. Ashraft Bhat, (1996) 1 SCC 432 SCC* para 5;

(3) *State of Maharashtra v. Bharati Chandmal Varma, (2002) 2 SCC 121, SCC* para 12; and

(4) *State of Madhya Pradesh v. Rustom, 1995 Supp (3) SCC 221, SCC* para 3.

Section 167(2) is one, dealing with the power of the learned Judicial Magistrate to remand an accused to custody. The 90 days' limitation is as such one relating to the power of the learned Magistrate. In other words the learned Magistrate cannot remand an accused to custody for a period of more than 90 days in total. Accordingly, 90 days would start running from the date of first remand. It is not in dispute in this case that the charge sheet was filed within 90 days from the first order of remand. Therefore, the appellant is not entitled to default bail.

There is yet another aspect of the matter. The right under Section 167(2) of Cr.P.C. to be released on bail on default if charge sheet is not filed within 90 days from the date of first remand is not an absolute or indefeasible right. The said right would be lost if charge sheet is filed and would not survive after the filing of the charge sheet. In other words, even if an application for bail is filed on the ground that charge sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge sheet is filed, the said right to be released on bail would be lost. After the filing of the charge sheet, if the accused is to be released on bail, it can be only on merits. This is quite evident from Constitution Bench decision of this Court in *Sanjay Dutt (2) v. State, (1994) 5 SCC 410* [Paras 48 and 53(2)(b)]. The reasoning is to be found in paras 33 to 49.

This principle has been reiterated in the following decisions of this Court :

(1) *State of M.P. v. Rustam* (supra)

(2) *Bipin Shantilal Panchal v. State of Gujarat, (1996) 1 SCC 718, SCC* para 4. It may be mentioned that this judgment was delivered by a Three Judge Bench of this Court;

(3) *Dinesh Dalmia v. CBI, (2007) 8 SCC 770* SCC para 39, and

(4) *Mustaq Ahmed Mohammed Isak v. State of Maharashtra, (2009) 7 SCC 480 SCC para 12*

In *Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453,* a three-Judge Bench of this Court considered the meaning of the expression "if already not availed of" used by this court in the decision rendered in case of *Sanjay Dutt* in para 48 and held that if an application for bail is filed before the charge sheet is filed, the accused could be said to have availed of his right under Section 167(2) even though the Court has not considered the said application and granted him bail under Section 167(2) Cr.P.C. This is quite evident if one refers to para 13 of the reported decision as well as conclusion of the Court at p. 747.

It is well settled that when an application for default bail is filed, the merits of the matter are not to be gone into. This is quite evident from the principle laid down in *Union of India v. Thamisharasi and others, (1995) 4 SCC 190,* SCC para 10, placita c-d.

From the discussion made above, it is quite clear that even if an application for bail is filed on the ground that charge sheet was not filed within 90 days, before the consideration of the same and before being released on bail if charge sheet is filed, the said right to be released on bail, can be only on merits.

(ii) In the grounds seeking bail either before the Trial Court or before the High Court, bail was not sought for on the ground of violation of Article 22(2) of the Constitution but it was confined only to the plea that charge sheet was not filed within 90 days and, therefore, this issue cannot be gone into in the S.L.P. more particularly in view of weighty observations made by this Court in para 14 of *Chaganti Satyanarayana* (supra) wherein it is clearly laid down that an enquiry as to exactly when the accused was arrested is neither contemplated nor provided under the Code. Even if it is assumed for the sake of argument that there was any violation by the police by not producing the appellant within 24 hours of arrest, the appellant could seek her liberty only so long as she was in the custody of the police and after she is produced before the Magistrate, and remanded to custody by the learned Magistrate, the appellant cannot seek to be set at liberty on the ground that there had been non-compliance with Article 22(2) or Section 167(2) of the Cr.P.C. by the police.

In *Saptawna v. State of Assam, AIR 1971 SC 813,* this Court has observed as under in paras 2 and 3 of the reported decision :

"2. The learned counsel for the petitioner says that the petitioner is entitled to be released on three grounds : (1) The original date of arrest being 10.1.1968 and the petitioner not having been produced before a Magistrate within 24 hours, the petitioner is entitled to be released; (2) The petitioner having been arrested in one case on 24.1.1968 and he having been discharged from that case, he is entitled to be released; and (3) As the petitioner was not produced for obtaining remand he is entitled to be released.

3. A similar case came before this Court from this very district *V.L. Rohlua v. Commr., (1970) 2 SCC 908* and the first point was answered by a Bench of five Judges thus :

"If the matter had arisen while the petitioner was in the custody of the Armed Forces a question might well have arisen that he was entitled to be released or at least made over to the police. However, that question does not arise now because he is an undertrial prisoner."

It seems to us that even if the petitioner had been under illegal detention between 10.1.1968 to 24.1.1968 though we do not decide this point - the detention became lawful on 24.1.1968 when he was arrested by the Civil Police and produced before the Magistrate on 25.1.1968. He is now an undertrial prisoner and the fact that he was arrested in only one case does not make any difference. The affidavit clearly states that he was also treated to have been arrested in the other cases pending against him."

At the time when the appellant moved for bail she was in judicial custody pursuant to orders of remand passed by the learned CJM/Special Judge. The appellant did not challenge the orders of remand dated 24.10.2008, 03.11.2008, 17.11.2008 and subsequent orders. In the absence of challenge to these orders of remand passed by the competent court, the appellant cannot be set at liberty on the alleged plea that there was violation of Article 22(2) by the police.

The plea that Article 22(2) of the Constitution was violated is based on the averment by the appellant that she was arrested on 10.10.2008 Factually this plea has not been found to be correct. The appellant was in fact arrested only on 23.10.2008. The affidavit filed by the appellant on 17.11.2008, on a careful perusal shows that the appellant was not arrested on 10.10.2008. Prayer in the said application did not ask for being set at liberty at all and only ask for an enquiry. Finding recorded by both the Courts i.e. the Trial Court and the High Court is that the appellant could not make out a case of her arrest on 10.10.2008. Having regard to the totality of the facts and circumstances of the case, this Court is of the opinion that question of violation of Article 22(2) does not arise.

An accused may be entitled to be set at liberty if it is shown that accused at that point of time is in illegal detention by the police, such a right is not available after the Magistrate remands the accused to custody. Right under Article 22(2) is available only against illegal detention by police. It is not available against custody in jail of a person pursuant to a judicial order. Article 22(2) does not operate against the judicial order.

Note : Readers are requested to go through the following two decisions rendered by the three Judge Bench of the Hon'ble Supreme Court in *Md. Iqbal Madar Sheikh v. State of Maharashtra, (1996) 1 SCC 722* and *Uday Mohan Lal Acharya v. State of Maharashtra, (2001) 5 SCC 453* to understand the meaning of "if already not availed of" in context of default bail.

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27. CRIMINAL PROCEDURE CODE, 1973 – Sections 211 and 214
INDIAN PENAL CODE, 1860 – Sections 34, 114 and 149

(i) Framing of charge – Object of – Is to give the accused notice of the matter he is charged with and does not touch jurisdiction – If however, necessary information is conveyed to him in other ways and there is no prejudice, framing of charge is not invalidated.

(ii) Procedural law – Criminal Procedure Code is devised to subserve the ends of justice and not to frustrate them by mere technicalities.

(iii) Sections 34, 114 and 149 of IPC, charge thereunder – These sections provide criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention and the charge is a rolled-up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable.

Santoshi Kumari v. State of Jammu and Kashmir and others
Judgment dated 13.09.2011 passed by the Supreme Court in Criminal Appeal No. 1660 of 2011, reported in (2011) 9 SCC 234

Held :

The provisions relating to framing of charge against the accused before the trial commences, are contained in the Code of Criminal Procedure, 1989 (1933 A.D.) which is applicable to the State of Jammu and Kashmir. The statute requires that every charge framed under the said code should state the offence with which the accused is charged and if the law which creates the offence gives it any specific name, the offence should also be described in the charge by that name only. The statute further requires that the law and section of the law against which the offence is said to have been committed has to be

mentioned in the charge. It is a fundamental principle of criminal law that the accused should be informed with certainty and accuracy the exact nature of the charge brought against him. The object of the statement of particulars to be mentioned in the charge is to enable the accused person to know the substantive charge, he will have to meet and to be ready for it before the evidence is given. The extent of the particulars necessary to be given in the charge depends upon the facts and the circumstances of each case.

It is well settled law that in drawing up a charge, all verbiage should be avoided. However, a charge should be precise in its scope and particular in its details. The charge has to contain such particulars as to the time and place of the alleged offence and the person against whom it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged. One of the requirements of law is that when the nature of the case is such that the particulars mentioned in the charge do not give the accused sufficient notice of the matter with which he is charged, the charge should contain such particulars of the manner in which alleged offence was committed as would be sufficient for that purpose. If A is accused of the murder of B at a given time and place, the charge need not state the manner in which A murdered B.

Like all procedural laws, the Code of Criminal Procedure is devised to subserve the ends of justice and not to frustrate them by mere technicalities. It regards some of its provisions as vital but others not, and a breach of the latter is a curable irregularity unless the accused is prejudiced thereby. It places errors in the charge, or even a total absence of a charge in the curable class. That is why we have provisions like Sections 215 and 464 in the Code of Criminal Procedure, 1973.

The object of the charge is to give the accused notice of the matter he is charged with and does not touch jurisdiction. If, therefore, the necessary information is conveyed to him in other ways and there is no prejudice, the framing of the charge is not invalidated. The essential part of this part of law is not any technical formula of words but the reality, whether the matter was explained to the accused and whether he understood what he was being tried for. Sections 34, 114 and 149 of the IPC provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; and as explained by five Judge Constitution Bench of this Court in *Willie Slavey v. The State of M.P. AIR 1956 SC 116* the charge is a rolled-up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable.

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*28. **CRIMINAL PROCEDURE CODE, 1973 – Section 216**
Alteration of charge – The Court is empowered to alter or add any charge at any stage before the judgment is pronounced – The Section is comprehensive and includes not only the correction of an error in framing the charge but will also include non-framing of a charge – Hence, even though the charges for offences under sections are made at initial stages, the Court has jurisdiction or power to alter that charge and frame a new charge as it has the power to correct the omission.

Kastoorchand v. State of M.P. & Ors.
Judgment dated 04.08.2011, passed by the High Court of M.P. in Cr. Rev. No. 799 of 2010, reported in I.L.R. (2011) M.P. S.N.123

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29. **CRIMINAL PROCEDURE CODE, 1973 – Section 378**
EVIDENCE ACT, 1872 – Sections 114 Illustration (b), 133 and 3
INDIAN PENAL CODE, 1860 – Section 34
(i) **Evidentiary value of approver/accomplice – The appreciation of an approver's evidence has to satisfy a double test – He must be a reliable witness and its evidence must receive sufficient corroboration – Legal position explained.**
(ii) **Power of Appellate Court – In appeal against acquittal, Court is fully competent to re-appreciate, reconsider and review the evidence and take its own decision – But if two reasonable views are possible on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal recorded by the Trial Court.**

Mrinal Das and Ors. v. State of Tripura
Judgment dated 05.09.2011 passed by the Supreme Court in Criminal Appeal No. 1994 of 2009, reported in AIR 2011 SC 3753

Held:

Though a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an approver, yet the universal practice is not to convict upon the testimony of an accomplice unless it is corroborated in material particulars. The evidence of an approver does not differ from the evidence of any other witness save in one particular aspect, namely, that the evidence of an accomplice is regarded *ab initio* as open to grave suspicion.

If the suspicion which attaches to the evidence of an accomplice be not removed, that evidence should not be acted upon unless corroborated in some material particulars; but if the suspicion attaching to the accomplice's evidence be removed, then that evidence may be acted upon even though uncorroborated, and the guilt of the accused may be established upon the evidence alone.

In order to understand the correct meaning and application of this term, it is desirable to mention Section 133 of the Indian Evidence Act, 1872 along with Illustration (b) to Section 114 which read as under:

> "133. Accomplice.- An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

Illustration (b) to Section 114

> "(b) The Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars."

Dealing with the scope and ambit of the above-noted two provisions, this Court, in *Bhiva Doulu Patil v. State of Maharahshtra, AIR 1963 SC 599* has held that both the sections are part of one subject and have to be considered together. It has further been held:

> "The combined effect of Sections 133 and Illustration (b) to Section 114, may be stated as follows:
>
> According to the former, which is a Rule of law, an accomplice is competent to give evidence and according to the latter, which is a Rule of practice it is almost always unsafe to convict upon his testimony alone. Therefore, though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars."

The very same principle was reiterated in *Mohd. Husain Umar Kochra etc. v. K. S. Dalipsinghji and another etc.,AIR 1970 SC 45* and it was held :—

> "....The combined effect of Sections 133 and 114, Illustration (b) is that though a conviction based upon accomplice evidence is legal, the Court will not accept such evidence unless it is corroborated in material particulars. The corroboration must connect the accused with the crime. It may be direct or circumstantial. It is not necessary that the corroboration should confirm all the circumstances of the crime. It is sufficient if the corroboration is in material particulars. The corroboration must be from an independent source. One accomplice cannot corroborate another."

While considering the validity of approver's testimony and tests of credibility, this Court, in *Sarwan Singh S/o Rattan Singh v. State of Punjab AIR 1957 SC 637* has held as under:-

> "7.....An accomplice is undoubtedly a competent witness under the Indian Evidence Act. There can be, however, no

doubt that the very fact that he has participated in the commission of the offence introduces a serious stain in his evidence and Courts are naturally reluctant to act on such tainted evidence unless it is corroborated in material particulars by other independent evidence. It would not be right to expect that such independent corroboration should cover the whole of the prosecution story or even all the material particulars. If such a view is adopted it would render the evidence of the accomplice wholly superfluous. On the other hand, it would not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details because, in such a case, corroboration does not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true. But it must never be forgotten that before the court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first initial and essential question to consider is whether even as an accomplice the approver is a reliable witness. If the answer to this question is against the approver then there is an end of the matter, and no question as to whether his evidence is corroborated or not falls to be considered. In other words, the appreciation of an approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness and that is a test which is common to all witnesses. If this test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration. This test is special to the cases of weak or tainted evidence like that of the approver.....

8....Every person who is a competent witness is not a reliable witness and the test of reliability has to be satisfied by an approver all the more before the question of corroboration of his evidence is considered by criminal courts"

Further, in *Ravinder Singh v. State of Haryana, AIR 1975 SC 856,* this Court, while considering the approver's testimony within the meaning of Section 133 of the Indian Evidence Act, 1872 has observed :

"12. An Approver is a most unworthy friend, if at all, and he, having bargained for his immunity, must prove his worthiness for credibility in Court. This test is fulfilled, firstly, if the story he relates involves him in the crime and appears intrinsically to be a natural and probable catalogue of events

that had taken place. Secondly, once that hurdle is crossed, the story given by an approver so far as the accused on trial is concerned, must implicate him in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt. In a rare case, taking into consideration all the factors, circumstances and situation governing a particular case, conviction based on the uncorroborated evidence of an approver confidently held to be true and reliable by the Court may be permissible. Ordinarily, however, an approver's statement has to be corroborated in material particulars bridging closely the distance between the crime and the criminal. Certain clinching features of involvement disclosed by an approver appertaining directly to an accused, if reliable, by the touchstone of other independent credible evidence, would give the needed assurance for acceptance of his testimony on which a conviction may be based."

In *Abdul Sattar v. Union Territory, Chandigarh, AIR 1986 SC 1438* where the prosecution had sought to prove its case by relying upon the evidence of the approver, it was held that the approver is a competent witness but the position in law is fairly well settled that on the uncorroborated testimony of the approver, it would be risky to base the conviction, particularly, in respect of a serious charge like murder. Once the evidence of the approver is found to be not reliable, the worth of his evidence is lost and such evidence, even by seeking corroboration, cannot be made the foundation of a conviction.

The above said ratio has been reaffirmed and reiterated by this Court in *Suresh Chandra Bahri v. State of Bihar, AIR 1994 SC 2420, Ramprasad v. State of Maharashtra, AIR 1999 SC 1969* and *Narayan Chetanram Chaudhary v. State of Maharashtra, AIR 2000 SC 3352.*

In *Narayan Chetanram Chaudhary* (supra), it was further held that for corroborative evidence, the court must look at the broad spectrum of the approver's version and then find out whether there is other evidence to corroborate and lend assurance to that version. The nature and extent of such corroboration may depend upon the facts of different cases. Corroboration need not be in the form of ocular testimony of witnesses and may even be in the form of circumstantial evidence. Corroborative evidence must be independent and not vague or unreliable.

Similar question again came up for consideration before this Court in *K. Hashim v. State of Tamil Nadu, AIR 2005 SC 128* and *Sitaram Sao @ Mungeri v State of Jharkhand, AIR 2008 SC 391* wherein this Court has held that:

"26. Section 133 of the Evidence Act expressly provides that an accomplice is a competent witness and the conviction is not illegal merely because it proceeds on an uncorroborated testimony of an accomplice. In other words,

this section renders admissible such uncorroborated testimony. But this Section has to be read along with Section 114, illustration (b). The latter section empowers the Court to presume the existence of certain facts and the illustration elucidates what the Court may presume and make clear by means of examples as to what facts the Court shall have regard in considering whether or not maxims illustrated apply to a given case. Illustration (b) in express terms says that accomplice is unworthy of credit unless he is corroborated in material particulars. The Statute permits the conviction of an accused on the basis of uncorroborated testimony of an accomplice but the rule of prudence embodied in illustration (b) to Section 114 of the Evidence Act strikes a note of warning cautioning the Court that an accomplice does not generally deserve to be believed unless corroborated in material particulars. In other words, the rule is that the necessity of corroboration is a matter of prudence except when it is safe to dispense with such corroboration must be clearly present in the mind of the Judge"

In *Sheshanna Bhumanna Yadav v. State of Maharashtra, AIR 1970 SC 1330* the test of reliability of approver's evidence and rule as to corroboration was discussed. The following discussion and conclusion are relevant which read as under:

"12. The law with regard to appreciation of approver's evidence is based on the effect of Sections 133 and 114, illustration (b) of the Evidence Act, namely, that an accomplice is competent to depose but as a rule of caution it will be unsafe to convict upon his testimony alone. The warning of the danger of convicting on uncorroborated evidence is therefore given when the evidence is that of an accomplice. The primary meaning of accomplice is any party to the crime charged and some one who aids and abets the commission of crime. The nature of corroboration is that it is confirmatory evidence and it may consist of the evidence of second witness or of circumstances like the conduct of the person against whom it is required. Corroboration must connect or tend to connect the accused with the crime. When it is said that the corroborative evidence must implicate the accused in material particulars it means that it is not enough that a piece of evidence tends to confirm the truth of a part of the testimony to be corroborated. That evidence must confirm that part of the testimony which suggests that the crime was committed by

the accused. If a witness says that the accused and he stole the sheep and he put the skins in a certain place, the discovery of the skins in that place would not corroborate the evidence of the witness as against the accused. But if the skins were found in the accused's house, this would corroborate because it would tend to confirm the statement that the accused had some hand in the theft.

13. This Court stated the law of corroboration of accomplice evidence in several decisions. One of the earlier decision is *Sarwan Singh v. State of Punjab, AIR 1957 SC 637* and the recent decision is *Lachi Ram v. State of Punjab, AIR 1967 SC 792.* In *Sarwan Singh* case this Court laid down that before the court would look into the corroborative evidence it was necessary to find out whether the approver or accomplice was a reliable witness. This Court in *Lachi Ram* case said that the first test of reliability of approver and accomplice evidence was for the court to be satisfied that there was nothing inherently impossible in evidence. After that conclusion is reached as to reliability corroboration is required. The rule as to corroboration is based on the reasoning that there must be sufficient corroborative evidence in material particulars to connect the accused with the crime."

In *Dagdu and Ors. v. State of Maharashtra, AIR 1977 SC 1579*, the scope of Section 133 and Illustration (b) to Section 114 of the Indian Evidence Act, 1872 and nature of rule of corroboration of accomplice evidence was explained by a three-Judge Bench of this Court in the following manner:

"24. In *Bhiiboni Sahu v. King, AIR 1949 PC 257* the Privy Council after noticing Section 133 and Illustration (b) to Section 114 of the Evidence Act observed that whilst it is not illegal to act on the uncorroborated evidence of an accomplice, it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act on the evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused; and further that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice. The rule of prudence was based on the interpretation of the phrase "corroborated in material particulars" in Illustration (b). Delivering the judgment of the Judicial Committee, Sir John Beaumont observed that the danger of acting on accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the

offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue. He may implicate ten people in an offence and the story may be true in all its details as to eight of them but untrue as to the other two whose names may have been introduced because they are enemies of the approver. The only real safeguard therefore against the risk of condemning the innocent with the guilty lies in insisting on independent evidence which in some measure implicates each accused.

25. This Court has in a series of cases expressed the same view as regards accomplice evidence. (See *State of Bihar v. Basawan Singh, AIR 1958 SC 500; Hari Charan Kurmi v. State of Bihar, AIR 1964 SC 1184; Haroon Haji Abdulla v. State of Maharashtra, AIR 1968 SC 832; and Ravinder Singh v. State of Haryana, AIR 1975 SC 856*) In *Haricharan*, Gajendragadkar, C.J., speaking for a five-Judge Bench observed that the testimony of an accomplice is evidence under Section 3 of the Evidence Act and has to be dealt with as such. The evidence is of a tainted character and as such is very weak; but, nevertheless, it is evidence and may be acted upon, subject to the requirement which has now become virtually a part of the law that it is corroborated in material particulars."

In *Rampal Pithwa Rahidas and Others v State of Maharashtra, 1994 Supp (2) SCC 73*, while considering the very same provisions, this Court has held that approver's evidence must be corroborated in material particulars by direct or circumstantial evidence. This Court further held that while considering credibility of the approver and weight to be attached to his statement, the statement made in bail application of approver can be looked into by the court.

It is clear that once the evidence of the approver is held to be trustworthy, it must be shown that the story given by him so far as an accused is concerned, must implicate him in such manner as to give rise to a conclusion of guilt beyond reasonable doubt. Insistence upon corroboration is based on the rule of caution and is not merely a rule of law. Corroboration need not be in the form of ocular testimony of witnesses and may even be in the form of circumstantial evidence.

(ii) If the appeal is heard by an appellate court, being the final court of fact, is fully competent to re- appreciate, reconsider and review the evidence and take its own decision. In other words, law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free

to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court. If two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal. There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is found and to come to its own conclusion. The appellate court can also review the conclusion arrived at by the trial Court with respect to both facts and law. While dealing with the appeal against acquittal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and only by giving cogent and adequate reasons set aside the judgment of acquittal. An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference. When the trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts etc., the appellate court is competent to reverse the decision of the trial Court depending on the materials placed.

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***30. CRIMINAL PROCEDURE CODE, 1973 – Section 391**
Further/additional evidence – Appellate Court remanded the case back to the trial Court with a direction to provide an opportunity to prosecution for exhibiting and proving the report of examination of seized liquor by the Excise Department and decide the case afresh on merits – Held, the section nowhere authorizes the appellate Court to set aside the conviction and remand the whole case back to the trial Judge for the sole purpose of examining a particular witness and then deciding the matter afresh after recording his evidence. The section is not intended to remedy the negligence or laches of the prosecution.

