JOTI JOURNAL

JUNE 2013 (BIMONTHLY)

न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान

मध्य प्रदेश उच्च न्यायालय, जबलपुर - 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

JOTI JOURNAL JUNE - 2013

SUBJECT- INDEX

PART-I
(ARTICLES & MISC.)

PART-II
(NOTES ON IMPORTANT JUDGMENTS)

CONSTITUTION OF INDIA ARTICLE

CONTRACT ACT, 1872

CRIMINAL PROCEDURE CODE, 1973

FORENSIC MEDICINE

HINDU MARRIAGE ACT, 1955

INDIAN PENAL CODE, 1860

•

FROM EDITOR'S DESK

C.V. Sirpurkar,
Director, JOTRI

Esteemed Readers

As you all are aware, the e-committee provided laptop computers to all subordinate Judges in the year 2008. Subsequently, the High Court of Madhya Pradesh supplied AIR Software which included AIR (SC), AIR (SCW), AIR (HC) and Cri.L.J. databases. The e-committee and the High Court spent substantial amount of money on training the members of District Judiciary on aforesaid software.

In the year 2011, the Judicial Officers' Training & Research Institute procured IndLaw Desktop Software for all subordinate Judges of the State mainly for judgments of Nagpur and Madhya Pradesh High Court. We are happy to note that a large number of subordinate Judges are now using laptops and aforesaid sets of software to enhance their capacity and capability. Most of the judgments in district headquarters are now being typed on computers. Many Judges have also compiled digests of precedent on their laptop computers. As such, there is considerable amount of lateral dissemination of knowledge.

The Judicial Officers' Training & Research Institute has been publishing this bi-monthly Journal since 1995. It consists of 4 parts. Part I contains Articles on topics relating to procedural and substantive laws. Part II comprises notes on Important judgments of the Supreme Court and High Courts. Part III consists of Circulars/Notifications and Part IV contains important Central/State Acts & Amendments. We are justifiably proud of the fact that JOTI Journal has served the needs of Judges of District Judiciary admirably and has fulfilled the objective for which it was originally conceived.

The officers and the officials of JOTRI have painstakingly compiled a database of every single piece of information published in JOTI Journal since the year 1995. In order to facilitate search of desired piece of information, a powerful search engine has been indigenously developed. This comprehensive database and the innovative search engine has been packaged in a software called JOTI Journal Software. It was provided to all the members of District Judiciary in January, 2013.

The High Court of Madhya Pradesh had allocated a web page in the official website of the High Court to the Judicial Officers' Training & Research Institute in the year 2004. Unfortunately, the webpage lay moribund for all those years. The JOTRI has now thoroughly revised and updated the web page with fresh inputs. This web page is now available through a link named JOTRI in the official website of the High Court www.mphc.in The web page contains historical perspective of JOTRI and other links with titles such as "Judicial Education", "Knowledge Gateway", "Administrative Structure", "Events", "News Letter" and "Article Updates".

"Judicial Education" contains the academic agenda of the Institute for the current Education Calendar including information about bi-monthly District Level Colloquia, Induction Courses, Refresher Courses, Specialized Courses, Workshops and Seminars. The link named "Administrative Structure" contains name of the Founder of the Institute and JOTI Journal, names of members of the Training Committee, names of the Officers currently posted in JOTRI, names of erstwhile Chairmen and Directors, names and posts of the staff currently posted in the Institute, Annual Report of JOTRI, contact details of officials and photo gallery of various events held in the JOTRI so far.

The "Knowledge Gateway" is the most useful sub-link, which has four further sub-links under the titles "JOTI Journal", "Reference Material" etc. It is password protected and only the Members of District Judiciary of Madhya Pradesh can access the sub-link. The sub-link titled "JOTI Journal" contains all the Articles and Notes of Cases published in JOTI Journal for past eighteen years. The Articles have been indexed subject-wise and are hyperlinked for instant access. The notes on cases are accessible through the JOTI Journal software, which has been incorporated in the web page. The knowledge gateway also contains Reference Material published on various useful topics by JOTRI.

In addition to aforesaid material, a web link also contains various photographs of the existing infrastructure of JOTRI and various programmes held so far.

Officers of JOTRI have designed a detailed Instruction Manual in simple language for navigation and exploration of the web page. The manual is available on home page of the web link. It has been designed in such a way that every members of District Judiciary can take fullest advantage of the information contained in the web page.

Friends, you may note thus that whatever JOTRI has done by way of micro-research in past eighteen years is available to every member of District Judiciary on the proverbial click of a mouse. At this point, it would not be inappropriate to share with you, the difficulties being faced by the Institute in publishing the JOTI Journal in print form. In aforesaid background, the JOTRI has decided to publish JOTI Journal in electronic form on the web page of the Institute as soon as it is ready. We have also adopted a policy of providing reference material during various workshops/seminars, colloquia and courses held by the Institute, in electronic form. Thus, JOTRI has effected a determined move away from paper, so that we can do our bit in preserving environment.

I hope and trust that the members of District Judiciary of Madhya Pradesh would appreciate the objective behind this move and would fully co-operate with the Institute. I also believe that the Members of District Judiciary of the state would make best possible use of the information now available on the web page of JOTRI, to improve the quality of the justice dispensed by them.

•

FAREWELL TO HON'BLE THE CHIEF JUSTICE SHRI SHARAD ARVIND BOBDE

Hon'ble Shri Justice Sharad Arvind Bobde who served as the Chief Justice of High Court of Madhya Pradesh has been elevated as the Judge of the Supreme Court of India.

His Lordship was born on 24th April, 1956 at Nagpur and passed Higher Secondary School Examination from SFS School, Nagpur in 1972 and obtained Bachelors Degree of Arts from SFS College in 1975 and Law Degree from Nagpur University in 1978.

His Lordship was enrolled as an Advocate with the Bar Council of Maharashtra on 13th September, 1978 and practiced at the Nagpur Bench of Bombay High Court for over 21 years. His Lordship had also practiced the Supreme Court of India and was designated a Senior Advocate in 1998.

His Lordship is a keen sportsman ad has special interest in Tennis and had played tennis representing University College of Law which won the Intercollegiate Championship. His Lordship has also played for Nagpur University in the All India Inter-Universities Tournament.

His Lordship was elevated to the Bench of Bombay High Court on 29th April, 2000 as Additional Judge and thereafter, as permanent Judge on 29th April 2002.

After rendering more than ten years of valuable services as a Judge in the High Court of Maharashtra, His Lordship was appointed as Chief Justice of High Court of Madhya Pradesh and was administered oath of office by the Governor of M.P. on 16th October, 2012 in an impressive ceremony organized at Raj Bhavan, Bhopal. His Lordship was accorded welcome ovation on 17th October, 2012 in the Conference Hall of South Block of the High Court of Madhya Pradesh, Jabalpur.

On elevation to the Supreme Court, His Lordship was accorded farewell ovation at the South Block of High Court of Madhya Pradesh on 10th April, 2013

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

●

PHOTOGRAPHS RELATING TO TRAINING PROGRAMMES ON 'MEDIATION' CONDUCTED BY THE INSTITUTE UNDER THE APPROVED SCHEMES FOR UTILISATION OF GRANT-IN-AID RECOMMENDED BY THE XIII FINANCE COMMISSION

PHOTO

WRITTEN STATEMENT, SET-OFF & COUNTER CLAIM

Hon'ble Shri Justice Rajendra Menon,
Judge, High Court of M.P.

A special Committee, constituted by the Government of India, to go into the question of making certain amendments to the Code of Civil Procedure, 1908 (for short the 'Code') in one of its reports made an observation wherein the objects and importance of a proper pleading in a civil suit is indicated. It was the opinion of the Committee that litigants in this country should come to trial with all issues clearly defined and cases pending in Courts should not be expanded on grounds, which are uncertain and are being contested without reference to correct facts. It is therefore, seen that pleadings are necessary to prevent surprises at the time of hearing and it is the cardinal principle of law that a party is entitled to know the case of his opponent before he is called upon to meet it. It is in the backdrop of these factors that the importance of pleadings in a civil litigation is indicated in various judgments and reports available in the matter.

In accordance to the provisions of Order VI Rule 1 of the Code, a **'Plaint'** and a **'written statement'** constitute the pleadings in a civil suit. According to this rule, pleading shall mean a **'plaint'** or a **'written statement'**. The plaintiff's pleading is a **'plaint'** and the defendant's pleading is a **'written statement'**. However, in a given case where the defendant in his written statement pleads a **'set off'** or puts forward a counter-claim against the plaintiff, the plaintiff can file a written statement in answer to such set-off or counter-claim. It is in the backdrop of these facts that the requirement to be fulfilled while filing written statement, claiming set off or raising a counter-claim, provisions are made in the Code. Order VIII of the Rules framed under the aforesaid statement and governs the principle for accepting the written statement, the manner in which it is to be filed and various other provisions. The order further contains provisions for claiming set off and for making a counter-claim and the procedure and principle to be followed in the matter of submitting and deciding the set off and counter-claim respectively. Initially under Rule 1 of Order VIII of the Code, the defendant was entitled to file the written statement before the first hearing or within such time as the Court would permit him or her to present the written statement of defence. The provisions of Rule 1 of Order 8 has undergone change with effect from 1.7.2002 after the CPC (Amendment) Act, 2002. Under the amended provisions the defendant is required to present his written statement and defence within 30 days from the date of service of summons provided when he fails to do so within 30 days, he is allowed to file the same within such period as may be specified by the Court for reasons to be recorded in writing, but the period shall not be later than 90 days from the date of service of summons.

It is therefore, clear from a perusal of the amended provisions that the earlier provision for filing written statement at the time of first hearing or during the extended time as may be granted by the Court is done away with and now immediately after receipt of summons the law mandates a defendant to file the written statement within 30 days of receipt of summons and even the time limit for extension of time be the Court is restricted to 90 days from the date of service of summons.

The question of filing of written statement and time period during which it has to be filed has been subject matter of adjudication by various Courts particularly by the Supreme Court in various cases and as on date the following cases have laid down the principle in the matter:

1. Nathuni Ram v. Raghupat Ram and Others, AIR 2007 SC 2487
2. Shiddappa Adiveppa Jadi v. Ramanna, AIR 2002 Kar 416
3. Smt. Rani Kusum v. Smt. Kanchan Devi and others, 2005 AIR SCW 3985
4. Andhra Bank v. ABN Amro Bank N.V. and others, (2007) 6 SCC 167
5. Kailash v. Nanku and Others, (2005) 4 SCC 480
6. Mr. Shaikh Salim Haji Abdul Khayumsab v. Mr. Kumar and Others, (2006) 1 SCC 46 : AIR 2006 SC 396
7. R. N. Jadi and Brothers, M/s. v. Subhash Chandra, AIR 2007 SC 2571
8. Mohammed Yusuf v. Faij Mohammad and Ors., (2009) 3 SCC 513

Smt. Rani Kusum Vs. Smt. Kanchan Devi and Others (AIR 2005 SC 3304)

> "16. It is also to be noted that though the power of the Court under the proviso appended to Rule 1 of Order VIII is circumscribed by the words "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.
>
> 17. Challenge to the Constitutional validity of the Amendment Act and 1999 Amendment Act was rejected by this Court in ***Salem Advocate Bar Association, Tamil Nadu v. Union of India (JT 2002 (9) SC 175: (2002 AIR SCW 4627: AIR 2003 SC 189).*** However to work out modalities in respect of certain provisions a Committee was constituted. After receipt of Committee's report the matter was considered by a three-Judge Bench in ***Salem Advocate Bar Association, Tamil Nadu v. Union of India (JT 2005 (6) SC 486).*** As regards Order VIII, Rule 1, Committee's report is as follows: (2005 AIR SCW 3827):
>
> "The question is whether the Court has any power or jurisdiction to extend the period beyond 90 days. The maximum period of 90 days to file written statement has been provided but the consequences on failure to file written

> statement within the said period have not been provided for in Order VIII, Rule 1. The point for consideration is whether the provision providing for maximum period of ninety days is mandatory and, therefore, the Court is altogether powerless to extend the time even in an exceptionally hard case.

It has been common practice for the parties to take long adjournments for filing written statements. The Legislature with a view to curb this practice and to avoid unnecessary delay and adjournments, has provided for the maximum period within which the written statement is required to be filed. The mandatory or directory nature of Order VIII, Rule 1 shall have to be determined by having regard to the object sought to be achieved by the amendment. It is, thus, necessary to find out the intention of the Legislature. The consequences which may follow and whether the same were intended by the Legislature have also to be kept in view.

In ***Raza Buland Sugar Co. Ltd., Rampur v. The Municipal Board, Rampur, AIR 1965 SC 895,*** a Constitution Bench of this Court held that the question whether a particular provision is mandatory or directory cannot be resolved by laying down any general rule and it would depend upon the facts of each case and for that purpose the object of the statute in making out the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the Legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory.

In ***Sangram Singh v. Election Tribunal, Kotah and Anr., AIR 1955 SC 425,*** considering the provisions of the Code dealing with the trial of the suits, it was opined that :

> "Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a Penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical construction of sections that leaves no room for reasonable elasticity of interpretation should, therefore, be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it.
>
> Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard,

> that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

In ***Topline Shoes Ltd. v. Corportation Bank, (2002) 6 SCC 33:2002 AIR SCW 2794 : AIR 2002 SC 2487,*** the question for consideration was whether the State Consumer Disputes Redressal Commission could grant time to the respondent to file reply beyond total period of 45 days in view of Section 13(2) of the Consumer Protection Act, 1986. It was held that the intention to provide time-frame to file reply is really made to expedite the hearing of such matters and to avoid unnecessary adjournments. It was noticed that no penal consequences had been prescribed if the reply is not filed in the prescribed time. The provision was held to be directory. It was observed that the provision is more by way of procedure to achieve the object of speedy disposal of the case.

The use of the word 'shall' in Order VIII, Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word 'shall' is ordinarily indicative of mandatory nature of the provision but having regard to the intention of the legislation; the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

In construing this provision, support can also be had from Order VIII, Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to suit as it thinks fit. In the context of the provision, despite use of the word 'shall', the court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of Order VIII, Rule 1 and Rule 10, the doctrine of harmonious construction is required to be applied. The effect would be that under Rule 10 of Order VIII, the court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided in Order

VIII, Rule 1. There is no restriction in Order VIII, Rule 10 that after expiry of ninety days, further time cannot be granted. The Court has wide power to 'make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of Order VIII, Rule 1 providing for upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the Legislature has fixed the upper time limit of 90 days. The discretion of the Court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order VIII, Rule 1.

R.N. Jadi & Brothers and others v. Subhashchandra.[(2007)6 SCC 420]

P.K. Balasubramanyan, J. (concurring) – I respectfully agree. The High Court was in error in setting aside the order of the trial court accepting the written statement filed by the defendants, in the circumstances of the case. I am prompted to make a few observations in the context of the discussion by my learned Brother on the scope of the related provisions of the Code of Civil Procedure.

It is notorious that suits were being dragged on by the defendants in suits by not filing their written statements within a reasonable time. We are not unaware of cases where written statements were not filed even within two or three years of the filing of the suits. The control expected to be exercised by courts, by the scheme of the Code, was not being exercised leading to slackness in the matter of filing of pleadings in defence. It was in that context that the relevant provisions of the Code of Civil Procedure were amended, the laudable object being to avoid delay in the disposal of suits. The amended Order 8 Rule 1 fixes a time-limit for the filing of written statements. But, Parliament did not stop with amending Order 8 Rule 1 alone i.e. introducing a time-limit for filing written statements and restricting the power of the court to grant extension of time for filing written statements as 90 days from the date of service of summons. The power for extension of time granted to the court under Section 148 of the Code was curtailed by introducing an outer time-limit of 30 days from the date originally fixed or granted. Thus, the legislative intent to limit or curtail the power of the court to extend the time for filing a written statement is obvious from a conjoint reading of these provisions.

In addition to the time-limit prescribed in Order 8 Rule 1 of the Code, it is provided in Order 5 rule 1 that the summons issued to the defendant should itself provide that he has to appear and file his written statement within one month of receipt of it and limiting the power of the court to extend the time for written statement to 90 days. The summons is to be accompanied by a copy of the plaint. It simultaneously introduced Rule 14 to Order 7 providing that where the plaintiff sues upon a document or relies upon a document in his possession or power, in support of his claim, he shall enter such documents in a list and shall produce it in court when the plaint is presented by him and shall at the

same time deliver the document and copy thereof to be filed with the plaint. Sub-rule (3) was introduced to provide that if the document is not included in the list, or is not produced with the plaint, it was not to be produced without the leave of the court and without the leave of the court it shall not be received in evidence on his behalf at the hearing of the suit.

In such a position, normally no injustice would be caused to the defendant in insisting upon his filing the written statement at least within 90 days of having received the summons in the suit. I think that it would be proper to avoid an interpretation that may tend to thwart the legislative intent in such circumstances.

It is true that procedure is the handmaid of justice. The court must always be anxious to do justice and to prevent victories by way of technical knockouts. But how far that concept can be stretched in the context of the amendments brought to the Code and in the light of the mischief that was sought to be averted is a question that has to be seriously considered. I am conscious that I was a party to the decision in ***Kailash v. Nanhku, (2005) 4 SCC 480*** which held that the provision was directory and not mandatory. But there could be situations where even a procedural provision could be construed as mandatory, no doubt retaining a power in the court, in an appropriate case, to exercise a jurisdiction to take out the rigour of that provision or to mitigate genuine hardship. It was in that context that in ***Kailash v. Nanhku*** (supra) it was stated that the extension of time beyond 90 days was not automatic and that the court, for reasons to be recorded, had to be satisfied that there was sufficient justification for departing from the time-limit fixed by the Code and the power inhering in the court in terms of Section 148 of the Code. ***Kailash*** (supra) is no authority for receiving written statements, after the expiry of the period permitted by law, in a routine manner.

A dispensation that makes Order 8 Rule 1 directory, leaving it to the courts to extend the time indiscriminately would tend to defeat the object sought to be achieved by the amendments to the Code. It is, therefore, necessary to emphasize that the grant of extension of time beyond 30 days is not automatic, that it should be exercised with caution and for adequate reasons and that an extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of the justification for granting such extension, the court being conscious of the fact that even the power of the court for extension inhering in Section 148 of the Code, has also been restricted by the legislature. It would be proper to encourage the belief in litigants that the imperative of Order 8 Rule 1 must be adhered to and that only in rare and exceptional cases, will the breach thereof will be condoned. Such an approach by courts alone can carry forward the legislative intent of avoiding delays or at least in curtailing the delays in the disposal of suits filed in courts. The lament of Lord Denning in ***Allen vs. Sir Alfred McAlpine & Sons, (1968) 2 QB 229,*** that law's delays have been intolerable and last so long as to turn justice sour, is true of our legal system as well. Should that state of affairs continue for all times?

From the aforesaid judgments, it would be seen that even though the words used in Order VIII Rule 1 is that the written statement shall be filed within 30 days and shall not be later than 90 days are used, the word 'shall' has been given a meaning to the effect that in a given case discretion is available with the Court to extend the period even beyond the statutory prescribed period of 90 days. However, recently the Supreme Court has given a stricter interpretation and has emphasized that the written statements should be filed within the period prescribed and normally the Court should not extend the period without any just cause or reason. That apart, the Code mandates the defendant to produce all documents upon which he relies in support of his defence and Rule 1(9) imposes a duty on the defendant to produce all the documents upon which he bases his defence or reliance in support of his evidence or claims set off or counter-claim. The law mandates the defendant to file all these documents alongwith the written statement. However, if all documents or any such document is not filed alongwith the written statement, the defendant may apply for leave of the Court to produce the same at a subsequent stage of the suit and if the defendant satisfies the same at a subsequent stage of the suit and if the defendant satisfies the same at a subsequent stage of the suit and if the defendant satisfies the same at a subsequent stage of the suit and if the defendant satisfies the Court as having sufficient reason for not producing the document alongwith the written statement the Court may grant him leave to do so.