Ramu v. State of M.P.
Judgment dated 28.07.2011, passed by the High Court of M.P. in Cr. Rev. No. 421 of 2006 reported in I.L.R. (2011) M.P. 2901

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***31. CRIMINAL PROCEDURE CODE, 1973 – Sections 451 and 457**
Supurdnama – Conditions therefor – Condition of deposit of value of seized silver worth ₹1,40,00,000 imposed while directing supurdnama to Income Tax Authorities – Held, Income Tax Authority is a Statutory Authority under Income Tax Act which is responsible to its higher authorities/tribunals and Courts of law having jurisdiction – Conditions imposed by Magistrate superfluous and redundant – Application allowed.

Income Tax Officer v. State of M.P. & ors.

Judgment dated 19.05.2011, passed by the High Court of M.P. in M.Cr.C. No. 1149 of 2011 reported in I.L.R. (2011) M.P. 2919

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32. CRIMINAL TRIAL:

Appreciation of Scientific Evidence.

INDIAN PENAL CODE, 1860 – Sections 302 and 404

EVIDENCE ACT, 1872 – Section 27

Exclusiveness of IMEI (International Mobile Equipment Identity) number of mobile handset can be utilized to prove the guilt of the accused in whose use and possession such mobile handset, pertaining to murdered person, was found immediately after the occurrence.

Gajraj v. State (NCT of Delhi)

Judgment dated 22.09.2011 passed by the Supreme Court in Criminal Appeal No. 2272 of 2010, reported in (2011) 10 SCC 675

Held:

The evidence produced by the prosecution is based on one irrefutable fact, namely, every mobile handset has an exclusive IMEI number. No two mobile handsets have the same IMEI number. And every time a mobile handset is used for making a call, besides recording the number of the caller as well as the person called, the IMEI numbers of the handsets used are also recorded by the service provider. The aforesaid factual position has to be kept in mind while examining the prosecution evidence.

The first step in the process of investigation was the receipt of information from Minakshi (the wife of deceased Harish Kumar), that the deceased was using mobile phone, SIM No.9871879824. Evidence on record indicates, that the aforesaid SIM Number became dead on 23.07.2005, i.e., the date on which deceased Harish Kumar came to be murdered. In the process of investigation it then emerged, that the mobile handset bearing IMEI No.35136304044030 was used with mobile phone SIM No. 9818480558. This happened soon after the murder of Harish Kumar, on 23.07.2005 itself. The same SIM was used to make calls from the same handset upto 02.08.2005.

Through the statement of R.K. Singh PW22, Nodal Officer, Bharati Airtel Limited, it came to be established, that mobile phone SIM No.9818480558 was registered in the name of appellant-accused Gajraj Singh. It is from the use of the mobile handset bearing IMEI no. 35136304044030, that the police came to trace the appellant-accused Gajraj Singh. It is only this aspect of the matter which is relevant for the purpose of present controversy. The use of Mobile handset bearing IMEI No. 35136304044030 from which the appellant-accused made calls from his own registered mobile phone SIM No.9818480558, immediately after the occurrence of the murder of deceased Harish Kumar, was

a legitimate basis for the identification of the appellant-accused. The appellant-accused was arrested on 06.08.2005. The nexus of the appellant-accused with the deceased at the time of occurrence stands fully substantiated from the aforesaid SIM/IMEI details.

In the aforesaid sense of the matter, the discrepancy in the statement of Minakshi PW23, pointed out by the learned counsel for the appellant-accused, as also, the reasoning rendered by the High Court in the impugned judgment becomes insignificant. We are satisfied, that the process by which the appellant-accused came to be identified during the course of investigation, was legitimate and unassailable. The IMEI number of the handset, from which the appellant-accused was making calls by using a mobile phone(SIM) registered in his name, being evidence of a conclusive nature, cannot be overlooked on the basis of such like minor discrepancies. In fact even a serious discrepancy in oral evidence, would have had to yield to the aforesaid scientific evidence.

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33. CRIMINAL TRIAL:
INDIAN PENAL CODE, 1860 – Section 302
CRIMINAL PROCEDURE CODE, 1973 – Section 154

(i) Murder trial – Inconsistency in the medical and ocular evidence – The ocular evidence would have primacy unless it is established that ocular evidence is totally irreconcilable with the medical evidence – Legal position restated.

(ii) Related witness can be relied upon provided it is trustworthy – Mere relationship does not disqualify a witness – However, evidence of such a witness is required to be carefully scrutinized and appreciated – Legal position reiterated.

(iii) FIR – Promptness in lodging – Prompt and early report of the occurrence by the informant with all its vivid details gives an assurance regarding truth of its version – Legal position explained.

Rakesh and another v. State of Madhya Pradesh

Judgment dated 19.09.2011 passed by the Supreme Court in Criminal Appeal No. 339 of 2008, reported in (2011) 9 SCC 698

Held:

It is a settled legal proposition that the ocular evidence would have primacy unless it is established that oral evidence is totally irreconcilable with the medical evidence. More so, the ocular testimony of a witness has a 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 if proved, the ocular evidence may be disbelieved. (Vide: *State of U.P. v. Hari Chand, (2009) 13 SCC*

542; Abdul Sayeed v. State of M.P., (2010) 10 SCC 259 and *Bhajan Singh v. State of Haryana, (2011) 7 SCC 421*).

So far as the opinion of the doctor that death had occurred within 3 to 6 hours prior to post-mortem examination, does not mean that Dr. R.K. Singhvi (PW.8) was able to fix any exact time of death. The issue raised by the learned counsel for the appellants is no more res integra.

In *Mangu Khan & Ors. v. State of Rajasthan, AIR 2005 SC 1912,* this Court examined a similar issue wherein the post-mortem report mentioned that the death had occurred within 24 hours prior to post-mortem examination. In that case, such an opinion did not match with the prosecution case. This Court examined the issue elaborately and held that physical condition of the body after death would depend on a large number of circumstances/factors and nothing can be said with certainty. In determining the issue, various factors such as age and health condition of the deceased, climatic and atmospheric conditions of the place of occurrence and the conditions under which the body is preserved, are required to be considered. There has been no cross-examination of the doctor on the issue as to elicit any of the material fact on which a possible argument could be based in this regard. The acceptable ocular evidence cannot be dislodged on such hypothetical basis for which no proper grounds were made.

In *Baso Prasad & Ors. v. State of Bihar, AIR 2007 SC 1019,* while considering a similar issue, this Court held that exact time of death cannot be established scientifically and precisely.

Evidence of related witness can be relied upon provided it is trustworthy. Mere relationship does not disqualify a witness. Witnesses who are related to the victim are as competent to depose the facts as any other witness. Such evidence is required to be carefully scrutinised and appreciated before reaching to a conclusion on the conviction of the accused in a given case. (See: *Himanshu v. State (NCT of Delhi), (2011) 2 SCC 36;* and *Bhajan Singh* (supra).

It is evident that incident occurred at 11.30 a.m. Kailash, injured was taken to the hospital where he was examined by the doctor and declared dead. Anil (PW.11) went from the hospital to police station and lodged the FIR at 12.30 p.m. wherein all the three accused were specifically named. The distance of the police station from the place of occurrence had been only 1 k.m. The overt acts of the accused had been mentioned. The motive was also disclosed. It is improbable that the appellants had been enroped falsely as promptness in lodging the FIR shows that there was no time for *manipulation*. Prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of its version. Allegations may not be an after-thought or having a colourable version of the incidents. (See: *Kishan Singh v. Gurpal Singh, AIR 2010 SC 3624*).

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*34. **EVIDENCE ACT, 1872 – Section 3**
INDIAN PENAL CODE, 1860 – Section 498-A
Credibility of witnesses – Doctor, who wrote the *tehrir* for dying declaration and Naib Tahsildar, who recorded the dying declaration stated that deceased told them that she got burnt by stove while preparing food – Both are Government Servants and are independent witnesses – Nothing in cross-examination to disbelieve them – Held, the trial Court committed illegality in not placing reliance on testimony of these witnesses.
Cruelty – Behaviour of appellant towards deceased was aggressive – Appellant humiliated and assaulted her in front of near relatives – Deceased was also beaten when she tried to stop the appellant from his illicit relationship with other women – It is proved that the deceased was subjected to cruelty by the appellant within the meaning of Section 498-A.

Ashok Kumar v. State of M.P.
Judgment dated 06.07.2011, passed by the High Court of M.P. in Cr.A. No. 1632 of 1995, reported in I.L.R. (2011) M.P. 2532

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35. **EVIDENCE ACT, 1872 – Sections 3 and 8**
INDIAN PENAL CODE, 1860 – Section 302
(i) **Whether absence of evidence regarding recovery of used pellets, blood stained clothes etc. will itself detract the case of the prosecution? Held, No particularly, where direct and reliable evidence coupled with medical evidence is also on record.**
(ii) **Motive – Motive is an emotion which motivates a man to do a particular act – It is very difficult to see into the mind of another – So the case of the prosecution cannot be thrown out in absence of proof of motive particularly where cogent evidence of eye witness corroborate with medical evidence are on record.**
(iii) **Credibility of eye witness – How to assess explained – The deceased sustained seven gun shot injuries which were sufficient to cause death although he died after 35 days from the date of incident due to septecemia – Conviction under Section 302 IPC, held, proper.**

State of Rajasthan v. Arjun Singh & Ors. etc.
Judgment dated 02.09.2011 passed by the Supreme Court in Criminal Appeal No. 552 of 2003, reported in AIR 2011 SC 3380

Held:

Learned senior counsel for the accused persons contended that in the absence of recovery of pellets from the scene of occurrence or from the body of the injured persons, it is highly doubtful as to the scene of occurrence and

whether such incident did take place in the manner suggested by the prosecution. Learned counsel appearing for the complainant pointed out that though there was an entry in Malkhana Register (Ex. P31A) wherein it was stated that a sealed packet containing pellets was deposited but prosecution failed to lead any evidence on this point. It was also pointed out that though a report was received from the Forensic Science Laboratory, no evidence regarding recovery of the pellets was produced. As rightly pointed out by the learned Additional Advocate General appearing for the State that mere non-recovery of pistol or cartridge does not detract the case of the prosecution where clinching and direct evidence is acceptable. Likewise, absence of evidence regarding recovery of used pellets, blood stained clothes etc. cannot be taken or construed as no such occurrence had taken place. As a matter of fact, we have already pointed out that the gun shot injuries tallied with medical evidence. It is also seen that Raghuraj Singh and Himmat Raj Singh, who had died, received 8 and 7 gun shot wounds respectively while Raj Singh (PW-2) also received 8 gun shots scattered in front of left thigh. All these injuries have been noted by the Doctor (PW-1) in his reports Exs. P1-P4. If we analyze the evidence of Dr. Manmohan Sharma (PW-1), his reports, Exs.P1-P4 and the evidence of Raj Singh (PW-2), it leads to a conclusion that gun shot injuries tallied with the medical evidence and both the deceased persons died due to the same reason.

Coming to the contention relating to the motive, it is not in dispute that Raghuraj Singh and Himmat Raj Singh died due to gun shot injuries. The reliable eye-witnesses have stated that there was previous enmity between them and litigation was going on between the accused-Karan Singh and the complainant. Even in the absence of motive, in view of the assertion of eye-witnesses, particularly, Raj Singh, (PW-2), coupled with the medical evidence as seen from Exs. P1-P4, by the Doctor (PW-1), the case of the prosecution cannot be thrown out. In a catena of decisions, this Court has held that motive for doing a criminal act is generally a difficult area for the prosecution to prove since one cannot normally be seen into the mind of another. Motive is the emotion which impels a man to do a particular act. Even in the absence of specific evidence as to motive, in view of the fact that in the case on hand, two persons have been killed and one sustained injuries due to fire arms, the case of the prosecution cannot be thrown out on this ground.

Learned senior counsel for the accused pointed out that inasmuch as Himmat Raj Singh died after 35 days due to septicemia, the Courts below are not justified in convicting the accused persons for an offence under Section 302 IPC for his death. Considering the medical evidence that Himmat Raj Singh sustained 7 gun shot injuries which were sufficient to cause death in the ordinary course, we are satisfied that the death of Himmat Raj Singh undoubtedly falls within the ambit of 302 IPC.

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36. EVIDENCE ACT, 1872 – Section 32

Change of date of birth – Case based on horoscope – Authenticity of horoscope not proved – Medical certificate is also not supported by medical test – Order directing change of date of birth held, improper.

The Registrar General, High Court of Madras v. M. Manickam and Ors.

Judgment dated 17.08.2011 passed by the Supreme Court in Civil Appeal No. 7030 of 2011, reported in AIR 2011 SC 3658

Held:

In our considered opinion, the said medical certificate is very vague and unreliable. Whether or not any radiological examination was done and if so, of what nature, and also whether any ossification test was done or not is not reflected from the said report. It is only stated in the certificate that on the basis of physical examination and from his appearance and on the basis of his own statement the age of the respondent was determined as 48 years.

This Court in the case of *Ramdeo Chauhan alias Raj Nath v. State of Assam, AIR 2001 SC 2231* while dealing with the reliability of the ossification test held as follows:-

> "21. ..... An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can by no means be so infallible and accurate a test as to indicate the exact date of birth of the person concerned. Too much of reliance cannot be placed upon textbooks, on medical jurisprudence and toxicology while determining the age of an accused. In this vast country with varied latitudes, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform."

In *State of Punjab v. Mohinder Singh, AIR 2005 SC 1868,* this Court had occasion to deal with the evidentiary value of horoscope as proof of date of birth. It was held in that decision that a horoscope is very weak piece of material to prove age of a person and in most of the cases the maker may not be available to prove that it was prepared immediately after the birth and therefore a heavy onus lies on the person who wants to press it to prove its authenticity. It was further held that in fact a horoscope to be treated as evidence in terms of Section 32(5) of Evidence Act, 1872, it must be proved to have been made by a person having special means of knowledge as regards authenticity of the date, time etc. mentioned therein. In that context horoscopes have been held to be inadmissible in proof of age.

Keeping the aforesaid principles laid down by this Court in our mind, we proceed to examine the evidentiary value of the horoscope which is relied upon by the respondent No. 1 in support of his claim. The aforesaid horoscope is the basis and foundation on which the respondent No. 1 primarily relies upon. The

said horoscope, therefore, must be shown to have been made by a person who has special knowledge of making such a horoscope. The creator of the horoscope or the writer is not examined in the present case as he was stated to be dead. None of his family members or any of his acquaintances was examined to prove handwriting. In order to come to a definite decision about the authenticity and evidentiary value or the reliability of the document, we have ourselves closely and very minutely considered the horoscope.

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37. EVIDENCE ACT, 1872 – Section 65-B

Admissibility of digital photograph and compact discs in evidence – The material comes within the sweep of electronic record and admissible in evidence but for that purpose, the person who is producing the evidence has to satisfy the conditions mentioned under Section 65-B(2) of the Evidence Act and also required to produce a certificate as enumerated under Section 65-B(4) of the Act.

Kailash v. Suresh Chandra

Judgment dated 19.08.2011 passed by the High Court of Madhya Pradesh in Writ Petition No. 14200 of 2010, reported in 2011 (5) MPHT 199

Held:

Section 65-B has been inserted in the Evidence Act by Act No. 21 of 2000 and has come in force w.e.f. 17-10-2000, which deals with admissibility of electronic records. As per sub-section (1) of Section 65-B any information contained in electronic record, which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be also a document, if the conditions mentioned in that section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible. Sub-section (2) of Section 65-B of the Act lays down the conditions, which has been referred to in sub-section (1) in respect of Computer output.

As per sub-section (4) of Section 65-B of the Act any proceedings where it is desired to give a statement in evidence by virtue of this Section, a certificate doing any of the following things, that is to say, –

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involving in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of a relevant device or the management of the relevant activities shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

After referring the cases of *Jagdish Singh v. State of Haryana, (2006) 11 SCC 1, State of Gujarat v. Shailendra Kamalkishor Pande, 2008 Cri. LJ 953* and *Lalji Bansanarayan Choubey v. Jiyalal Chavan, AIR 2009 (NOC) 1230 (Bom.)* the court observed that from the aforesaid position of law, it is evident that after insertion of special provisions as the evidence relating to electronic record, the electronic record is admissible in evidence, but for that purpose the person who is producing the evidence has to satisfy the conditions mentioned under sub-section (2) of Section 65-B of the Indian Evidence Act and is also required to produce a certificate as enumerated under sub-section (4) of Section 65-B of Indian Evidence Act.

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38. FINANCIAL CODE (M.P.) – Rule 84

Correction of date of birth in Service Record.

(i) The date of birth once recorded in accordance with Rule 84 in Service Record must be deemed to be absolutely conclusive and except in the case of a clerical error, no revision of such a declaration shall be allowed to be made at a later period for any purpose whatsoever.

(ii) If there is no specific rule or order framed or made prescribing the period within which the application for correction of date of birth could be filed, it is trite that even in such a situation such an application should be filed which can be held to be reasonable. (*2002 (2) MPLJ 82* reversed)

State of M.P. & Ors. v. Premlal Shrivas

Judgment dated 19.09.2011 passed by the Supreme Court in Civil Appeal No. 2331 of 2004, reported in AIR 2011 SC 3418

Held:

Rule 84 of the M.P. Financial Code, heavily relied upon by the respondent reads as under :

> "**Rule 84**. Every person newly appointed to a service or a post under Government should at the time of the appointment declare the date of his birth by the Christian era with as far as possible confirmatory documentary evidence such as a matriculation certificate, municipal birth certificate and so on. If the exact date is not known, an approximate date may be given. The actual date or the

assumed date determined under Rule 85 should be recorded in the history of service; Service book or any other record that may be kept in respect of the Government servant's service under Government. The date of birth, once recorded in this manner, must be deemed to be absolutely conclusive, and except in the case of a clerical error no revision of such a declaration shall be allowed to be made at a later period for any purpose whatsoever."

It is manifest from a bare reading of Rule 84 of the M.P. Financial Code that the date of birth recorded in the service book at the time of entry into service is conclusive and binding on the government servant. It is clear that the said rule has been made in order to limit the scope of correction of date of birth in the service record. However, an exception has been carved out in the rule, permitting the public servant to request later for correcting his age provided that incorrect recording of age is on account of a clerical error or mistake. This is a salutary rule, which was, perhaps, inserted with a view to safeguard the interest of employees so that they do not suffer because of the mistakes committed by the official staff. Obviously, only that clerical error or mistake would fall within the ambit of the said rule which is caused due to the negligence or want of proper care on the part of some person other than the employee seeking correction. Onus is on the employee concerned to prove such negligence.

In *Commissioner of Police, Bombay and Anr. v. Bhagwan v. Lahane, AIR 1997 SC 1986* this Court has held that for an employee seeking the correction of his date of birth, it is a condition precedent that he must show, that the incorrect recording of the date of birth was made due to negligence of some other person, or that the same was an obvious clerical error failing which the relief should not be granted to him. Again, in *Union of India v. C. Rama Swamy & Ors., (1997) 4 SCC 647,* it has been observed that a *bonafide* error would normally be one where an officer has indicated a particular date of birth in his application form or any other document at the time of his employment but, by mistake or oversight a different date has been recorded.

As aforesaid, in the instant case, no evidence has been placed on record by the respondent to show that the date of birth recorded as 1st June, 1942 was due to the negligence of some other person. He had failed to show that the date of birth was recorded incorrectly, due to want of care on the part of some other person, despite the fact that a correct date of birth had been shown on the documents presented or signed by him. We hold that in this fact situation the High Court ought not to have directed the appellants to correct the date of birth of the respondent under Rule 84 of the said Rules.

It needs to be emphasised that in matters involving correction of date of birth of a Government servant, particularly on the eve of his superannuation or at the fag-end of his career, the Court or the Tribunal has to be circumspect, cautious and careful while issuing direction for correction of date of birth,

recorded in the service book at the time of entry into any government service. Unless, the Court or the Tribunal is fully satisfied on the basis of the irrefutable proof relating to his date of birth and that such a claim is made in accordance with the procedure prescribed or as per the consistent procedure adopted by the department concerned, as the case may be, and a real injustice has been caused to the person concerned, the Court or the Tribunal should be loath to issue a direction for correction of the service book. Time and again this Court has expressed the view that if a government servant makes a request for correction of the recorded date of birth after lapse of a long time of his induction into the service, particularly beyond the time fixed by his employer, he cannot claim, as a matter of right, the correction of his date of birth, even if he has good evidence to establish that the recorded date of birth is clearly erroneous. No Court or the Tribunal can come to the aid of those who sleep over their rights. (See *Union of India v. Harnam Singh, AIR 1993 SC 1367, Secretary and Commissioner, Home Department & Ors. v. R. Kirubakaran, AIR 1993 SC 2647* and *State of U.P. & Anr. v. Shiv Narain Upadhyaya, AIR 2005 SC 4192*)

Viewed in this perspective, we are of the opinion that the High Court committed a manifest error of law in ignoring the vital fact that the respondent had applied for correction of his date of birth in 1990, i.e. 25 years after his induction into service as a constable. It is evident from the record that the respondent was aware ever since 1965 that his date of birth as recorded in the service book is 1st June, 1942 and not 30th June, 1945. It had come on record of the Tribunal that at the time of respondent's medical examination, his age as on 27th September, 1965 was mentioned to be 23 years and his father's name was recorded as Gayadin; and in his descriptive roll, prepared by the Senior Superintendent of Police as well, his father's name was shown as Gayadin and his date of birth as 1st June, 1942 and this document was signed by the respondent and the form of agreement known as "Mamuli Sipahi Ka Ikrarnama" was filled up by the respondent himself with the very same particulars. Therefore, it cannot be said that the decision of the Tribunal rejecting respondent's plea that it was for the first time in the year 1990, when he was promoted as Head Constable, that he noticed the error in the service record was vitiated. Be that as it may, in our opinion, the delay of over two decades in applying for the correction of date of birth is ex-facie fatal to the case of the respondent, notwithstanding the fact that there was no specific rule or order, framed or made, prescribing the period within which such application could be filed. It is trite that even in such a situation such an application should be filed which can be held to be reasonable. The application filed by the respondent 25 years after his induction into service, by no standards, can be held to be reasonable, more so when not a feeble attempt was made to explain the said delay.

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39. HINDU MARRIAGE ACT, 1955 – Section 13 (1)
Divorce – General allegations of cruelty – Allegations in the nature of 'normal wear and tear' in matrimonial life of a couple, cannot fall within the fold of Clauses (i-a) and (i-b) of sub-section (1) of Section 13 of the Act.
Divorce – Allegations of cruelty – Cruelty must be of such a nature that the parties cannot reasonably be expected to live together.

Anil Kumar Rathore v. Smt. Shashi Rathore

Judgment dated 01.08.2011, passed by the High Court of M.P. in F.A. No. 395 of 1995, reported in I.L.R. (2011) M.P. 2487 (D.B.)

Held :

Having regard to the evidence brought on record by both the parties, it has to be seen whether the appellant was put to cruelty at the hands of the respondent. Neither PW-I nor PW-2 and PW-3 have specifically stated in their evidence the acts of the respondent which constituted the cruelty. They simply stated that the respondent abused the appellant. These aspects would not constitute cruelty. Cruelty must be of such a nature that the parties cannot reasonably be expected to live together. We would like to mention that the appellant did not examine any of his family members or relatives in support of his case. Further, the appellant did not specifically pleaded the acts which tantamount to cruelty, in his petition.

As regards the term "Cruelty" the Apex Court observed in *V. Bhagat v. Mrs. D. Bhagat, AIR 1994 SC 710,* as under:-

> "Mental cruelty in Section 13 (1) (ia) of the Act can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations

and allegations, regard must also be had to the context in which they were made."