The pleading of defendant's case in the written statement as a general rule of pleading should comply with the requirement of being complete and in all respects in accordance to the general rule of pleading. The defendant is required to either deny or refuses all such facts which he does not admit. He is entitled to put up new facts in support of his defence or facts which he thinks are relevant for deciding the dispute between the parties. Apart from objecting to the claim made by the plaintiff, he has a right to seek set off and also raise a counter claim.

Denial of a plaintiff's claim as a fundamental rule has to be in accordance to the provisions of Rule 3, 4 and 5 of Order VIII, the denial must be specific and should not be a general denial. The defendant is required to deal specifically with each and every allegation, which he does not admit to be true and evasive denials is not permissible under law.

The requirement of law is that a traverse whether by denial or refusal to admit should not be evasive or vague. The averments made in the written statement should be specific and must be an answer to the point issue. Allegation of fact raised by the plaintiff in the suit are required to be admitted in specific terms or denied boldly by the defendant. The purport and fact of the denial must be distinct and clear.

Evasive and indefinite answer in the written statement is not permissible under law and it is held in various cases that evasive denials may be construed as an admission. In this regard the principles laid down by the Supreme Court, in the case of ***Badat and Company, Bombay Vs. East India Trading Company, AIR***

1964 SC 538, may be referred to. For example, “Bullen and Leake” in their book on pleadings, have given an example:- Plaintiff in his suit raised a ground that defendant had offered a bribe of 500 Pounds. In answer to the aforesaid, the defendant only stated that he has never offered the bribe of 500 Pound. It is held that this reply of the defendant is evasive. In the book, the learned authors have emphasized that after denying offer of 500 Pound as bribe, defendant is further required to add the following words i.e. “or any other sum” to make the reply specific. The Rule of specific denial contained in Order VIII Rule 3 imposes an obligation on the defendant as a cardinal principle is based on the fact that a party, who makes an allegation, is required to prove it and if the evasive reply is treated as an admission then the party, who raises the plea, is not required to prove it. It is because of this reason that in most of the written statement as a matter of rule a general statement is made in the following terms: “save as hereinbefore specifically admitted, the defendant denies each and every allegation as contained in the statement of claim”. Some of the judgments in this regard may be referred to are :

1. Samrthlal v. Union of India, AIR 1959 MP 305
2. Jahuri Sah v. Dwarika Prasad Jhunjhunwala, AIR 1967 SC 109
3. Roop Bai v. Mahavir, AIR 1994 Raj 133
4. Shankar Lal v. Balmukund, AIR 199 Bom 260
5. Gurudas v. Director, AIR 1964 Punj 117
6. Asha v. Baldev, AIR 1985 Del 76
7. Rakesh Wadhwan v. M/s Jagdamba Industrial Corporation, 2002 AIR SCW 2044

The Supreme Court in the case of ***Vidhyadhar v. Mankirao and Another, AIR 1999 SC 1441,*** has laid down the principle that in a written statement the defendant can raise any legitimate plea available to him under the law to resist the claim of the plaintiff. In his written statement, the defendant is entitled to raise any question of law without making any specific allegation, but if raising any question of law requires proving of some factual aspect also, then the fundamental rule of putting forth these facts has to be complied with. These principles are made applicable particularly in the cases where bar of limitation is a plea raised by the defendant. In a written statement a defendant is also entitled to take alternative pleas. He may deny for example existence of a contract and at the same time take a plea that if the contract is proved then the contract and at the same time take a plea that if the contract is proved then the contract is proved then the contract is void and unenforceable. Similarly, in a suit for recovery of some amount if the plea of payment of raised then it is incumbent upon the defendant to specifically give the date, time and place of such payment. An objection to a point of law may be taken in the written statement and it has to be specific. All details in support of the aforesaid legal ground have to be raised separately in the written statement.

SET OFF

A defendant in his written statement can also claim a set off in respect of any claim of his own. A written statement in which a claim for set off is made has the same effect as a plain in a cross-suit and enables the Court to pronounce the final judgment in respect of both the original claim and the set off. The plaintiff has a right to file a written statement against the claim for set off and all the Rules with regard to filing of written statement become applicable.

Set off normally means deduction, which is claimed by the defendant on the demand, made by the plaintiff and is in fact a cross-demand of the defendant. It is infact a demand raised by the defendant for the purpose of liquidating the whole or part of the claim raised by the plaintiff in his suit. The provision of Order VIII Rule 6 of the Code deals with what is commonly known as the legal set off and the same is restricted to an ascertained sum. The conditions that must be fulfilled for applicability of the aforesaid rules are as under:

(a) The suit in question should be for recovery of money.
(b) The claim demanded to be set off must be of ascertained sum of money.
(c) It must be legally recoverable from the plaintiff.
(d) It must not exceed the pecuniary jurisdiction of the Court.
(e) Both parties must fill the same character as they fill in the plaintiff's suit.
(f) The claim must be made at the first hearing of the suit unless permitted by the Court to do so at a later stage.

It is to be remembered that a set off claimed in a suit and a counter-claim raised by the defendant are different. Even though in one sense both are cross-actions initiated by the defendant, but the basic different is that set off is a ground of defence and if established, it affords an answer to the plaintiff's claim whereas a counter-claim is a weapon of offence. Set off can be claimed only in a suit for recovery of money whereas it is not so in the case of a counter-claim. Even though set off in a sense may also be a counter-claim, but in essence it is only in the Kerela High Court, in the case of ***Pathrose v. Karumban, AIR 1988 Ker 163.*** The set off claimed should have a nexus with the suit in question and if the set off is based on different cause or circumstances, the same cannot be raised in the said suit. In fact a plea of set off is a request to the effect that the debt found to be due to the plaintiff be treated as extinguished or reduced **pro tanto** being set off against the debt of the defendant. In an enlarged sense set off is a defence and a counter-claim is a combination of both the defence and a claim of the plaintiff to the extent of wiping out plaintiff's claim and raising a claim by the defendant for the balance due to him. In fact when the amount claimed by the defendant is either below or upto the claim of the plaintiff, the claim is pure set off, but when the claim is for an amount more than the claim of the plaintiff, the claim in excess is the counter-claim. In either case, the set of or a counter-

claim cannot travel beyond the scope and limit of the suit with which the Court is concerned. Something which is totally foreign to the suit cannot be brought into force by means of a set off or a counter-claim. In the case of ***Mohanlal v. Bhawani Shankar, AIR 2002 RAJ 144.*** it is held that the right guaranteed to the defendant to set up counter-claim are not limited for the claim put forth by the plaintiff in a suit and even the cause need not be the same. It is held by the High court that there is nothing in Order VIII Rule 6 or 6-A of the Code restricting the nature of relief which the defendant might seek in the counter claim. However, without filing a written statement a counter-claim filed by the defendant is not entertainable. This principle is also laid down in this case. Even though the cardinal rule is that a set off can be claimed only for an ascertained sum, but Rule 6 does not take away the right to set off which a party would have independent of the Court and such right exists in favour of the party and arises out of the same transaction or are also indicated in the nature of things that the circumstances make it inequitable that the defendant should be driven to file another suit. Such claims are permitted to be raised on the principle of equity and is generally classified as "equitable set off" . However, such a set off cannot be claimed as a matter of right. The set off for an ascertained sum provided in Order VIII Rule 6 can be claimed as a matter, but over and above the same as a matter of discretion the Court may allow the defendant to claim equitable set off in respect of unascertained sum of money provided the same arises out of one and the same circumstances. The two conditions, which are necessary to be fulfilled before equitable set off can be claimed are :

(i) that, it must arises out of the same transaction; and,
(ii) that it would be inequitable to drive the defendant to a separate suit for the purpose.

In this regard, the following judgments may be referred to: ***Maheshwari Metals v. M/s S.I. Corporation, AIR 1974 Mad 39 and Nathmal v. Kashiram, AIR 1975 Raj 217***

The following examples may be taken note of to make the position more clear. In a given case.- 'A', the plaintiff, files a suit against 'B', for recovery of Rs. 50,000/- in accordance to a contract entered into between the parties. In his written statement 'B' claims a set off towards damages sustained by him on the ground that 'A' has committed breach of contract. The set off claimed by way of damages of an uncertain money by 'B' would come in the category of equitable set off. In this regard, reference may be made to the case of ***Harishchandra v. Murlidhar, AIR 1957 Madh B 53.***

Similarly, in a suit filed by an employee claiming salary from his employer, the employer may raise a plea in his written statement claiming set off, of certain amount as loss sustained by the employer because of some negligence by the employee in the discharge of his duties or due to some misconduct committed by him while in employment. The claim made by the employer for set off, of the loss so sustained, would fall in the category of equitable set off. For example, if

the employee is employed as a Washer man in an establishment and he files a suit claiming salary, the employer may seek set off, of an amount equal to the price of the cloth lost by the employer may seek set off, of an amount equal to the price of the cloth lost by the employer, due to negligence or improper procedure followed by the employee for washing clothes.

The basic difference between a legal and equitable set off can be summarized in the following manner:

(a) Legal set off is for an ascertained sum of money whereas equitable set off may be allowed even for an unascertained sum of money.

(b) Legal set off can be claimed as a matter of right and a Court is bound to entertain and agitate upon such a claim whereas equitable set off can be claimed as a matter of right and it is the sole discretion of the Court either to Permit adjudication of such a claim or to refuse.

(c) In a legal set off it is not necessary that the cross demand arises out of the same transaction. There are cases where the cross demand arising out of a different transaction is permitted to be raised as a legal set off, but it an equitable set off as a matter of rule, the cross demand should arise of the same transaction.

(d) In a legal set off, it is mandatory requirement that the amount claimed as set off must be legally recoverable and should not pertain to a claim, which is barred by time. However, a claim raised by way of equitable set off can be allowed in the discretion of the Court even if it is time barred.

(e) Finally, a legal set off can be made after payment of court fee, but in case of equitable set off, no such court fee is payable.

An example of equitable set off claimed and decided are available in the case of ***Anand Enterprises, Bangalore v. Syndicate Bank, Banglore, AIR 1990 Kar 175.*** This was a case in which a suit was filed by the Bank for recovery of a term loan advanced to the defendant. In his written statement, the defendant claimed damages due to loss sustained by him on account of delay in payment of loan.

Some of the cases in which the principle of equitable set off are considered are: ***Munshi Ram v. Radha Kishan, AIR 1975 P & H 112, Shiva v. Shirish, AIR 1943 Pun 327 and P. Venkatavaradhan v. Laxmi Ammal and Others, AIR 1982 Mad 5.***

It may also be taken note of that mere failure on the part of the defendant to claim set off does not bar filing of a separate suit by the defendant. In cases of set off, the court fee payable is the same as in the case of plaint i.e. as per Article 1 of Schedule 1 of the Court Fees Act, and the court fee has to be paid on the full amount which is claimed as a set off and not merely on the excess amount over the claim of the plaintiff. But there is no such fee required in the case of equitable ‘set-off’ which is for an amount that may equally be deducted from the claim of the plaintiff where a Court Fee had been paid on the gross amount. Similarly the Court has to consider whether the plea of the defendant

amounts to a plea, of payment or set-off or counter-claim. If it is a plea of payment, there would be no court-fees payable. But if it is a plea of set-off or counter-claim, court fee has to be paid. In ***Punjab Electric Power Co. Ltd. v. Suraj Kishan, AIR 1937 Lah 62 (A),*** the facts were as follows. Plaintiff brought a suit against the defendant for a certain amount. Defendant 'inter alia' pleaded that the plaintiff owed to him another amount which was adjusted with the claim in suit and only a little balance had remained due to him. In these circumstances it was held by Bhide, J. (as he was then) that it was an adjustment that was claimed and not a set-off; hence no court-fee was necessary. This case is not relevant. No adjustment has been pleaded with regard to any items except Nos. 4 and 5. On the question of payment of court fee on set-off, the following judgments may be referred to:

1. Taiyab Ali v. Atmaram, AIR 1938 Bom 631
2. Bank of Rajasthan v. Pallaram Gupta, AIR 2001 Del. 58
3. VXL INDIA LIMITED and other v. Keshav Brij Bhushan Das Agarawal and another, 2001(1) MPLJ 344

COUNTER CLAIM

Rule 6-A has been introduced in Order VIII by the Amending Act of 1976, incorporating a statutory provision with regard to admissibility of a counter-claim to be made by defendant and this Rule entitles the defendant to enforce an independent right unconnected with the claim made in this plaint and not intended to be defence to the claim of the plaintiff.

A counter claim is substantively a cross action by the defendant and is something over and above his defence to the claim of the plaintiff. A counter claim can be raised only by filing a written statement under Order VIII Rule 6 of the Code, a counter claim is not entertainable without filing the written statement. See : ***Mohanlal v. Bhawani Shankar, AIR 2002 RAJ 144 and Ramesh Chand Ardawatiya v. Anil Panjwani, AIR 2003 SC 2508,*** raising of a counter claim has been treated as a plaint and is governed by the same Rules as are applicable to a plaint. A counter claim is required to be filed within a period of limitation and when no limitation is prescribed within 3 years from the date of accrual of cause of action. Even if the suit is dismissed or withdrawn a counter claim would survive and a decree can be passed on the counter claim.

But following death of one of plaintiffs, once LRs of deceased plaintiff have been substituted in the suit, it is not necessary for defendant also to take steps to the have the deceased plaintiff (defendant in his counter-claim) substituted in the counter claim. The counter claim would not abate as no prejudice would be caused to the LRs of the deceased who would full opportunity to present their defence because a suit and counter claim are to be tried by the same court in the same proceedings. See : ***Organic Insulations v. Indian Rayon Corporation Ltd. [(2003)9 SCC 187]***.

A counter claim can be raised by the defendant in a suit, even if it is a money suit or not. In this regard reference may be made to the judgment in the case of ***Suman Kumar v. St. Thomas School and Hostel, AIR 1988 P&H 38. A*** defendant in a suit may set up by way of favour against the plaintiff. As a counter claim is not restricted to money claim only the defendant may also raise a counter claim seeking possession in a suit for injunction by the plaintiff. For example, in a suit for injunction against a trespasser and for recovery of damages by the plaintiff, a defendant can raise a counter claim for possession on the strength of his own title. Refer to the case ***Pathrose v. Karumban, AIR 1988 Ker 163***.

Similarly, in a suit for declaration and confirmation of possession with respect to a plot of land, defendant can file a counter claim for eviction against the plaintiff. The Orissa High Court in the case of ***Ramsewak v. Saifuddin, AIR 1991 Ori 51,*** has held that such a claim is maintainable. In the case of ***Neelam Singh v. Vijay Narayan Singh, AIR 1955 All 214,*** in a suit for maintenance filed by the wife under the Hindu Adoption and Maintenance Act, 1956 it was held that the husband as a defendant can seek for divorce while granting permanent alimony to the wife. The Supreme Court in the case of ***Mahendra Kumar v. State of MP, AIR 1987 SC 1395,*** has held that a counter claim can be in the nature of claim for damages also. In the case of ***Southern Ancillaries Pvt. Ltd. v. Southern Alloys, AIR 2003 Mad 415,*** it is held that the counter claim subsequent to filing of the written statement can be permitted, but once recording of evidence has commenced, it is not permissible.

Modes of setting up counterclaim

There are three modes of pleading or setting up a counterclaim in a civil suit:

1. In the written statement filed under Order 8 Rule 1;
2. By amending written statement with the leave of the court and setting up counterclaim; and
3. In a subsequent pleading under Order 8 Rule 9;

In the latter two cases the counter-claim though referable to R. 6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the Court, either under O. 6, R. 17 of the CPC if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the Court under O. 8, R. 9 of the CPC if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the Court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favour

of permitting a belated counter-claim. The framers of the law never intended the pleading by way of counter-claim being utilized as an instrument for forcing upon a re-opening of the trial or pushing back the progress of proceeding. Generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced. See: ***Ramesh Chand v. Anil Panjwani [(2003) 7 SCC 350]***.

Who may file counterclaim?

Normally, it is the defendant who may file a counterclaim against the plaintiff. But incidentally and along with the plaintiff, the defendant may also claim relief against the co-defendants in the suit. But a counterclaim solely against co-defendants is not maintainable. See: ***Rohit Singh v. State of Bihar, AIR 2007 SC 10***.

Similarly, a counter claim cannot be raised at the appellate stage. It has been held by the Supreme Court that a counter claim filed by defendant, who has not filed the written statement and had a right to file the written statement, is not maintainable. If a counter claim is refused, the defendant can bring a fresh suit. In the case of ***K.K. Rao v. P. Narayan, AIR 2001 AP 276,*** it is held that a defendant is entitled to file cause of action has to arise before filing of the written statement. If the plaintiff makes default in putting in a reply to the counter claim, the Court is entitled to pronounce the judgment against the plaintiff in relation to the counter-claim. All the rules relating to filing of a written statement by the defendant is available for filing of a written statement in answer to the counter claim by the plaintiff.

The words used in the rule i.e. the time limited for delivery of defence has been interpreted by the Supreme Court in the case ***Mahendra Kumar v. State of MP, AIR 1987 SC 1395,*** by holding that the counter claim which is treated as a cross suit can be filed before the time limit, by the law of limitation for filing an independent suit on the cause of action, when the claim is maintainable. Relaying on the aforesaid judgment of the Supreme Court, the Kerala High Court in one of its cases has held that it is only when an independent suit on the same cause of action is barred by limitation that setting up of a counter claim is barred. In ***Atmaram Gangadhar Deshwali v. Noormohammad, AIR 2007 M P 81*** Counter Claim was filed by defendant not along with written statement but subsequently .Madhya Pradesh High Court held that It cannot be dismissed at threshold on ground of limitation without framing of issues or recording of evidence. On the question of limitation in the matter of raising a counter claim, the following judgments may be referred to :

1. Govindji Jewat and Co. And others v. Cannanore Spinning and weaving Mills Ltd, AIR 1968 Ker 310
2. Shantirane Das Dewanji v. D.S. Das, AIR 1997 SC 3985
3. Orient Ceramics Product Limited v. Calcutta Municipal Corportation, AIR 2000 Cal 17

4. Ramesh Chand v. Anil Panjwani [(2003) 7 SCC 350]

5. Atmaram Gangadhar Deshwali v. Noormohammad, AIR 2007 MP 81

The following features with regard to set off and counter claim may be taken note of:

(i) None should exceed the pecuniary jurisdiction of the Court.

(ii) Both are pleaded in the written statement.

(iii) The plaintiff is expected to file a written statement in answer to the claim of set off or counter claim.

(iv) Even if permissible to be raised, the Court may in an appropriate case direct a set off or a counter claim to be tried separately.

(v) A defendant cannot be compelled to plead a set off not a counter claim. He may be well within his rights to resort to independent action for enforcing his right.

(vi) Both are liable for payment of court fee [except equitable 'set-off' which is for an amount that may equally be deducted from the claim of the plaintiff where a Court Fee had been paid on the gross amount. See: ***VXL India Limited and others v. Keshav Brij Bhushan Das Agarawal and another, 2001(1) MPLJ 344]*** and dismissal of the suit or its withdrawal does not debar a set off or a counter claim.

However, the difference between set-off and counter claim can be summarized as under:

(a) Set-off is a statutory defence to a plaintiff's action, whereas a counterclaim is substantially a cross-action.

(b) Set-off must be for an ascertained sum or it must arise out of the same transaction; a counter claim need not arise out of the same transaction.

(c) Set -off is a ground of defence to the plaintiff's action. In other words, the former is a ground of defence, a shield, which if established, would afford an answer to the plaintiff's claim in toto (as a whole) or pro tanto (in proportion); the latter is a weapon of offence, a sword which enables the defendant to enforce the claim against the plaintiff effectually as an independent action.

(d) In the case of a legal set-off, the amount must be recoverable at the date of the suit, while in the case of a counter-claim the amount must be recoverable, at the date of the written statement.

(e) When the defendant demands in a plaintiff's suit an amount below or up to the suit claim, it is a set-off stricto sensu, but when it is for a larger amount, the claim for excess amount is really a counter claim.

•

RAMESH KUMAR SONI'S CASE – EFFECT ON FORUM FOR TRIAL

[2013 Cri.L.J. 1738 (SC)]

Gajendra Singh
Faculty Member, JOTRI

The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007, came into force with effect from 22nd February, 2008. The amendment inter alia changed the forum for the trial of offences punishable under sections 317, 318, 326, 363, 363-A, 365, 377, 392, 393, 394, 409, 435, 466, 467, 468, 471, 472, 473, 475, 476, 477 and 477-A, from that of a Court of Magistrate of First Class to that of a Court of Sessions. The portions of the amendment, relevant for the purposes of this article are hereinbelow reproduced:

> "An Act further to amend the Code of Criminal Procedure, 1973 in its application to the State of Madhya Pradesh.
>
> Be it enacted by the Madhya Pradesh Legislature in the Fifty-eighth Year of the Republic of India as follows:
>
> 1. Short title – This Act may be called the Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007.
>
> 2. Amendment of Central Act No. 2 of 1974 in its application to the State of Madhya Pradesh – The Code of Criminal Procedure, 1973 (No. 2 of 1974) (hereinafter referred to as the Principal Act), shall in its application to the State of Madhya Pradesh, be amended in the manner hereinafter provided.
>
> 3. Amendment of Section 167 – ...
>
> ***4. Amendment of the First Schedule – In the First Schedule to the Principle Act, under the heading "I-Offences under the Indian Penal Code in column 6 against section 317, 318, 326, 363, 363-A, 365, 377, 392, 393, 394, 409, 435, 466, 467, 468, 471, 472, 473, 475, 476, 477 and 477-A, for the words "Magistrate of First Class" wherever they occur, the words "Court of Sessions" shall be substituted."***

The Amendment received the assent of the President on 14th February, 2008 and was published in Madhya Pradesh Gazette (Extra Ordinary) on 22nd February, 2008.

No sooner aforesaid amendment came into force on 22nd February 2008; then a question arose as to whether the same is prospective and will be applicable only to offences committed after that date or would be retrospective and also govern the offences committed before that date and were either being investigated or were pending in the Court or the date of filing of charge-sheet/cognizance by the Magistrate, would be the date of reckoning?

In this scenario, the Sessions Judge, Jabalpur made a reference to the High Court under section 395 of the Code of Criminal Procedure; whereon, the

Full Bench of the High court of Madhya Pradesh **In Re: Amendment of First Schedule of Criminal Procedure Code by Criminal Procedure Code (M.P. Amendment) Act, 2007, reported in 2008 (3) MPLJ 311** held that all cases pending before the Court of Judicial Magistrate First Class as on 22nd February, 2008 remained unaffected by the amendment and were triable by the Judicial Magistrate First Class as the Amendment Act did not contain a clear indication that it was retrospective and even the cases that were pending on the date on which the amendment came into force, shall be affected and shall have to be committed to the Court of Sessions for trial. The Court further directed that all such cases as were pending before the Judicial Magistrate First Class on the date of amendment and had subsequently been committed to the Court of Sessions, shall be sent back to the Judicial Magistrate First Class in accordance with law.

Relying upon the decision of the Full Bench, one Ramesh Kumar Soni, accused in Crime No 129 of 2007, for commission of offences punishable u./ss. 408, 420, 467, 468 and 470 of the I.P.C., registered on 18.05.2007 at Police Station Bhedaghat, Jabalpur, claimed to be tried before the court of Judicial Magistrate First Class and filed an application before the Sessions Court for remission of the case back to a Judicial Magistrate for trail.

After unsuccessful challenge before the Sessions Court Jabalpur and High Court of Madhya Pradesh, accused Ramesh Kumar Soni preferred an Appeal before the Apex Court. Relying upon the principle laid down by the Apex Court in the cases of ***Jamuna Singh and Ors. v. Bahdai Shah, AIR 1964 SC 1541, Devrapally Lakshminarayana Reddy and Ors. v. Narayana Reddy and Ors., (1976) 3 SCC 252 and Kamlapati Trivedi v. State of West Bengal, (1980) 2 SCC 91*** the Supreme Court observed that a case is said to be instituted only when the Magistrate takes cognizance thereof on filing of charge sheet.

Referring to the law laid down in the cases of ***New India Insurance Company Ltd. v. Smt. Shanti Misra, Adult, (1975) 2 SCC 840 and Hitendra Vishun Thakur and Ors. etc v. State of Maharashtra and Ors., (1994) 4 SCC 602,*** the Apex Court reiterated the legal position with regard to retrospective operation of a statute in the following words:

> ***"26 xxx xxx***
>
> ***(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.***

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial, is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

Consequently, the Supreme Court held that no charge-sheet had been filed against the appellant Ramesh Kumar and the Magistrate had not taken cognizance of any offence against him on the date of amendment; therefore, his case was covered by the amendment and it was rightly committed to the Court of Session for trial. However, on the strength of aforesaid decisions it was held that an amendment changing the forum of trial was procedural in nature and in the absence of any indication to the contrary in the amending act, was applicable retrospectively. As a result it was further held that the Full Bench of the High Court had erred in holding that the amendment did not affect the cases that had been instituted prior to coming into force of the amending act and were pending on that date. The amendment being retrospective in nature, was applicable to all those cases that were pending before the Magistrate on the date of amendment and such cases ought to have been committed to the Court of Session. Consequently, the decision of the Full Bench was overruled.

The judgment of the Full Bench had been rendered in the year 2008 and following that judgment the Magistrates all over the state of Madhya Pradesh had proceeded with the trial of such cases and many such cases had been disposed of. Obeying the directions issued by the Full Bench, the Courts of Session had remitted back all those cases that were pending on the date of amendment before the Magistrate and had been committed pursuant to the directions of the Full Bench. In such cases Magistrates had proceeded with the trial and had disposed of many such cases. The logical consequence of overruling the judgment of Full Bench in ordinary course would have been invalidation of all such proceedings, which would have resulted in tremendous hardship to the accused as the cases that were pending before the Magistrates on the date of amendment, and had meanwhile reached advanced stages of trial would have had to be committed to the Court of Sessions. The Supreme Court, however, was alive to this eventuality, and observed that

..... "the trial of the cases that were sent back from Sessions Court to the Court of Magistrate First Class under the orders of the Full Bench may also have

been concluded or may be at an advanced stage Any change of forum at this stage in such cases would cause unnecessary and avoidable hardship to the accused in those cases if they were to be committed to the Sessions for trial in the light of the amendment and the view expressed by us." .....

(Emphasis supplied)

After considering numerous authorities on the point, the Supreme Court invoked the doctrine of prospective overruling. Consequently, the judgment of the Full Bench, no doubt, was overruled but only prospectively, thus saving the cases which had already been decided from being reopened and the cases which had reached advanced stages of trial before the Magistrate, from committal. It may be noted however that the Supreme Court refrained from elaborating as to what constitutes an "advanced stage of trial"

The judgment gives rise to following questions:

1. Which stage of a case may be considered to be an advanced stage of a case ?

2. What would be the position if a Magistrate, being of the opinion that a case is not in advanced stage of trial, commits it and the Court of Sessions is of the opinion that the case had reached the advanced stage? In such a case, whether the sessions court is empowered to remit the case back to the Court of the Magistrate?

3. What would be the forum for trial where an accused had absconded and the case of co-accused had been disposed of by Judicial Magistrate First Class before 22nd February, 2008 and absconding accused appears or is brought before court after 22nd February, 2008?

Now we shall consider aforesaid questions one by one.

What constitutes advanced stage of trial in a case?

The Supreme Court has not dilated upon the phrase "advanced stage of trial" in the judgment of ***Ramesh Kumar Soni but in the case of Sathish Mehra v. State of N. C. T. of Delhi, 2013 CRI.L.J.411*** advanced stage has been held to be the stage after framing of charge against the accused. In the cases of ***Akil v. State of NCT of Delhi, 2013 CRI.L.J. 571*** and ***State of U. P. v. Shambhu Nath Singh, 2001 CRI.L. J. 1740*** advanced stage has been held to be the stage when examination of witnesses begin. However, we shall have to distinguish between "advanced stage of a case" and advanced stage of trial in a case". The trial of a case begins when the Court applies its mind to facts of a case with a view to frame a charge. As such framing of charge may be advanced stage of a case but not advanced stage of trial in a case.

In any case, if we were to assume that a case reaches advanced stage of trial with framing of charge, it may not be in conformity with the purpose of saving clause rather it will adversely affect the retrospective operation of the procedural amendment. Take for example, a case where the charge has been framed by the Judicial Magistrate of First Class and in view of the mandate of the Supreme Court the case is committed to the Court of Session. In such a case the Court of Session may reconsider the framing of charge and if prima facie, a case is made out, may frame the charge. Such a procedure would neither cause any significant amount of delay in the case nor entail any substantial hardship or prejudice to any party. As such, in this peculiar scenario, trial of a case cannot be said to be in an advanced stage, merely because charge has been framed therein.

To gather true import of the phrase "advanced stage of trial", reference may have to be made to paragraph nos. 24 & 25 of the judgment in the case of Ramesh Kumar Soni, which read as follows:

> 24. In ***Rajasthan State Road Transport Corporation and Anr. v. Bal Mukund Bairwa, (2009) 4SCC 299,*** this court relied upon the observation made by Justice Benjamin N. Cardozo in his famous compilation of lectures: "The Nature of Judicial Process" that in the vast majority of cases, a judgment would be retrospective. It is only where the hardship are too great that retrospective operation is withheld.'
>
> 25. The present case, in our opinion, is one in which we need to make it clear that the overruling of the Full Bench decision of the Madhya Pradesh High Court will not affect cases that have already been tried or are at an advanced stage before the Magistrates in terms of the said decision.

"Unnecessary and avoidable hardship to the accused" sought to be avoided by retrospective operation of the amendment by the Apex Court in Ramesh Kumar's case, would really be caused in the cases where material witness /witnesses have been examined on behalf of the prosecution. This is so, because in case a de novo trial is held after examination of such witness/witnesses those witness/witnesses would have to be examined afresh and their statement before Magistrate would be treated as previous statement under section 145 of the Evidence Act and the witness may be cross-examined as to that previous statement in addition to the one under section 161 of the Cr.P.C. and contradiction may arise which may affect the merits of the case.

There is another angle to the problem. A material witness, who had supported the prosecution case before Magistrate, may be pressurized or influenced to turn hostile in the trial held de novo. Likewise, a witness who had turned hostile before the Magistrate, may support the prosecution case in the Court of Session. In both situations, the merits of the case would be affected, causing prejudice to the parties.

Now the question arises, who is a material witness? The phrase material witness has been examined by the Apex court in the case of ***Narain v. State of Punjab, AIR 1959 SC 484.*** The Court observed that a witness essential to the unfolding of the narrative on which the prosecution case is based, is a material witness. Whether a witness is so essential or not would depend on whether he could testify to any part of the prosecution case or whether the evidence led disclosed that he was so situated that he would have been able to give evidence of the facts on which the prosecution relied.

Thus, the trial of a case may be said to be in advanced stage where a material witness/witnesses have been examined on behalf of the prosecution. In this regard, it is not so much the number of the witnesses examined by the prosecution but the nature of the evidence given by such witness/witnesses, is what would have to be seen. In a given case many witnesses might have been examined on behalf of the prosecution but none might have deposed to any essential part of the prosecution case, or the evidence of such witnesses might have been of a formal character. In both situations the case may not be said to be at the advanced stage of trial. On the other hand, if only single witness is examined on behalf of the prosecution but that witness unfolds the narrative on which the prosecution is based or deposes to any essential part of the prosecution case, then the witness would come under the category of material witness and the trial would be said to be in advance stage. Either way, one thing is certain that in a case in which only charge is framed but no witness has been examined or only formal witnesses have been examined, cannot be said to be in advance stage of trial.

What would be the position if a Magistrate, being of the opinion that a case is not in advanced stage of trial, commits it and the Court of Sessions is of the opinion that the case had reached the advanced stage? In such a case, whether the sessions court is empowered to remit the case back to the Court of the Magistrate?

The answer of this question is dependent upon the jurisdiction of Sessions Court to try cases and powers of the Sessions Court when a case is committed.

In ***Sudhir v. State of Madhya Pradesh, AIR 2001 SC 826*** it was held that :

> ***A Sessions Judge has the power to try any offence under the Indian Penal Code. It is not necessary for the Sessions Court that the offence should be one exclusively triable by a Court of Sessions. The employment of word 'may' at one place and the word 'shall' at another place in same sub-section (1) (a) of S. 228 unmistakably indicates that when an offence is not triable exclusively by Sessions Court it is not mandatory that he should order transfer of case to the Chief Judicial Magistrate after framing a charge.***

In ***Sammun v. State of M.P., 1988 CRI.L.J. 498 (M.P.)*** also it is held that once the case is committed to the Sessions Court, it becomes clothed with the jurisdiction to try it and the mere fact that the offence disclosed is not one exclusively triable by the Sessions Court does not divest it of that jurisdiction. The provision in S. 228 (1)(a); therefore, has to be interpreted as clothing the Court with a discretion to transfer the case for trial to the Chief Judicial Magistrate.

In aforesaid backdrop, the question being considered shall have to be looked into from a different perspective. Such cases would have been committed by the Magistrate in view of the directions made by the apex Court in Ramesh Kumar Soni's case because the Magistrate was of the opinion that the trial of the case had not reached advanced stage. If the Sessions Judge is, for the reasons to be recorded, of the opinion that the trial had indeed reached advanced stage, it may deal with the matter in the same manner as it would deal with the matter in which it is of the opinion that the case is not triable exclusively by a Court of Sessions. That is to say, it may either try the case itself or remit the case to the Court of Chief Judicial Magistrate for trial in accordance with law. Both options are within the scope of the jurisdiction of Sessions Court but Sessions Court has to exercise this jurisdiction so that the purpose of saving is not frustrated and no prejudice is caused to either party. Thus, there should be no doubt that after receiving the case on committal the Court of Session has jurisdiction to remit it to the Court of C.J.M.

What would be the forum for trial where an accused had absconded and the case of co-accused had been disposed of by Judicial Magistrate First Class before 22nd February, 2008 and absconding accused appears or is brought before court after 22nd February, 2008?

Answer of this question is dependent upon the stage of the proceedings at which the accused had absconded. If the accused had absconded at the initial stage of the case i.e. before the examination of any material prosecution witness then certainly the forum would be Sessions Court in spite of the fact that the case of co-accused had been disposed of by the Judicial Magistrate First Class and the plea of parity would not be available to the accused who appears or is brought before the Court after the commencement of the Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007.

However, the situation would be different, where the accused had absconded after examination of material prosecution witness/witnesses. In that case, it shall be deemed that trial of the case had reached advanced stage and the trial shall be continued before the Judicial Magistrate, without the case of the absconding accused being committed to the Court of Session.

Conclusions

(1) The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007 is retrospective in its operation.

(2) Retrospective operation of the Amendment Act will not affect the cases wherein the trial before the Magistrate has reached an advanced stage.

(3) The trial of a case may be said to have reached an advanced stage where any material witness/witnesses have been examined by the prosecution.

(4) A witness is material who is essential to the unfolding of the narrative on which the prosecution is based or who deposes to any part of the prosecution case but is not a formal witness.

(5) In a case in which only charge is framed but no witness has been examined or only formal witnesses have been examined would not come under the category of a case which has reached an advanced stage.

(6) Where the Magistrate being of the opinion that the case is not at the advanced stage of trial, commits it to the Court of Session but the Sessions Court differs and is of the opinion that the trial in the case is already in advanced stage, it has option either to try the case itself or remit it back to the Chief Judicial Magistrate or Judicial Magistrate of First Class but Session Court has to exercise this Jurisdiction in such a way that the purpose of saving is not frustrated and no prejudice is caused to either party.

(7) If the accused had absconded before commencement of amending Act, before the examination of any material witness by the prosecution, the forum for trial would be Sessions Court if he appears or is brought before the Magistrate after commencement of the Act, regardless of the fact that the case of co-accused had been disposed of by the Judicial Magistrate First Class.

(8) In aforesaid circumstances, if the accused had absconded after the examination of material witness/witnesses, the trial before the Judicial Magistrate First Class shall continue.

•

न्यायालय द्वारा अनुसरित की जाने वाली प्रक्रिया के संदर्भ में धारा 210 द. प्र. सं. का विस्तार

न्यायाधीश गण
जिला नीमच, राजगढ, अशोकनगर
एवं गुना

विधिक प्रावधान

धारा 210 (1) द.प्र.स. 1973 के अनुसार जब पुलिस रिपोर्ट से भिन्न आधार पर संस्थित किसी मामले में अथवा परिवाद मामले में मजिस्ट्रेट द्वारा की जाने वाली जाँच या विचारण के दौरान उसके समक्ष यह प्रकट किया जाता है कि उस अपराध के बारे में जो उसके द्वारा की जाने वाली जाँच या विचारण का विषय है पुलिस द्वारा अन्वेषण हो रहा है; तब मजिस्ट्रेट ऐसी जाँच या विचारण की कार्यवाहियों को रोक देगा और अन्वेषण करने वाले पुलिस अधिकारी से उस मामले के रिपोर्ट मांगेगा।

धारा 210 (2) के अनुसार यदि अन्वेषण करने वाले पुलिस अधिकारी द्वारा धारा 173 के अधीन रिपोर्ट की जाती है और ऐसी रिपोर्ट पर मजिस्ट्रेट द्वारा ऐसे व्यक्ति के विरूद्ध किसी अपराध का संज्ञान किया जाता है जो परिवाद वाले मामले में अभियुक्त है तो, मजिस्ट्रेट परिवाद वाले मामले की और पुलिस रिपोर्ट से पैदा होने वाले मामले की जाँच या विचारण साथ–साथ ऐसे करेगा मानो दोनों मामले पुलिस रिपोर्ट पर संस्थित किए गए हैं।

धारा 210 (3) के अनुसार यदि पुलिस रिपोर्ट परिवाद वाले मामले में किसी अभियुक्त से संबंधित नहीं है या यदि मजिस्ट्रेट पुलिस रिपोर्ट पर किसी अपराध का संज्ञान नहीं करता है तो वह उस जाँच या विचारण में जो उसके द्वारा रोक ली गयी थी; इस संहिता के उपबंधों के अनुसार कार्यवाही करेगा।

उद्देश्य

माननीय सर्वोच्च न्यायालय ने न्याय दृष्टांत संकरन मोइत्रा विरूद्ध साधना दास, ए.आई.आर. 2006 एस.सी. 1599 (तीन न्यायमूर्ति गण की पीठ) के मामले में धारा 210 द.प्र.सं. के तीन उद्देश्य बताए हैं जो इस प्रकार से हैं :–

1. न्यायालय को यह आश्वस्त कराना कि निजी परिवाद से न्याय की प्रक्रिया में हस्तक्षेप नहीं होगा।
2. अभियुक्त को दो बार विचारण का सामना करने से निवारित करना।
3. समान अपराध में एक से अधिक बार संज्ञान लिये जाने से जो विषमता आती है उसे दूर किया जाना।

संसद की संयुक्त समिति का यह मत था कि जहाँ गंभीर प्रकरणों में पुलिस अनुसंधान लम्बित होता है, कुछ व्यक्ति निजी परिवाद प्रस्तुत करके दुरभिसंधि पूर्वक या अन्यथा तेजी से दोषमुक्ति का आदेश प्राप्त कर लेते हैं। ऐसे मामलों में अनुसंधान निष्फल हो जाता है और यह कुछ प्रकरणों में न्याय की हानि भी करता है। इस से बचने के लिए समिति ने ऐसे प्रावधान का सुझाव दिया जहाँ किसी अपराध के संबंध में परिवाद प्रस्तुत किया जाता है और मजिस्ट्रेट को यह सूचना मिलती है कि उसी अपराध के संबंध में पुलिस भी अनुसंधान कर रही है तब मजिस्ट्रेट परिवाद प्रकरण पर आगे कार्यवाही को रोक देगा है तथा पुलिस रिपोर्ट प्राप्त होने पर परिवाद प्रकरण और पुलिस रिपोर्ट के आधार पर संस्थित प्रकरण, दोनों, का एक साथ विचारण करेगा। पुलिस रिपोर्ट प्रस्तुत नहीं होती है तब मजिस्ट्रेट परिवाद प्रकरण का निराकरण करने के लिए स्वतंत्र होगा। द.प्र.सं. में यह प्रावधान इसलिए किया गया कि निजी परिवाद से न्यायिक प्रक्रिया में बाधा कारित होने को सुरक्षित किया जा सके। संसद की संयुक्त समिति का उपरोक्त मत माननीय सर्वोच्च न्यायालय ने न्यायदृष्टांत ***संकरन मोइत्रा*** (पूर्वोक्त) में विचार में लिया है। न्यायदृष्टांत ***विनोद विरूद्ध सतीश, 2009 (2) एम.पी.एल.जी. 150*** भी अवलोकनीय है जिसमें धारा 210 द.प्र.सं. के उद्देश्य की प्रतिपादना की गयी है।