We are of the view that there were general allegations of cruelty against the respondent/wife. Even if such allegations are accepted, these are in the nature of 'normal wear and tear' in matrimonial life of a couple which cannot fall within the fold of Clauses (i-a) and (i-b) of sub-section (1) of Section 13 of the Act.

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40. HINDU SUCCESSION ACT, 1956 – Sections 6, 14 to 16 and 19

(i) Property acquired by Hindu woman – Whether becomes a joint family property ? Hindu woman has full ownership of any property that she has acquired on her own or as *stridhan* and the same shall not be treated as a part of the joint family property.

(ii) Presumption as to joint family property – No presumption can be made as to joint family property in absence of strong evidence in favour of the same.

Marabasappa (dead) by LRs. and others v. Ningappa (dead) by LRs. and others

Judgment dated 08.09.2011 passed by the Supreme Court in Civil Appeal No. 3495 of 2001, reported in (2011) 9 SCC 451

Held:

Stridhana belonging to a woman is a property of which she is the absolute owner and which she may dispose of at her pleasure, if not in all cases during coverture, in all cases during widowhood. Since the plaintiffs have proved that Parwatevva had not alienated the property by executing a Will in favour of defendant No. 5 during her lifetime, the property is the absolute property of Parvatevva and would not be available for partition among the members of joint family since it does not partake the character of joint family property.

Section 14 of the Hindu Succession Act, 1956 clearly mandates that any property of a female Hindu is her absolute property and she, therefore, has full ownership. The Explanation to sub-section (1) further clarifies that a Hindu woman has full ownership over any property that she has acquired on her own or as stridhana. As a consequence, she may dispose of the same as per her wish, and that the same shall not be treated as a part of the joint Hindu family property.

This Court has time and again held that there is no presumption of joint family property, and there must be some strong evidence in favour of the same. In the case of *Appasaheb Peerappa Chamdgade v. Devendra Peerappa Chamdgade, (2007) 1 SCC 521*, after examining the decisions of this Court, it was held:

> "17. Therefore, on survey aforesaid decisions, what emerges is that there is no presumption of a joint Hindu family but on the evidence if it is established that the property was joint Hindu family property and the other

properties were acquired out of that nucleus, if the initial burden is discharged by the person who claims joint Hindu family, then the burden shifts to the party alleging self-acquisition to establish affirmatively that property was acquired without the aid of the joint family property by cogent and necessary evidence."

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41. HINDU SUCCESSION ACT, 1956 – Section 6 (as amended by Act of 2005)
CIVIL PROCEDURE CODE, 1908 – Order 20 Rule 18

(i) Partition of co-parcenary property by a decree of a Court – Right accrued to a daughter by virtue of 2005 Amendment Act – A preliminary decree passed in a partition suit prior to coming into effect of the Amendment Act, 2005 does not deprive the daughter of the benefits of the 2005 Amendment Act since final decree for partition has not yet been passed.

(ii) Modification of preliminary decree – A preliminary decree passed in a partition suit prior to commencement of Hindu Succession (Amendment) Act, 2005, can be modified to include share of daughter as per Section 6 amended in 2005, granting share in co-parcenary property to a daughter.

Ganduri Koteshwaramma and another v. Chakiri Yanadi and another

Judgment dated 12.10.2011 passed by the Supreme Court in Civil Appeal No. 8538 of 2011, reported in (2011) 9 SCC 788

Held:

The new Section 6 of the Hindu Succession Act, 1956 provides for parity of rights in the coparcenary property among male and female members of a joint Hindu family on and from 09.09.2005. The Legislature has now conferred substantive right in favour of the daughters. According to the new Section 6, the daughter of a copercener becomes a coparcener by birth in her own rights and liabilities in the same manner as the son. The declaration in Section 6 that the daughter of the coparcener shall have same rights and liabilities in the coparcenary property as she would have been a son is unambiguous and unequivocal. Thus, on and from 09.09.2005, the daughter is entitled to a share in the ancestral property and is a coparcener as if she had been a son.

The right accrued to a daughter in the property of a joint Hindu family governed by the Mitakshara Law, by virtue of the 2005 Amendment Act, is absolute, except in the circumstances provided in the proviso appended to sub-section (1) of Section 6. The excepted categories to which new Section 6 of the 1956 Act is not applicable are two, namely, (i) where the disposition or alienation including any partition has taken place before 20.12.2004; and (ii) where

testamentary disposition of property has been made before 20.12.2004. Sub-section (5) of Section 6 leaves no room for doubt as it provides that this Section shall not apply to the partition which has been effected before 20.12.2004. For the purposes of new Section 6 it is explained that 'partition' means any partition made by execution of a deed of partition duly registered under the Registration Act 1908 or partition effected by a decree of a court. In light of a clear provision contained in the Explanation appended to sub-section (5) of Section 6, for determining the non-applicability of the Section, what is relevant is to find out whether the partition has been effected before 20.12.2004 by deed of partition duly registered under the Registration Act, 1908 or by a decree of a court. In the backdrop of the above legal position with reference to Section 6 brought in the 1956 Act by the 2005 Amendment Act, the question that we have to answer is as to whether the preliminary decree passed by the trial court on 19.03.1999 and amended on 27.09.2003 deprives the appellants of the benefits of 2005 Amendment Act although final decree for partition has not yet been passed.

The legal position is settled that partition of a Joint Hindu family can be effected by various modes, inter-alia, two of these modes are (one) by a registered instrument of a partition and (two) by a decree of the court. In the present case, admittedly, the partition has not been effected before 20.12.2004 either by a registered instrument of partition or by a decree of the court. The only stage that has reached in the suit for partition filed by the respondent no.1 is the determination of shares vide preliminary decree dated 19.03.1999 which came to be amended on 27.09.2003 and the receipt of the report of the Commissioner.

A preliminary decree determines the rights and interests of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum i.e. after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree re-determining the rights and interests of the parties having regard to the changed situation. *[Phoolchand v. Gopal Lal, AIR 1967 SC 1479 and S. Sai Reddy v. S. Narayana Reddy, (1991) 3 SCC 647]*

The High Court was clearly in error in not properly appreciating the scope of Order 20 Rule 18 of C.P.C. In a suit for partition of immovable property, if such property is not assessed to the payment of revenue to the government, ordinarily passing of a preliminary decree declaring the share of the parties may be required. The court would thereafter proceed for preparation of final decree. In *Phoolchand* (supra), this Court has stated the legal position that C.P.C. creates no impediment for even more than one preliminary decree if after passing of the preliminary decree events have taken place necessitating the readjustment of shares as declared in the preliminary decree. The court has always power to

revise the preliminary decree or pass another preliminary decree if the situation in the changed circumstances so demand. A suit for partition continues after the passing of the preliminary decree and the proceedings in the suit get extinguished only on passing of the final decree. It is not correct statement of law that once a preliminary decree has been passed, it is not capable of modification. It needs no emphasis that the rights of the parties in a partition suit should be settled once for all in that suit alone and no other proceedings.

Section 97 C.P.C. that provides that where any party aggrieved by a preliminary decree passed after the commencement of the Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree does not create any hindrance or obstruction in the power of the court to modify, amend or alter the preliminary decree or pass another preliminary decree if the changed circumstances so require.

It is true that final decree is always required to be in conformity with the preliminary decree but that does not mean that a preliminary decree, before the final decree is passed, cannot be altered or amended or modified by the trial court in the event of changed or supervening circumstances even if no appeal has been preferred from such preliminary decree. The view of the High Court is against law and the decisions of this Court in *Phoolchand* (supra) and *S. Sai Reddy* (supra).

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42. HINDU SUCCESSION ACT, 1956 – Sections 8, 15 and 16
Property of intestate female, devolution of – In absence of heirs specified in Section 15 (1) (a), the property would devolve upon the heirs of her husband as per Section 15 (1) (b) – Plaintiffs are real sisters of her husband – No heirs specified under Class I of the schedule to Section 8 and no brother in Class II – Held, the property would devolve upon the plaintiffs as they are sisters of her husband as per Class II of the Schedule to Section 8 – Defendant No. I, step-brother of her husband was not entitled for a share in the property.

Heera Lal v. Tijiabai (since deceased) now by LRs. Ravi Shankar Dubey & Ors.

Judgment dated 18.08.2011 passed by the High Court of Madhya Pradesh in S. A. No. 920 of 1997, reported in 2011 (4) MPLJ 350

Held :

Needless to say that the plaintiffs are the real sisters of Dwarka Prasad and defendant No. 1 Heeralal is his step-brother. Since admittedly Kalwati (widow of Dwarka Prasad) died leaving behind no issue, according to Section 16 of the Act of 1956 her right would devolve under Rule 1 among the heirs specified in sub-section (1) of Section 15. Since Kalawati and Dwarka Prasad were not having

any sons, daughters including children of any predecessor's son or daughter ad Dwarka Prasad already died during the life time of Kalawati, therefore the right in the disputed property would devolve in the heirs according to Rule 2 of section 16. But, in the present case there is no heir in terms of Rule 2, hence the devolution of property would take place in accordance to Rule 3 of section 16 and according to this rule, the devolution of the property of the intestate of female Hindu would devolve upon the heirs referred to in clauses (b), (d) and (e) of sub-section (1) and sub-section (2) of Section 15 of the Act of 1956 which shall be in the same order and according to same rules as would have applied if the property had been the father's or the mother's or the husband's as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

A pure finding of fact which has been recorded by learned two Courts below is that the property in dispute was of Dwarka Prasad and Kalawati inherited the disputed property from her husband and if that would be the position, since there is no heir of Kalawati mentioned in the category 15(1)(a) of the Act of 1956 therefore, the property would devolve upon the heirs of her husband. At this juncture it would be apposite to go through Class II of the Schedule to Section 8 of the Act of 1956 because there is no heir under class I and according to class II firstly the brother and then sister comes. According to me, if Section 16(3) and Section 15(1) (b) and Class II of he Schedule to section 8 are kept in juxtaposition to each other and are read conjointly on the touchstone and anvil of the settled position of the law, it is carved out on marshalling the evidence and which is also not disputed to the parties that plaintiffs being the real sisters of Dwarka Prasad, the entire property in dispute of Kalawati would devolve in them.

No doubt, it is true that defendant No. 1 Heeralal Is the step-brother of Kalawati's husbad Dwarka Prasad but he is the half blood brother of plaintiffs. In this regard, it would be apposite to go through Section 3 of the Act of 1956 which pertains to definitions and interpretation and particularly sub-section (1) clause (e) (i) according to which two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife, and by half blood when they are descended from a common ancestor by different wives. Needless to say rather it is an admitted position that defendant No. 1 Heeralal is step-brother of Kalawati's husband Dwarka Prasad while the plaintiffs are his real sisters and thus defendant No. 1 Heeralal is also the step-brother of plaintiffs. At this juncture it would be apt to borrow sufficient light from Section 18 of the Act of 1956 which speaks that heir of full blood having preferential right over half blood. According to this section the heirs related to an intestate by full blood shall be preferred to heir related to half blood, if the nature of relationship is the same in every other respect and therefore I am of the view that plaintiffs being the real sisters of Dwarka Prasad are having preferential right over defendant No. 1 Heera Lal who is the heir related by half blood of Dwarka Prasad. The aforesaid situation has been dealt by the Full Bench of the Bombay High Court in *Waman Govind Shindore and others v. Gopal*

Baburao Chakradeo and others, AIR 1984 Bombay 208 and also by the Kerala High Court in *Narayanan v. Pushparajji and others, AIR 1991 Kerala 10.*

In *Lachman Singh v. Kirpa Singh and others, AIR 1987 SC 1616* similar position appears to be there and only difference is that in case of *Lachman Singh* (supra) instead of step-brother, the question under consideration was that whether the step-son can share simultaneously with the son of a female and the Apex Court while considering the aforesaid provision came to hold that step son of a female dying intestate shall not be entitled to claim share simultaneously with her son. But applying the same analogy in the present case a step brother (defendant No. 1 Heeralal) cannot share the property of widow Kalawati simultaneously with real sisters of Kalawati's husband.

On the basis of the aforesaid proposition of law, Article 43 of *Mulla's Hindu Law* placed reliance by learned counsel for the appellant is not applicable because after the commencement of the Act of 1956, the devolution of the property of the male and female would be governed by the provisions of the Act of 1956.

On the basis of aforesaid enunciation of law, according to me learned two Courts below did not err in holding that appellant was not entitled to the share in the suit property along with respondents No. 1 and 2 under Section 15 of the Hindu Succession Act, 1956.

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43. INDIAN PENAL CODE, 1860 – Sections 149 and 307
EVIDENCE ACT, 1872 – Section 3

(i) Whether prior concert in the sense of meeting of the members of unlawful assembly is necessary for common object? Held, No – The common object may form at spur of the moment – It is enough if it is adopted by all the members and is shared by all of them.

(ii) Though the offence committed is not in direct prosecution of the common object, it may yet come under Second Part of Section 149 IPC if it can be held that the offence was such as the members knew was likely to be committed.

(iii) Once it is established that unlawful assembly had common object, some overt act of all persons forming the unlawful assembly is not necessary.

(iv) Appreciation of evidence – Where 17 accused persons were involved in the incident which took place in a very short time, minor contradiction appearing in the evidence of witnesses is to be ignored because any minute detail i.e. meticulous exactitude of individual acts cannot be expected from the eye witnesses.

Ramachandran & Ors. Etc. v. State of Kerala
Judgment dated 02.09.2011 passed by the Supreme Court in Criminal Appeal No. 162 of 2006, reported in AIR 2011 SC 3581

Held:

For "common object", it is not necessary that there should be a prior concert in the sense of a meeting of the members of the unlawful assembly, the common object may form on spur of the moment; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. [See: *Bhanwar Singh & Ors. v. State of M.P., AIR 2009 SC 768*]

Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under second part of Section 149 IPC if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that if a body of persons go armed to take forcible possession of the land, it would be right to say that someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of Section 149 IPC.

There may be cases which would come within the second part, but not within the first. The distinction between the two parts of Section 149 IPC cannot be ignored or obliterated. [See : *Mizaji & Anr. v. State of U.P., AIR 1959 SC 572;* and *Gangadhar Behera & Ors. v. State of Orissa, AIR 2002 SC 3633*]

Regarding the application of Section 149, the following observations from *Charan Singh v. State of U.P., AIR 2004 SC 2828,* are very relevant:

> "13. ... The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. ... The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 has to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There

must be community of object and the object may exist only up to a particular stage, and not thereafter...."

In *Bhanwar Singh* (Supra) this Court held:

"Hence, the common object of the unlawful assembly in question depends firstly on whether such object can be classified as one of those described in Section 141 IPC. Secondly, such common object need not be the product of prior concert but, as per established law, may form on the spur of the moment (see also *Sukha v. State of Rajasthan, AIR 1956 SC 513*). Finally, the nature of this common object is a question of fact to be determined by considering nature of arms, nature of the assembly, behaviour of the members, etc. (see also *Rachamreddi Chenna Reddy v. State of A.P., AIR 1999 SC 994*)".

Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring the vicarious liability under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. [See : *Daya Kishan v. State of Haryana, AIR 2010 SC 2147; Sikandar Singh v. State of Bihar, AIR 2010 SC 3580, Debashis Daw v. State of W.B., AIR 2010 SC 3633* and *State of U.P. v. Krishnapal & Ors., 2008 AIR SCW 6322*]

We do not find any force in the submission made by the learned counsel for the appellants that as the number of accused had been seventeen and the incident was over within a very short time, it was not possible for witnesses to give as detailed description as has been given in this case, and there had been several contradiction therein, therefore, their evidence is not reliable. In such a case even if minor contradictions appeared in the evidence of witnesses, it is to be ignored for the reason that it is natural that exact version of the incident revealing any minute detail i.e. meticulous exactitude of individual acts cannot be expected from the eye-witnesses. [See: *Abdul Sayeed v. State of Madhya Pradesh, 2010 AIR SCW 570*].

In this case all the accused were very well known to the witnesses. So their identification etc. has not been in issue. As their participation being governed by second part of Section 149 IPC, overt act of an individual lost significance.

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*44. **INDIAN PENAL CODE, 1860 – Section 300 Secondly or Exception 4, Section 302 or Section 304 Pt. II**

Murder or culpable homicide – Accused used a wooden pestle singly but with such force that the head of deceased was broken into pieces (multiple fractures on the skull) leading to almost instantaneous death – Any reasonable person with any stretch of imagination can come to the conclusion that such an injury on such vital part of the body with such a weapon would cause death – The injury sustained by the deceased not only exhibits the intention of the accused in causing death of the victim but also the knowledge of the accused as to the likely consequence of such attack which would be none other than causing death of the victim – Act of accused comes under second part of Section 300 IPC and not under Exception to Section 300 IPC – Therefore, conviction under Section 302 IPC even on single blow injury, upheld.

Ashok kumar Magabhai Vankar v. State of Gujarat

Judgment dated 03.11.2011 passed by the Supreme Court in Criminal Appeal No. 1340 of 2008, reported in (2011) 10 SCC 604

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45. **INDIAN PENAL CODE, 1860 – Section 302**
EVIDENCE ACT, 1872 – Section 32 (1)

Murder trial – Dying declaration – Appreciation and acceptability – Held, it is the duty of the Court to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination – Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence – Position explained.

Surinder Kumar v. State of Haryana

Judgment dated 21.10.2011 passed by the Supreme Court in Criminal Appeal No. 328 of 2004, reported in (2011) 10 SCC 173

Held:

Before considering the acceptability of dying declaration (Ex.PD), it would be useful to refer the legal position.

In *Sham Shankar Kankaria v. State of Maharashtra, (2006) 13 SCC 165,* this Court held as under:

> "This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be

excluded it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence.

Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of deceased was not as a result of either tutoring or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under as indicated in *Paniben v. State of Gujarat, (1992) 2 SCC 474;*

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See *Munnu Raja v. State of M.P.;(1976) 3 SCC 104)*

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See *State of U.P. v. Ram Sagar Yadav, (1985) 1 SCC 552 and Ramawati Devi v. State of Bihar;(1983) 1 SCC 211*)

(iii) The Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (*See K. Ramachandra Reddy v. Public Prosecutor;(1976) 3 SCC 618*)

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See *Rasheed Beg v. State of M.P.,(1974) 4 SCC 264*)

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See *Kake Singh v. State of M.P., 1981 Supp SCC 25)*

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See *Ram Manorath v. State of U.P.,(1981) 2 SCC 654*)

(vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected. (See *State of Maharashtra v. Krishnamurti Laxmipati Naidu,1980 Supp SCC 455*)

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See *Surajdeo Ojha v. State of Bihar,1980 Supp SCC 769*)

(ix) Normally the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See *Nanhau Ram v. State of M.P.,1988 Supp SCC 152*)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See *State of U.P. v. Madan Mohan, (1989) 3 SCC 390*)

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. (See *Mohanlal Gangaram Gehani v. State of Maharashtra,(1982) 1 SCC 700*)"

In *Puran Chand v. State of Haryana, (2010) 6 SCC 566,* this Court once again reiterated the abovementioned principles.

In *Panneerselvam v. State of Tamil Nadu, (2008) 17 SCC 190,* a Bench of three Judges of this Court reiterating various principles mentioned above held that :

"...it cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of the conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence."

In the light of the above principles, the acceptability of the alleged dying declaration in the instant case has to be considered. If, after careful scrutiny, the Court is satisfied that it is free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make a basis of conviction, even if there is no corroboration.

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46. INDIAN PENAL CODE, 1860 – Sections 302 and 292
CRIMINAL TRIAL:
EVIDENCE ACT, 1872 – Sections 24 and 30

(i) Murder with robbery – Extra-judicial confession can be used against its maker but as a matter of caution, Courts look for corroboration to the same from other evidence on record.

(ii) Confession of co-accused – Appreciation of – Court cannot start with the confession of a co-accused – It must begin with other evidence adduced by the prosecution, then only it is permissible to turn to confession in order to receive assurance as to conclusion of guilt.

Pancho v. State of Haryana

Judgment dated 20.10.2011 passed by the Supreme Court in Criminal Appeal No. 1050 of 2005, reported in (2011) 10 SCC 165

Held:

The extra-judicial confession made by A1-Pratham is the main plank of the prosecution case. It is true that an extra- judicial confession can be used against its maker, but as a matter of caution, courts look for corroboration to the same from other evidence on record. In *Gopal Sah v. State of Bihar, (2008) 17 SCC 128,* this court while dealing with an extra-judicial confession held that an extra-judicial confession is on the face of it, a weak evidence and the courts are reluctant, in the absence of chain of cogent circumstances, to rely on it for the purpose of recording a conviction.

The question which needs to be considered is what is the evidentiary value of a retracted confession of a co-accused?

The law on this point is well settled by catena of judgments of this court. We may, however, refer to only two judgments to which our attention is drawn by the learned senior counsel/Amicus-curiae. In *Kashmira Singh v. The State of Madhya Pradesh, AIR 1952 SC 159* referring to the judgment of the Privy Council in *Bhuboni Sahu v. R., (1949) 50 Cri LJ 872,* and observations of Sir Lawrence Jenkins in *Emperor v. Lalit Mohan Chuckerburty, ILR (1911) 38 Cal. 559* this Court observed that proper way to approach a case involving confession of a co-

accused is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then it is not necessary to call the confession in aid.

This court further noted that : [*Kashmira Singh* (supra)]

> "10. ...cases may arise where the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event, the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession, he would not be prepared to accept."

In *Haricharan Kurmi v. State Bihar, AIR 1964 SC 1184* the Constitution Bench of this Court was again considering the same question. The Constitution Bench referred to Section 3 of the Evidence Act and observed that confession of a co-accused is not evidence within the meaning of Section 3 of the Evidence Act. It is neither oral statement which the court permits or requires to be made before it as per Section 3(1) of the Evidence Act nor does it fall in the category of evidence referred to in Section 3(2) of the Evidence Act which covers all documents produced for the inspection of the court. This court observed that even then Section 30 provides that a confession may be taken into consideration not only against its maker, but also against a co-accused. Thus, though such a confession may not be evidence as strictly defined by Section 3 of the Evidence Act, "it is an element which may be taken into consideration by the criminal court and in that sense, it may be described as evidence in a non-technical way".

This court in *Haricharan case* (supra) further observed that Section 30 merely enables the court to take the confession into account. It is not obligatory on the court to take the confession into account. This court reiterated that a confession cannot be treated as substantive evidence against a co-accused. Where the prosecution relies upon the confession of one accused against another, the proper approach is to consider the other evidence against such an accused and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused, the court turns to the confession with a view to assuring itself that the conclusion which it is inclined to draw from the other evidence is right.

This Court in *Haricharan* (supra) clarified that though confession may be regarded as evidence in generic sense because of the provisions of Section 30 of the Evidence Act, the fact remains that it is not evidence as defined in Section 3 of the Evidence Act. Therefore, in dealing with a case against an accused, the court cannot start with the confession of a co-accused; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to

turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence.

Applying the above principles to the case on hand, we find that so far as A2-Pancho is concerned, except the evidence of alleged belated discovery of certain articles at his instance, which we have already found to be doubtful, there is no other evidence on record to connect him to the offence in question. When there is no other evidence of sterling quality on record establishing his involvement, he cannot be convicted on the basis of the alleged extra-judicial confession of the co-accused A1-Pratham, which in our opinion, is also not credible. Once A1-Pratham's extra-judicial confession is obliterated and kept out of consideration, his conviction also cannot be sustained because we have come to the conclusion that the alleged discovery of articles at his instance cannot be relied upon. There is thus, no credible evidence to persuade us to uphold the conviction of A1-Pratham.