न्यायदृष्टांत संकरन मोइत्रा (पूर्वोक्त) में माननीय सर्वोच्च न्यायालय नें धारा 210 द.प्र.सं. के प्रावधान लागू होने की निम्न शर्तें बतायी हैं–

1. जॉच या विचारण के लिए एक परिवाद लम्बित होना चाहिए।
2. उसी अपराध के संबंध में अनुसंधान पुलिस द्वारा किया जाना चाहिए।
3. पुलिस अधिकारी द्वारा धारा 173 द.प्र.सं. के अन्तर्गत रिपोर्ट पेश की जाना चाहिए।
4. मजिस्ट्रेट द्वारा ऐसे व्यक्ति के विरूद्ध किसी अपराध में संज्ञान लिया गया हो जो परिवाद वाले मामले में भी अभियुक्त है।

इस संबंध में उक्त न्यायदृष्टांत विनोद (पूर्वोक्त) अवलोकनीय है। न्याय दृष्टांत ***रामजी शुक्ला विरूद्ध उत्तर प्रदेश राज्य, 2009 सी.आर.एल.जे. 3495*** के अनुसार धारा 210 दं.प्र.सं. के लिए समान घटना नहीं वरन् समान अपराध अनिवार्य है।

आज्ञापक प्रकृति

धारा 210 द.प्र.सं. के प्रावधान आज्ञापक हैं। जहाँ मजिस्ट्रेट को यह पता लग जाए कि अपराध में पुलिस अनुसंधान हो रहा है तब उसके लिए आवश्यक है कि वह परिवाद प्रकरण की कार्यवाही रोक ले। इस संबंध में न्यायदृष्टांत ***राम रतन विरूद्ध स्टेट ऑफ हरियाणा, 2004 सीआर.एल.जे 3617, थानचंद्र विरूद्ध स्टेट ऑफ राजस्थान, 1998 सी.आर.एल.जे. 3700, विरेन्द्र कुमार शर्मा विरूद्ध स्टेट ऑफ बिहार, 2000 सीआर.एल.जे. 145*** में प्रतिपादित मत अवलोकनीय है।

अपालन का प्रभाव

धारा 210 दं.प्र.सं. के प्रावधान का अनुपालन न करना अपने आप में अभियोजन के लिए घातक नहीं होता जब तक कि ऐसी त्रुटी, लोप या अनियमितता से न्याय की हानि न हुई हो। इस तथ्य के

निर्धारण के लिए ये ध्यान रखना चाहिए कि क्या आपत्ति कार्यवाही के पूर्व प्रक्रम पर उठायी जा सकती थी, तब उठाना चाहिए थी। इस संबंध में न्याय दृष्टांत ***दिलावर सिंह विरूद्ध स्टेट ऑफ देहली, (2007)12 एस. सी.सी. 641*** अवलोकनीय है।

दो प्रकरण कब सम्मिलित और समेकित नहीं होगें

न्यायदृष्टांत ***हरजिन्दर सिंह विरूद्ध स्टेट ऑफ पंजाब, (1985) 1 एस.सी.सी. 422*** के अनुसार जहाँ एक प्रकरण परिवाद पर आधारित हो तथा दूसरा पुलिस अभियोग पत्र पर आधारित हो और दोनों मामलों में अभियोजन का कथानक तात्विक रूप से भिन्न, परस्पर विरोधी और अलग–अलग हो तब ऐसे प्रकरणों का विचारण साथ–साथ आदेशित किया जा सकता है। लेकिन उन्हें समेकित नहीं किया जा सकता। ऐसे दोनों प्रकरणों में साक्ष्य पृथक–पृथक अभिलिखित करना चाहिए और उनका निराकरण एक ही समय लेकिन पृथक–पृथक करना चाहिए। ऐसा करने से संविधान के अनुच्छेद 20 (2) और धारा 300 द.प्र.सं. के प्रावधान का उल्लंघन नहीं होगा। न्यायदृटांत ***पाल उर्फ पल्ला विरूद्ध स्टेट ऑफ यू.पी., (2010) 10 एस.सी.सी. 123*** भी अवलोकनीय है जिसमें ऐसा ही मत प्रतिपादित किया गया है।

न्यायदृष्टांत ***विष्णु कुमार मेहता विरूद्ध रश्मि मेहता, 2003 (1) एम.पी.डब्ल्यू.एन. 119*** के मामले में, जहाँ पुलिस द्वारा प्रस्तुत अभियोग पत्र और निजी परिवाद दोनों में घटना की तारीख अलग–अलग थी, यह प्रतिपादित किया गया कि दोनों प्रकरणों का संयुक्त विचारण नहीं किया जा सकता।

न्याय दृष्टांत ***शेलेन्द्र कुमार जैन विरूद्ध स्टेट आफ यूपी, 1991 सीआर.एल.जे. 2969*** के मामले में यह कहा गया है कि जहाँ दो भिन्न मामले बनते हैं वहॉ विचारण पृथक होगा, संयुक्त विचारण अनुज्ञेय नहीं है। जैसे खाद्य अपमिश्रण निवारण अधिनियम, 1954 की धारा 16 (1) के अपराध के क्रम में अभियुक्त द्वारा खाद्य निरीक्षक और उसके दल के लोगों का हमला किया जाता है, रिष्टी कारित की जाती है और धारा 332, 352 तथा 427 भा.द.सं. के अंतर्गत अपराध किये जाते है, चूंकि दोनों अपराध सुभिन्न तथा पृथक हैं अतः विभिन्न अधिनियमों के उपबंधों के अंतर्गत उनका पृथक से विचारण करना चाहिए।

न्यायदृष्टांत ***स्टेट ऑफ एम.पी. विरूद्ध मिश्रीलाल, ए.आई.आर 2003 एस.सी. 4089*** के अनुसार जहाँ अभियोगी की शिकायत पर से पुलिस ने अनुसंधान करके अभियोग पत्र प्रस्तुत किया है और अभियुक्त की शिकायत पर से भी अनुसंधान करके अभियोग पत्र प्रस्तुत किया है और दोनों एक ही घटना से संबंधित हों, वहां यह युक्तियुक्त और न्यायसंगत होगा कि दोनों मामलों का निराकरण एक ही न्यायालय द्वारा किया जाये। इस तरह क्रॉस केस या प्रति प्रकरण का विचारण एक ही न्यायालय द्वारा किया जाना चाहिए ताकि दो परस्पर विरोधी निर्णयों से बचा जा सके।

धारा 210 कब लागू नहीं होगी

यदि अपराध ऐसा हो जिसका प्रसंज्ञान किसी विशेष वैधानिक प्राधिकारी के परिवाद पर ही

किया जा सकता हो जैसे वन्य जीव संरक्षण अधिनियम, तब चाहे पुलिस ने अपराध के संबंध में प्रकरण पंजीबद्ध कर लिया हो तब भी धारा 210 द.प्र.सं. के प्रावधान लागू नहीं होगा। इस संबंध में न्यायदृष्टांत ***स्टेट ऑफ बिहार विरूद्ध मुराद अली खान, ए.आई.आर. 1989 एस.सी. 1*** अवलोकनीय है। धारा 125 द.प्र.सं. की कार्यवाही में धारा 210 द.प्र.सं. लागू नहीं होती है। इस संबंध में न्यायदृष्टांत ***अनिल कुमार झा विरूद्ध स्टेट ऑफ बिहार, 1992 सी.आर.एल.जे. 2510*** अवलोकनीय है। जहॉ पुलिस अधिकारी ने संस्था जैसे मानव अधिकार आयोग को प्रतिवेदन देने के लिए जाँच प्रारम्भ की हो उसे धारा 210 द.प्र.सं. के क्रम में अनुसंधान नहीं माना जाता है। इस संबंध में न्यायदृष्टांत ***सविता विरूद्ध गीता रानी, 2004 सी.आर.एल.जे 3975*** अवलोकनीय है।

जहाँ पुलिस का अनुसंधान परिवाद प्रस्तुत करते समय प्रगति पर हो वहां धारा 210 लागू होती है। जहाँ पुलिस ने प्रकरण ही पंजीबद्ध न किया हो और न ही अनुसंधान प्रारम्भ किया हो वहाँ धारा 210 द.प्र. सं. के प्रकाश में प्रतिवेदन बुलवाने का प्रश्न ही उत्पन्न नहीं होता है। इस संबंध में न्यायदृष्टांत ***विदाबालूरू बी विरूद्ध स्टेट ऑफ ए.पी., 2003 सी.आर.एल.जे. 3192*** अवलोकनीय है ।

न्याय दृष्टांत ***किशनलाल विरूद्ध राजस्थान राज्य, 1999 सी.आर.एल.जे. 4493*** के अनुसार जहाँ पुलिस द्वारा दर्ज प्रकरण और निजी परिवाद के आधार पर दर्ज प्रकरण में आरोपीगण समान न हों पुलिस द्वारा मामले में आरोप पत्र दाखिल कर देने के बाद निजी परिवाद प्रस्तुत हुआ हो वहॉ धारा 210 दं.प्र.सं. लागू नहीं होगी।

न्याय दृष्टांत ***पीटर मेथ्यू विरूद्ध बेट्टी जान, 2001 सी.आर.एल.जे. 4555*** के मामले, जिसमें परक्राम्य विलेख अधिनियम की धारा 138 के अंतर्गत अपराध के संबंध में परिवाद प्रस्तुत किया गया था, पुलिस द्वारा उसी अनादृत चैक के विषय में धारा 409, 420 भा.द.सं. के अंतर्गत अपराध पंजीबद्ध कर आरोप पत्र भी प्रस्तुत किया गया। माननीय उच्च न्यायालय ने यह अवधारित किया कि परक्राम्य विलेख अधिनियम की धारा 138 के अपराध का संज्ञान सम्यक् अनुक्रम में चैक के धारक के लिखित परिवाद पर ही किया जा सकता है जो धारा 409, 420 भा.द.सं. के अंतर्गत अपराध से अलग है। अतः धारा 210 दं.प्र.सं. आकर्षित नहीं होगी।

न्याय दृष्टांत ***जी. श्रीहरि विरूद्ध नन्द किशोर लाहौटी, 2003 सी.आर.एल.जे. 643*** के मामले में एक ही संव्यवहार को लेकर दो प्रकरण प्रस्तुत हुए। एक धारा 420 भा.दं.सं. के अंतर्गत अपराध के संबंध में पुलिस रिपोर्ट के आधार पर और दूसरा धारा 138 परक्राम्य विलेख अधिनियम के अंतर्गत अपराध के संबंध में निजी परिवाद के आधार पर। यह मत दिया गया कि दोनों मामलों को सम्मिलित करना उचित प्रक्रिया होगी परिवाद को समाप्त करना उचित नहीं होगा।

न्याय दृष्टांत ***परमानन्द सिसोदिया विरूद्ध मधुकर, 2002 सी.आर.एल.जे. 3640*** में माननीय मध्य प्रदेश उच्च न्यायालय ने यह प्रतिपादित किया है कि मजिस्ट्रेट ने पुलिस रिपोर्ट बुलायी और पुलिस ने आरोप पत्र प्रस्तुत किया वहां यह माना जायेगा कि निजी परिवाद पुलिस रिपोर्ट में विलय हो चुका है। ऐसी दशा में आरोप पत्र के आधार पर अभियुक्त को उन्मोचित किये जाने के बाद परिवाद के आधार पर अतिरिक्त साक्ष्य देने की परिवादी को अनुज्ञा नहीं दी जा सकती है।

धारा 210 द.प्र.सं. के तहत मजिस्ट्रेट द्वारा बुलवाई गई रिपोर्ट सभी उद्देश्यों के लिए अंतिम नहीं होती है और मजिस्ट्रेट उस रिपोर्ट के बाहर भी जा सकते हैं। इस संबंध में न्यायदृष्टांत ***एलिसा वाकर विरूद्ध कुसुम तिर्की, 2001 सी.आर.एल.जे. 4446*** अवलोकनीय है।

कार्यवाही रोकने की अवधि

धारा 210 द.प्र.सं. के तहत मजिस्ट्रेट अनिश्चित अवधि के लिए प्रकरण को नहीं रोकता है। यदि युक्तियुक्त समय के भीतर पुलिस रिपोर्ट प्राप्त नहीं होती है तो मजिस्ट्रेट विधि अनुसार परिवाद मामले में कार्यवाही कर सकते हैं। इस संबंध में न्यायदृष्टांत **एन. रंजीत सिंह विरूद्ध यमुनन्म फिलीपोस, 1987 सी. आर.एल.जे. 1605 अवलोकनीय है।** न्याय दृष्टांत **पदमलोचन विरूद्ध लोकनाथ, 1981 सी.आर.एल.जे. 189** के अनुसार यदि पुलिस तर्क संगत समय के अन्दर रिपोर्ट प्रस्तुत नहीं करती है तब मजिस्ट्रेट समय निर्धारित कर रिपोर्ट पेश करने के निर्देश दे सकते हैं उसके बाद भी पुलिस के असफल रहने पर मजिस्ट्रेट स्थगित मामले पर कार्यवाही प्रारंभ कर सकते हैं।

अनन्यतः सत्र न्यायालय द्वारा विचारणीय मामला

जहाँ परिवाद के आधार पर संस्थित मामले से अनन्यतः सत्र न्यायालय द्वारा विचारणीय अपराध किया जाना प्रतीत होता हो, जबकि पुलिस प्रतिवेदन पर आधारित मामला मजिस्ट्रेट द्वारा विचारणीय हो वहाँ मजिस्ट्रेट को दोनों मामले सत्र न्यायालय को सुपुर्द करना चाहिए। इस संबंध में न्यायदृष्टांत ***अजीज खान विरूद्ध सिराजुद्दीन, 1987 सी.आर.एल.जे. 1304 (एम.पी.)*** अवलोकनीय है।

अस्तु निष्कर्ष में, धारा 210 दं.प्र.सं. का उद्देश्य एक ही अपराध के लिए दो बार संज्ञान लेने, दोहरे विचारण से न्यायिक प्रक्रिया के दुरूपयोग को रोकना है और निजी परिवादों से न्याय की प्रक्रिया में हस्तक्षेप को निवारित करना है। जब कभी किसी मजिस्ट्रेट के ज्ञान में यह तथ्य आता है कि जिस परिवाद में वे जाँच या विचारण कर रहे हैं उसी के संबंध में पुलिस भी अनुसंधान कर रही है तब उन्हें परिवाद के आधार पर आगे की कार्यवाही रोक देना चाहिए और पुलिस प्रतिवेदन बुलवाना चाहिए और यदि पुलिस रिपोर्ट और परिवाद उसी अभियुक्त और उसी अपराध से संबंधित हो तब परिवाद और पुलिस रिपोर्ट दोनों में एक साथ ऐसे जाँच या विचारण करना चाहिए जैसे दोनों मामले पुलिस रिपोर्ट पर संस्थित हुए हों। लेकिन जहाँ परिवाद और पुलिस रिपोर्ट अलग–अलग अभियुक्त से संबंधित हों वहाँ धारा 210 (3) दं.प्र.सं. के तहत कार्यवाही करना चाहिए और उक्त वैधानिक स्थितियों को ध्यान में रखना चाहिए।

•

PART - II
NOTES ON IMPORTANT JUDGMENTS

97. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12(1) (e) & (f) and 23-A (a) & (b)

Eviction on the ground of bona-fide need – If the accommodation has been let for non-residential purpose and the bona-fide requirement has been shown for residential purpose; no decree of eviction can be passed – Similarly, if the accommodation is let for residential purpose and the bona-fide requirement has been shown for non-residential purpose, no decree of eviction can be passed either.

Ashok Kumar Soni v. Kazi Mohammad Ateeque Rahman
Order dated 04.12.2012 passed by the High Court of M.P. in Civil Revision No. 508 of 2010, reported in 2013 (1) MPLJ 466

Extracts from Order:

The accommodation was let for non-residential purpose while bona fide requirement of the landlord and his family members has been pleaded for residential purpose. It is not a case of the landlord that the suit accommodation was let for residential purpose and without his consent it has been used wholly or partly for non-residential purpose. It is also not a case of the landlord that the accommodation has not been let under an express provision of contract for non-residential purpose. Therefore, the purpose for which the accommodation was let out it may be vacated for the same purpose on proving bona fide requirement commensurate to purpose of tenancy. Thus, the bona fide requirement set forth in the suit is residential one though accommodation was let out for non-residential purpose as per the pleadings and evidence. However, decree of eviction cannot be directed showing the bona fide need of the landlord of non-residential premises for residential purpose. As per the intention of the Legislature which is reflected from the language of section 12(1)(e) and, (f) and also section 23-A (a) and (b) of the Act, the predominant purpose to which the accommodation was let out the bona fide requirement of the landlord must be for the same purpose to get decree of eviction. If the accommodation is let for non-residential purpose and the bona fide requirement has been shown for residential purpose, the decree of eviction cannot be directed. Similarly, if the accommodation is let for residential purpose and the bona fide requirement has been shown for non-residential purpose, the decree of eviction cannot be passed. The Chhattisgarh High Court in the case of ***Smt. Sarla Devi Gupta v. Smt. Tara Devi Dubey, 2007 (4) MPHT 54 (CG)*** has also explained the similar proposition of law in the context of the Chhattisgarh Accommodation Control Act referring the provisions of section 12(1) (e) and (f).

•

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

Stay of suit – Pendency of criminal case – A civil suit for recovery of loss sustained due to fraud played by respondent in respect of which criminal case is pending, cannot be stayed.

(Nemichand Gangwal v. Harish Kumar, 2003 (3) MPHT 194 and State of Rajasthan v. M/s. Kalyan Sundaram Cement Industries Ltd.,1996 (II) MPWN 61 Relied on.)

Orient Vindyaas (M/s) v. Sazzi Kuttppan

Order dated 06.11.2012 passed by the High Court of M.P. in W.P. No. 1934 of 2008, reported in ILR (2013) M.P. 105

●

99. CIVIL PROCEDURE CODE, 1908 – Section 10

(i) For the application of section 10 CPC the entire subject-matter of the two suits must be the same – Section 10 CPC will not apply where a few of the matters in issue are common but will apply where all subject-matters in controversy are the same.

(ii) The test for applicability of section 10 is whether or not, on final decision being reached in the previously instituted suit, it will operate as res-judicata in the subsequent suit.

(iii) Where three civil suits for eviction were filed on same ground but had different causes of action, section 10 CPC would not apply.

Aspijal and another v. Khushroo Rustom Dadyburjor

Judgment dated 05.04.2013 passed by the Supreme Court in Civil Appeal No. 2908 of 2013, reported in (2013) 4 SCC 333

Extracts from Judgment:

For application of Section 10 of the Code, the matter in issue in both the suits have to be directly and substantially in issue in the previous suit but the question is what "the matter in issue" exactly means? As in the present case, many of the matters in issue are common, including the issue as to whether the plaintiffs are entitled to recovery of possession of the suit premises, but for application of section 10 of the Code, the entire subject-matter of the two suits must be the same. This provision will not apply where a few of the matters in issue are common and will apply only when the entire subject-matter in controversy is same. In other words, the matter in issue is not equivalent to any of the questions in issue. As stated earlier, the eviction in the third suit has been sought on the ground of non-user for six months prior to the institution of that suit. It has also been sought in the earlier two suits on the same ground of non-user but for a different period. Though the ground of eviction in the two suits was similar, the same were based on different causes. The plaintiffs may or may not be able to establish the ground of non-user in the earlier two suits, but if they establish the ground of non-user for a period of six months prior to

the institution of the third suit that may entitle them the decree for eviction. Therefore, in our opinion, the provisions of Section 10 of the Code is not attracted in the facts and circumstances of the case.