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47. INDIAN PENAL CODE, 1860 – Sections 302 and 323 r/w/s 34
CRIMINAL TRIAL:
EVIDENCE ACT, 1872 – Section 32

(i) Murder trial – Conduct, reaction and behaviour of eye witnesses – None of the close family members, who were witnesses, has made any statement to the police immediately after the incident – They could not have been expected to proceed to the police station to lodge a report when the injured were critical – Any action to be taken against the assailants, would have been a matter of secondary concern – Behaviour of the witnesses not unnatural looking to the facts and circumstances of the case.

(ii) Common intention, sharing of – Presence of other accused with prime accused was not merely incidental – Other accused did share common intention of prime accused – Presence does justify conviction of other accused along with prime accused.

(iii) Motive, proof of – Is not a *sine qua non* before a person can be held guilty of commission of crime – Motive being a matter of mind, is more often than not difficult to establish through evidence.

(iv) Dying declaration – Discrepancies pointed out in recording time, presence of words not in common use, as well as, overwriting in the dying declaration, are too trivial to brush aside the overwhelming oral evidence produced by prosecution – In the facts and circumstances, dying declaration, held, reliable.

Deepak Verma v. State of Himachal Pradesh

Judgment dated 11.10.2011 passed by the Supreme Court in Criminal Appeal No. 2423 of 2009, reported in (2011) 10 SCC 129

Held:

In the peculiar facts, as have been noticed hereinabove, it is evident that the first endeavour of all close family members would have been to have the two injured Kamini Verma and Rakesh Kumar treated at the Zonal Hospital, Chamba. None of the close family members could have been expected to proceed to the police station to lodge a report when both the injured were critical. Full attention for the welfare of the two close family members would have been the expected behaviour of all family members. The action to be taken against the assailants, would have been a matter of secondary concern. The contention of their not having made any statements at that juncture to the police, cannot therefore, be considered unnatural. Kamini Verma was declared medically fit at 13:00 hrs., on 28.7.2003 by Dr. D.P. Dogra PW11. She specifically identified the two accused Dheeraj Verma and Deepak Verma as the perpetrators of the occurrence. There is no reason whatsoever to doubt the dying declaration made by Kamini Verma.

The second contention advanced at the hands of the learned counsel for the appellants was limited to the appellant-accused no.2 Deepak Verma. In so far as the second submission is concerned, it was sought to be asserted that no role whatsoever has been attributed to appellant-accused no.2 Deepak Verma. It was pointed out, that as per the prosecution witnesses, the double barrel gun which came to be fired at Kamini Verma and Rakesh Kumar, had remained in possession of Dheeraj Verma, appellant-accused no.1 throughout the occurrence. All the shots were fired by Dheeraj Verma, appellant-accused no.1. It was pointed out, that as per the prosecution story, it was Dheeraj Verma, appellant-accused no.1 alone, who had allegedly fired shots, in the first instance at Kamini Verma, and thereafter, at Rakesh Kumar. It was submitted that none of the shots was fired by Deepak Verma appellant-accused no.2. It is submitted that even if the prosecution story is examined dispassionately, it would emerge that Deepak Verma, accused-appellant no.2 was a mere by-stander, and had no role whatsoever in the commission of the crime in question.

It is not possible for us to accept the contention advanced at the hands of the learned counsel for the appellant to the effect that the appellant-accused no.2 Deepak Verma was not an active participant in the crime in question. The evidence produced by the prosecution clearly establishes that the two accused-appellants nos.1 and 2 Dheeraj Verma and Deepak Verma had come to the house of Arun Kumar PW2 to commit the crime in question on a scooter. It is also apparent that at one juncture only two cartridges can be loaded in a double barrel gun. With the cartridges loaded in the gun, the appellant-accused no.1 Dheeraj Verma had fired the first two shots at Kamini Verma. Thereafter, there were no live cartridges in the gun. Sumitri Devi, while appearing as PW4, pointed out, that after the appellant-accused no.1 Dheeraj Verma had fired two shots at Kamini Verma, the appellant-accused no.2 Deepak Verma provided two live cartridges to the appellant-accused no.1 Dheeraj Verma. Dheeraj Verma then

reloaded his double barrel gun with the two live cartridges furnished by appellant-accused no.2 Deepak Verma, and fired one further shot at the deceased Rakesh Kumar.

After the commission of the crime, Dheeraj Verma and Deepak Verma, jointly made good their escape on a scooter bearing Registration No. PB 58 A 0285. When the two accused were apprehended at Bhatulun Morh at a police naka appellant-Accused 2 Deepak Verma was driving the scooter, whereas, appellant-Accused 1 Dheeraj Verma was pillion riding with him. It, accordingly emerges, that after having committed the crime, appellant-Accused 2 Deepak Verma, also helped his brother appellant-Accused 1 Dheeraj Verma to make good his escape from the place of occurrence. It is, therefore, not possible for us to conclude that appelant-Accused 2 Deepak Verma was merely a bystander, who was incidentally present at the place of occurrence. In our considered view, both Dheeraj Verma and Deepak Verma jointly planned and committed the crime.

Various eyewitnesses had identified the two accused who had committed the offence. The dying declaration of Kamini Verma and the statements of her relations, who had appeared as prosecution witnesses duly establishes the commission of the crime, as well as, the common motive for the two accused to had joined hands in committing the crime. The handing over of two live cartridges by the appellant-accused no.2 Deepak Verma to his brother Dheeraj Verma, after he had fired two shots from the double barrel gun with which the crime in question was committed, completely demolishes the contention advanced at the hands of the learned counsel for the appellants, in so far as the participation of the appellant-accused no.2 Deepak Verma in the crime is concerned. For the reasons recorded herein above, we find no merit even in the second contention advanced at the hands of the counsel for the appellants.

The third contention advanced at the hands of the learned counsel for the appellants was that there was no motive whatsoever for the appellant-accused no.2 Deepak Verma to have committed the offence in question. It is the submission of the learned counsel for the appellants that insult on account of non acceptance of the marriage proposal already referred to above, may have been felt by appellant-accused no.1 Dheeraj Verma. There was no question of the appellant-accused no.2 Deepak Verma to have felt any insult, or to have any motive to commit the offence in question. On account of lack of motive to commit the crime on the part of appellant-accused no.2 Deepak Verma, learned counsel emphatically submits that the appellant-accused no.2 Deepak Verma deserves acquittal.

We have examined the third submission canvassed at the hands of the learned counsel for the appellants, based on the plea of motive. While dealing with the second contention, advanced at the hands of the learned counsel for the appellants, we have already concluded hereinabove, that there was sufficient motive even for the appellant-accused no.2 Deepak Verma to commit the crime

in question, in conjunction with his younger brother Dheeraj Verma, appellant-accused no.1. Be that as it may, it would be relevant to indicate, keeping in mind the observations recorded by this Court that proof of motive is not a *sine qua non* before a person can be held guilty of the commission of a crime. Motive being a matter of the mind, is more often than not, difficult to establish through evidence.

In our view, the instant contention advanced by the learned counsel for the appellant is misconceived in the facts and circumstances of the case. In the present case, there is extensive oral evidence in the nature of the statements of three eye-witnesses out of which one is a stamped witness, that appellant-accused no.2 Deepak Verma was an active participant in the crime in question. There is also the dying declaration of Kamini Verma implicating both the accused. In *State of U.P. v. Rajvir, (2007) 15 SCC 545* relied upon by the learned counsel for the appellant, the oral evidence produced by the prosecution to implicate the respondent with the commission of the crime, was not clear. Accordingly, in the absence of the prosecution (sic not) having been able to establish even the motive, the High Court (as well as, this Court) granted the respondent the benefit of doubt. That is not so in so far as the present controversy is concerned. The oral evidence against the appellant-accused no.2 Deepak Verma is clear and unambiguous. Besides, motive of appellant-accused no.2 Deepak Verma is also fully established. We are therefore satisfied, that the judgment relied upon by the learned counsel for the appellant has no relevance to the present case. We, therefore, find no merit even in the third contention advanced at the hands of the learned counsel for the appellants.

We have considered the last submission advanced at the hands of the learned counsel for the appellants. There can be no doubt that there are certain discrepancies in the time recorded in the dying declaration. Additionally, there can also be no doubt that certain words which are not in common use have found place in the dying declaration made by Kamini Verma. Despite the aforesaid, we find no merit in the submission advanced at the hands of the learned counsel for the appellant. It is not possible for us to accept that Kamini Verma was not fit to make her statement when she actually recorded the same in the presence of ASI Jog Raj PW26 and Dr.D.P. Dogra PW11. The very medical report, relied upon by the learned counsel for the appellants, which depicted that the pulse rate and blood pressure of Kamini Verma was not recordable, also reveals, that on having been given treatment her blood pressure improved to 140/70 and her pulse rate improved to 120 per minute. This aspect of the medical report is not subject matter of challenge.

The fact that the incident occurred on 28.7.2003 and Kamini Verma eventually died on 1.8.2003, i.e., 4 days after the recording of the dying declaration also shows that she could certainly have been fit to make her dying declaration on 28.7.2003. Her fitness was actually recorded on the dying declaration by Dr. D.P. Dogra PW11. A number of prosecution witnesses reveal that she was conscious and was able to speak. Kamini Verma after having

recorded her statement before ASI Jog Raj PW26, also repeated the same version of the incident (as she had narrated while recording her dying declaration) to her father Arun Kumar PW2, when she was being shifted from Chamba to Amritsar for medical treatment. Moreover, Dr. D.P. Dogra PW11 appeared as a prosecution witness, and affirmed the veracity of her being in a fit condition to make the statement. There is no reason whatsoever to doubt the statement of Dr. D.P. Dogra PW11. The question of doubting the dying declaration made by Kamini Verma could have arisen if there had been other cogent evidence to establish any material discrepancy therein.

As already noticed hereinabove, three eye witnesses, namely, Deepak Kumar PW1, Sonia PW3 and Sumitri Devi PW4 have supported the version of the factual position depicted in the statement of Kamini Verma. It is, therefore, not possible for us to accept, that the statement of Kamini Verma was either false or fabricated, or that, the statement was manipulated at the hands of the prosecution to establish the guilt of the appellant-accused nos.1 and 2 Dheeraj Verma and Deepak Verma, or that she was not medically fit to make a statement.

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48. INDIAN PENAL CODE, 1860 – Sections 302 and 376
EVIDENCE ACT, 1872 – Section 3
All the circumstances have been proved by the prosecution as (a) dead body of deceased recovered by police in the house of accused; (b) deceased was playing with other children in front of the house of accused and she was missing during the play; (c) accused had an opportunity to take deceased inside the house of accused; (d) accused had taken plea of *alibi* and found false; (e) medical evidence shown sexual assault and death by strangulation etc. – Conviction upheld.

Haresh Mohandas Rajput v. State of Maharashtra

Judgment dated 20.09.2011 passed by the Supreme Court in Criminal Appeal No. 2030 of 2009, reported in AIR 2011 SC 3681

Held:

In *Krishnan v. State represented by Inspector of Police, 2008 AIR SCW 4065*, this Court after considering a large number of its earlier judgments observed that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that with all human probability the crime was committed by the accused and none else; and

(iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

Though a conviction may be based solely on circumstantial evidence, however, the court must bear in mind the aforesaid tests while deciding a case involving the commission of a serious offence in a gruesome manner.

In *Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622,* this Court observed that it is well settled that the prosecution's case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence put up by the accused. However, a false defence may be called into aid only to lend assurance to the court where various links in the chain of circumstantial evidence are in themselves complete. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The same should be of a conclusive nature and exclude all possible hypothesis except the one to be proved. The facts so established must be consistent with the hypothesis of the guilt of the accused and the chain of evidence must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and must show that in all human probability, the act must have been done by the accused. The Court also discussed the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone and held as under:

"(a) The circumstances from which the conclusion of guilt is to be drawn should be fully established;

(b) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(c) The circumstances should be of a conclusive nature and tendency;

(d) They should exclude every possible hypothesis except the one to be proved; and

(e) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

A similar view has been reiterated by this Court persistently observing that the evidence produced by the prosecution should be of such a nature that it makes the conviction of the accused sustainable. [See: *Paramjeet Singh @ Pamma v. State of Uttarakhand, AIR 2011 SC 200; Wakkar & Anr. v. State of Uttar Pradesh,*

2011 AIR SCW 1215, Mohd. Mannan @ Abdul Mannan v. State of Bihar, (2011) 5 SCC 317; Inspector of Police, Tamil Nadu v. John David, (2011) 5 SCC 509; and *SK. Yusuf v. State of West Bengal, AIR 2011 SC 2283*].

In this case the following circumstances have been taken into consideration by the courts below while convicting the appellant:

(1) Incident occurred in the house of the appellant.

(2) Appellant was present at his house when the children were playing.

(3) Appellant had an opportunity to take Pooja inside the house.

(4) During play Pooja was found missing.

(5) Nitesh (PW.3) saw Pooja in the house of the appellant and asked him about it and he denied.

(6) Appellant admitted before his mother and son Khushal (PW.10) to have killed Pooja.

(7) Khushal (PW.10) had given information at the Police Station that his father/appellant killed Pooja and put the dead body below the cot in his house.

(8) Police Head Constable G.R. More (PW.4), Ashok (PW.2) and Deepak Jawahar Agarwal (PW.8) went to the house of the appellant and recovered the dead body of Pooja. Explanation given by the appellant that he had gone to liquor shop for drinking leaving his house open was not found to be acceptable.

(9) Recovery of rope used in the crime at the instance of the appellant from his house.

(10) Person other than the appellant had no opportunity to commit the crime.

The evidence led by the prosecution clearly establishes the aforesaid circumstances. Only a very few which are immaterial and are not vital to determine the case, stood fully proved against the appellant. In such a fact-situation, we do not find any cogent reason to interfere with the well-reasoned judgments of the courts below so far as the conviction of the appellant is concerned, and we affirm his conviction under Sections 302 and 376 IPC. So far the sentence part is concerned, we are of the considered opinion that the case does not fall within the rarest of the rare case. Thus, sentence of life imprisonment awarded by the Trial Court restored.

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49. INDIAN PENAL CODE, 1860 – Section 376
CRIMINAL TRIAL:

(i) Age of prosecutrix, determination of – Birth certificate reveals that prosecutrix was less than 16 years of age on the date of incident – Radiologist's report revealed it as 16 to 17 years – Defence also produced certificate from hospital – Radiologist's report cannot predict exact date of birth – Margin of error in age ascertained by radiological examination is two years on either side – It was held that prosecutrix was less than 16 years of age on date of incident.

(ii) Rape of minor – Sole testimony of prosecutrix – Appreciation of – Her evidence must receive the same weight as is attached to an injured witness in case of physical violence – Legal position reiterated.

(iii) Defective investigation – Statement of investigating officer, reliability of – Investigation into a criminal matter must be free from all objectionable features or infirmities – The investigating officer is supposed to investigate an offence avoiding any kind of mischief or harassment to either of the party.

Mohd. Imran Khan v. State Government (NCT of Delhi)
Judgment dated 10.10.2011 passed by the Supreme Court in Criminal Appeal No. 1516 of 2010, reported in (2011) 10 SCC 192

Held:

Both the courts below have laboured hard to find out the age of the prosecutrix for the reason that defence produced certificate from Safdarjung Hospital, New Delhi to create confusion and the I.O. in order to help the appellants had made a statement that the certificate on record did not belong to the prosecutrix. The medical report of the Radiologist issued by Ram Manohar Lohia Hospital, New Delhi revealed that age of the prosecutrix was between 16 and 17 years. The Birth Certificate issued under Section 17 of the Registration of Birth & Death Act, 1969 reveals that a female child was born on 2.9.1974 from the wedlock of Prabhu Dass and Devki, residents of Sector 12/69, R.K. Puram, New Delhi and its registration number had been 4840. It also reveals that number of live children including this child had been two. However, this certificate has been duly proved by Vijay Kumar Harnal, Medical Record Officer, Safdarjung Hospital, New Delhi (PW.9), who explained that one female child was born in Safdarjung Hospital at 7.15 a.m. on 2.9.1974. Her mother's name was Devki, wife of Prabhu Dass and her address was R.K. Puram, New Delhi. He also explained that the other Birth Certificate produced by the defence according to which a female child was born on 12.9.1971 was of a different female child who was born to one Devi Rani, wife of Prabhu Dayal, residents of Kotla Mubarakpur and thus, it did not belong to prosecutrix. Similar evidence had been given by Dr. R.K. Sharma, C.M.O., N.D.M.C., Delhi (PW.7). According to him, the female

child was born with Registration No.4840 on 2.9.1974 and he further explained that the name of the parents and address of another female child born on 27.9.1971 bearing different registration no.4502 had been totally different, i.e. Prabhu Dayal and Devi Rani, residents of Kotla Mubarakpur. The number of living children with that family is also different from that of the prosecutrix. These documents have thoroughly been examined by the courts below and we do not see any cogent reason to examine the issue further.

The medical report and the deposition of the Radiologist cannot predict the exact date of birth, rather it gives an idea with a long margin of 1 to 2 years on either side. In *Jaya Mala v. Government of J & K, AIR 1982 SC 1297* this Court held:

> "However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."

(See also: *Ram Suresh Singh v. Prabhat Singh, (2009) 6 SCC 681* and *State of U.P. v. Chhotey Lal, (2011) 2 SCC 550,*)

In view of the above as we have seen the original record produced before us, we are of the considered opinion that the prosecutrix was less than 16 years of age on the date of incident.

(ii) It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust. The prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. Indian Evidence Act, nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 of Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

The court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. Rape is not merely a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the

prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence. (Vide: *State of Maharashtra v. Chandraprakash Kewalchand Jain, AIR 1990 SC 658, State of U.P. v. Pappu, AIR 2005 SC 1248* and *Vijay v. State of M.P., (2010) 8 SCC 191*).

Thus, the law that emerges on the issue is to the effect that statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix.

The Trial Court came to the conclusion that there was no reason to disbelieve the prosecutrix, as no self-respecting girl would level a false charge of rape against anyone by staking her own honour. The evidence of rape stood fully corroborated by the medical evidence. The MLC of the prosecutrix Ext.PW2/A was duly supported by Dr. Reeta Rastogi (PW.2). This view of the Trial Court stands fortified by the judgment of this Court in *State of Punjab v. Gurmit Singh, AIR 1996 SC 1393*, wherein this Court observed that :

> "... the courts must, while evaluating evidence remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her."

Similarly, in *Wahid Khan v. State of Madhya Pradesh, (2010) 2 SCC 9* it has been observed as under:

> "It is also a matter of common law that in Indian society any girl or woman would not make such allegations against a person as she is fully aware of the repercussions flowing therefrom. If she is found to be false, she would be looked at by the society with contempt throughout her life. For an unmarried girl, it will be difficult to find a suitable groom. Therefore, unless an offence has really been committed, a girl or a woman would be extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity. She would also be conscious of the danger of being ostracised by the society. It would indeed be difficult for her to survive in Indian society which is, of course, not as forward-looking as the western countries are."

(iii) Much reliance has been placed by learned counsel for the appellants on the judgment of this Court in *Javed Masood v. State of Rajasthan, (2010) 3 SCC 538*, wherein it had been held that in case the prosecution witness makes a statement and is not declared hostile, he is supposed to speak the truth and his statement is to be believed.

It is in view of this fact in the instant case that Puran Singh, I.O. (PW.15) has deposed in the court that the "birth certificate of the prosecutrix did not relate to the prosecutrix. I did not verify about the birth certificate from the NDMC. I do not remember if at the time of bail application I had submitted that the birth certificate is genuine but does not relate to prosecutrix." Thus, the question does arise as to what extent the court is under an obligation to accept the statement of Puran Singh, I.O. (PW.15) particularly in view of the birth certificate available on the record. In view of our finding in respect of the date of birth we are of the view that Puran Singh, I.O. (PW.15) unfortunately made an attempt to help the accused/appellants, though in the examination-in-chief the witness has deposed that the Birth Certificate providing the date of birth as 2.9.1974 was genuine.

Be that as it may, by now Puran Singh (PW.15) might have retired as the incident itself occurred 22 years ago. Therefore, we do not want to say anything further in respect of his conduct.

In *State of Karnataka v. K Yarappa Reddy, AIR 2000 SC 185,* this Court while dealing with a similar issue held:

> "It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinized independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by investigating officers. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case."

The investigation into a criminal offence must be free from all objectionable features or infirmities which may legitimately lead to a grievance to either of the parties that the investigation was unfair or had been carried out with an ulterior motive which had an adverse impact on the case of either of the parties. Investigating Officer is supposed to investigate an offence avoiding any kind of mischief or harassment to either of the party. He has to be fair and conscious so as to rule out any possibility of bias or impartial conduct so that any kind of suspicion to his conduct may be dispelled and the ethical conduct is absolutely essential for investigative professionalism. The investigating officer

> "is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth."

(Vide: *Jamuna Chaudhary v. State of Bihar, AIR 1974 SC 1822, State of Bihar v. P.P. Sharma, AIR 1991 SC 1260* and *Babubhai v. State of Gujarat, (2010) 12 SCC 254*)

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50. JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000 – Sections 4, 29 and 63

Constitution of Juvenile Justice Boards, Child Welfare Committees and Special Juvenile Police Units – Apex Court issued direction to ensure that the Juvenile Justice Boards and Child Welfare Committees are established and are functional with requisite facilities and also to ensure creation of Special Juvenile Police Units in every district and city.

Sampurna Behura v. Union of India and others

Order dated 12.10.2011 passed by the Supreme Court in Writ Petition (C) No. 473 of 2005, reported in (2011) 9 SCC 801

Held:

In this Writ Petition under Article 32 of the Constitution, the Court has been monitoring the implementation of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short 'the Act'). The Court has already passed several orders for constitution of Juvenile Justice Boards under Section 4 of the Act and Child Welfare Committees under Section 29 of the Act in different States and Union Territories and most of the States and Union Territories have taken steps to constitute the Juvenile Justice Boards and the Child Welfare Committees. As there were complaints that in many districts Child Welfare Committees were not operational or functional and even Juvenile Justice Boards had not been constituted in the manner provided in the Act, in our order dated 19.08.2011 (in this case) we have requested the State Legal Services Authorities to coordinate with the respective Child Welfare Department of the States to ensure that the Juvenile Justice Boards and Child Welfare Committees are established and are functional with the required facilities.

We think that we must now monitor the implementation of the provisions of the Act relating to Special Juvenile Police Unit. Section 63 of the Act is quoted hereinbelow:

> "*63. Special juvenile police unit.*- (1) In order to enable the police officers who frequently or exclusively deal with juveniles or are primarily engaged in the prevention of juvenile crime or handling of the juveniles or children under this Act to perform their functions more effectively, they shall be specially instructed and trained.
>
> (2) In every police station at least one officer with aptitude and appropriate training and orientation may be designated as the 'juvenile or the child welfare officer' who will handle the juvenile or the child in co-ordination with the police.

(3) Special juvenile police unit, of which all police officers designated as above, to handle juveniles or children will be members, may be created in every district and city to co-ordinate and to upgrade the police treatment of the juveniles and the children."

The Home Departments and the Director Generals of Police of the States/ Union Territories will ensure that at least one police officer with aptitude in every police station is given appropriate training and orientation and designated as Juvenile or Child Welfare Officer, who will handle the juveniles or childen in coordination with the police as provided under sub-section (2) of Section 63 of the Act. The required training will be provided by the District Legal Services Authorities under the guidance of the State Legal Services Authorities and Secretary, National Legal Services Authority will issue appropriate guidelines to the State Legal Services Authorities for training and orientation of police officers, who are designated as the Juvenile or Child Welfare Officers. The training and orientation may be done in phases over a period of six months to one year in every State and Union Territory.

The Home Departments and the Director Generals of Police of the States/ Union Territories will also ensure that Special Juvenile Police Unit comprising of all police officers designated as Juvenile or Child Welfare Officers be created in every district and city to coordinate and to upgrade the police treatment to juveniles and the children as provided in sub-section (3) of Section 63 of the Act.

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51. LAND ACQUISITION ACT, 1894 – Sections 18 and 19
CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17

(i) Amendment of amount claimed as compensation in reference application – Limitation therefor – There is no obligation on land owner to specify amount of compensation in reference application, therefore, period of limitation is inapplicable for amendment of amount of compensation.

(ii) Amendment in reference application after expiry of period of limitation – Amendment as to changing nature of objections from one category to another is impermissible after expiry of period of limitation specified in Section 18.

Ambya Kalya Mhatre (dead) through LRs. and others v. State of Maharashtra

Judgment dated 12.09.2011 passed by the Supreme Court in Civil Appeal No. 7784 of 2011, reported in (2011) 9 SCC 325 (3-Judge Bench)

Held:

Section 18 does not require a land owner objecting to the amount of compensation, to make a claim for any specific amount as compensation, nor does it require him to state whether the increase in compensation is sought only

in regard to the land, or land and building, or land, building and trees. A land owner can seek reference to civil court, with reference to any one or more of the four types of objections permissible under Section 18 of the Act, with reference to the award. His objection can either be in regard to the measurement of the acquired land or in regard to the compensation offered by the Collector or in regard to persons to whom it is shown as payable or the apportionment of compensation among several claimants. Once the land owner states that he has objection to the amount of compensation, and seeks reference to the civil court, the entire issue of compensation is open before the Reference Court. Once the claimant satisfies the Reference Court that the compensation awarded by the Land Acquisition Officer is inadequate, the Reference Court proceeds to determine the compensation, with reference to the principles in Section 23 of the Act. As the Act does not require the person aggrieved/landowner to specify the amount of compensation sought, when objecting to the amount of compensation and seeking a reference, mentioning of the amount of compensation sought is optional. As there is no obligation to specify the amount in the application for reference, it can be specified in the claim statement filed before the Reference Court. The period of limitation in Section 18 of the Act has nothing to do with specifying the amount of compensation claimed. It therefore follows that if the reference is in regard to objection to the amount of compensation, the Reference Court can permit any application for amendment of the claim relating to compensation.

Section 18 of the Act enables the land owner or person interested to make a written application to the Collector requiring his objection to the award, to be referred for determination by the court. In the application, he has to state whether his objection is in regard to measurement, quantum of compensation, persons entitled to compensation, or apportionment. He is also required to state the grounds on which the objection to the award, is taken. But the section does not require the land owner while seeking a reference, to specify the quantum of compensation demanded by him. Section 18 merely requires a land owner who has an objection to the amount of compensation awarded by the Land Acquisition Officer to require the matter to be referred to reference court for determination of compensation by specifying the grounds of objections to the award.

When the reference is received, the court causes notice specifying the date of hearing for determining the objection of the land owner/person aggrieved (Section 20 of the Act). The Reference Court has to call upon the claimants to file their statement of claim and call upon the Collector to file his objections to the claim statement and then proceed with the matter. Where the application under Section 18 contains the necessary particulars, the Reference Court may treat the application for reference under Section 18 and the Collector's statement under Section 19 of the Act as the pleadings. The land owner is entitled to specify the amounts claimed by him as compensation and the heads of compensation for the first time in such claim statement before the Reference Court. He can also file an application amending the claim. What is not permitted

after the expiry of the period of limitation specified in Section 18 of the Act, is changing the nature of objections from one category to another. If the reference had been sought with reference to objection to amount of compensation, the land owner cannot after the period of limitation, seek amendment to change the claim as objection to measurement or objection to apportionment.

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52. LAND ACQUISITION ACT, 1884 – Section 23

(i) Addition towards appreciation in value – Held, unless the difference is more than one year, normally no addition should be made towards appreciation in value unless there is specific evidence to show some specific increase within a short period.

(ii) Advantage of a better frontage with respect to an undeveloped agricultural land – Adding of percentage – Where the value of large tracts of undeveloped agricultural land situated on the periphery of a city in an area which is yet to be developed is to be determined with reference to the value of a nearby small residential plot – The question of adding any percentage for the advantage of frontage to the acquired lands does not arise.

(iii) Acquisition of large tracts of undeveloped land – Determination of compensation with reference to the prices faced by a small developed plot – By comparing situational advantages, existing developments and amenities available to acquired lands and exemplar sale transactions relating to small plots, deductions varying from 20% to 75% will have to be made to arise at value of acquired lands – Principle reiterated.

Kolkata Metropolitan Development Authority v. Gobinda Chandra Makal and another

Judgment dated 02.08.2011 passed by the Supreme Court in Civil Appeal No. 5938 of 2007, reported in (2011) 9 SCC 207

Held :

The valuer has added 8% towards appreciation in value during the period of eight months between the date of the exemplar sale (10.3.2000) and the date of preliminary notification (which was taken as 16.11.2000). The date of publication of the said notification is 13.9.2000. Only about six months had passed from the date of the exemplar sale deed (10.3.2000), when the preliminary notification regarding the acquisition was issued in the same year namely 2000. (The difference would be eight months even if the date of publication of preliminary notification is taken as 16.11.2000). When the relied upon sale transaction and the preliminary notification are in the same year, no provision is made for any appreciation in value. This Court in *ONGC Ltd. vs. Rameshbhai Jivanbhai Patel, (2008) 4 SCC 745* observed :

> "20. ....: However, for the purpose of calculation, we have to exclude the year of the relied-upon transaction, which is the base year. If the year of relied upon transaction is 1987, the increase is applied not from 1987 itself, but only from the next year which is 1988."

Therefore, unless the difference is more than one year, normally no addition should be made towards appreciation in value, unless there is special evidence to show some specific increase within a short period. Therefore, the addition of 8% to the price (Rs.100,000/- per cottah) of plot no.192, was unwarranted.

The Expert valuer has added to the basic value of ₹ 1,00,000 (relating to plot No.192), 20% for plot no.62 for having a frontage to Anandpur main road, 10% for plot no.42 for having a frontage to a kutcha KMC road, and 20% for plot No.272 for having a frontage to a sixty feet wide road, on the ground that these three lands were more advantageously situated when compared to plot No.192 which faces a narrow eight feet common passage. The valuer has made one more addition to the basic value on account of frontage advantage of the acquired plots, that is 25%, 20% and 30% respectively for plot nos 62, 42 and 272 for having a frontage on a wider road thereby giving the advantage of a better FAR (floor area ratio) when undertaking construction. Addition of percentages for advantageous frontage, that too twice was unwarranted.

Advantage of a better frontage is considered to be a plus factor while assessing the value of two similar properties, particularly in any commercial or residential area, when one has a better frontage than the other. However where the value of large tracts of undeveloped agricultural land situated on the periphery of a city in an area which is yet to be developed is being determined with reference to a value of nearby small residential plot, the question of adding any percentage for the advantage of frontage to the acquired lands, does not arise. Therefore, the entire addition for frontage, that is 45%, 30% and 50% respectively for plots 62, 42 and 272, have to be deleted.

In *Administrator General of West Bengal vs. Collector, Varanasi, (1988) 2 SCC 150*, this Court has explained the principle for valuing large extent of undeveloped urban land with reference to the price fetched by a small developed plot. This Court explained that prices fetched for small plots cannot form safe basis for valuation of large tracts of land and cannot be directly adopted in valuation of large tracts of land as the two are not comparable properties – the former reflects the 'retail' price of land and the latter the 'wholesale' price. However, if it is shown that the large extent to be valued does admit of and is ripe for use for building purposes; that building lots that could be laid out on the land would be good selling propositions and that valuation on the basis of the method of a hypothetical layout could with justification be adopted, then in valuing such small laid out sites the valuation indicated by sale of comparable small sites in the area at or about the time of the notification would be relevant. In such a case, necessary deductions for the extent of land required for the formation of roads and other civic

amenities; expenses of development of the sites by laying out roads, drains, sewers, water and electricity lines, and the interest on the outlays for the period of deferment of the realization of the price; the profits on the venture etc., are to be made. From the value of small plots which represents what may be called the 'retail' price of land, the 'wholesale' price of land is to be estimated.

In *Chimanlal Hargovinddas vs. Special Land Acquisition Officer, Poona, (1988) 3 SCC 751*, this Court gave the following illustration to arrive at the value of large undeveloped land from the value of a small developed plot :

> "4. (15) ... A building plot of land say 500 to 1000 sq.yds cannot be compared with a large tract or block of land of say 10,000 sq.yds or more. Firstly, while a smaller plot is within the reach of many, a large block of land will have to be developed by preparing a lay out, carving out roads, leaving open space, plotting out smaller plots, waiting for purchasers (meanwhile the invested money will be blocked up) and the hazards of an entrepreneur. The factor can be discounted by making a deduction by way of an allowance at an appropriate rate ranging approximately between 20% to 50% to account for land required to be set apart for carving out lands and plotting out small plots. The discounting will to some extent also depend on whether it is a rural area or urban area, whether building activity is picking up, and whether waiting period during which the capital of the entrepreneur would be locked up, will be longer or shorter and the attendant hazards."

By comparing the situational advantage, existing development and amenities available to the acquired lands and the exemplar sale transactions relating to small plots, and other relevant circumstances, this Court has made cuts or deductions varying from 20% to 75% from the value of the small developed plots to arrive at the value of acquired lands. [See : *K. Vasundara Devi vs. Revenue Divisional Officer (LAO), (1995) 5 SCC 426; Basavva v. Land Acquisition Officer, (1996) 9 SCC 640; Shaji Kuriakose v. Indian Oil Corporation Ltd., (2001) 7 SCC 650; Atma Singh v. State of Haryana, (2008) 2 SCC 568; Kanta Devi v. State of Haryana, (2008) 15 SCC 201* and *Lal Chand v. Union of India, (2009) 15 SCC 769*].

In *Lal Chand* (supra), this Court gave the following guidelines as to what should be the deduction for development :

> "13. The percentage of 'deduction for development' to be made to arrive at the market value of large tracts of undeveloped agricultural land (with potential for development), with reference to the sale price of small developed plots, varies between 20% to 75% of the price of such developed plots, the percentage depending upon

the nature of development of the lay out in which the exemplar plots are situated.

14. The 'deduction for development' consists of two components. The first is with reference to the area required to be utilised for developmental works and the second is the cost of the development works. For example if a residential layout is formed by DDA or similar statutory authority, it may utilise around 40% of the land area in the layout, for roads, drains, parks, play grounds and civic amenities (community facilities) etc.

15. The Development Authority will also incur considerable expenditure for development of undeveloped land into a developed layout, which includes the cost of levelling the land, cost of providing roads, underground drainage and sewage facilities, laying waterlines, electricity lines and developing parks and civil amenities, which would be about 35% of the value of the developed plot. The two factors taken together would be the 'deduction for development' and can account for as much as 75% of the cost of the developed plot.

16. On the other hand, if the residential plot is in an unauthorised private residential layout, the percentage of 'deduction for development' may be far less. This is because in an un-authorized lay outs, usually no land will be set apart for parks, play grounds and community facilities. Even if any land is set apart, it is likely to be minimal. The roads and drains will also be narrower, just adequate for movement of vehicles. The amount spent on development work would also be comparatively less and minimal. Thus the deduction on account of the two factors in respect of plots in unauthorised layouts, would be only about 20% plus 20% in all 40% as against 75% in regard to DDA plots.

17. The 'deduction for development' with reference to prices of plots in authorised private residential layouts may range between 50% to 65% depending upon the standards and quality of the layout. ..... If the acquired land is in a semi-developed urban area, and not an undeveloped rural area, then the deduction for development may be as much less, that is, as little as 25% to 40%, as some basic infrastructure will already be available. (Note: The percentages mentioned above are tentative standards and subject to proof to the contrary).

20. Therefore the deduction for the 'development factor' to be made with reference to the price of a small plot in a developed lay out, to arrive at the cost of undeveloped land, will be for more than the deduction with reference to the price of a small plot in an unauthorized private lay out or an industrial layout. ...

* * *

22. Some of the layouts formed by statutory Development Authorities may have large areas earmarked for water/sewage treatment plants, water tanks, electrical sub-stations etc. in addition to the usual areas earmarked for roads, drains, parks, playgrounds and community/civic amenities. The purpose of the aforesaid examples is only to show that the 'deduction for development' factor is a variable percentage and the range of percentage itself being very wide from 20% to 75%."

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53. LAND ACQUISITION ACT, 1894 – Sections 23, 24 fifthly and sixthly and Section 28

Determination of compensation – Principle of comparability in context of free hold and restricted user of acquired land stated – Where acquired land is free hold land not subject to any restrictions in regard to user and adjacent land though similarly situated is subject to a permanent restriction regarding user requiring it to be used only for agricultural purposes then these two lands cannot be subjected to the same compensation even acquired by the same notification – First land (free hold) can be valued with reference to sales statistics of other nearby land which have the potential of being used for urban development by making appropriate deduction for development whereas second land will have to be valued only as an agricultural land.

Goa Housing Board v. Rameshchandra Govind Pawaskar and another

Judgment dated 11.10.2011 passed by the Supreme Court in Civil Appeal No. 8540 of 2011, reported in (2011) 10 SCC 371 (3 Judge Bench)

Held:

There can be no doubt that similarly situated land in the same area, having the same advantages and acquired under the same notification should be awarded the same compensation. But the question is when one land is a freehold land not subject to any restrictions in regard to user and the adjoining land though similarly situated is subject to a permanent restriction regarding user

requiring it to be used only for agricultural purposes, the question is whether the two lands can be termed as comparable lands which should be subjected to the same compensation. We may give a few examples to illustrate the position:

(i) A person constructs two identical houses adjoining each other. He lets out one of them and keeps the other vacant. After some years he sells both the properties. The house sold with vacant possession will fetch a better price than the adjoining premises which is in occupation of a tenant and therefore sold without possession. The fact that both properties are situated adjoining each other and have the same area of construction and face the same road will not mean that the price they will fetch will be the same.

(ii) There are two adjoining properties belonging to the same owner. One falls under area earmarked as commercial and the other falls under area earmarked as residential. Though they are similarly situated, the land which is capable of commercial use is likely to fetch a higher price than a land earmarked for residential use.

(iii) An agricultural land with no development potential sold to another agriculturalist for agricultural purposes will fetch a price which will be lower than the price fetched by an agricultural land with potential of development into residential or commercial plots sold for development into a layout of plots.

(iv) A small plot measures 10'x20' and is suitable for construction of a shop. If it is to be sold, it will fetch a good price at par with prevailing market value. But if the said plot is subject to an easementary right of passage in favour of the owner of the property to the rear of the said plot and also subject to easementary rights of light and air in favour of the owners of plots on either side, the plot cannot be used for construction at all and will have to be kept as a vacant plot. Necessarily its market value will be far less than the value of such a plot which is not subject to such easements.

In *Administrator General of West Bengal v. Collector, (1988) 2 SCC 150,* this court observed thus in regard to determination of market value :

> "The market-value of a piece of property, for purposes of Section 23 of the Act, is stated to be the price at which the property changes hands from a willing seller to a willing, but not too anxious a buyer, dealing at arms length. The determination of market-value, as one author put it, is the

prediction of an economic event, viz, the price-outcome of a hypothetical sale, expressed in terms of probabilities. Prices fetched for similar lands with similar advantages and potentialities under bonafide transactions of sale at or about the time of the preliminary notification are the usual; and indeed the best, evidences of market-value. Other methods of valuation are resorted to if the evidence of sale of similar lands is not available."

In *Chimanlal Hargovinddas v. Land Acquisition Officer, (1988) 3 SCC 751* this court set out the principle regarding determination of market value. One of the principles mentioned is as under :

> "The determination has to be made standing on the date line of valuation (date of publication of notification under Section 4) as if the valuer is a hypothetical purchaser willing to purchase land from the open market and is prepared to pay a reasonable price as on that day. It has also to be assumed that the vendor is willing to sell the land at a reasonable price."

Thereafter, this court stated that the exercise of determining the market value has to be taken in a commonsense manner as a prudent man in a business world would do and gave some illustrative facts which have a bearing on the value :

4. (14) ★ ★ ★

Plus factors	**Minus factors**
1. smallness of size	1. largeness of area.
2. proximity to a road	2. situation in the interior at a distance from the road.
3. frontage on a road	3. narrow strip of land with very smallfrontage compared to depth
4. nearness to developed area	4. lower level requiring the depressed portion to be filled up
5. regular shape	5. remoteness from developed locality.
6. level *vis-a-vis* land under acquisition	6. some special disadvantageous factor which would deter a purchaser.
7. special value for an owner of an adjoining property to whom it may have some very special advantage"	

In *Subh Ram v. State of Haryana, (2010) 1 SCC 444,* this court observed :

> "20. It is in this context, in some cases, to avoid the need to differentiate the lands acquired under a common notification for a common purpose, and to extend the benefit of a uniform compensation, courts have observed that the purpose of acquisition is also a relevant factor. The said observation may not apply in all cases and all circumstances as the general rule is that the land owner is being compensated for what he has lost and not with reference to the purpose of acquisition.
>
> 21. The purpose of acquisition can never be a factor to increase the market value of the acquired land. We may give two examples. Where irrigated land belonging to 'A' and dry land of 'B' and waste land of 'C' are acquired for purpose of submergence in a dam project, neither 'B' nor 'C' can contend that they are entitled to the same higher compensation which was awarded for the irrigated land, on the ground that all the lands were acquired for the same purpose. Nor can the Land Acquisition Collector hold that in case of acquisition for submergence in a dam project, irrigated land should be awarded lesser compensation equal to the value of waste land, on the ground that purpose of acquisition is the same in regard to both. The principle is that the quality (class) of land, the situation of the land, the access to the land are all relevant factors for determination of the market value."

While section 23 of the Land Acquisition Act enumerates the matters to be considered in determining compensation, section 24 enumerates the matters to be neglected in determining compensation. It provides :

> "24. Matters to be neglected in determining compensation.– But the court shall not take into consideration–
>
> ★ ★ ★
>
> *fifthly,* any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired;
>
> ★ ★ ★
>
> *eighthly,* any increase to the value of the land on account of its being put to any use which is forbidden by law or opposed to public policy."

It is thus clear that if there is a prohibition regarding use of the land for purposes other than agriculture, the value of such land on account of the same being put to commercial, residential or industrial use cannot form the basis of determining the market value.

Where an acquired land is subject to a statutory covenant that it can be used only for agriculture and cannot be used for any other purpose necessarily it will have to be sold as agricultural land as the land owner cannot sell it for any purpose other than agriculture and the purchaser cannot sell it for any purpose other than agriculture. As a consequence, the price fetched for such land will be low even if it is situated near any urban area. But if the same land is not subject to any prohibition or restrictive covenant regarding use and has the potential of being developed either as a residential layout or put to commercial or industrial use, the land will fetch a much higher price; and the market value of such other land with development potential can be determined with reference to the sale price of nearby residential plots by making appropriate deduction for development. On the other hand if the land is to be used only for agricultural purposes, it may not be possible to arrive at the market value thereof with reference to the market value of nearby residential plots.

Therefore, we are of the considered view that in regard to the land in question, in view of the permanent restriction regarding user, that is it should only be used for agricultural purposes, and the bar in regard to any non-agricultural use, it will have to be valued only as an agricultural land and cannot be valued with reference to sales statistics of other nearby lands which have the potential of being used for urban development.

We may also look at the matter from a slightly different perspective. A vacant land has a particular value. If such land is in the occupation of a long term lessee, and the owner wants to sell it without possession, he will only get a far lesser price that what he would get as price for the same land if vacant possession can be given to the purchaser. If such land in the occupation of a long term lessee is acquired, as the lessee's rights are also taken over, the compensation awarded for the land will be the full value as awarded for any neighbouring property which is not subject to any tenancy. But the entire compensation will not be received by the land owner/landlord. The landlord will have to share the compensation with the long term lessee. In other words, the landlord will not get the entire value as compensation but will only get a part of the market value and the tenant will get the balance. In that sense even if the market value of the land without any restrictive covenants is considered to be ₹ 110 per sq.m., having regard to the fact that the land is incapable of being used for purposes other than agriculture and the price of ₹ 110 is arrived at with reference to a land which can be used for all purposes, an appropriate percentage will have to be deducted from the value of ₹ 110 per sq.m. to arrive at the land subject to the statutory restriction regarding use.

On the facts and circumstances, having regard to the prohibition regarding use of land for any purpose other than agricultural, the land will have to be treated and valued as agricultural land without any development potential for being used as residential/commercial/industrial plots. We are of the view that at least 50% will have to be deducted from the market value of freehold land with

development potential to arrive at the market value of such land which can be used only for agricultural purposes. As we have already determined the market value of neighbouring land (which is not subject to the prohibition under the Land Use Act) as ₹ 110 per sq.m. We are of the view that an appropriate compensation for the acquired land should be 50% thereof, that is ₹ 55 per sq.m.

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54. LAND ACQUISITION ACT, 1894 – Section 48

Power under Section 48 (1) of Land Acquisition Act can be exercised by the State only if the possession of the land has not been taken over – If possession has been taken over, the State cannot withdraw from acquisition.

Mahesh Bharadwaj v. State of Madhya Pradesh & Ors.

Judgment dated 20.05.2011 passed by the High Court of Madhya Pradesh in Writ Petition No. 1759 of 2008 (PIL), reported in AIR 2011 MP 189 (DB)

Held:

Power under Section 48 (1) of the Land Acquisition Act, 1894 can be exercised by the State only if the possession of the land has not been taken over. In the present case, from the record it is clear that possession of the land in question had been taken over. Apart from this, the award passed by the Competent Authority has become final because the revisions and writ petitions filed against the said award were dismissed. In this view of the matter, in our opinion, the impugned Notification issued by the Revenue Department is malafide, arbitrary and without any power and authority and against the provisions of Section 48 (1) of the Act of 1894.

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55. LIMITATION ACT, 1963 – Section 3 and Article 58 of the Schedule

Suit for declaration and permanent injunction – When period of limitation will begin to run? If suit is based on multiple cause of action, the period of limitation will begin to run from the date when the right to sue first accrues – Successive violation of rights will not give rise to fresh cause and the suit will be liable to be dismissed if it is beyond the period of limitation counted from the day when the right to sue first accrued.

Khatri Hotels Private Limited and another v. Union of India and another

Judgment dated 09.09.2011 passed by the Supreme Court in Civil Appeal No. 7773 of 2011, reported in (2011) 9 SCC 126

Held :

The Limitation Act, 1963 (for short, 'the 1963 Act') prescribes time limit for all conceivable suits, appeals etc. Section 2(j) of that Act defines the expression

"period of limitation" to mean the period of limitation prescribed in the Schedule for suit, appeal or application. Section 3 lays down that every suit instituted, appeal preferred or application made after the prescribed period shall, subject to the provisions of Sections 4 to 24, be dismissed even though limitation may not have been set up as a defence. If a suit is not covered by any specific article, then it would fall within the residuary article. In other words, the residuary article is applicable to every kind of suit not otherwise provided for in the Schedule.