•

100. CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 10
SPECIFIC RELIEF ACT, 1963 – Section 19
Whether a person not party to a contract can be impleaded in a suit for specific performance of contract? Held, No – He cannot be impleaded as he is neither necessary nor proper party in such suit.

Anil Kumar Das v. Dinesh Kumar and others
Order dated 19.06.2012 passed by the High Court of M.P. in W.P. No.11326 of 2011, reported in 2013 Revenue Nirnaya 45

Extracts from Order:

In ***Panna and another v. Jeewanlal and another, 1976 MPLJ 170,*** Full Bench of this Court after taking into consideration the decision by Supreme Court in ***Deputy Commissioner v. Ram Krishna, AIR 1952 SC 521; Razia Begum v. Sahebzadi Anwar Begum and others, AIR 1958 SC 886*** has considered as to whether a person not a party to a contract can be impleaded as defendant in a suit for specific performance of said contract and has held:

> "The question referred to us is:
> "Whether in a suit for specific performance of a contract for sale, a third person intervenor, who contends that the suit property is a joint property of the applicant and he is also the co-owner of that property, would be made a party (defendant)."
> Our answer is:
> "Strangers to the contract making a claim adverse to the title of the defendant (vendor) contending that they are the co-owners of the contracted property, are neither necessary nor proper party and are therefore, not entitled to be joined as parties to the suit."
> In ***Kasturi v. Iyyamperumal and others, (2005) 6 SCC 733*** it is held by their lordships
> "In our view, a bare reading of this provision namely, second part of Order 1 Rule 10 sub-rule (2) of the CPC would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with or without notice of the

contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are - (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings (2) no effective decree can be passed in the absence of such party.

We may look to this problem from another angle. Section 19 of the Specific Relief Act provides relief against parties and persons claiming under them by subsequent title. Except as otherwise provided by Chapter II, specific performance of a contract may be enforced against:-

(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

(d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company;

Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract.

We have carefully considered sub-sections (a) to (e) of Section 19 of the Act. From a careful examination of the aforesaid provisions of sub-sections (a) to (e) of the Specific Relief Act we are of the view that the persons seeking addition in the suit for specific performance of the contract for sale who were not claiming under the vendor but they were claiming adverse to the title of the vendor do not fall in any of the categories enumerated in sub-sections (a) to (e) of section 19 of the Specific Relief Act."

In the case at hand indisputably respondent No. 3 is not a party to contract, i.e., agreement of sale dated 26.7.2007, entered into between the petitioner and respondent No. 1 and intends to put forth the claim adverse to respondent No.1. Merely because the respondent No. 3 claims her title over the suit property being the daughter of Ramgopal, may entitle her to bring a separate suit to establish her right over the suit property, which eventually she has already filed, but being an alien to the contract in question subjected to specific performance, she is neither a necessary nor proper party as could seek impleadment as a defendant.

In view whereof the order impugned deserves to be and is hereby quashed. An application under Order 1 Rule 10 CPC filed by respondents No.3 is rejected.

•

101. CIVIL PROCEDURE CODE, 1908 – Order 8 Rule 1

Written Statement – Verification of pleadings – Until the pleadings of Written Statement are not verified, it cannot be said to be a Written Statement in the eyes of law.

Pop Singh v. Ram Singh

Order dated 16.10.2012 passed by the High Court of M.P. in Misc. Appeal No. 407 of 2011, reported in 2013 (1) MPLJ 16

Extracts from Order:

In the case of ***Babulal Agrawal v. Jyoti Shrivastava and others, 2000 (1) MPLJ 102 (DB)*** it is observed that without verification of the pleadings in the written statement, it is not a written statement in the eye of law. On going through the impugned judgment and decree of the Appellate Court, it is apparent that the judgment and decree of the Trial Court has been set-aside and the case has been remanded on the grounds that in the alleged written statement, there was no verification of the pleadings; therefore, the so called written statement cannot be said to be a written statement in the eye of law and the pleadings without verification cannot be termed as pleadings.

•

102. CIVIL PROCEDURE CODE, 1908 – Order 8 Rule 10

(i) Relief under O.8 R.10 C.P.C. is a discretionary relief – Where defendant fails to file written statement, the court has to be cautious, while exercising power under O.8 R.10 – The court must be satisfied that there is no fact which needs to be proved in spite of deemed admission of defendant.

(ii) Whenever the court passes judgment under O.8 R.10 C.P.C., it must give reasons, so a party understands on what reasoning the suit has been decreed.

Shantilal Gulabchand Mutha v. Tata Engineering and Locomotive Company Limited and another

Order dated 18.03.2013 passed by the Supreme Court in Civil Appeal No. 6162 of 2005, reported in (2013) 4 SCC 396

Extracts from Order:

This Court in ***Balraj Taneja v. Sunil Madan, AIR 1999 SC 3381*** dealt with the issue and held that even in such fact situation, the court should not act blindly on the averments made in the plaint merely because the written statement has not been filed by the defendant traversing the facts set out by the plaintiff therein. Where a written statement has not been filed by the defendant, the court should be little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly by passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who failed to file the written statement. However, if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. The power of the court to proceed under Order 8 Rule 10 CPC is discretionary.

In ***Bogidhola Tea & Trading Co. Ltd. v. Hira Lal Somani, AIR 2008 SC 911*** this Court while reiterating a similar view observed that a decree under Order 8 Rule 10 CPC should not be passed unless the averments made in the plaint are established. In the facts and circumstances of a case, the court must decide the issue of limitation also, if so, involved. (See also ***Ramesh Chand Ardawatiya v. Anil Panjwani, AIR 2003 SC 2508***.

•

103. CIVIL PROCEDURE CODE, 1908 – Order 17 Rule 1

Right to speedy justice explained – It is the responsibility of all concerned, i.e. the Judges, the lawyers, the judicial officers who work in Courts, the law officers of the State, the Registry and the litigants – Seeking adjournment after adjournment in a non-chalant manner and grant of the same in a routine fashion deprecated.

Noor Mohammed v. Jethanand & another

Judgment dated 29.01.2013 passed by the Supreme Court in SLP (C) No. 25848 of 2011, reported in (2013) 5 SCC 202

Extracts from Judgment:

In a democratic set-up, intrinsic and embedded faith in the adjudicatory system is of seminal and pivotal concern. Delay gradually declines the citizenry faith in the system. It is the faith and faith alone that keeps the system alive. It provides oxygen constantly. Fragmentation of faith has the effect-potentiality to bring in a state of cataclysm where justice may become a casualty. A litigant expects a reasoned verdict from a temperate Judge but does not intend to and,

rightly so, to guillotine much of time at the altar of reasons. Timely delivery of justice keeps the faith ingrained and establishes the sustained stability. Access to speedy justice is regarded as a human right which is deeply rooted in the foundational concept of democracy and such a right is not only the creation of law but also a natural right. This right can be fully ripened by the requisite commitment of all concerned with the system. It cannot be regarded as a facet of Utopianism because such a though is likely to make the right a mirage losing the centrality of purpose. Therefore, whoever has a role to play in the justice-dispensation system cannot be allowed to remotely conceive of casual approach.

In the case at hand, as we perceive, the learned counsel sought adjournment after adjournment in a non-chalant manner and the same were granted in a routine fashion. It is the duty of the counsel as the officer of the court to assist the court in a properly prepared manner and not to seek unnecessary adjournments. Getting an adjournment is neither an art nor science. It has never been appreciated by the courts. All who are involved in the justice-dispensation system, which includes the Judges, the lawyers, the judicial officers who work in courts, the law officers of the State, the Registry and the litigants, have to show dedicated diligence so that a controversy is put to rest. Shifting the blame is not the cure. Acceptance of responsibility and dealing with it like a captain in the frontier is the necessity of the time. It is worthy to state that diligence brings satisfaction. There has to be strong resolve in the mind to carry out the responsibility with devotion. A time has come when all concerned are required to abandon idleness and arouse oneself and see to it that the syndrome of delay does not erode the concept of dispensation of expeditious justice which is the constitutional command. Sagacious acceptance of the deviation and necessitous steps taken for the redress of the same would be a bright lamp which would gradually become a laser beam. This is the expectation of the collective, and the said expectation has to become a reality. Expectations are not to remain at the stage of hope. They have to be metamorphosed to actuality. Long back, Francis Bacon, in his aphoristic style, had said, “Hope is good breakfast, but it is bad supper.” We say no more on this score.

•

104. CIVIL PROCEDURE CODE, 1908 – Order 19 Rule 3 and Order 18 Rule 4
EVIDENCE ACT, 1872 – Section 3
CONSTITUTION OF INDIA – Article 14

(i) An affidavit is not evidence within the meaning of Section 3 of the Evidence Act, 1872 – Only where opportunity to cross-examine was accorded, the contents of the affidavit may be relied upon.

(ii) Natural justice – Right of cross-examination – Is an integral part of the principles of natural justice.

***(Sudha Devi v. M.P. Narayanan & Ors., AIR 1988 SC 1381* and *Range Forest Officer v. S.T. Hadimani, AIR 2002 SC 1147* referred)**

Ayyubkhan Noorkhan Pathan v. State of Maharashtra and others
Judgment dated 08.11.2012 passed by the Supreme Court in Civil Appeal No. 7728 of 2012, reported in AIR 2013 SC 58

Extracts from Judgment:

It is a settled legal proposition that an affidavit is not evidence within the meaning of Section 3 of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act')

Affidavits are therefore, not included within the purview of the definition of "evidence" as has been given in Section 3 of the Evidence Act, and the same can be used as "evidence" only if, for sufficient reasons, the Court passes an order under Order XIX of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC'). Thus, the filing of an affidavit of one's own statement, in one's own favour, cannot be regarded as sufficient evidence for any Court or Tribunal, on the basis of which it can come to a conclusion as regards a particular fact-situation. (Vide: ***Sudha Devi v. M.P. Narayanan & Ors., AIR 1988 SC 1381*** and ***Range Forest Officer v. S. T. Hadimani, AIR 2002 SC 1147.***

Therefore, affidavits in the light of the aforesaid discussion are not considered to be evidence, within the meaning of Section 3 of the Evidence Act. However, in a case where the deponent is available for cross-examination, and opportunity is given to the other side to cross-examine him, the same can be relied upon. Such view, stands fully affirmed particularly, in view of the amended provisions of Order XVIII, Rules 4 & 5 CPC. In certain other circumstances, in order to avoid technicalities of procedure, the legislature, or a court/tribunal, can even lay down a procedure to meet the requirement of compliance with the principles of natural justice, and thus, the case will be examined in the light of those statutory rules etc. as framed by the aforementioned authorities.

In ***New India Assurance Company Ltd. v. Nusli Neville Wadia & Anr., AIR 2008 SC 876*** this Court considered a case under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and held as follows :-

> *"If some facts are to be proved by the landlord, indisputably the occupant should get an opportunity to cross-examine. The witness who intends to prove the said fact, has the right to cross-examine the witness. This may not be provided by under the statute, but it being a part of the principle of natural justice should be held to be indefeasible right."*

In view of the above, we are of the considered opinion that the right of cross-examination is an integral part of the principles of natural justice.

The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of

natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice.

•

105. CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 29

Stay of Execution Proceedings – Unless and until the execution proceedings are stayed by a competent court or by an interlocutory injunction, executing court cannot go beyond the decree and cannot stay the execution.

Chandrika Prasad v. Indramani (Dead) Through L.Rs. & ors.
Order dated 11.10.2012 passed by the High Court of M.P. in W.P. No. 15948 of 2012, reported in ILR (2012) M.P. 2964

Extracts from Order:

The petitioner has filed the COS No. 1-A/11 in the court of Civil Judge Class II, Rewa and in such suit he has also filed an application for issuing ad interim injunction against the operation and execution of the impugned decree under execution but till today, neither ex-parte nor bi-parte order has been passed by such court in such matter and in this matter nothing of that suit could be taken into consideration otherwise the right of the petitioner to prosecute said suit on merits may be prejudiced. However, taking note of the fact that in such civil suit also no injunction as prayed by the petitioner, has been granted, I am of the considered view that unless such decree is stayed by any competent court with appropriate order or an interlocutory injunction is granted against the execution of such decree, the executing court cannot stop its hands to execute the same and pursuant to it, considering the objections of the petitioner filed under Order 21 rule 29 of the CPC, the executing court cannot go beyond the decree and this court while sitting in the superintending jurisdiction, against the order of the executing court, cannot interfere in such order which has been passed by such court under its vested jurisdiction and in accordance with the procedure and the settled proposition of the law.

•

106. CIVIL PROCEDURE CODE, 1908 – Order 23 Rule 3 and Section 151

(i) What classes of compromise under O.23 R.3 C.P.C. are required to be written and signed by the parties and it need not be?

O.23 R.3 C.P.C speaks of distinct classes of compromise in a civil suit – The first part refers to lawful agreement or compromise arrived at by the parties out of court, which is required to be in writing and signed by the parties – The second part of the rule deals with the cases where the defendant satisfies the plaintiff in respect of whole or a part of the suit claim which is different from the first part of Rule 3.

The requirement of "in writing and signed by the parties" does not apply to the second part where the defendant satisfies the plaintiff in respect of whole or part of the subject-matter of the suit.

(ii) Where one party alleges that the matter is adjusted by an agreement or compromise but the other party denies the allegation, the court is called upon to decide one way or the other.

(iii) Even after consolidation, every suit always retains its independent identity and the Court is not powerless to dispose of any suit independently, once the ingredients of Order 23 Rule 3 C.P.C. have been satisfied.

(iv) Purpose of consolidation of civil suits explained – The purpose is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.

Mahalaxmi Cooperative Housing Society Limited and others v. Ashabhai Atmaram Patel (dead) through LRs. and others
Judgment dated 01.03.2013 passed by the Supreme Court in Civil Appeal No. 2050 of 2013, reported in (2013) 4 SCC 404

Extracts from Judgment:

Rule 3 of Order 23, speaks of compromise of suit. Rule 3 of Order 23 refers to distinct classes of compromise in suits. The first part refers to lawful agreement or compromise arrived at by the parties out of court, which is under the 1976 Amendment of CPC required to be in writing and signed by the parties. The second part of the rule deals with the cases where the defendant satisfies the plaintiff in respect of whole or a part of the suit claim which is different from the first part of Rule 3. The expression "agreement" or "compromise" refer to the first part and not the second part of Rule 3. The Second part gives emphasis to the expression "satisfaction". In ***Pushpa Devi Bhagat v. Rajinder Singh, (2006) 5 SCC 566*** this Court has recognized that the distinction deals with the distinction between the first part and the second part:

> "What is the difference between the first part and the second part of Rule 3? The first part refers to situations where an agreement or compromise is entered into in writing and signed by the parties. The said agreement or compromise is placed before the court. When the court is satisfied that the suit has been adjusted either wholly or in part by such agreement or compromise in writing and signed by the parties and that it is lawful, a decree follows in terms of what is agreed between the parties. The agreement/compromise spells out agreed terms by which the claim is admitted or adjusted by mutual concessions or promises, so that the parties thereto can be held to their promise (s)

> in future and performance can be enforced by the execution of the decree to be passed in terms of it. On the other hand, the second part refers to cases where the defendant has satisfied the plaintiff about the claim. This may be by satisfying the plaintiff that his claim cannot be or need not be met or performed. It can also be by discharging or performing the required obligation. Where the defendant so 'satisfies' the plaintiff in respect of the subject-matter of the suit, nothing further remains to be done or enforced and there is no question of any 'enforcement or 'execution' of the decree to be passed in terms of it."

So far as the present case is concerned, the pursis falls under Order 23 Rule 3 since the defendant has satisfied the plaintiffs in respect of whole of the subject-matter of the suit. Since objections were raised by Plaintiff 3 and Defendant 3, those objections had to be dealt with by the court in accordance with Order 23 Rule 3. The proviso to Order 23 Rule 3 cast an obligation on the court to decide that question at the earliest, without giving undue adjournments. Objections raised by Plaintiff 3 and Defendant 3 were examined by the court and rejected, in our view, rightly. Cogent reasons have been stated by the court while rejecting their objections and accepting the pursis.

The transfer of the suits from one court to another to be tried to together will not take away the right of the parties to invoke Order 23 Rule 3 and there is also no prohibition under Order 23 Rule 3 or Section 24 CPC to record a compromise in one suit. Suits always retain their independent identity and even after an order of consolidation, the Court is not powerless to dispose of any suit independently once the ingredients of Order 23 Rule 3 have been satisfied.

•

107. CIVIL PROCEDURE CODE, 1908 – Order 47 Rule 1

WORDS AND PHRASES:

Review – An erroneous decision cannot be permitted to be 'reheard and corrected'.

'Erroneous decision' and an 'error apparent on the face of record' – Distinction between – While the first can be corrected by the higher forum, the latter can be corrected in the exercise of review jurisdiction.

Union of India v. Udaypal

Order dated 29.01.2013 passed by the High Court of M.P. in Review Petition No. 544 of 2012, reported in ILR (2013) M.P. 378

Extracts from Order:

The review jurisdiction cannot be used as the appellate jurisdiction. In exercise of the jurisdiction under Order 47 Rule 1 CPC, it is not permissible for an erroneous decision to be "reheard and corrected". There is a clear distinction between an erroneous decision and an error apparent on the face of record.

While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction (***Parsion Devi v. Sumitri Devi, (1997) 8 SCC 715*** referred to).

•

108. CONTRACT ACT, 1872 – Section 29
SPECIFIC RELIEF ACT, 1963 – Section 29
EVIDENCE ACT, 1872 – Section 93
Description of property in suit for specific performance of agreement of sale – If description of property made in the agreement of sale is incorrect and uncertain, the agreement is void and cannot be specifically enforced.

Kashiram v. Mitthulal
Judgment dated 05.09.2012, passed by the High Court of M.P. in F.A. No. 334 of 1996, reported in 2013 (1) MPLJ 56

Extracts from Judgment:

Plaintiff has admitted in his cross examination that the description of the suit property which has been stated in the document no such land exists of said description at the spot. Thus, from the plaintiff's own admission on account of incorrect description of the suit land, the agreement is not certain and therefore according to me because the agreement is uncertain, hence, it is void as envisaged under Section 29 of Contract Act, 1872.

According to me, before passing a decree of specific performance of contract, the Court should give effect to the terms of agreement but at the same time if an agreement is read as a whole, in order to ascertain true intention of the parties and if it is carved out that description of the property is not certain, the suit of specific performance of contract cannot be decreed in favour of plaintiffs in regard to property which does not exist and particularly when, as in the present case, is not owned by the defendant. No plan has been attached to the document of agreement of sale (Ex.P/1) in order to locate the land. In this context, rightly, reliance has been placed by learned counsel for appellant upon the decision of the Supreme Court in ***Vimlesh Kumari Kulshrestha v. Sambhajirao, (2008) 5 SCC 448*** and also Single Bench decision of this Court in ***Abdul Gaffar v. Kouleshiya Bai, 1979 (1) MPWN SN 306.*** In order to constitute a valid contract, parties must so express in regard to subject matter that its meaning can be determined with a reasonable degree of certainty. It should be plain enough and should not be based upon conjectures (see Full Bench decision of Calcutta High Court in ***Dwarkadas & Co. v. Daluram Goganmull, AIR 1951 Cal 10*** and Division Bench decision of Madras High Court in ***Komaru Kollappa Devara v. Kumar Krishna Mitter and another, AIR 1945 Mad 10).***

I have already held hereinabove that the document of agreement of sale (Ex.P/1) is uncertain and void. The first plaintiff in para 5 of his cross-examination has given certain description of the property of defendant but said description

is not mentioned in the document of agreement of sale (Ex.P/1) and if that would be the position, section 93 of the Evidence Act would be applicable in the present case, which speaks about exclusion of evidence to explain or amend unambiguous document. According to this provision, when the language used in the document on its face, is ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its meaning. The language of the document of agreement of sale Ex.P/1 is ambiguous and therefore in evidence if plaintiff is saying by describing some other property of defendant, his evidence cannot to be accepted.

According to me, on account of the uncertainty and the incorrect description of the suit property made in the document of agreement of sale, the same is void in terms of section 29 of Contract Act, 1872 and as such void document cannot be specifically enforced in a suit for specific performance of contract.

●

109. CRIMINAL PROCEDURE CODE, 1973 – Sections 24 and 25
CONSTITUTION OF INDIA – Article 233

(i) A Public Prosecutor, Assistant Public Prosecutor, District Attorney, Additional District Attorney, Assistant Advocate General are eligible for appointment to the post of District Judge under Article 233 (2) of Constitution if his acting as such is consistent with his practicing as an advocate or pursuant to such appointment, he continues to act and/or plead in the Courts.

(ii) Meaning of expression "The service" in Article 233(2) of Constitution and sources of appointment of District Judges – Explained – The expression the service in Article 233 (2) means the "judicial service" – Other members of the service of the Union or State are excluded because Article 233 contemplates only two sources from which the District Judges can be appointed – These sources are: (i) Judicial services and (ii) the Bar – The District Judges can be appointed from no source other than judicial service or from amongst advocates.

(iii) A person who has a right to act and/or plead in the Court on behalf of his client is called advocate or pleader.

(iv) The Role of a Public Prosecutor and duties of an advocate – Explained.

(v) Expression "if he has been for not less than 7 years an advocate" under Article 233 (2) of the Constitution means such person must in the requisite period (i.e. 7 years) be continuing as an advocate on the date of application.

Deepak Aggarwal v. Keshav Kaushik and others
Judgment dated 21.01.2013 passed by the Supreme Court in Civil Appeal No. 561 of 2013, reported in (2013) 5 SCC 277

Extracts from Judgment:

The expression, "the service" in Article 233 (2) means the "judicial service". Other members of the service of the Union or State are as it is excluded because Article 233 contemplates only two sources from which the District judges can be appointed. These sources are: (i) judicial service; and (ii) the advocate/pleader or in other words from the Bar. The District Judges can, thus, be appointed from no source other than judicial service or from amongst advocates. Article 233 (2) excludes appointment of District Judges from the judicial service and restricts eligibility of appointment as District Judges from amongst the advocates or pleaders having practice of not less than seven years and who have been recommended by the High Court as such.

An advocate has a twofold duty: (1) to protect the interest of his client and pursue the case briefed to him with the best of his ability, and (2) as an officer of the court. Whether full-time employment creates any conflict of duty or interest for a Public Prosecutor/Assistant Public Prosecutor? We do not think so. As noticed above, and that has been consistently stated by this Court, a Public Prosecutor is not a mouthpiece of the investigating agency. In our opinion, even though Public Prosecutor/Assistant Public Prosecutor is in full-time employment with the Government and is subject to disciplinary control of the employer, but once he appears in the Court for conduct of a case or prosecution, he is guided by the norms consistent with the interest of justice. His acts always remain to serve and protect the public interest. He has to discharge his functions fairly, objectively and within the framework of the legal provisions. It may, therefore, not be correct to say that an Assistant Public Prosecutor is not an officer of the Court. The view in ***Samarendra Das v. State of W.B., (2004) 2 SCC 274,*** to the extent it holds that an Assistant Public Prosecutor is not an officer of the Court is not a correct view.

The Division Bench has, in respect of all the five private appellants – Assistant District Attorney, Public Prosecutor and Deputy advocate General – recorded undisputed factual position that they were appearing on behalf of their respective States primarily in criminal/Civil cases and their appointments were basically under the CPC or CrPC. That means their job has been to conduct cases on behalf of the State Government/CBI in Courts. Each one of them continued to be enrolled with the respective State Bar Council. In view of this factual position and the legal position that we have discussed above, can it be said that these appellants were ineligible for appointment to the office of the Additional District and Sessions Judge? Our answer is in the negative. The Division Bench committed two fundamental errors, first, the Division Bench erred in holding that since these appellants were in full-time employment of the State Government/Central Government, they ceased to be "advocate" under the 1961 Act and the Bar Council of India Rules, and second, that being a member of service, the first essential requirement under Article 233 (2) of the Constitution

that such person should not be in any service under the Union or the State was attracted. In our view, none of the five private appellants, on their appointment as Assistant District Attorney/Public Prosecutor/Deputy Advocate General, ceased to be "advocate" and since each one of them continued to be "advocate" they cannot be considered to be in the service of the Union or the State within the meaning of Article 233 (2). The view of the Division Bench is clearly erroneous and cannot be sustained.

As regards construction of the expression, "if he has been for not less than seven years an advocate" in Article 233 (2) of the Constitution, we think Mr Prashant Bhushan was right in his submission that this expression means seven years as an advocate immediately preceding the application and not seven years any time in the past. This is clear by use of "has been". The present perfect continuous tense is used for a position which began at some time in the past and is still continuing. Therefore, one of the essential requirements articulated by the above expression in Article 233 (2) is that such person must with requisite period be continuing as an advocate on the date of application.

•

110. CRIMINAL PROCEDURE CODE, 1973 – Section 154

Whether two FIRs in same occurrence, by the same complainant against same accused is permissible? Held, No – But concept of sameness has been given a restricted meaning – It does not cover filing of a counter FIR related to the same or connected cognizable offence.

Surender Kaushik and others v. State of Uttar Pradesh and others
Judgment dated 14.02.2013 passed by the Supreme Court in Criminal Appeal No. 305 of 2013, reported in (2013) 5 SCC 148

Extracts from Judgment:

The lodgment of two FIRs is not permissible in respect of one and the same incident. The concept of sameness has been given a restricted meaning. It does not encompass filing of a counter-FIR relating to the same or connected cognizable offence. What is prohibited is any further complaint by the same complainant and others against the same accused subsequent to the registration of the case under the Code, for an investigation in that regard would have already commenced and allowing registration of further complaint would amount to an improvement of the facts mentioned in the original complaint. As is further made clear by the three-judge Bench in ***Upkar Singh v. Ved Prakash, (2004) 13 SCC 292,*** the prohibition does not cover the allegations made by the accused in the first FIR alleging a different version of the same incident. Thus, rival versions in respect of the same incident do take different shapes and in that event, lodgment of two FIRs is permissible.

•

111. CRIMINAL PROCEDURE CODE, 1973 – Sections 156(3), 200, 202 and 204

(i) After receiving a complaint of cognizable offence, what courses are open to a Magistrate?

(1) If he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under section 156 (3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily, the duty of the police to investigate, the Magistrate can invoke the power under section 156 (3) Cr.P.C. before taking cognizance of an offence.

(2) He may, himself take cognizance of the offence, however, once he takes cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to revert back to the pre-cognizance stage and avail of section 156 (3).

(ii) Where a Magistrate chooses to take cognizance on complaint, he can adopt any of the following alternatives:

(a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding, he can straightaway issue process to the accused but before he does so he must comply with the requirements of section 200 Cr.P.C. and record the evidence of the complainant or his witnesses.

(b) The Magistrate can postpone the issue of process and direct an inquiry by himself.

(c) The Magistrate can postpone the issue of process and direct an inquiry by any other person or an investigation by the polices.

If the Magistrate after considering the statement of the complainant, the witnesses or as a result of the investigation and the inquiry ordered, is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint.

Madhao and another v. State of Maharashtra and another

Judgment dated 03.05.2013 passed by the Supreme Court in Criminal Appeal No. 684 of 2013, reported in (2013) 5 SCC 615

Extracts from Judgment:

In ***CREF Finance Ltd. v. Shree Shanthi Homes (P) Ltd., (2005) 7 SCC 467*** while considering the power of a Magistrate taking cognizance of the offence, this Court held:

> "... Cognizance is taken at the initial stage when the Magistrate peruses the complaint with a view to ascertain whether the commission of any offence is disclosed. The

> issuance of process is at a later stage when after considering the material placed before it, the court decides to proceed against the offenders against whom a prima facie case is made out. It is possible that a complaint may be filed against several persons, but the Magistrate may choose to issue process only against some of the accused. It may also be that after taking cognizance and examining the complainant on oath, the court may come to the conclusion that no case is made out for issuance of process and it may reject the complaint. It may also be that having considered the complaint, the court may consider it appropriate to send the complaint to the police for investigation under Section 156 (3) of the Code of Criminal Procedure."

It is clear that any Judicial Magistrate before taking cognizance of the offence can order investigation under Section 156 (3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein.

When a Magistrate receives a complaint he is not bound to take cognizance if the facts alleged in the complaint disclose the commission of an offence. The Magistrate has discretion in the matter. If on a reading of the complaint, he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156 (3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence itself. As said earlier, in the case of a complaint regarding the commission of cognizable offence, the power under Section 156 (3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190 (1) (a). However, if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to revert back to the pre-cognizance stage and avail of Section 156(3).

Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives:

(a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightaway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.

(b) The Magistrate can postpone the issue of process and direct an enquiry by himself.

(c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.

In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint.

•

112. CRIMINAL PROCEDURE CODE, 1973 – Section 157

F.I.R. was registered on 26.04.1984 – It was placed before the Magistrate on 30.04.1984 – It cannot be said that the F.I.R. was ante-timed, ante-dated and fabricated, more so where no question was put to the I.O. as to the cause of delay in sending F.I.R. to the Magistrate.

Guiram Mondal v. State of West Bengal

Judgment dated 26.04.2013 passed by the Supreme Court in Criminal Appeal No. 1268 of 2007, reported in 2013 (2) Crimes 324 (SC)

Extracts from Judgment:

We also fully agree with the views expressed by the High Court that the FIR was not anti dated, anti timed or was subsequently created. The verbal submission of PW 1 was reduced into writing by PW 15 and the same was treated as the FIR (Ext.3). The formal FIR was marked ext. 3/3. Those documents would clearly indicate that the incident took place on 26.4.1984 at about 12 hrs and the FIR was recorded at village Pechaliya at 6.05 PM and after it was sent to the Khairasole Police station which was registered as Khairasole P.S. Case No. 10 dated 26.4.1984 at 7.25 P.M. There is nothing to show that the FIR was anti dated, anti timed or fabricated. Merely because the FIR was placed before the learned Magistrate on 30.4.1984, three days after registration of FIR, it cannot be said that the FIR was ante timed, ante dated and fabricated. In fact, no question was put to the Investigating Officer as to the cause of delay in sending FIR to the Magistrate.

•

113. CRIMINAL PROCEDURE CODE, 1973 – Sections 173 (2) 190 (1) (b) and 319

A Magistrate can take cognizance u/s 190 (1) (b) Cr.P.C. against a person who is named in FIR but his name is not included in charge-sheet – Magistrate has power to apply his mind independently and he need not wait till the stage of 319 Cr. P.C.

Dhrup Singh and others v. State of Bihar

Judgment dated 08.04.2013 passed by the Supreme Court in SLP(Crl.) No. 7679 of 2012, reported in (2013) 4 SCC 275

Extracts from Judgment:

The learned counsel appearing for the respondent State placed reliance on a subsequent judgment of this Court in ***Uma Shankar Singh v. State of Bihar, (2010) 9 SCC 479***, and stated that such a request was declined by this Court stating that:

> ". ... even if the investigating authority is of the view that no case has been made out against an accused, the Magistrate can apply his mind independently to the materials contained in the police report and take cognizance thereupon...."

We notice that in this case the petitioners have been named in the FIR and the learned Magistrate after perusing the FIR, case diary and the death report came to a prima facie conclusion of the involvement of all the persons named in the FIR in the occurrence. The learned Magistrate expressed the view that there are enough materials to initiate prosecution against them apart from the charge-sheeted accused persons. The High Court has also concurred in ***Dhrup Singh v. State of Bihar, Criminal Misc. No. 22713 of 2011,*** order dated 06.04.2012 (Pat) with the view. In such a situation, we find no good reasons to take a different view from that of the learned Magistrate as well as that of the High Court. Hence, this special leave petition lacks merit and the same is dismissed.

•

114. CRIMINAL PRODEDURE CODE, 1973 – Section 204

Order of Magistrate summoning the accused in a complaint case – Criminal law cannot be set into motion as a routine matter – Summoning of accused in a criminal case is a serious matter – The order of Magistrate summoning the accused must indicate that he has applied his mind to the facts of the case and the law applicable to it – The Magistrate has to record his satisfaction with regard to the existence of a prima facie case on the basis of specific allegations made in the complaint supported by satisfactory evidence and other material on record.

GHCL Employees Stock Option Trust v. India Infoline Limited
Judgment dated 22.03.2013 passed by the Supreme Court in Criminal Appeal No. 488 of 2013, reported in (2013) 4 SCC 505

Extracts from Judgment:

Summoning of accused in a criminal case is a serious matter. Hence, criminal law cannot be set into motion as a matter of course. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The Magistrate has to record his satisfaction with regard to the existence of a Prima facie case on the basis of specific allegations made in the complaint supported by satisfactory evidence and other material on record.

•

115. CRIMINAL PROCEDURE CODE, 1973 – Section 311

An application u/s 311 Cr.P.C. – Points to be considered –

(i) Whether the evidence proposed to be adduced is relevant or not.

(ii) Whether the fresh evidence, if allowed to be produced, will facilitate a just decision.

(iii) Conclusiveness or otherwise of proposed evidence, would not be considered at that stage.

An application under section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party – Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties.

Natasha Singh v. Central Bureau of Investigation

Judgment dated 08.05.2013 passed by the Supreme Court in Criminal Appeal No. 709 of 2013, reported in (2013) 5 SCC 741

Extracts from Judgment:

The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as “any court” , “at any stage”, or “or any enquiry, trial or other proceedings”, “any person” and “any such person” clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus, no escape if the fresh evidence to be obtained is essential to the just decision of thecase. The determinative factor should therefore be, whether the summoning/ recalling of the said witness is in fact, essential to the just decision of the case.

Undoubtedly, an application filed under Section 311 CrPC must be allowed if fresh evidence is being produced to facilitate a just decision, however, in the instant case, the learned trial court prejudged the evidence of the witness sought to be examined by the appellant, and thereby caused grave and material prejudice to the appellant as regards her defence, which tantamounts to a flagrant violation of the principles of law governing the production of such evidence in keeping with the provisions of Section 311 CrPC. By doing so, the trial court reached the conclusion that the production of such evidence by the defence was not essential to facilitate a just decision of the case. Such an assumption is wholly misconceived, and is not tenable in law as the accused has every right to adduce evidence in rebuttal of the evidence brought on record by the prosecution. The court must examine whether such additional evidence is necessary to facilitate a just and proper decision of the case. The examination of the handwriting expert may therefore be necessary to rebut the evidence of Rabi Lal Thapa (PW 40), and a request made for his examination ought not to have been rejected on the sole ground that the opinion of the handwriting expert would not be conclusive. In such a situation, the only issue that ought to have been considered by the courts below, is whether the evidence proposed to be adduced was relevant or not. Identical is the position regarding the panchnama witness, and the court is justified in weighing evidence, only and only once the same has been laid before it and brought on record. Mr. B.B. Sharma, thus, may be in a position to depose with respect to whether the documents alleged to have been found, or alleged to have been seized, were actually recovered or not, and therefore, from the point of view of the appellant, his examination might prove to be essential and imperative for facilitating a just decision of the case.

•

116. CRIMINAL PROCEDURE CODE, 1973 – Section 313
INDIAN PENAL CODE, 1860 – Sections 148 and 149

(i) Where a large number of accused persons are involved in a crime – How their role may be determined? Explained as follows:

1. Accused persons who are named in F.I.R. and also in specific terms at the trial by the prosecution witness and some of whom were themselves injured in the incident – Their roles are quite clear and their conviction may be affirmed.

2. Accused persons who are named in F.I.R. but their presence or participation was not proved by prosecution, deserve benefit of doubt.

3. Accused persons who were not named in F.I.R. but whose presence and participation in incident was proved by prosecution beyond any doubt, their conviction may also be affirmed.

(ii) Use of statement u/s 313 Cr.P.C. against accused – The statement of an accused made by him u/s 313 Cr.P.C. cannot only be taken into consideration as provided u/s 313 (4) Cr.P.C. but also in the light of law laid down by the Apex Court from time to time.

The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution; however, such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution.

Conviction of the accused cannot be based merely on the statement made under section 313 CrPC as it cannot be regarded as a substantive piece of evidence.

Khairuddin and others v. State of West Bengal

Judgment dated 07.05.2013 passed by the Supreme Court in Criminal Appeal No. 2036 of 2009, reported in (2013) 5 SCC 753

Extracts from Judgment:

Coming to the case at hand, we find that the first information report named as many as twenty-four persons who, according first informant, were responsible for the commission of several offences including murder of the deceased Dabaru and Imamuddin. The evidence adduced at the trial comprising the depositions of PW 1 Budhu, PW4 Samsul, PW5 Monglu Mohd., PW6 Lal Khan and PW 17 Bholu, Mohd. Attributed overt acts of assault to only five of the appellants viz. Khairuddin, Nazrul Haq, Nasir Md. Munshi, Bhoka alias Jarifuddin and Iswahaque only. Appellant 11 Ishwahaque expired during the pendency of this appeal. The depositions of the above witnesses have been carefully perused by us with the assistance of the learned counsel for the parties. We are of the opinion that the appellants abovementioned were not only named in the FIR but were in specific terms named even at the trial by the witnesses examined by the prosecution, some of whom were themselves injured in the incident, thereby proving their presence on the spot beyond any doubt. The courts below have also appreciated their depositions in the right perspective and in our opinion rightly held that the presence and participation of the abovementioned five appellants in the incident was established by the prosecution beyond any reasonable doubt. To that extent, therefore, we see no reason to interfere with the findings recorded by the trial court and affirmed by the High Court.

That leaves us with appellants Rahimuddin, Idrish, Nurul, Ibrahim Khoka Md., Pasir alias Bishu, Kanchu and Asir alias Asiruddin. These appellants have no doubt been named in the FIR but, as rightly pointed out by the learned counsel for the appellants, there is no evidence showing that they were either present on the spot or participated in the occurrence. The depositions of the eyewitnesses, reliance upon which was placed by the learned counsel for the respondent do not incriminate these appellants. At any rate, in the absence of any cogent and reliable evidence proving that the abovementioned appellants were either present on the spot or

that they had committed any overt act that could show that they shared the common object of the unlawful assembly comprising those who had come to the spot armed with weapons and actually carried out the assault, it is not possible to support their conviction. There is, it is well known, a general tendency in incidents of the kind we are dealing with in this case, to implicate as many members of the opposite party as is possible. That the villagers in the vicinity of the disputed land were divided into factions, is evident from the depositions of the witnesses examined at the trial. It is not, therefore, unnatural that a very large number of persons were named in the FIR but when it came to giving them a role in the incident, the prosecution witnesses fell short of words. It is true that the commission of an overt act may not always be necessary to prove that a member of an unlawful assembly shared the common object of the assembly but then, the minimum that the prosecution must prove is that the persons concerned were members of the unlawful assembly. There is no evidence worthy of credence to prove that requirement in the case at hand. We are, therefore, inclined to give to the appellants named above the benefit of doubt which in our view they deserve in the facts and circumstances of the case.

That the statement of an accused made under Section 313 CrPC can be taken into consideration is not in dispute; not only because of what Section 313 (4) of the Code provides but also because of the law laid down by this Court in several pronouncements. We may in this regard refer to the decision of this Court in ***Sanatan Naskar v. State of W.B., (2010) 8 SCC 249*** where this Court observed:

> "The answers by an accused under Section 313 CrPC are of relevance for finding out the truth and examining the veracity of the case of the prosecution....
>
> As already noticed, the object of recording the statement of the accused under Section 313 Cr.P.C. is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. ... Once such a statement is recorded, the next question that has to be considered by the court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.
>
> The Statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any,

made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Sections 313 (4) Cr.P.C. explicitly provide that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence for or against the accused in any other enquiry into or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution.