Article 58 of the 1963 Act, which has bearing on the decision of this appeal, reads as under:

"*THE SCHEDULE*

PERIODS OF LIMITATION

[*See sections 2(j) and 3*]

First Division – Suits

Description of suit	Period of limitation	Time from which period begins to run
*	*	*
PART III – Suits Relating To Declarations		
*	*	*
58. To obtain any other declaration.	Three years	When the right to sue first accrues."

Article 120 of the Indian Limitation Act, 1908 (for short, 'the 1908 Act') which was interpreted in the judgment relied upon by Shri Rohtagi reads as under:

Description of suit	Period of limitation	Time from which period begins to run
*	*	*
120. Suit for which no period of limitation is provided elsewhere in this Schedule	Six years	When the right to sue accrues."

The differences which are discernible from the language of the above reproduced two articles are:

(i) The period of limitation prescribed under Article 120 of the 1908 Act was six years whereas the period of limitation prescribed under the 1963 Act is three years and,

(ii) Under Article 120 of the 1908 Act, the period of limitation commenced when the right to sue accrues. As against this, the period prescribed under Article 58 begins to run when the right to sue first accrues.

Article 120 of the 1908 Act was interpreted by the Judicial Committee in *Bolo v. Koklan AIR 1930 PC 270* and it was held:

> "There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least, a clear or unequivocal threat to infringe that right, by the defendant against whom the suit is instituted."

The same view was reiterated in *Annamalai Chettiar v. Muthukaruppan Chettiar ILR. (1930) 8 Rang 645* and *Gobinda Narayan Singh v. Sham Lal Singh (1930-31) 58 IA 125.*

In *Rukhmabai v. Lala Laxminarayan, AIR 1960 SC 335*, the three-Judge Bench noticed the earlier judgments and summed up the legal position in the following words:

> "The right to sue under Article 120 of the 1908 Act accrues when the defendant has clearly or unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective or innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right."

While enacting Article 58 of the 1963 Act, the legislature has designedly made a departure from the language of Article 120 of the 1908 Act. The word "first" has been used between the words "sue" and "accrued". This would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. To put it differently, successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed if it is beyond the period of limitation counted from the day when the right to sue first accrued.

In the light of the above, it is to be seen as to when the right to sue first accrued to the appellants. They have not controverted the fact that in the written statement filed on behalf of the DDA in Suit No. 2576 of 1990, *Lal Chand v. MCD*, it was clearly averred that the suit land belonged to Gaon Sabha and with the urbanisation of the rural areas of village Kishangarh vide notification dated 28.5.1966 issued under Section 507 of the DMC Act, the same automatically vested in the Central Government and that vide notification dated 20.8.1974 issued under Section 22(1) of the DD Act, the Central Government transferred the suit land to the DDA for development and maintaining as Green. This shows that that the right, if any, of the appellants over the suit land stood violated with the issue of notification under Section 507 of the DMC Act and, in any case, with the issue of notification under Section 22(1) of the DD Act. Even if the appellants were to plead ignorance about the two notifications, it is impossible to believe that they did not know about the violation of their so- called right over the suit land despite the receipt of copy of the written statement filed on behalf of the

DDA in December, 1990. Therefore, the cause of action will be deemed to have accrued to the appellants in December, 1990 and the suit filed on 14.2.2000 was clearly barred by time.

The issue deserves to be considered from another angle. Although, paragraph 19 of Suit No. 303/2000 was cleverly drafted to convey an impression that the right to sue accrued to the appellants in November/December, 1998 when they learnt about the wrong recording of entries in Khasra Girdawris/ Revenue Records, but if the averments contained in that paragraph are read in conjunction with the pleadings of the earlier suits, falsity of the appellants' claim that the cause of action accrued to them in November/December, 1998 is established beyond any doubt. In the first suit filed by him, appellant No. 2-Lal Chand had pleaded that the cause of action accrued on 10.8.1990 when the officials of the respondents came to the suit premises and threatened to demolish the same. In the second suit filed by Surat Singh (brother of appellant No. 2-Lal Chand), it was claimed that the cause of action accrued on 29.2.1992 when the officials of the respondents demolished the boundary wall of the property on the ground that the same was Gaon Sabha land. The appellants have not explained stark contradictions in the averments contained in three suits on the issue of cause of action and in the absence of cogent explanation, it must be held that the statement contained in paragraph 19 of Suit No. 313 of 2000 was per se false and, as a matter of fact, the cause of action had first accrued to the appellants on 10.8.1990 when their so called right over the suit land was unequivocally threatened by the respondents. Therefore, the suit filed by the appellants on 14.2.2000 was clearly beyond the period of limitation of 3 years prescribed under Article 58 of the 1963 Act and was barred by time.

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56. MOTOR VEHICLES ACT, 1988 – Sections 147, 148, 158 (6), 163-A, 166, 168, 170 and 173

(i) A claim petition is neither a suit nor adversarial *lis* in the traditional sense and an award by the Tribunal cannot be seen as an adversarial adjudication between the litigating parties to the dispute, but a statutory determination of compensation on the occurrence of an accident after due enquiry and accordance with the statute.

(ii) The Motor Vehicles Act, 1988 does not require the claimants to implead the insurer as a party (opponent) but: –

(a) if the claimants chooses to implead the insurer as a party voluntarily not being a noticee under Section 149 (2) then–

- **the insurer can urge all the grounds and not necessarily the limited grounds mentioned in Section 149 (2) of the Act; and**
- **the insurer need not seek the permission of the Tribunal under Section 170 of the Act to raise the grounds other than those mentioned in Section 149 (2) of the Act.**

(b) **where the insurer is a party (opponent) on account of being impleaded as a party by the Tribunal under Section 170, it will be entitled to contest the matter by raising all grounds without being restricted to the grounds available under Section 149 (2) of the Act.**

(iii) **Rights of insurer are significantly different in case if impleaded voluntarily as a party (opponent) to the claim petition as contrasted from merely being a noticee under Section 149 (2), the Tribunal issues notice to the insurer so that it can be made liable to pay the amount awarded against the insurer and if necessary, deny liability under the policy of insurance, on any of the grounds mentioned in Section 149 (2) – If an insurer is only a noticee and not a party-respondent (opponent), having regard to the decision in *National Insurance Co. Ltd. v. Nicolletta Rohtagi, (2007) 7 SCC 456,* it can defend the claim only on the grounds mentioned in Section 149 (2) and not any of the other grounds relating to merits available to the insured respondent – That is the position even where the claim proceedings are initiated *suo motu* under Sections 166 (4) and 158 (6) of the Act, without any formal application by the claimants, as the insurer is only a noticee under Section 149 (2) of the Act.**

(iv) **Joint appeal under Section 173 of the Motor Vehicles Act, 1988 filed by insured and insurer is maintainable so long as owner is an appellant and he is "a person aggrieved" in law, question whether he has independently filed the appeal or whether he has filed at the instance of the insurer becomes irrelevant.**

United India Insurance Company Limited v. Shila Datta and others

Judgment dated 13.10.2011 passed by the Supreme Court in Civil Appeal No. 6026 of 2007, reported in (2011) 10 SCC 509 (3 Judge Bench)

Held:

A claim petition for compensation in regard to a motor accident (filed by the injured or in case of death, by the dependant family members) before the Motor Accident Claims Tribunal constituted under section 165 of the Act is neither a suit nor an adversarial lis in the traditional sense. It is a proceeding in terms of and regulated by the provisions of Chapter XII of the Act which is a complete Code in itself. We may in this context refer to the following significant aspects in regard to the Tribunals and determination of compensation by Tribunals:

(i) Proceedings for award of compensation in regard to a motor accident before the Tribunal can be initiated either on an application for compensation made by the persons aggrieved (claimants) under Section 166(1) or Section 163A of the Act or suo motu by the Tribunal,

by treating any report of accident (forwarded to the tribunal under Section 158(6) of the Act as an application for compensation under Section 166 (4) of the Act.

(ii) The rules of pleadings do not strictly apply as the claimant is required to make an application in a form prescribed under the Act. In fact, there is no pleading where the proceedings are suo motu initiated by the Tribunal.

(iii) In a proceeding initiated *suo motu* by the tribunal, the owner and driver are the respondents. The insurer is not a respondent, but a noticee under Section 149(2) of the Act. Where a claim petition is filed by the injured or by the legal representatives of a person dying in a motor accident, the driver and owner have to be impleaded as respondents. The claimants need not inplead the insurer as a party. But they have the choice of impleading the insurer also as a party respondent. When it is not impleaded as a party, the Tribunal is required to issue a notice under Section 149(2) of the Act. If the insurer is impleaded as a party, it is issued as a regular notice of the proceedings.

(iv) The words 'receipt of an application for compensation' in Section 168 refer not only to an application filed by the claimants claiming compensation but also to a suo motu registration of an application for compensation under Section 166(4) of the Act on the basis of a report of an accident under Section 158(6) of the Act.

(v) Though the tribunal adjudicates on a claim and determines the compensation, it does not do so as in an adversarial litigation. On receipt of an application (either from the applicant or suo motu registration), the Tribunal gives notice to the insurer under Section 149(2) of the Act, gives an opportunity of being heard to the parties to the claim petition as also the insurer, holds an inquiry into the claim and makes an award determining the amount of compensation which appears to it to be just. (Vide Section 168 of the Act).

(vi) The Tribunal is required to follow such summary procedure as it thinks fit. It may choose one or more persons possessing special knowledge of and matters relevant to inquiry, to the assist it in holding the enquiry (vide Section 169 of the Act).

(vii) The award of the Tribunal should specify the persons to whom compensation should be paid. It should also specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them. (Vide section 168 of the Act).

(viii) The Tribunal should deliver copies of the award to the parties concerned within 15 days from the date of the award. (Vide Section 168 (2) of the Act).

We have referred to the aforesaid provisions to show that an award by the tribunal cannot be seen as an adversarial adjudication between the litigating parties to a dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statute.

The scheme of the Motor Vehicles Act, 1988 as contained in Chapters XI (Insurance of Motor Vehicles against Third Party risks) and XII (Claim Tribunals) proceeds on the basis that an insurer need not be impleaded as a party to the claim proceedings and it should only be issued a statutory notice under section 149(2) of the Act so that it can be made liable to pay the compensation awarded by the tribunal and also resist the claim on any one of the grounds mentioned in clauses (a) and (b) of sub-section (2) of section 149. Sub-sections (1), (2) and (7) of section 149 clearly refer to the insurer being merely a noticee and not a party. Similarly, sections 158(6), 166(4), 168(1) and 170 clearly provide for and contemplate insurer being merely a noticee for the purposes mentioned in the Act and not being a party-respondent. Section 170 specifically refers to impleading of insurer as a party to the claim proceedings.

When an insurer is impleaded as a party-respondent to the claim petition, as contrasted from merely being a noticee under Section 149(2) of the Act, its rights are significantly different. If the insurer is only a noticee, it can only raise such of those grounds as are permissible in law under Section 149(2). But if he is a party-respondent, it can raise, not only those grounds which are available under Section 149(2), but also all other grounds that are available to a person against whom a claim is made. It therefore follows that if a claimant impleads the insurer as a party-respondent, for whatever reason, then as such respondent, the insurer will be entitled to urge all contentions and grounds which may be available to it.

The Act does not require the claimants to implead the insurer as a party respondent. But if the claimants choose to implead the insurer as a party, not being a noticee under Section 149(2), the insurer can urge all grounds and not necessarily the limited grounds mentioned in Section 149(2) of the Act. If the insurer is already a respondent (having been impleaded as a party respondent), it need not seek the permission of the Tribunal under section 170 of the Act to raise grounds other than those mentioned in Section 149(2) of the Act.

The entire scheme and structure of Chapters XI and XII is that the claimant files a claim petition only against the owner and driver and the tribunal issues notice to the insurer under Section 149(2) so that it can be made liable to pay the amount awarded against the insurer and if necessary, deny liability under the policy of insurance, on any of the grounds mentioned in Section 149(2). If an insurer is only a noticee and not a party-respondent, having regard to the decision in *National Insurance Co. Ltd. v. Nicolletta Rohtagi, (2002) 7 SCC 456*,it can defend the claim only on the grounds mentioned in section 149(2) and not any of the other grounds relating to merits available to the insured-respondent. This is the position even where the claim proceedings are initiated suo motu

under Sections 149(7) [sic Sections 166 (4)] and 158(6) of the Act, without any formal application by the claimants, as the insurer is only a noticee under Section 149(2) of the Act.

Section 170 of the Act does not contemplate an insurer making an application for impleadment. Nor does it contemplate the insurer, if he is already impleaded as a party respondent by the claimants, making any application seeking permission to contest the matter on merits. Section 170 proceeds on the assumption that a claim petition is filed by the claimants, or is registered suo motu by the tribunal, with only the owner and driver of the vehicle as the respondents. It also proceeds on the basis that in such a proceeding, a statutory notice would have been issued by the tribunal to the insurer so that the insurer may know about its future liability in the claim petition and also resist the claim, on any of the grounds mentioned in Section 149(2).

Section 170 of the Act also assumes that the tribunal will hold an inquiry into the claim, where only the claimants and the owner and driver will be the parties. Section 170 provides that if during the course of such inquiry, the tribunal finds and satisfies itself that there is any collusion between the claimant and the owner/driver or where the owner/driver has failed to contest the claim, the tribunal may suo motu, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of the claim, who was till then only a noticee, shall be treated as a party to the proceedings. The insurer so impleaded, without prejudice to the provisions of Section 149(2), will have the right to contest the claim on all or any of the grounds that are available to the driver/owner.

Therefore, where the insurer is a party-respondent, either on account of being impleaded as a party by the tribunal under Section 170 or being impleaded as a party-respondent by the claimants in the claim petition voluntarily, it will be entitled to contest the matter by raising all grounds, without being restricted to the grounds available under Section 149(2) of the Act. The claim petition is maintainable against the owner and driver without impleading the insurer as a party.

When a statutory notice is issued under Section 149(2) by the tribunal, it is clear that such notice is issued not to implead the insurer as a party-respondent but merely to put it on notice that a claim has been made in regard to a policy issued by it and that it will have to bear the liability as and when an award is made in regard to such claim. Therefore, it cannot, as of right, require that it should be impleaded as a party-respondent. But it can however be made a party-respondent either by the claimants voluntarily in the claim petition or by the direction of the Tribunal under Section 170 of the Act. Whatever be the reason or ground for the insurer being impleaded as a party, once it is a party-respondent, it can raise all contentions that are available to resist the claim.

There is no dispute that when an award is made by the Tribunal, the owner of the vehicle (insured), being a person aggrieved, can file an appeal challenging his liability on any ground, or challenge the quantum of compensation. An appeal

which is "maintainable" when the owner of the vehicle files it, does not become "not maintainable" merely on account of the insurer being a co-appellant with the owner. When the insurer becomes a co-appellant, the owner of the vehicle does not cease to be a person aggrieved.

This question came up for consideration of a Two Judge Bench of this Court with reference to the provisions of the Motor Vehicles Act, 1939 ('Old Act' for short) in *Narendra Kumar v. Yarenissa, (1998) 9 SCC 202.* This Court held :

> "The question, however, is if such a joint appeal is preferred must it be dismissed in toto or can the tortfeasor, the owner of the offending vehicle, be permitted to pursue the appeal while rejecting or dismissing the appeal of the insurer. If the award has gone against the tortfeasors it is difficult to accept the contention that the tortfeasor is not "an aggrieved person" as has been held by some of the High Courts vide *Kantilal & Bros. v. Ramarani Debi, 1980 ACJ 501 (Cal), New India Assurance Co. Ltd. v. Shakuntla Bai, 1987 ACJ 224 (M.P.), Nahar Singh v. Manohar Kumar, 1993 (1) ACJ 269 (J & K), Radha Kishan Sachdeva v. Flt. Lt. L.D. Sharma, 1993 27 DRJ 18 (Del)* merely because under the scheme of Section 96 if a decree or award has been made against the tortfeasors the insurer is liable to answer judgment "as if a judgment-debtor". That does not snatch away the right of the tortfeasors who are jointly and severally liable to answer judgment from preferring an appeal under Section 110-D of the Act. If for some reason or the other the claimants desire to execute the award against the tortfeasors because they are not in a position to recover the money from the insurer the law does not preclude them from doing so and, therefore, so long as the award or decree makes them liable to pay the amount of compensation they are aggrieved persons within the meaning of Section 110-D and would be entitled to prefer an appeal. But merely because a joint appeal is preferred and it is found that one of the appellants, namely, the insurer was not competent to prefer an appeal, we fail to see why the appeal by the tortfeasor, the owner of the vehicle, cannot be proceeded with after dismissing or rejecting the appeal of the insurer. To take a view that the owner is not an aggrieved party because the Insurance Company is liable in law to answer judgment would lead to an anomalous situation in that no appeal would lie by the tortfeasors against any award because the same logic applies in the case of a driver of the vehicle. The question can be decided a little differently. Can a claim application

be filed against the Insurance Company alone if the tortfeasors are not the aggrieved parties under Section 110-D of the Act? The answer would obviously be in the negative. If that is so, they are persons against whom the claim application must be preferred and an award sought for otherwise the insurer would not be put to notice and would not be liable to answer judgment as if a judgment-debtor. Therefore, on first principle it would appear that the contention that the owner of a vehicle is not an aggrieved party is unsustainable...

For the reasons stated above, we are of the opinion that even in the case of a joint appeal by insurer and owner of offending vehicle if an award has been made against the tortfeasors as well as the insurer even though an appeal filed by the insurer is not competent, it may not be dismissed as such. The tortfeasor can proceed with the appeal after the cause-title is suitably amended by deleting the name of the insurer."

When the issue again came up for consideration before another Two Judge bench of this Court in *Chinnama George v. N. K. Raju, (2000) 4 SCC 130,* with reference to the provisions of the Motor Vehicles Act, 1988, this Court agreed with *Narendra Kumar* (supra) that the owner of the vehicle is an aggrieved person, but held that a joint appeal would not be maintainable. This Court held [*Chinnama George case* (supra)]:

"Admittedly, none of the grounds as given in Sub-section (2) of Section 149 exist for the insurer to defend the claims petition. That being so, no right existed in the insurer to file appeal against the award of the Claims Tribunal. However, by adding N.K. Raju, the owner as co-appellant, an appeal was filed in the High Court which led to the impugned judgment. None of the grounds on which insurer could defend the claims petition was the subject matter of the appeal as far as the insurer is concerned. We have already noticed above that we have not been able to figure out from the impugned judgment as to how the owner felt aggrieved by the award of the Claims Tribunal. The impugned judgment does not reflect any grievance of the owner or even that of the driver of the offending bus against the award of the Claims Tribunal. The insurer by associating the owner or the driver in the appeal when the owner or the driver is not an aggrieved person cannot be allowed to mock at the law which prohibit the insurer from filing any appeal except on the limited grounds on which it could

defend the claims petition. We cannot put our stamp of approval as to the validity of the appeal by the insurer merely by associating the insured. Provision of law cannot be undermined in this way. We have to give effect to the real purpose to the provision of law relating to the award of compensation in respect of the accident arising out of the use of the motor vehicles and cannot permit the insurer to give him right to defend or appeal on grounds not permitted by law by a backdoor method. Any other interpretation will produce unjust results and open gates for the insurer to challenge any award. We have to adopt purposive approach which would not defeat the broad purpose of the Act. Court has to give effect to true object of the Act by adopting purposive approach.

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10. There is no dispute with the proposition so laid by this Court. But the insurer cannot maintain a joint appeal along with the owner or the driver if defence on any ground under Section 149(2) is not available to it. In that situation joint appeal will be incompetent. It is not enough if the insurer is struck out from the array of the appellants. The appellate court must also be satisfied that a defence which is permitted to be taken by the insurer under the Act was taken in the pleadings and was pressed before the Tribunal. On the appellate court being so satisfied the appeal may be entertained for examination of the correctness or otherwise of the judgment of the Tribunal on the question arising from/ relating to such defence taken by the insurer. If the appellate court is not satisfied that any such question was raised by the insurer in the pleadings and/or was pressed before the Tribunal, the appeal filed by the insurer has to be dismissed as not maintainable. The court should take care to ascertain this position on proper consideration so that the statutory bar against the insurer in a proceeding of claim of compensation is not rendered irrelevant by the subterfuge of the insurance company joining the insured as a co-appellant in the appeal filed by it. This position is clear on a harmonious reading of the statutory provisions in Sections 147, 149 and 173 of the Act. Any other interpretation will defeat the provision of Sub-section (2) of Section 149 of the Act and throw the legal representatives of the deceased or the injured in the accident to unnecessary prolonged litigation at the instance of the insurer."

This issue did not arise for consideration of the Three Judge Bench decision in *Nicolletta Rohtagi* (supra), as the question therein was whether an insurer could file an appeal.

On a careful consideration, we are of the view that the decision in *Chinnamma George* (Supra) to the extent it holds that a joint appeal is not maintainable, does not lay down the correct law. As observed in *Narendra Kumar* (supra), the owner of the vehicle does not cease to be an aggrieved person, merely because the insurer is ultimately liable under the terms of the policy or under section 149 of the Act. If the owner by himself, can file an appeal as an aggrieved person and such appeal is maintainable, we fail to understand how the presence of the insurer as a co-appellant would make the appeal not maintainable. Whether the owner joins the insurer or the insurer joins the owner, makes no difference to the fact that owner continues to be a person aggrieved.

When a joint appeal is filed, to say that the insurer is not an aggrieved person and the owner of the vehicle is also not an aggrieved person, would lead to an anomalous situation and would border on an absurdity. Without entering upon the question whether an insurer is an aggrieved person (which requires to be considered separately), we make it clear that on account of the insurer being a co-appellant, will not affect the maintainability of the appeal. So long as the owner is an appellant and he is a 'person aggrieved' in law, the question whether he is independently filing the appeal, or whether he is filing it at the instance of the insurer becomes irrelevant. When a counsel holds vakalatnama for an insurer and the owner of the vehicle in a joint appeal, the court cannot say his arguments and submissions are only on behalf of the insurer and not on behalf of the owner. There is also no need to examine at the threshold in a joint appeal, whether the insurer should be deleted from the array of appellants.

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***57. MOTOR VEHICLES ACT, 1988 – Sections 166 and 168**

(i) Determination of just compensation in cases of permanent disability – Principles laid down in *Arvind Kumar Mishra v. New India Assurance Co. Ltd., (2010) 10 SCC 254* and *Rajkumar v. Ajay Kumar, (2011) 1 SCC 343* must be followed by all the Tribunals and the High Courts in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily – If the victim of the accident suffers permanent disability, then efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and his inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident.

(ii) In absence of other cogent evidence regarding income of the victim, the Tribunal/High Court should determine the amount of compensation in lieu of loss of earning by taking victim's

notional annual income on the basis of minimum wages payable to a worker at the relevant time of the accident. (In this case date of accident was 14.11.2004 and the Apex Court assumed the notional income @ ₹ 3,000 per month or ₹ 36,000 per annum).

Govind Yadav v. New India Insurance Company Limited
Judgment dated 01.11.2011 passed by the Supreme Court in Civil Appeal No. 9014 of 2011, reported in (2011) 10 SCC 683

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58. MOTOR VEHICLES ACT, 1988 – Sections 166 and 168

(i) Tribunal should adopt a proactive approach and ensure disposal of claim cases with required urgency and keeping in view the relevant factors to award just compensation to the victims/their legal representatives.

(ii) Under the Motor Vehicles Act, there is no restriction that the Tribunal cannot award compensation amount exceeding the claimed amount, as the Tribunal is duty-bound to award "just" compensation which is reasonable on the basis of evidence produced on record.

(iii) In this case, in the petition for permanent partial disablement, the compensation claimed was of ₹ 3 lakh only with interest and cost but just compensation awarded was of ₹ 6 lakh for anticipated future expenses on treatment, reduction of marriage prospects and enjoyment of life and loss of future earning due to deprivation of opportunity to undertake further studies on account of permanent partial disablement.

Ibrahim v. Raju and others
Judgment dated 31.10.2011 passed by the Supreme Court in Civil Appeal No. 8943 of 2011, reported in (2011) 10 SCC 634

Held:

The sufferings of the dependents of those who are killed in motor accidents and the survivors who are disabled are manifold. Some time these can be measured in terms of money but most of the times it is not possible to do so. If an individual is disabled as a result of road accident, the cost of treatment, care and rehabilitation is likely to be very high. A very large number of people involved in motor accidents are pedestrians, children and women and, on account of sheer ignorance, poverty and other disabilities, majority of them are unable to engage competent lawyers for putting their cause before the Tribunals and the Courts. The insurance companies, with whom the vehicles involved in accidents are insured always have the advantage of assistance of legally trained mind (law officers and panel lawyers). They contest the claim petitions by raising all possible technical objections for ensuring that their clients are either completely absolved or their liability is minimized and in the process, adjudication of the

claims filed by the victims and/or their legal representatives is delayed for years together. At times, the delay in disposal of the claim cases and litigation expenses make the award of compensation meaningless for survivors of the accidents and/or families of the victims. This Court has time and again emphasized that the officers, who preside over the Tribunals adopt a proactive approach and ensure that the claims filed under the Act are disposed of with required urgency and compensation is awarded to the victims of the accident and/or their legal representatives in adequate measure keeping in view the relevant factors.

(ii) We are conscious of the fact that in the petition filed by him, the appellant had claimed compensation of ₹ 3 lacs only with interest and cost. It will be reasonable to presume that due to financial incapacity the appellant and his family could not avail the services of a competent lawyer and make a claim for adequate compensation. However, as the Tribunal and the High Court and for that reason this Court are duty bound to award just compensation, we deem it proper to enhance the compensation from ₹ 1,89,440 to ₹ 6 lacs. This approach is in tune with the judgment in *Nagappa v. Gurudayal Singh, (2003) 2 SCC 274* in which the court has observed that for the reasons discussed, in our view, under the MV Act, there is no restriction that the Tribunal/court cannot award compensation amount exceeding the claimed amount. The function of the Tribunal/court is to award 'just' compensation which is reasonable on the basis of evidence produced on record. Further, in such cases there is no question of claim becoming time-barred or it cannot be contended that by enhancing the claim there would be change of cause of action. It is also to be stated that as provided under sub-section (4) to Section 166, even the report submitted to the Claims Tribunal under sub-section (6) of Section 158 can be treated as an application for compensation under the MV Act. If required, in appropriate cases, the court may permit amendment to the claim petition.

(iii) After referring the observations made in *Raj Kumar v. Ajay Kumar, (2011) 1 SCC 343,* the Apex Court in this case considered the evidence as under:

A perusal of the record shows that the appellant had produced substantive evidence to prove that as a result of accident he had suffered 8 grievous injuries including fracture of pelvis and he had to remain in the hospital for one month and a half; that he was treated by Dr. Anil K. Bhat, Assistant Professor, Orthopaedics and Dr. Joseph Thomas, Professor of Urology and that on account of grievous injuries he was unable to continue his studies. In his deposition, Dr. Joseph Thomas categorically stated that the appellant will have to undertake life long treatment for recurrence of urethral strictures and consequential dysfunction due to fracture of pelvis. Unfortunately, neither the Tribunal nor the High Court adverted to this part of the evidence and omitted to award compensation for the expenses likely to be incurred by the appellant for future treatment. One can reasonably expect that the appellant who was only 18 years old at the time of accident would live for at least next 50 years. The Tribunal awarded ₹ 20,340 for expenses incurred by the appellant for treatment taken

by him in the hospital. Although, Dr. Thomas did not indicate the approximate expenditure likely to be incurred by the appellant and his family for future treatment, keeping in view the nature of injuries and the fact that he will have to take treatment for the remaining life, it will be reasonable to infer that he will be required to spend a minimum of ₹ 1,000 per month for future treatment, which would necessarily include fees of the doctors, medicines, transportation, etc. In the absence of concrete evidence about the anticipated expenditure, we think that ends of justice will be met if the appellant is awarded a sum of ₹ 2 lacs which, if deposited in a fixed deposit, would earn an interest of ₹ 14,000 to ₹ 16,000 per annum.

On account of the injuries suffered by him, the prospects of the appellant's marriage have considerably reduced. Rather, they are extremely bleak. In any case, on account of the fracture of pelvis, he will not be able to enjoy the matrimonial life. Therefore, the award of ₹ 50,000 under this head must be treated as wholly inadequate. In the facts and circumstances of the case, we feel that a sum of ₹ 2 lacs should be awarded to the appellant for loss of marriage prospects and enjoyment of life.

The compensation awarded for loss of future earning on account of permanent partial disablement is *ex facie* unreasonable. Respondent No.3 did not produce any evidence to controvert the appellant's assertion that on account of the injuries suffered in the accident, he had to abandon his studies. The consequences which followed were extremely grave inasmuch as he lost all opportunities for making a career in future. The prospects of the appellant's marriage are extremely bleak. Therefore, a sum of ₹ 2 lacs deserves to be awarded under these heads.

In the result, total compensation of ₹ 6 lakh with interest at the rate of 6% per annum from the date of filing of claim petition awarded.

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59. MUSLIM LAW:
TRANSFER OF PROPERTY ACT, 1882 – Sections 2 and 6
Doctrine of *spes successionis* – Bar to transfer of right to *spes successionis* under the Mohammaden Law – Exception there to and applicability of rule of estoppel – Relinquishment or renunciation of chance of succession to a property by heirs apparent during lifetime of owner of the property by receiving consideration for relinquishing their expectant future share in the property or by entering into a family arrangement or settlement to that effect, either such course of conduct would constitute an exception to bar to transfer of right to *spes successionis*.

Shehammal v. Hassan Khani Rauther and others
Judgment dated 02.08.2011 passed by the Supreme Court in SLP (C) No. 7421 of 2008, reported in (2011) 9 SCC 223 (3-Judge Bench)

Held :

From the submissions made on behalf of the respective parties and the facts of the case, three questions of importance emerge for decision, namely:-

(i) Whether in view of the doctrine of *spes successionis*, as embodied in Section 6 of the Transfer of Property Act, 1882, and in paragraph 54 of *Mulla's Principles of Mahomedan Law*, a Deed of Relinquishment executed by an expectant heir could operate as estoppel to a claim that may be set up by the Executor of such Deed after inheritance opens on the death of the owner of the property?

(ii) Whether on execution of a Deed of Relinquishment after having received remuneration for such future share, the expectant heir could be estopped from claiming a share in the inheritance?

(iii) Can a Mohammedan by means of a Family Settlement relinquish his right of *spes successionis* when he had still not acquired a right in the property?

Chapter VI of *Mulla's Principles of Mahomedan Law* deals with the general rules of inheritance under Mohammedan law. Paragraph 54 which falls within the said Chapter relates to the concept of transfer of *spes successionis* which has also been termed as "renunciation of a chance of succession". The said paragraph provides that the chance of a Mohammedan heir-apparent succeeding to an estate cannot be said to be the subject of a valid transfer or release. The same is included in Section 6 of the Transfer of Property Act and the relevant portion thereof, namely, clause (a) is extracted below :-

> "*6. What may be transferred.*- Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.
>
> (a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred."

The provisions of Section 6(a) have to be read along with Section 2 of the Act, which provides for repeal of Acts and saving of certain enactments, incidents, rights, liabilities etc. It specifically provides that nothing in Chapter II, in which Section 6 finds place, shall be deemed to affect any rule of Mohammedan Law.

In spite of the aforesaid provisions, both of the general law and the personal law, the Courts have held that the fetters imposed under the aforesaid provisions are capable of being removed in certain situations. Two examples in this regard are -

(i) When an expectant heir willfully does something which has the effect of attracting the provisions of Section 115 of the Evidence Act, is he estopped from claiming the benefit of the doctrine of *spes successionis*, as provided for under Section 6(a) of the Transfer of Property Act,

1882, and also under the Mohammedan Law as embodied in paragraph 54 of *Mulla's Principles of Mahomedan Law*?

(ii) When a Mohammedan becomes a party to a family arrangement, does it also entail that he gives up his right of *spes successionis*."The answer to the said two propositions is also the answer to the questions formulated hereinbefore.

The Mohammedan Law enjoins in clear and unequivocal terms that a chance of a Mohammedan heir-apparent succeeding to an estate cannot be the subject of a valid transfer or release. Section 6(a) of the Transfer of Property Act was enacted in deference to the customary law and law of inheritance prevailing among Mohammedans.

As opposed to the above, are the general principles of estoppel as contained in Section 115 of the Evidence Act and the doctrine of relinquishment in respect of a future share in property. Both the said principles contemplated a situation where an expectant heir conducts himself and/or performs certain acts which makes the two aforesaid principles applicable inspite of the clear concept of relinquishment as far as Mohammedan Law is concerned, as incorporated in Section 54 of *Mulla's Principles of Mahomedan Law*." Great reliance has been placed by both the parties on the decision in *Gulam Abbas v. Haji Kayyum Ali, (1973) 1 SCC 1* While dealing with a similar situation, this Court watered down the concept that the chance of a Mohammedan heir apparent succeeding to an estate cannot be the subject of a valid transfer on lease and held that renunciation of an expectancy in respect of a future share in a property in a case where the concerned party himself chose to depart from the earlier views, was not only possible, but legally valid. Referring to various authorities, including Ameer Ali's *Mohammedan Law*, this Court observed that "renunciation implies the yielding up of a right already vested". It was observed in the facts of that case that during the lifetime of the mother, the daughters had no right of inheritance. Citing the decision in the case of *Khannum Jan v. Jan Beebee, (1827) 4 SDA 210* it was held that renunciation implies the yielding up of a right already vested. Accordingly, renunciation during the mother's lifetime of the daughters' shares would be null and void on the ground that an inchoate right is not capable of being transferred as such right was yet to crystallise. This Court also held that "under the Muslim Law an expectant heir may, nevertheless, be part of a course of conduct which may create an estoppel against claiming the right at a time when the right of inheritance has accrued". It was observed by the learned Judges that the Contract Act and the Evidence Act would not strictly apply since they did not involve questions arising out of Mohammedan Law. This Court accordingly held that the renunciation of a supposed right, based upon an expectancy, could not, by any test be considered "prohibited".

This Court ultimately held that the binding force of the renunciation of a supposed right, would depend upon the attendant circumstances and the whole course of conduct of which it formed a part. In other words, the principle of an

equitable estoppel far from being opposed to any principle of Mohammedan Law, is really in complete harmony with it.

On the question of family arrangement, this Court observed that though arrangements arrived at in order to avoid future disputes in the family may not technically be a settlement, a broad concept of a family There is little doubt that ordinarily there cannot be a transfer of spes successionis, but in the exceptions pointed out by this Court in *Gulam Abbas's case* (supra), the same can be avoided either by the execution of a family settlement or by accepting consideration for a future share. It could then operate as estoppel against the expectant heir to claim any share in the estate of the deceased on account of the doctrine of *spes successionis*. While dealing with the various decisions on the subject, which all seem to support the view taken by the learned Judges, reference was made to the decision of Chief Justice Suleman of the Allahabad High Court in the case of *Latafat Hussain v. Hidayat Hussain, AIR 1936 All 573*, where the question of arrangement between the husband and wife in the nature of a family settlement, which was binding on the parties, was held to be correct in view of the fact that a presumption would have to be drawn that if such family arrangement had not been made, the husband could not have executed a deed of Wakf if the wife had not relinquished her claim to inheritance. It is true that in the case of *Khannum Jan* (supra), it had been held by this Court that renunciation implied the yielding up of a right already vested or desisting from prosecuting a claim maintainable against another, and such renunciation during the lifetime of the mother of the shares of the daughters was null and void since it entailed the giving up of something which had not yet come into existence.

The High Court after considering the aforesaid views of the different jurists and the decision in connection with the doctrine of relinquishment came to a finding that even if the provisions of the doctrine of *spes successionis* were to apply, by their very conduct the Petitioners were estopped from claiming the benefit of the said doctrine. In this context, we may refer to yet another principle of Mohammedan Law which is contained in the concept of Wills under the Mohammedan Law. Paragraph 118 of Mulla's "*Principles of Mahomedan Law*" embodies the concept of the limit of testamentary power by a Mohammedan. It records that a Mohammedan cannot by Will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of one-third cannot take effect unless the heirs consent thereto after the death of the testator. The said principle of testamentary disposition of property has been the subject matter of various decisions rendered by this Court from time to time and it has been consistently stated and reaffirmed that a testamentary disposition by a Mohammedan is binding upon the heirs if the heirs consent to the disposition of the entire property and such consent could either be express or implied. Thus, a Mohammedan may also make a disposition of his entire property if all the heirs signified their consent to the same. In other words, the general principle that a Mohammedan cannot by Will dispose of more than a

third of his estate after payment of funeral expenses and debts is capable of being avoided by the consent of all the heirs. In effect, the same also amounts to a right of relinquishment of future inheritance which is on the one hand forbidden and on the other accepted in the case of testamentary disposition. Having accepted the consideration for having relinquished a future claim or share in the estate of the deceased, it would be against public policy if such a claimant be allowed the benefit of the doctrine of *spes successionis*. In such cases, we have no doubt in our mind that the principle of estoppel would be attracted.

We are, however, not inclined to accept that the methodology resorted to by Meeralava Rawther can strictly be said to be a family arrangement. A family arrangement would necessarily mean a decision arrived at jointly by the members of a family and not between two individuals belonging to the family. The five deeds of relinquishment executed by the five sons and daughters of Meeralava Rawther constitute individual agreements entered into between Meeralava Rawther and the expectant heirs. However, notwithstanding the above, as we have held hereinbefore, the doctrine of estoppel is attracted so as to prevent a person from receiving an advantage for giving up of his/her rights and yet claiming the same right subsequently. In our view, being opposed to public policy, the heir expectant would be estopped under the general law from claiming a share in the property of the deceased, as was held in *Gulam Abbas* (supra).

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***60. PRECEDENTS:**

Binding effect of rulings of coordinate/larger Benches of High Court *vis-à-vis* itself – Basic postulates of judicial discipline is that Single Bench of the High Court is bound by the Division Bench – Similarly, Division Bench or Single Bench cannot ignore the law laid down by the co-ordinate Bench.

Royal Orchid Hotels Limited and another v. G. Jayarama Reddy and others

Judgment dated 29.09.2011 passed by the Supreme Court in Civil Appeal No. 7588 of 2005, reported in (2011) 10 SCC 608

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61. PREVENTION OF CORRUPTION ACT, 1988 – Sections 7 and 13

Reduction of minimum prescribed sentence – Corruption by public servant has become a gigantic problem – Long delay in disposal of appeal or any other factor, quantum of amount of bribe demanded by accused or loss of job due to conviction of alleged offence may not be a mitigating circumstance for reduction of minimum prescribed sentence.

A.B. Bhaskara Rao v. Inspector of Police, CBI, Visakhapatnam

Judgment dated 23.09.2011 passed by the Supreme Court in Criminal Appeal No. 650 of 2008, reported in AIR 2011 SC 3845

Held:

In *State of M.P. v. Shambhu Dayal Nagar, AIR 2007 SC 163* wherein it was held that:

> "It is difficult to accept the prayer of the respondent that a lenient view be taken in this case. The corruption by public servants has become a gigantic problem. It has spread everywhere. No facet of public activity has been left unaffected by the stink of corruption. It has deep and pervasive impact on the functioning of the entire country. Large-scale corruption retards the nation-building activities and everyone has to suffer on that count. As has been aptly observed in *Swatantar Singh v. State of Haryana, AIR 1997 SC 2105,* corruption is corroding, like cancerous lymph nodes, the vital veins of the body politics, social fabric of efficiency in the public service and demoralising the honest officers. The efficiency in public service would improve only when the public servant devotes his sincere attention and does the duty diligently, truthfully, honestly and devotes himself assiduously to the performance of the duties of his post. The reputation of corrupt would gather thick and unchaseable clouds around the conduct of the officer and gain notoriety much faster than the smoke".

After analyzing the previous judgments of the Supreme Court and Article 142 of the Constitution of India, the Apex Court summarized the principles as under:

(a) When the Court issues notice confining to particular aspect/sentence, arguments will be heard only to that extent unless some extraordinary circumstance/material is shown to the Court for arguing the matter on all aspects.

(b) Long delay in disposal of appeal or any other factor may not be a ground for reduction of sentence, particularly, when the statute prescribes minimum sentence. In other cases where no such minimum sentence is prescribed, it is open to the Court to consider the delay and its effect and the ultimate decision.

(c) In a case of corruption by public servant, quantum of amount is immaterial. Ultimately it depends upon the conduct of the delinquent and the proof regarding demand and acceptance established by the prosecution.

(d) Merely because the delinquent lost his job due to conviction under the Act may not be a mitigating circumstance for reduction of sentence, particularly, when the Statute prescribes minimum sentence.

(e) Though Article 142 of the Constitution gives wider power to this Court, waiver of certain period as prescribed in the Statute imposing lesser sentence than the minimum prescribed is not permissible.

(f) An order, which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but also it cannot even be inconsistent with the substantive provisions of the relevant Statute. In other words, this Court cannot altogether ignore the substantive provisions of a Statute.

(g) In exercise of the power under Article 142 of the Constitution, this Court generally does not pass an order in contravention of or ignoring the statutory provisions nor is the power exercised merely on sympathy.

(h) The power under Article 142 of the Constitution is a constitutional power and not restricted by statutory enactments. However, this Court would not pass any order under Article 142 which would amount to supplant the substantive law applicable or ignoring statutory provisions dealing with the subject. In other words, acting under Article 142, this Court cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case.

(i) The powers under Article 142 are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in statute dealing expressly with the subject.

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62. PREVENTION OF FOOD ADULTERATION ACT, 1954 – Section 7(v) r/w/s 16 (1) (a)
PREVENTION OF FOOD ADULTERATION RULES, 1955 – Rule 32 (a)
Food Inspector purchased the sample of 450 gm of 'Vital' Pure Refined Cooking Oil (Soya Oil) from open tin of 10 Kg. for the purpose of anylysis – Sample was divided into three parts and were sealed and one sample was sent to State Food Laboratory – Report of Public Analyst that sample contravenes the Rule 32 (a) and the sample was mis-branded – To ascertain whether the provision of Rule 32 (a) of the Rules are violated, he sought an inquiry from the Public Analyst, which was not answered by him – Held, prosecution has failed to establish the case against the petitioner-accused beyond reasonable doubt – Accused discharged, prior to the stage of charge.

Nemichand v. State of M.P.

Judgment dated 28.07.2011, passed by the High Court of M.P. in Cr. Rev. No. 74 of 2005 reported in I.L.R. (2011) M.P. 2896

Held :

On bare perusal of the complaint and the documents filed alongwith the complaint, it clearly shows that on 21st January 1992 at Gwalior Trade Fair Ground, from the shop of petitioner, the Food Inspector duly authorized, purchased sample 450 gm. 'Vital' Pure Refined Cooking oil (Soya Oil) from open tin of 10 Kg. for the purpose of examination under the Prevention of Food Adulteration Act. Thereafter, the sample was divided into three parts and were sealed as per Rules/Law. The one sample was sent to the State Food Laboratory Sagar. The Report from Public Anaylist State Food Laboratory opined that the sample contravenes Rule 32 (a) of the Rules 1955. The evidence collected during investigation shows that the Food Inspector purchased the sample of 450 gm. of 'Vital' Pure Refined Cooking oil (Soya Oil) from open tin of 10 Kg. for the purpose of examination under the Prevention of Food Adulteration Act from the vendor. Under the circumstances, to ascertain whether the provisions of Rule 32(a) of the Rules 1955 are violated by the petitioner-accused and the rule governs the case, he sought an inquiry from the Public Analyst, which was not answered by him. In the instant case except giving the properties of the seized oil, there is no definite opinion given by the Public Analyst as to what type of oil was seized and it is merely stated that the sample was mis-branded. In the set of facts, the decision rendered in the case of *State of Maharastra v. Pravin Virjang Gala, 1999 (1) FAJ 25* shall fully cover the case.

In that view of the matter, the prosecution has failed to establish the case against the petitioner-accused beyond reasonable doubt.

Consequently, by allowing the revision petition, the order dated 6th December 2004 is hereby set aside and accused is discharged, prior to the stage of charge.

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63. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Sections 12, 18 and 19

Application u/s 12 of the Act – It was alleged that non-applicants ill-treated and forcibly threw her out from her matrimonial home – No evidence was led on behalf of the applicant to prove domestic violence in terms of Sections 18 and 19 of the Act which is required to be proved for the purpose of seeking relief u/s 12 of the Act – Court below rightly rejected the application.

Smt. Santosh Kunwar v. Yogendra and another

Judgment dated 17.08.2011 passed by the High Court of Madhya Pradesh in Criminal Revision No. 1502 of 2009, reported in 2011 (5) MPHT 205

Held:

In so far as the statement made by the pertitioner is concerned, in her statement there was contradiction with regard to the date of her marriage as in

the petition she pleaded that her marriage took place 11 years back whereas in the statement she stated that her marriage took place 5-6 years back. She also stated in here statement that after her marriage she stayed in her matrimonial home at Sarvan, in addition to that she only deposed that the respondent Gopal Singh, who is father-in-law of the petitioner was not giving her husban's share in the joint family property and that of after the death of her husband she was also beaten and ill-treated by them and forcibly thrown out from her matrimonial home. But even with respect to the aforesaid allegations, she has not been able to lead any evidence.

She also stated that her jewellery was with the respondents, but to prove this that her jewellery was in possession of the respondent nothing has been led on behalf of the petitioner. In the cross-examination she also stated that before her, Shailendra Singh was married to some other lady who was not alive but she denied the adoption of Ratandeep Singh by late Shailendra Singh and his first wife, but no evidence has been led that Ratandeep Singh was not adopted by them. She was also unable to place on record any document which may go to support her contentions. She also admitted that she never reported to Police or any one else about ill treating her by her in-laws. She denied that the last rites of Shailendra Singh was done by Ratandeep Singh but, simply brushed aside the photographs shown to her.

The second witness examined by her namely—Smt. Sampat Kunwar has not given any proof about the harassment with the petitioner by respondent. She is a married woman and sister-in-law of the petitioner, but it has not made clear as to how she was aware of the alleged cruelty caused to the petitioner and that when she was thrown out from the matrimonial house after the death of her husband Shailendra Singh.

On the other hand, the evidence led by the respondents is consistent. The said evident goes to prove that Shailendra Singh was earlier married with another lady and Ratandeep Singh was the adopted son of late Shailendra Singh and his first wife.

In these circumstances, in the absence of any evidence led on behalf of the petitioner in support of her case and cruelties made by her in-laws, the petitioner was not entitled to any benefit that also after four years of the death of Shailendra Singh in which period she was living separately.