Another important caution that courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 CrPC as it cannot be regarded as a substantive piece of evidence."

To the same effect is the decision of this Court in ***Ashok Kumar v. State of Haryana, (2010) 12 SCC 350***

Reference may also be made to the decision of this Court in ***Brajendra Singh v. State of M.P., (2012) 4 SCC 289*** where this Court said:

"It is a settled principle of law that the statement of an accused under Section 313 Cr.P.C. can be used as evidence against the accused, insofar as it supports the case of the prosecution. Equally true is that the statement under Section 313 Cr.P.C. simpliciter, normally, cannot be made the basis for conviction of the accused. But where the statement of the accused under Section 313 CrPC is in line with the case of the prosecution, then certainly the heavy onus of proof on the prosecution is, to some extent, reduced."

•

117. CRIMINAL PROCEDURE CODE, 1973 – Section 378
EVIDENCE ACT, 1872 – Section 3

(i) Appeal against acquittal – Powers and duties of appellate court – The appellate court has a duty to scrutinize the evidence and sometimes it is an obligation on the part of it to do so – The power is not curtailed by any of the provisions of the Cr.P.C. – It is also worth noting that while re-appreciating and reconsidering the evidence upon which the order of acquittal is based, certain other principles pertaining to other facets are to be borne in

mind – There is double presumption in favour of the accused – Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law – Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court – 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.

(ii) Appreciation of evidence – How to consider the behaviour or reactions of witnesses? The behaviour of the witnesses or their reactions would differ from situation to situation and individual to individual – Expectation of uniformity in the reactions of witnesses would be unrealistic but the court cannot be oblivious of the fact that even taking into account the unpredictability of human conduct and lack of uniformity in human reactions, in the circumstances of the case, whether the behaviour is acceptably natural allowing for variations – If the behaviour is absolutely unnatural, the testimony of the witness may not deserve credence and acceptance.

Shivasharanappa and others v. State of Karnataka
Judgment dated 07.05.2013 passed by the Supreme Court in Criminal Appeal No. 1366 of 2007, reported in (2013) 5 SCC 705

Extracts from Judgment:

At this juncture, we may refer with profit to the dictum in ***Shivaji Sahabrao Bobade v. State of Maharashtra, AIR 1973 SC 2622*** wherein a three-Judge Bench has opined thus:

> "... there are no fetters on the plenary power of the appellate court to review the whole evidence on which the order of acquittal is founded and, indeed, it has a duty to scrutinize the probative material de novo, informed, however, by the weighty thought that the rebuttable innocence attributed to the accused having been converted into an acquittal the homage of our jurisprudence owes to individual liberty constrains the higher court not to upset the holding without very convincing reasons and comprehensive consideration."

A Similar view has been expressed in ***Girja Prasad v. State of M.P., (2007) 7 SCC 625*** and ***State of Goa v. Sanjay Thakran, (2007) 3 SCC 755.***

From the aforesaid authorities, it is as clear as day that while dealing with an appeal against acquittal, the High Court has a duty to scrutinize the evidence

and sometimes it is an obligation on the part of the High Court to do so. The power is not curtailed by any of the provisions of the Code of Criminal Procedure. It is also worthy to note that while reappreciating and reconsidering the evidence upon which the order of acquittal is based, certain other principles pertaining to other facets are to be borne in mind. The said aspects have been encapsuled in ***Chandrappa v. State of Karnataka, (2007) 4 SCC 415*** as under:

> "... An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.
>
> (5) If two reasonable conclusions 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.

Quite apart from the above, the High Court is required to see that unless there are substantial and compelling circumstances, the order of acquittal is not required to be reversed in appeal. It has been so stated in ***State of Rajasthan v. Shera Ram, (2012) 1 SCC 602.***

Thus, the behavior of the witnesses or their reactions would differ from situation to situation and individual to individual. Expectation of uniformity in the reaction of witnesses would be unrealistic but the court cannot be oblivious of the fact that even taking into account the unpredictability of human conduct and lack of uniformity in human reaction, whether in the circumstances of the case, the behavior is acceptably natural allowing the variations. If the behavior is absolutely unnatural, the testimony of the witness may not deserve credence and acceptance.

•

118. CRIMINAL PROCEDURE CODE, 1973 – Sections 432 and 433A

(i) Can a Court effectively nullify the power of appropriate Government to remit sentences by awarding sentences of 20 years, 25 years and in some cases without any remission? This issue needs further and greater discussion but as at present advised, this is not permissible.

(ii) Before actually exercising the power of remission under section 432 of the Cr.P.C., the appropriate Government must obtain the opinion (with reasons) of the presiding Judge of the convicting or confirming Court – Remissions can be given only on a case-by-case basis.

Sangeet and anr. v. State of Haryana
Judgment dated 20.11.2012 passed by the Supreme Court in Criminal Appeal No. 490 of 2011, reported in AIR 2013 SC 447

Extracts from Judgment

A reading of some recent decisions delivered by this Court seems to suggest that the remission power of the appropriate Government has effectively been nullified by awarding sentences of 20 years, 25 years and in some cases without any remission. Is this permissible? Can this Court (or any Court for that matter) restrain the Appropriate Government from granting remission of a sentence to a convict? What this Court has done in ***Swamy Shraddananda v. State of Karnataka, AIR 2008 SC 3040*** and several other cases, by giving a sentence in a capital offence of 20 years or 30 years imprisonment without remission, is to effectively injunct the appropriate Government from exercising its power of remission for the specified period. In our opinion, this issue needs further and greater discussion, but as at present advised, we are of the opinion that this is not permissible. The appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for a remission in his sentence, whatever the reason.

Before actually exercising the power of remission under Section 432 of the Cr.P.C. the appropriate Government must obtain the opinion (with reasons) of the presiding Judge of the convicting or confirming Court. Remissions can, therefore, be given only on a case-by-case basis and not in wholesale manner.

•

119. CRIMINAL TRIAL:

(i) Absconding of accused – A person may run away due to fear of false implication, so absconding by itself, does not prove the guilt of a person.

(ii) Adverse inference against accused – When need not be drawn? Where the prosecution has not been able to prove its case beyond reasonable doubt, it cannot take advantage of weakness of the case of accused and no adverse inference can be drawn against accused in such a situation.

(iii) Defect and lapses in investigation – When affect prosecution case adversely?

If the lapses or irregularities in investigation go to the root of the matter and dislodge the substratum of prosecution case, they adversely affected prosecution case.

Sunil Kundu and another v. State of Jharkhand
Judgment dated 09.04.2013 passed by the Supreme Court in Criminal Appeal No. 1073 of 2008, reported in (2013) 4 SCC 422

Extracts from Judgment:

It was argued by the learned counsel for the State that different persons react differently to a particular situation and as such there may be minor variations in their statements. He submitted that minor contradictions and inconsistencies which do not go to the root of the prosecution version need to be ignored. In this case, it is not possible for us to adopt such an approach because there is a major lacuna in the prosecution story. It has been alleged that at least two of the accused were carrying pistols; the deceased was fired at and he was injured. This case is not borne out by the medical evidence. At the cost of repetition, we must State that no bullets or empty cartridges have been recovered from the scene of offence. If we keep this major lacuna of the prosecution story in mind and consider the abovementioned inconsistencies in the evidence of the prosecution witnesses, it would not be possible to term them as minor inconsistencies or variations which should be ignored. Besides, all the three important prosecution witnesses are related to the deceased and, therefore, are interested witnesses. We are aware that the evidence of an interested witness is not to be mechanically overlooked. If it is consistent, it can be relied upon and conviction can be based on it because, an interested witness is not likely to leave out the real culprit. But in this case, the interested witnesses are not truthful. Their presence itself is doubtful. According to PW 6 Narendra Yadav, they were present at the scene of offence, but their names are not mentioned in the FIR. The genesis of the prosecution case is suppressed. Moreover, admittedly, there is deep-rooted enmity between the accused and the deceased to which we have made reference earlier. We are mindful of the fact that enmity is a double-edged weapon but possibility of false involvement because of deep-rooted enmity also cannot be ruled out.

It was argued that the accused were absconding and, therefore, adverse inference needs to be drawn against them. It is well settled that absconding by itself does not prove the guilt of a person. A person may run away due to fear of false implication or arrest. (See ***Sk. Yusuf v. State of W.B., (2011)11 SCC 754***) It is also true that the plea of alibi taken by the accused has failed. The defence witnesses examined by them have been disbelieved. It was urged that adverse inference should be drawn from this. We reject this submission. When the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probabilise their defence. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt.

We began by commenting on the unhappy conduct of the investigating agency. We conclude by reaffirming our view. We are distressed at the way in which the investigation of this case was carried out. It is true that acquitting the accused merely on the ground of lapses or irregularities in the investigation of a case would amount to putting premium on the depreciable conduct of an

incompetent investigating agency at the cost of the victims which may lead to encouraging perpetrators of crimes. This Court has laid down that the lapses or irregularities in the investigation could be ignored subject to a rider. They can be ignored only if despite their existence, the evidence on record bears out the case of the prosecution and the evidence is of sterling quality. If the lapses or irregularities do not go to the root of the matter, if they do not dislodge the substratum of the prosecution case, they can be ignored. In this case, the lapses are very serious. PW 5 Jaldhari Yadav is a pancha to the seizure panchnama under which weapons and other articles were seized from the scene of offence and also to the inquest panchnama. Independent panchas have not been examined. The investigating officer has stated in his evidence that the seized articles were not sent to the court along with the charge-sheet. They were kept in the malkhana of the police station. He has admitted that the seized articles were not sent to the forensic science laboratory. No explanation is offered by him about the missing sanha entries. His evidence on that aspect is evasive. Clothes of the deceased were not sent to the forensic science laboratory. The investigating officer admitted that no seizure list of the clothes of the deceased was made. Blood group of the deceased was not ascertained. No link is established between the blood found on the seized article and the blood of the deceased. It is difficult to make allowance for such gross lapses. Besides, the evidence of eyewitnesses does not inspire confidence. Undoubtedly, a grave suspicion is created about the involvement of the accused in the offence of murder. It is well settled that suspicion, however strong, cannot take the place of proof. In such a case, benefit of doubt must go to the accused. In the circumstances, we quash and set aside the impugned judgment and order ***Sunil Kundu v. State of Jharkhand, Criminal Appeal No. 1762 of 2004,*** decided on 20-8-2007 (Jhar). The appellant-accused are in jail. We direct that the appellants A-1 Sunil kundu, A-2 Bablu Kundu, A-3 Nageshwar Prasad Sah and A-4 Hira Lal Yadav be released forthwith unless otherwise required in any other case.

•

120. CRIMINAL TRIAL:

Principles of sentencing – The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric – The principle of proportionality between an offence committed and the penalty imposed are to be kept in view – Impact of the offence on the society as a whole is also a relevant factor.

Shyam Narain v. The State of NCT of Delhi

Judgment dated 15.05.2013 passed by the Supreme Court in Criminal Appeal No. 1860 of 2010, reported in 2013 (2) Crimes 342 (SC)

Extracts from Judgment:

Primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crime. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view, while carrying out this complex exercise. It is obligatory on the part of the Court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

•

121. DUTY OF HIGHER JUDICIARY TO PROTECT HONEST SUBORDINATE JUDICIAL OFFICERS

A subordinate Judicial-officer works under a psychological pressure and mostly in a charged atmosphere – Contestants and lawyers breathing down his neck – "Judge bashing" has become a favorite pastime of some people – There is growing tendency of maligning the reputation of Judicial-officers by disgruntled elements, who fail to secure an order which they desire – The subordinate judiciary faces problems at the hands of unscrupulous litigants and lawyers – In case the High Court does not protect honest Judicial-officers, the survival of the judicial system would itself be in danger.

Nirmala J. Jhala v. State of Gujarat and another

Judgment dated 18.03.2013 passed by the Supreme Court in Civil Appeal No. 2668 of 2005 reported in (2013) 4 SCC 301

Extracts from Judgment:

In ***Ishwar Chand Jain v. High Court of P&H, AIR 1988 SC 1395,*** it was held:

> "Under the Constitution the High Court has control over the subordinate judiciary. While exercising that control it is under a constitutional obligation to guide and protect judicial officers. An honest strict judicial officer is likely to have adversaries in the mofussil courts. If complaints are entertained on trifling matters relating to judicial orders ... no judicial officer would feel protected and it would be difficult for him to discharge his duties in an honest and independent manner. An independent and honest judiciary is a sine qua non for the rule of law. ..... It is therefore imperative that the

> High Court should also take steps to protect its honest officers by ignoring ill-conceived or motivated complaints made by the unscrupulous lawyers and litigants."

In ***Yoginath D. Bagde v. State of Maharashtra, AIR 1999 SC 3734,*** it was held:

> " ... The Presiding Officers of the court cannot act as fugitives. They have also to face sometimes quarrelsome, unscrupulous and cantankerous litigants but they have to face them boldly without deviating from the right path. They are not expected to be overawed by such litigants or fall to their evil designs."

A subordinate judicial officer works mostly in a charged atmosphere. He is under a psychological pressure with contestants and lawyers breathing down his neck. If the fact that he renders a decision which is resented by a litigant or his lawyer were to expose him to such risk, it will sound the death nail of the institution. "Judge bashing" has become a favourite pastime of some people. There is growing tendency of maligning the reputation of judicial officers by disgruntled elements who fail to secure an order which they desire. For functioning of democracy, an independent judiciary, to dispense justice without fear and favour is paramount. Judiciary should not be reduced to the position of flies in the hands of wanton boys. (Vide ***L.D. Jaikwal v. State of U.P., AIR 1984 SC 1374, K.P. Tiwari v. State of M.P., AIR 1994 SC 1031, Haridas Das v. Usha Rani Banik, AIR 2007 SC 2688*** and ***Ajay Kumar Pandey, in re AIR 1998 SC 3299)***.

The subordinate judiciary works in the supervision of the High Court and it faces problems at the hands of unscrupulous litigants and lawyers, and for them "Judge bashing" becomes a favourable pastime. In case the High Court does not protect honest judicial officers, the survival of the judicial system would itself be in danger.

•

122. EVIDENCE ACT, 1872 – Section 3

Appreciation of Evidence:

With a view to explain a thing in a better way, if something new is added then such contradiction cannot be said to be material.

State of M.P. v. Ravikumar Singh Malhotra

Judgment dated 09.10.2012 passed by the High Court of M.P. in Cr. A. No. 491 of 1994, reported in ILR (2013) M.P. 442

Extracts from Judgment:

It is submitted by the learned counsel for respondent that Child witness has improved his version in trial court as from his earlier statement Ex. P-6 and such improved version cannot be believed. It is pertinent to note that each and every contradiction and omission is not material. It is matter of time also, contradictions and omissions are material only when these are leading towards falsehood. With a view to explain a thing in a better way, if something new is added then such contradiction cannot be said to be

material. Discrepancies, contradictions and omissions in the evidence of a witness should be evaluated with a balanced approach in right perspective. ***Bharwada Bhoginbhai Hirjibhai v. State of Gujrat, AIR 1983 SC 753*** referred.

•

123. EVIDENCE ACT, 1872 – Section 3

Appreciation of evidence – Testimony of a house wife, who is not highly educated, has a limited vocabulary and an imperfect capacity to describe the manner of assault on her husband, cannot be rejected solely on the ground of some statement made by her under the stress of cross-examination and in answer of some convoluted question.

Rajendra Singh v. State of Uttaranchal

Judgment dated 11.04.2013 passed by the Supreme Court in Criminal Appeal No. 1702 of 2008, reported in (2013) 4 SCC 713

Extracts from Judgment:

We are unable to accept the submission that on the basis of the statements pointed out by the counsel the deposition of PW 3 is liable to be rejected. The statements relied upon by the counsel were made by PW 3 under the stress of cross-examination. She is a housewife and apparently not highly educated. She has a limited vocabulary and an imperfect capacity to describe the manner of assault on her husband. Her statement especially in Para 21 is obviously in answer to some convoluted question by the cross-examiner, to which she replied as best as she could.

We find the testimonies of PW 2 and PW 3 wholly reliable and see no reason not to accept the same. Apart from the evidence of PW 2 and PW 3, there are other circumstances that lend credence to the prosecution case.

•

124. EVIDENCE ACT, 1872 – Sections 3 and 45

CRIMINAL PROECDURE CODE, 1973 – Section 154

Appreciation of evidence – Medical evidence vis-a-vis ocular evidence – The position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence – However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.

Umesh Singh v. State of Bihar

Judgment dated 22.03.2013 passed by the Supreme Court in Criminal Appeal No. 43 of 2010, reported in (2013) 4 SCC 360

Extracts from Judgment:

Insofar as the medical evidence of the doctor, PW 8 read with the post-mortem report upon which strong reliance is placed by the learned Senior Counsel for the appellant that death must have taken place prior to 30 to 36 hours as opined by the doctor that means it relates back to the early hours of 16-7-1996 but not at 3.30 p.m. as mentioned in the FIR. Once the time of death is drastically different from the one claimed by the prosecution its case is vitiated in law. In support of the above said contention strong reliance placed upon the decisions of this Court in the aforesaid cases are all misplaced as the same are contrary to the law laid down by this Court in ***Abdul Sayeed v. State of M.P., (2010)10 SCC 259*** The relevant paragraphs are extracted hereunder:

> "In ***State of Haryana v. Bhagirath, (1999) 5 SCC 96*** it was held as follows:
>
> 'The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject.'
>
> Drawing on ***Bhagirath case*** (supra), this Court has held that where the medical evidence is at variance with ocular evidence,
>
> > 'it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant"'.
>
> Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive. The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.
>
> '... The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with

> the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the 'credit' of the witnesses; their performance in the witness box; their power of observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.'
>
> In ***Solanki Chimanbhai Ukabhai v. State of Gujarat, (1983) 2 SCC 174*** this Court observed:
>
> > 'Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.'

Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.

The learned State counsel has rightly urged that if the medical and ocular evidence is contrary then the ocular evidence must prevail. This aspect of the matter has been elaborately discussed and the principle is laid down by this Court in the aforesaid decision.

The findings and decision recorded and rendered by the learned Additional Sessions Judge after thorough discussion and on proper appreciation of evidence on record held that the doctor has opined that rigor mortis starts within 1 to 3 hours and vanishes after 36 hours. The said opinion of the medical officer, PW 8 regarding complete vanishing of rigor mortis from the dead body after 36 hours is medically not correct and this may be lack of his knowledge on the subject and he was liberal to the cross-examination by the defence lawyer. Further, the learned Additional Sessions Judge has rightly referred to Medical Jurisprudence Digest written by B.L. Bansal, Advocate (1996 Edn. at p. 422), which clearly mentions that the rigor mortis persists from 12 to 24 hours and then passes off but it means that the faster the rigor mortis appears, the shorter time it persists.

Further, rightly the learned Additional Sessions Judge has referred to the case decided by the Court in ***Poolin Haldar v. State, 1996 Cri.L.J 513 (Cal)*** wherein it has been held that at the same climate of India, rigor mortis may commence in an hour to two and begin to disappear within 18 to 24 hours. Therefore, the learned Additional Sessions Judge has held that broadly speaking the faster the rigor mortis appears, the shorter the time it persists and further has rightly made observation that rigor mortis will be present in some parts of legs of the dead body. According to the medical officer, PW 8 there is no question of the time of death of the deceased. It must have preceded more than 24 hours which is the maximum limit for disappearance of rigor mortis. The said view of the medical officer, PW 8 was found fault with by the learned Additional Sessions Judge and held that he has not correctly deposed in his cross-examination regarding the time lapse of a dead person. He has extended the time for rigor mortis to be 30 to 36 hours and further rightly held that PW 8, the medical officer, has deposed in his evidence contrary to the rule of medical jurisprudence. Therefore, the learned Additional Sessions Judge has rightly held in the impugned judgment that the same cannot be the basis for the defence to acquit the accused. The claim by the appellant that the deceased had been killed in the early morning of 16-7-1996 and the allegation that the accused has been falsely implicated in the case has been rightly rejected by the learned Additional Sessions Judge and the same has been concurred with by the High Court by assigning the valid and cogent reasons in the impugned judgment.