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***64. REGISTRATION ACT, 1908 – Section 57(5)**
EVIDENCE ACT, 1872 – Sections 64, 65(e) & (f), 67 and 68
Certified copy of the sale deed – Can be taken on record by the Court even in the absence of laying any foundation in that respect or having obtained prior permission to adduce secondary evidence in this regard – Plaintiffs produced the certified copy of the sale deed which was taken on record – Plaintiff did not examine any person including the witnesses to the sale to prove the document – On the contrary,

the vendor, who was examined as DW 4, categorically denied the execution of the sale deed as well as his signatures thereon – He was also not confronted with the signature in the sale deed for the purpose of proving his signature in the sale deed – Plaintiffs have failed to prove the document, i.e. proving the fact that it was executed, signed and executed by the vendor.

Jamuna Prasad & ors v. Shivnandan & ors.

Judgment dated 29.07.2011, passed by the High Court of M.P. in S.A. No. 469 of 1994, reported in I.L.R. (2011) M.P. S.N. 137

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65. **SPECIFIC RELIEF ACT, 1963 – Sections 9 and 16 (b)**
CONTRACT ACT, 1872 – Section 55

(i) **Contract relating to commercial enterprises for sale of immovable property –When time is essence of contract?Time is not normally the essence – However, this is not an absolute proposition and has several exceptions – In a contract relating to commercial enterprise, the Court is strongly inclined to hold time to be essential, where the contract is for purchase of land or for such purpose or more "directly for the prosecution of trade".**

(ii) **Discretionary relief of specific performance of contract, entitlement of – When discretionary relief is prayed for, party must come to Court on proper disclosure of facts – Plaintiff, in such case must state all facts with sufficient candour and clarity – Where plaintiff had suppressed material fact that defendant vendor had refunded earnest amount which plaintiff refused to accept prior to filing of suit, plaintiff is not entitled to discretionary relief of specific performance of contract.**

Citadel Fine Pharmaceuticals v. Ramaniyam Real Estates Private Limited and another

Judgment dated 08.08.2011 passed by the Supreme Court in Civil Appeal No. 6437 of 2011, reported in (2011) 9 SCC 147

Held :

There is another aspect of the matter also. In the instant case by asking for specific performance of the contract, the plaintiff-purchaser is praying for a discretionary remedy. It is axiomatic that when discretionary remedy is prayed for by a party, such party must come to court on proper disclosure of facts. The plaint which it filed before the Court in such cases must state all facts with sufficient candour and clarity. In the instant case the plaintiff-purchaser made an averment in the plaint that the defendant-vendor be directed to return the advance amount of ₹ 10,00,000/- at the rate of 24% interest from the date of payment of the said amount till the realization and an alternative prayer to that effect was also made in the prayer clause (c).

However, the fact remains that prior to the filing of the suit the defendant vendor returned the said amount of ' 10,00,000/- by its letter dated 4th September, 1996 by an account payee cheque in favour of the plaintiff and the same was sent to the plaintiff under registered post which was refused by the plaintiff on 6.9.1996. The plaintiff suppressed this fact in the plaint and filed the suit on 9.9.1996 with a totally contrary representation before the court as if the amount has not been returned to it by the vendor. This is suppression of a material fact, and disentitles the plaintiff purchaser from getting any discretionary relief of specific performance by the Court.

In this connection we may refer to the *Principle of Equitable Remedies* by I.C.F. SPRY, Fourth Edition (Sweet & Maxwell, 1990). Dealing with the question of 'Clean Hands' the learned author opined that where the plaintiff is shown to have materially misled the court or to have abused its process, or to have attempted to do so, the discretionary relief of specific performance can be denied to him. In laying down this principle, the learned author relied on a decision of the English Court in the case of *Armstrong v. Sheppard & Short Ltd. (1959) 2 Q.B. 384 at page 397.* (*See* Spry *Equitable Remedies* page 243).

This Court has also taken the same view in the case of *Arunima Baruah v. Union of India and others, (2007) 6 SCC 120.* At paragraph 12, page 125 of the report, this Court held that it is trite law that to enable the court to refuse to exercise its discretionary jurisdiction suppression must be of a material fact. This Court, of course, held what is a material fact, suppression whereof would disentitle the suitor to obtain a discretionary relief, would depend upon the facts and circumstances of each case. However, by way of guidance this Court held that material fact would mean that fact which is material for the purpose of determination of the lis.

Following the aforesaid tests, this Court is of the opinion that the suppression of the fact that the plaintiff refused to accept the cheque of ₹ 10 lac sent to it by the defendant under registered post with A.D. in terms of Clause 9 of the Contract is a material fact. So on that ground the plaintiff-purchaser is not entitled to any relief in its suit of specific performance.

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66. SPECIFIC RELIEF ACT, 1963 – Section 34
PRESS AND REGISTRATION OF BOOKS ACT, 1867 – Sections 5 and 8-B
Exercise of judicial discretion as to relief of declaration and injunction – Before granting or refusing to grant relief of declaration or injunction or both, the courts must weigh pros and cons in each case, consider the facts and circumstances in their proper perspective and exercise discretion with circumspection to further the ends of justice.

Gopal Krishna Premi v. Tarun and others
Judgment dated 30.08.2011 passed by the High Court of Madhya Pradesh in F. A. No. 06 of 2004, reported in 2011 (4) MPLJ 591

Held:

It is true that normally civil Court has jurisdiction to make a declaration of status or right, but the same is not independent of Section 34 of the Specific Relief Act, 1963.

Section 34 confers upon the Court a discretion to make a declaration about status or right, which is judicial discretion and is to be exercised on well settled principles. Court has to see the nature of obligation in respect of which performance is sought, circumstances under which, the decision came to be made, conduct of the parties and the effect of the Court granting the decree. I may successfully quote here the Apex Court's decision in the case of *American Express Bank Ltd. v. Calcutta Steel Co. and others, (1993) 2 SCC 199.* It has been observed :-

> "Undoubtedly, declaration of the rights or status is one of the discretion of the Court under section 34 of the Specific Relief Act, 1963, Equally the grant or refusal of the relief of declaration and injunction under the provision of that Act is discretionary. The Plaintiff cannot claim the relief as of right. It has to be granted according to sound principles of law and *ex debito justitiae*. The Court cannot convert itself into an instrument of injustice or vehicle of oppression. While exercising its discretionary power, the Court must kept in its mind the well-settled principles of view the ends of justice since justice is the hallmark and it cannot be administered in vacuum. Grant of declaration and injunction relating to commercial transactions tend to aid dishonesty and perfidy. Conversely, refusal to grant relief generally encourages candour in business behaviour, facilitates free flow of capital, prompt compliance with covenants, sustained growth of commerce and above all inculcates respect for the efficacy of judicial adjudication. Before granting or refusing to grant relief of declaration or injunction or both, the Court must weigh pros and cons in each case, consider the facts and circumstances in their proper perspective and exercise discretion with circumspection to further the ends of justice."

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***67. TRANSFER OF PROPERTY ACT, 1882 – Section 53-A**

Part performance – Benefit when available:–

(i) the contract should have been in writing signed by or on behalf of transferor;

(ii) the transferee should have got possession of the immovable property covered by the contract;

(iii) the transferee should have done some act in furtherance of the contract; and

(iv) the transferee has either performed his part of the contract or is willing to perform his part of contract.

A party can take advantage of the provision only when it satisfies all the conditions aforesaid – All the postulates are *sine qua non* and a party cannot derive benefit by fulfilling one or more conditions.

Nanjegowda & Anr. v. Gangamma & Ors.

Judgment dated 25.08.2011 passed by the Supreme Court in Civil Appeal No. 2006 of 2006, reported in AIR 2011 SC 3774

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68. TRANSFER OF PROPERTY ACT, 1882 – Section 100
STAMP ACT, 1899 – Sections 29 and 48

(i) Charge – Liability to pay itself does not create a "charge" over the property – A charge can be created only in two ways, namely (i) by the act of parties i.e. by contract or (ii) by operation of law.

(ii) Recovery of Stamp Duty/Penalty – Society purchased the property from its owners by sale deed and subsequently sold it to the appellants – State has no authority to recover the shortage of stamp duty on the sale deed executed in favour of the Society or penalty therefor from the subsequent purchasers/appellants.

Hemlata (Dr.) & ors. v. State of M.P. & ors.

Judgment dated 16.08.2011, passed by the High Court of M.P. in W.A. No. 262 of 2006, reported in I.L.R. (2011) M.P. 2672 (FB)

Held:

Section 100 of the Transfer of Property Act defines "charge" and also specifies the persons against whom and the circumstances under which the "charge" is not enforceable.

In *Ahmedabad Municipal Corporation of the City of Ahmedabad v. Haji Abdul Gafur Haji Hussenbhai, AIR 1971 SC 1201* it has been held in respect of Section 100 of the Transfer of Property Act: –

> "This section in unambiguous language lays down that no charge is enforceable against any property in the hands of a transferee for consideration without notice of the charge except where it is otherwise expressly provided by any law for the time being in force. The saving provision of law must expressly provide for enforcement of a charge against the property in the hands of a transferee for value without notice of the charge and not merely create a charge".

The submission made by the learned counsel for the State also cannot be accepted for the following reasons. Firstly, there are no clear pleadings containing particulars of the alleged fraud, nor there are any such cogent findings. Secondly, even assuming thee was a fraud by the Society, it was regarding non-payment/

short-payment of stamp duty on the sale deed in its favour. The consequences of non-payment/short-payment of stamp duty are provided in the Stamp Act. Passing on the liability of payment of duty or penalty to the subsequent purchaser is not among the consequences provided. Nor is the sale deed or its registration rendered a nullity due to such non-payment/short-payment.

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69. TRANSFER OF PROPERTY ACT, 1882 – Section 105
EASEMENTS ACT, 1882 – Section 52
Lease and licence – Test for determination of document whether it creates a lease or licence and distinction between the terms – Law explained.

Mangal Amusement (P) Limited and another v. State of M.P. and others

Judgment dated 19.05.2011 passed by the High Court of M.P. in Writ Petition No. 5698 of 2008, reported in 2011 (5) MPHT 485 (DB)

Held :

In *Halsbury's Laws of England* IV edition, the expression "lease" is defined to mean "an instrument in proper form by which the conditions of a contract of letting are finally ascertained, and which is intended to vest the right of exclusive possession in the tenant, either at once, if the term is to commence immediately, or at a future date, if the term is to commence subsequently, is a lease which takes effect from the date fixed for the commencement of the term without the necessity of actual entry by the tenant".

The term "Licence" has been defined in Halsbury's Laws of England IV edition in following words -

> "A licence is normally created where a person is granted the right to use premises without becoming entitled to exclusive possession of them, or where exceptional circumstances exist which negative the presumption of the grant of a tenancy. If the agreement is merely for the use of the property in a certain way and on certain terms while the property remains in the owner's possession and control, the agreement operates as a licence, even though the agreement may employ words appropriate to a lease."

Section 105 of the Transfer of Property Act, 1882 defines "lease" of immovable property as under :-

> "105. Lease defined.- A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other things of value, to be rendered

periodically or on specified occasion, to the transfer or by the transferee, who accepts the transfer on such term"

Section 52 of the Indian Easements Act, 1882 defines a "licence" to mean:-

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

Thus, a lease is essentially a transfer of an interest in immovable property entitling the lessee to the enjoyment of such immovable property which " includes the right to possession thereof. Another essential feature of a lease is that the transfer must be for consideration, though it may be for a limited period or in perpetuity. A lease can be effected only by a bilateral transaction in which both lessor and lessee should be the parties. On the other hand, the characteristics of licence are that it grants the licensee right to do something on the property which otherwise would have been unlawful for him to do so. The distinction between the lease and licence has been considered by the Supreme Court in catena of decisions, namely, *Associated Hotels of India Ltd. v. R.N. Kapoor, AIR 1959 SC 1262, Uttam Chand v. S. M. Lalwani, AIR 1965 SC 716, L. B. M. Loll v. M/s Dunlop Rubber Co. (India) Ltd. and another, AIR 1968 SC 175, Konchada Ramamurty Subudhi (dead) v. Gopinath Naik and others, AIR 1968 SC 919, Board of Revenue v. A. M. Ansari, (1976) 3 SCC 512, Khalil Ahmed Bashir Ahmed v. Tufelhussein Samasbhai Sarangpurwala, AIR 1988 SC 184, Capt. B. V. D. Souza v. Antonio Fausto Fernandes, AIR 1989 SC 1816, Corporation of Calicut v.K. Sreenivasan, (2002) 5 SCC 361 and Chandy Varghese and others v. K. Abdul Khader and others, (2003) 11 SCC 328.* From a close scrutiny of the aforesaid decisions, following tests for determination whether a document creates a lease or licence can be taken as well established:

(i) To ascertain whether a document creates licence or lease, substance of the document must be preferred to the form. The Court must refer to the object and the circumstances under which document is executed. The character of the transaction turns on the operative intent of the parties.

(ii) The real test is the intention of the parties. The Court must apply the test of dominant intention of the parties. The Court must determine the character of the document by asking itself as to what was the dominant intention of the parties in executing the document. The question whether a particular transaction creates a lease or licence is always the question of intention of the parties and, therefore, has to be inferred from the facts and circumstances of each case.

(iii) If a document creates an interest in the property, it is a lease but if it permits another party to make use of the

property, of which the legal possession continues with the owner, it is a licence.

(iv) If under the document, a party gets-exclusive possession of the property, prima facie, he is considered to be a tenant, but circumstances may be established which negative the intention to create a lease. However, the test of exclusive possession is not conclusive by itself to arrive at the conclusion that the transaction in question is a lease. Merely exclusive possession is not decisive for drawing an inference that the document in question is a lease and not licence.

(v) A lease is a transfer of right to enjoy the premises whereas the licence is a privilege to do something on the premises which otherwise would be unlawful.

(vi) Occupation of licensee is permissive by virtue of a grant of licence in his favour, though he does not acquire any right in the property and the property remains in possession and control of the grantor, but by virtue of such a grant, he acquires a right to remain in occupation so long the licence is not revoked and/or he is not evicted from its occupation either in accordance with law or otherwise.

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70. WILD LIFE (PROTECTION) ACT, 1972 – Sections 39 (1) (D), 50 (4) and 54 CRIMINAL PROCEDURE CODE, 1973 – Sections 451 and 452

(i) On the basis of seizure and mere accusations/allegations, Section 39 (1) (d) of the 1972 Act cannot be allowed to operate – For Section 39 (1) (d) to come into play there has to be a categorical finding by the competent Court of law about the use of seized items such as vehicle, weapon, etc. for commission of the offence – The expression "has been used for committing an offence" in Section 39 (1) (d) cannot be read or understood as "is suspected to have been used for committing an offence".

(ii) None of the provisions under the Wild Life (Protection) Act, 1972 empowers and authorizes the specified officer u/s 54, on composition of the offence, to deal with the seized property much less order forfeiture of the seized property used by the person suspected of commission of offence against the Act – The property seized u/s 50 (1) (c) and Section 50 (3-A) has to be dealt with by the Magistrate according to law.

Principal Chief Conservator of Forests and another v. J.K. Johnson and others

Judgment dated 17.10.2011 passed by the Supreme Court in Civil Appeal No. 2534 of 2011, reported in (2011) 10 SCC 794

Held:

Sections 39(1)(d), 50, 51 and 54 of the Wild Life (Protection) Act, 1972 do not provide for the forfeiture of the seized items by the departmental authorities from a person who is suspected to have committed offence/s against the 1972 Act. Chapter VI-A which has been inserted in the 1972 Act by Act 16 of 2003 that provides for forfeiture of property derived from illegal hunting and trade is entirely different provision and has nothing to do with forfeiture of the property seized from a person accused of commission of offence against the 1972 Act. Insofar as Section 39(1) (d) of the 1972 Act is concerned, it provides that every vehicle, vessel, weapon, trap or tool that has been used for committing an offence and has been seized under the provisions of the Act shall be the property of the State Government and in a certain situation, the property of the Central Government. The key words in Clause (d) of Section 39(1) are, "..... has been used for committing an offence. .. ." What is the meaning of these words? The kind of absolute vesting of the seized property in the state government, on mere suspicion of an offence committed against the 1972 Act, could not have been intended by the Parliament. Section 39(1)(d) does not get attracted where the items, suspected to have been used for committing an offence, are seized under the provisions of the Act. It seems to us that it is implicit in Section 39(1)(d) that for this provision to come into play there has to be a categorical finding by the competent court of law about the use of seized items such as vehicle, weapon, etc. for commission of the offence. The expression "has been used for committing an offence" occurring in Section 39 (1) (d) cannot be read as "is suspected to have been used for committing an offence".

Section 51 (2) of the 1972 Act provides for forfeiture of the property on conviction; it says, inter alia, that when any person is convicted of an offence against the Act, the court trying the offence may order that any captive animal, wild animal, etc. in respect of which the offence has been committed and any vehicle, vessel or weapon, etc. used in the commission the said offence be forfeited to the State Government.

In *State of M.P. v. Madhukar Rao, (2008) 14 SCC 624*, albeit, the question was little different but this Court considered the ambit and scope of Section 39(1)(d). That matter reached this Court from a Full Bench decision of the Madhya Pradesh High Court. The question before the Full Bench was whether as a result of deletion of sub-section (2) of Section 50 withdrawing power of interim release, there existed any power with the authorities under the 1972 Act or the Code to release the vehicle used in the course of alleged commission of offence under the Act. The Full Bench of the High Court held that any property including vehicle seized on accusation or suspicion of commission of offence under the 1972 Act can be released by the Magistrate pending trial in accordance with Section 50(4) of the 1972 Act para (page 805) read with Section 451 of the Code. The Full Bench also held that mere seizure of any property including vehicle on the charge of commission of offence would not make the property to be of the State Government under Section 39(1)(d) of the 1972 Act.

This Court extensively considered the statutory provisions and approved the view of the Full Bench of the High Court that deletion of sub-section (2) and its replacement by sub-section (3-A) in Section 50 of the 1972 Act had no effect on the powers of the Court to release the seized vehicle during the pendency of trial under the provisions of the Code. While dealing with Section 39(1)(d), this Court also approved the view of the Full Bench of the High Court that Section 39(1)(d) would come into play only after a court of competent jurisdiction found that accusation and allegations made against the accused were true and recorded the finding that the seized article was, as a matter of fact, used in the commission of offence. This Court said :

> " ..... Any attempt to operationalise Section 39(1)(d) of the Act merely on the basis of seizure and accusations/ allegations levelled by the departmental authorities would bring it into conflict with the constitutional provisions and would render it unconstitutional and invalid....."

The composition of the offence u/s 54 of the Wild Life (Protection) Act, 1972 is not during the course of a trial or in the trial of a compoundable offence. It is a departmental compounding and does not amount to acquittal. But in terms of Section 54 (2), on composition of offence, the suspected person is saved from criminal prosecution and from being subjected to further proceedings in respect of the offence. The plain language that is written in Section 54 (2) does not show that the legislature intended to confer power on specified officer u/s 54 to order forfeiture of the seized property used by the suspected person in commission of offence against the Act. The property seized under Section 50(1)(c) and Section 50(3-A) has to be dealt with by the Magistrate according to law. This is made clear by Section 50(4) which provides that things seized shall be taken before a Magistrate to be dealt with according to law. Section 54 substituted by Act 16 of 2003 does not empower the specified officer to deal with the seized property.

In our view, the items were seized in exercise of power u/s 50 (1) (c), the seized property has to be dealt with by the Magistrate u/s 50 (4) of the Act. Therefore, any specified officer empowered u/s 54 (1) of the Act to compound offence, has no power, competence or authority to order forfeiture of the seized items on composition of the offence by a person, who is suspected to have committed offence under the Act.

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NOTE: (*) Asterisk denotes short notes

PART - III

CIRCULARS/NOTIFICATIONS

NOTIFICATION REGARDING CONFERRING POWERS UPON ALL THE GRAM SABHAS CONSTITUTED UNDER THE MADHYA PRADESH PANCHAYAT RAJ AVAM GRAM SWARAJ ADHINIYAM, 1993

Notification F. No. 2-3-2010-VII-6-692(A) dated the 4th May, 2011. – In exercise of the powers conferred by sub-section (1) of Section 24 of the M.P. Land Revenue Code, 1959 (No. 20 of 1959) and in supersession of this department's Notification No. F. 2-2-VII-S-8-2001, dated the 26th January, 2001 the State Government hereby confer the following powers upon all the Gram Sabhas constituted under the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (No. 1 of 1994), within their respective jurisdictions, namely: –

(1) the powers of Tahsildar under sub-section (2) of Section 128 of the said Code;

(2) the powers of Tahsildar under Section 130 of the said Code; and

(3) the powers of Tahsildar under Section 178 of the said Code, in respect of undisputed cases of partition of holding.

[Published in M.P.Rajpatra Part I dated 27.05.2011 Pages 1780-1781]

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NOTIFICATION REGARDING DISPOSAL OF UNDISPUTED CASES OF MUTATION UPON ALL THE GRAM SABHAS CONSTITUTED UNDER THE MADHYA PRADESH PANCHAYAT RAJ AVAM GRAM SWARAJ ADHINIYAM, 1993

Notification F.No. 2-3-2010- VII-6-692-(B) dated the 4th March, 2011. – In exercise of the powers conferred by sub-section (1) of Section 24 of the M.P. Land Revenue Code, 1959 (No. 20 of 1959), the State Government, hereby confer the powers of Tahsildar under Section 110 of the said Code for the purpose of disposal of undisputed cases of mutation, upon all the Gram Sabhas constituted under the Madhya Pradesh Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 (No. 1 of 1994) within their respective jurisdiction, with the direction that such cases shall be disposed of within 45 days and after this time period, such cases shall be disposed of by the Tahsildar.

[Published in M.P.Rajpatra Part I dated 27.05.2011 Page 1781]

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The Supreme Court has a constitutional duty to protect the fundamental rights of Indian citizens. Whenever the Supreme Court has found that the socio-economic rights of citizens are required to be enforced, but there was a vacuum on account of the absence of any law to protect and enforce such rights. The Supreme Court has invariably stepped in and evolved new mechanisms to protect and enforce such rights, to do complete justice. This has been done by re-fashioning remedies beyond those traditionally available under writ jurisdiction by issuing appropriate direction or guidelines to protect the fundamental rights and make them meaningful.

R.V. Raveendran, J.

in *Dayaram v. Sudhir Batham, (2012) 1 SCC 333*

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE MADHYA PRADESH CIVIL COURTS (AMENDMENT) ACT, 2011

(Received the assent of the Governor on the 22nd December, 2011; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)," dated the 23rd December, 2011)

An Act further to amend the Madhya Pradesh Civil Courts Act, 1958

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

Short title

1. This Act may be called the Madhya Pradesh Civil Courts (Amendment) Act, 2011.

Amendment of Section 6

2. In Section 6 of the Madhya Pradesh Civil Courts Act, 1958 (No. 19 of 1958), in sub-section (1),

(i) in clause (a), for the word and figures "Rupees 2,50,000" shall be substituted;

(ii) in clause (b), for the word and figures "Rupees 50,000", the word and figures "Rupees 10,00,000" shall be substituted;

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार
सही/–
राजेश यादव
अपर सचिव

NEVER WAIT FOR OPPORTUNITY RATHER DEVELOP YOUR STRENGTH

"What is opportunity, and when does it knock? It never knocks !!!

You can wait a whole lifetime, listening, hoping, and you will hear no knocking,

None at all.

You are opportunity, and you must knock on the door leading to your destiny.

You prepare yourself to recognize opportunity, to pursue and seize opportunity

as you develop the strength of your personality, and build a self-image

with which you are able to live with your self-respect alive and growing"

- Maxwell Maltz.