Rightly, the learned counsel appearing on behalf of the State has placed reliance upon the judgment of this Court referred to supra that between medical and ocular evidence the ocular evidence must be preferred to hold the charge proved. This is the correct legal position as held by both the learned Additional Sessions Judge as well as the High Court after placing reliance upon the statement of evidence of PW 2, PW 3, PW 5 and PW 7. Therefore, we do not find any erroneous reasoning on this aspect of the matter. There is no substance in the submissions of the learned Senior Counsel on the above aspect of the matter with reference to judgments of this Court referred to supra which decisions have absolutely no application to the fact situation of the case on hand.

•

125. EVIDENCE ACT, 1872 – Section 65

Photo copy of document – Petitioner filed application for taking photo copy of the receipt on the ground that the original was taken away by the husband of the plaintiff/respondent on false pretext – In application for taking secondary evidence on record, it is nowhere mentioned that the photocopy was made from the original and it was compared with original – Name of person who has obtained the photocopy by mechanical process has also not been mentioned and further who compared the same with original is also not mentioned – Photo copy cannot be taken on record as secondary evidence.

Aneeta Rajpoot (Smt.) v. Smt. Saraswati Gupta
Order dated 22.08.2012 passed by the High Court of M.P. in W.P. No. 11990 of 2012, reported in ILR (2013) M.P. 43

Extracts from Order:

On bare perusal of the application under Section 65 of the Evidence Act which has been rejected by the impugned order it is found that although it has been mentioned that under the false pretext the plaintiff and her husband obtained the original receipt from petitioner/defendant, but, nowhere it has been so stated in the application that the photocopy was made from the original and it was compared with original. The name of the person, who had obtained the photocopy by mechanical process has also not been mentioned in the application and further who compared the same with original his name is also not mentioned nor any affidavit in that regard has been filed.

So far as the applicability of Clause (2) of Section 63 Evidence Act placed reliance upon by the learned counsel for petitioner is concerned, according to me, it can be said that by some mechanical process a photocopy of original receipt was obtained but there cannot be any surety of its correctness and accuracy in absence of supporting material on record. Again in this regard there is no averment in the application that the photocopy which has been obtained by mechanical process was never tempered and it ensures its accuracy. Even if accurate photocopy is obtained by a mechanical process, it is a matter of common parlance that after inserting some words on a document which is already a photocopy and by interpolating the same, another photocopy of the said interpolated photocopy may be obtained and thus the accuracy of photocopy is always surrounded by dark clouds of doubt. In the present case since there is no averment in the application under Section 65 that photocopy was compared with the original and it is an accurate photocopy of the original and further by not filing any affidavit of person who obtained the said photocopy is on record, it is difficult to hold the hallmark and authenticity and accuracy of the photocopy.

According to me, not only the satisfaction of Clause (a) to Section 65 is required, but simultaneously it is also required that the photocopy was compared with the original in terms of section 63 (3) of the Evidence Act.

The Supreme Court in ***United India Assurance Co. Ltd. v. Anbari and others, (2000) 10 SCC 523*** while dealing with the photocopy of licence of a driver expressed the view as under : –

> "Learned counsel for the appellant submitted that the point regarding validity of the driver's licence was raised by the appellant before the Motor Accidents Claims Tribunal and the Tribunal in accepting photocopy of a document purporting to be the driver's licence and recording a finding that the driver had a valid licence, has committed a grave error of law. He also submitted that the High Court has not

dealt with the said contentions of the appellant and without giving any reason has dismissed the appeal. The Tribunal and also the High Court have failed to appreciate that production of a photocopy was not sufficient to prove that the driver had a valid licence when the fact was challenged by the appellant and genuineness of the photocopy was not admitted by it."

Thus, the Apex Court has held that photocopy was not sufficient to prove that driver had a valid licence. By following the aforesaid decision of Supreme Court, Shri Justice Dipak Misra, J. (as His Lordship then was) in ***Haji Mohd. Islam and another v. Asgar Ali and another, AIR 2007 M.P. 157*** has held that when a photocopy without any reasonable source has been filed, it is not permissible as secondary evidence. There is yet another decision of this Court in W.P. No. 8224 of 2010 (***Sunil Kumar Sahu v. Smt. Awadharani***) decided on 31.08.2010 wherein it has been held that photocopy of a document is not admissible as secondary evidence under Section 65 of the Evidence Act.

•

126. HINDU MARRIAGE ACT, 1955 – Section 13 (1) (i-a)

(i) Case law on mental cruelty reviewed – Some illustrative instances of mental cruelty enumerated –

Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing such type of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse, filing repeated false complaints and cases in the Court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse.

(ii) Following directions regarding mediation have been issued by the Supreme Court for the Courts dealing with matrimonial matters:

a) In terms of section 9 of the Family Courts Act, the Family Courts shall make all efforts to settle the matrimonial disputes through mediation – Even if the counsellors submit a failure report, the Family Court shall, with the consent of the parties, refer the matter to the mediation centre. In such a case, however, the Family Courts shall set a reasonable time-limit for mediation centres to complete the process of mediation, otherwise the resolution of the disputes by the Family Court may get delayed. In a given case, if there is good chance of settlement, the Family Court in its discretion, can always extend the time-limit.

b) The criminal courts dealing with the complaints under Section 498-A IPC should, at any stage, particularly before

they take up the complaint for hearing, refer the parties to mediation centre if they feel that there exist elements of settlement and both the parties are willing – However, they should take care to see that in this exercise, rigour, purport and efficacy of Section 498-A IPC is not diluted – Needless to say that, the discretion to grant or not to grant bail is not in any way curtailed by this direction – It will be for the court concerned to work out the modalities taking into consideration the facts of each case.

c) All mediation centers shall setup pre-litigation desks/clinics, give them wide publicity and make efforts to settle matrimonial disputes at pre-litigation stage.

K. Srinivas Rao v. D.A. Deepa
Judgment dated 22.02.2013 passed by the Supreme Court in Civil Appeal No. 1794 of 2013, reported. In (2013) 5 SCC 226

Extracts from Judgment:

In ***Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511,*** this Court set out illustrative cases where inference of "mental cruelty" can be drawn. This list is obviously not exhaustive because each case presents its own peculiar factual matrix and existence or otherwise of mental cruelty will have to be judged after applying mind to it. We must quote the relevant paragraph of ***Samar Ghosh*** (supra). we have reproduced only the instances which are relevant to the present case:

> "No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behavior which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:
>
> (i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.
>
> (ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.
>
> (iii) * * *
>
> (iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behavior of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii)-(ix) * * *

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi)- (xiii) * * *

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

In ***Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate, (2003) 6 SCC 334,*** disgusting accusations of unchastity and indecent familiarity with a neighbour were made in the written statement. This Court held that the allegations are of such quality, magnitude and consequence as to cause mental pain, agony and suffering amounting to the reformulated concept of cruelty in matrimonial law causing profound and lasting disruption and driving the wife to feel deeply hurt and reasonably apprehend that it would be dangerous to live with her husband.

In ***Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558,*** the respondent wife got an advertisement issued in a national newspaper that her husband was her employee. She got another news item issued cautioning his business associates to avoid dealing with him. This was treated as causing mental cruelty to the husband. In ***Naveen Kohli*** (supra), the wife had filed several complaints and cases against the husband. This Court viewed her conduct as a conduct causing mental cruelty and observed that:

> "...The findings of the High Court that these proceedings could not be taken to be such which may warrant annulment of marriage, is wholly unsustainable."

•

127. INDIAN PENAL CODE, 1860 – Sections 141, 149 and 302

(I) To bring a case within Section 149 IPC, the following features must be present:-

(i) There must be an unlawful assembly as defined u/s 141 IPC.

(ii) An offence must have been committed by a member of the unlawful assembly.

(iii) The offence committed must be in prosecution of a common object of the unlawful assembly or must be such as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object.

- Once above features are satisfied,the provisions of Section 149 IPC will come into play and cover every member of the unlawful assembly.

(II) Delay in lodging FIR – A realistic and pragmatic approach is necessary – Whenever an incident of fatal injury has taken place, the victims would have to recover from the shock and trauma caused by injuries suffered by them and make arrangements for medical treatment – Often several emergent issues need attention and so, it is not as if the moment an incident is over, someone is expected to rush to the police-station for lodging an FIR.

(III) Non-explanation of injuries on accused – Effect explained in Para 45.

Gurmail Singh v. State of Punjab and another

Judgment dated 21.11.2012 passed by the Supreme Court in Criminal Appeal No. 1782 of 2008, reported in (2013) 4 SCC 228

Extracts from Judgment:

In situations such as the present one, a realistic and pragmatic approach is necessary. It is not as if the incident of firing and inflicting of gandasa-blows was over within a minute or so. The entire incident would have taken some time, and thereafter, the victims would have to recover from the shock and trauma caused by injuries suffered by them and make arrangements for medical treatment. Often several emergent issues need attention and so, it is not as if the moment an incident is over, someone is expected to rush to the police station for lodging an FIR. However, if there is an unreasonable or unexplained delay in lodging a complaint, an argument can surely be made, but it is wrong to make a fetish out of every delay in lodging an FIR. Given the facts of this case, we do not think there was any unreasonable or unexplained delay in lodging an FIR.

In this context, we may only refer to a recent decision of this Court (authored by one of us, Swatanter Kumar, J.) in ***Jitender Kumar v. State of Haryana, (2012) 6 SCC 204,*** in which it was held:

> "It is a settled principle of criminal jurisprudence that mere delay in lodging the FIR may not prove fatal in all cases, but in the given circumstances of a case, delay in lodging the FIR can be one of the factors which corrode the credibility of the prosecution version. Delay in lodging the FIR cannot be a ground by itself for throwing away the entire prosecution case. The court has to seek an explanation for delay and check the truthfulness of the version put forward. If the court is satisfied, then the case of the prosecution cannot fail on this ground alone."

As long as the evidence on record is trustworthy (and it has found to be so by both the courts below) the failure of the prosecution to explain the injuries on an accused person may not necessarily adversely impact on its case. In a recent decision ***Mano Dutt. v. State of U.P., (2012) 4 SCC 79,*** (authored by one of us, Swatanter Kumar, J.) it was held as follows:

> "... this Court has taken a consistent view that the normal rule is that whenever the accused sustains injury in the same occurrence in which the complainant suffered the injury, the prosecution should explain the injury upon the accused. But, it is not a rule without exception that if the prosecution fails to give explanation, the prosecution case must fail.
>
> ... Before the non-explanation of the injuries on the person of the accused, by the prosecution witnesses, may be held to affect the prosecution case, the court has to be satisfied of the existence of two conditions:
>
> (i) That the injuries on the person of the accused were also of a serious nature; and
>
> (ii) That such injuries must have been caused at the time of the occurrence in question.
>
> ... Where the evidence is clear, cogent and creditworthy; and where the court can distinguish the truth from falsehood, the mere fact that the injuries on the person of the accused are not explained by the prosecution cannot, by itself, be the sole basis to reject the testimony of the prosecution witnesses and consequently, the whole case of the prosecution. Reference in this regard can be made to ***Rajender Singh v. State of Bihar, (2000) 4 SCC 298, Ram Sunder Yadav v. State of Bihar, (1998) 7 SCC 365*** and ***Vijayee Singh v. State of U.P., (1990) 3 SCC 190."***

Section 149 IPC constructively criminalizes all members of an unlawful assembly if a member of that assembly commits an offence in prosecution of a

common object of that assembly or if the members of that assembly knew to be likely to be committed in prosecution of that object. To bring a case within Section 149 IPC three features must be present. Firstly, there must be in existence an unlawful assembly within the meaning of Section 141 IPC. This is a mixed question of fact and law, which was overlooked by the trial Judge. Secondly, an offence must have been committed by a member of the unlawful assembly. Thirdly, the offence committed must be in prosecution of a common object of the unlawful assembly or must be such as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once these ingredients are satisfied, the provisions of Section 149 IPC will come into play and cover every member of the unlawful assembly.

•

128. INDIAN PENAL CODE, 1860 – Sections 149, 302 and 436
EVIDENCE ACT, 1872 – Sections 3, 8 and 9
CRIMINAL PROCEDURE CODE, 1973 – Section 173

(i) Dock identification – Where the attack was dastardly and eye witnesses had seen the accused from close quarters, it is difficult to forget such heinous episode – In such situation, there is nothing unusual if the eye witnesses identified some of the accused in the court – Such dock identification is reliable.

(ii) Motive – The prosecution has not established motive but there is credible evidence of eye witnesses on record, so the motive pales into insignificance.

(iii) Investigation and trial of sessions cases – Sessions cases involve the rights of the victims and rights of the accused – The society has a great stake in the proper conduct of Sessions cases because they have relevance to the maintenance of Law and order – So investigation of such criminal cases must be done very carefully and trials must be conducted with a sense of responsibility.

(iv) Unlawful assembly – Ingredients reiterated – Common object – Caution for court – Concept of constructive liability must not be so stretched as to lead to false implication of innocent bystanders – Some people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly – If general allegation is made against large number of people, the Court must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly – Persons not named in FIR may be given benefit of doubt.

Subal Ghorai and others v. State of West Bengal
Judgment dated 02.04.2013 passed by the Supreme Court in Criminal Appeal No. 88 of 2007, reported in (2013) 4 SCC 607

Extracts from Judgment:

The Counsel for the appellant submitted that the identification of the accused in the court should not be relied upon. We have no hesitation in rejecting this submission. The attack was dastardly. It is difficult to forget such heinous episode. The injuries suffered by the deceased show how brutally they were attacked. The eye-witnesses had seen the accused from close quarters. There is, therefore, nothing unusual if the eye- witnesses identified some of the accused in the court. This Court has accepted the evidence of identification in the court in several cases (see ***Malkhansingh v. State of M.P., (2003) 5 SCC 746***) This submission must, therefore, be rejected. It is pertinent to note that some witnesses have honestly stated that they could not identify some of the accused. That shows that they were not tutored. It was argued that the prosecution has not been able to establish motive. The incident appears to have taken place because juvenile delinquent-Gopal was detained by deceased Hemanta. Assuming, however, that this is a case of weak motive or that the prosecution has not established motive, that will not have adverse impact on its case because when there is credible evidence of eye-witnesses on record, the motive pales into insignificance.

We need to sum-up the principles so as to examine the present case in their light. Section 141 IPC defines unlawful assembly to be an assembly of five or more persons. They must have common object to commit an offence. Section 142 IPC postulates that whoever being aware of facts which render any assembly an unlawful one intentionally joins the same would be a member thereof. Section 143 of the IPC provides for punishment for being a member of unlawful assembly. Section 149 IPC provides for constructive liability of every person of an unlawful assembly if an offence is committed by any member thereof in prosecution of the common object of that assembly or such of the members of that assembly who knew to be likely to be committed in prosecution of that object. The most important ingredient of unlawful assembly is common object. Common object of the persons composing that assembly is to do any act or acts stated in clauses ‘First’, ‘Second’, ‘Third’, ‘Fourth’ and ‘Fifth’ of that section. Common object can be formed on the spur of the moment. Course of conduct adopted by the members of common assembly is a relevant factor. At what point of time common object of unlawful assembly was formed would depend upon the facts and circumstances of each case. Once the case of the person falls within the ingredients of Section 149 IPC, the question that he did nothing with his own hands would be immaterial. If an offence is committed by a member of the unlawful assembly in prosecution of the common object, any member of the unlawful assembly who was present at the time of commission of offence and who shared the common object of that assembly would be liable for the commission of that offence even if no overt act was committed by him. If a large crowd of persons armed with weapons assaults intended victims, all may not take part in the actual assault. If weapons carried by some members were not

used, that would not absolve them of liability for the offence with the aid of Section 149 IPC if they shared common object of the unlawful assembly.

Before parting, we must express that the investigation of this case is far from satisfactory and recording of evidence is done in a casual manner. Justice is done only because of the inherent strength of the prosecution case and credible evidence of the honest rustic witnesses. Sessions cases involve the rights of the victims and rights of the accused. Even the society has a great stake in the proper conduct of sessions cases because they have relevance to the maintenance of law and order. Investigation of criminal cases must, therefore, be done very carefully and trials must be conducted with a sense of responsibility.

•

129. INDIAN PENAL CODE, 1860 – Sections 302, 364 and 120-B

Circumstantial evidence – Panchsheel – Five golden principles reiterated:

(i) The circumstances from which the conclusion of guilt is to be drawn should be fully established.

(ii) 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.

(iii) The circumstances should be of a conclusive nature and tendency.

(iv) They should exclude every possible hypothesis except the one to be proved.

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

These five golden principles constitute the panchsheel of the proof of a case based on circumstantial evidence.

Prakash v. State of Rajasthan

Judgment dated 22.03.2013 passed by the Supreme Court in Criminal Appeal No. 26 of 2008, reported in (2013) 4 SCC 668

Extracts from Judgment:

Before considering the materials placed by the prosecution and the defence, let us analyse the legal position as declared by this Court on the standard of proof required for recording a conviction on the basis of circumstantial evidence. In a leading decision of this Court in ***Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116*** this Court elaborately considered the standard of proof required for recording a conviction on the basis of circumstantial evidence and laid down the golden principles of standard of proof required in a case sought to be established on the basis of circumstantial evidence which are as follows:

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1)The circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in ***Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793*** where the following observations were made:

> "...Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
>
> (2) 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,
>
> (3) The circumstances should be of a conclusive nature and tendency,
>
> (4) They should exclude every possible hypothesis except the one to be proved, and
>
> (5) 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.

These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

•

130. INDIAN PENAL CODE, 1860 – Section 304
FORENSIC MEDICINE :

(i) Offence of culpable homicide – Allegations of mere omission, lapse or negligence on the part of the named accused is not sufficient – To attract the ingredients of the said offence some act, more positive is necessary.

(ii) Mere absence of diatoms in body of deceased – Does not rule out possibility of death by drowning.

Shantibhai J. Vaghela and anr. v. State of Gujarat and ors.
Judgment dated 09.11.2012 passed by the Supreme Court in Criminal Appeal No. 1805 of 2012, reported in AIR 2013 SC 571

Extracts from Judgment:

Commission of the offence of culpable homicide would require some positive act on the part of the accused as distinguished from silence, inaction or a mere lapse. Allegations of not carrying out a prompt search of the missing children; of delay in the lodging of formal complaint with the police and failure to take adequate measures to guard the access from the ashram to the river, which are the principal allegations made in the FIR, cannot make out a case of culpable homicide not amounting to murder punishable under Section 304 IPC. To attract the ingredients of the said offence something more positive than a mere omission, lapse or negligence on the part of the named accused will have to be present. Such statements are conspicuously absent in the FIR filed in the present case. A reading of the relevant part of the opinion of the Forensic Medicine Department of the BJ Medical College Ahmadabad would go to show that possibility of death of the children by drowning cannot be ruled out. Expert opinion available on record indicates that mere absence of diatom will not exclude the aforesaid possibility.

●

131. INDIAN PENAL CODE, 1860 – Section 304-B
CRIMINAL PROCEDURE CODE, 1973 – Section 154
Dowry-death – Sentence:

(i) There is a minimum sentence of 7 yrs. prescribed in the offence of dowry-death by statue – There is no provision for reducing the sentence for any reason whatsoever nor has any exception been carved out in the law – So Supreme Court refused to reduce the sentence, though the accused persons were aged 80 and 78 yrs. respectively.

(ii) Incident took place on 14.10.1988 – FIR lodged on 02.11.1988, after receiving chemical examination report – Complainant even went to police-station with a written application – It could not be said that there was any delay in lodging FIR which affected prosecution case.

Kulwant Singh and others v. State of Punjab
Judgment dated 02.04.2013 passed by the Supreme Court in Criminal Appeal No. 1548 of 2007, reported in (2013) 4 SCC 177

Extracts from Judgment:

As far as the delay in lodging the FIR is concerned, we are in agreement with the conclusion arrived at by the trial court that there was no delay in lodging the FIR. It may be mentioned that the argument of delay in lodging the FIR was not raised before the High Court. Be that as it may, the facts reveal that Sukhdev

Singh (PW 5) had made sufficient attempts to have the FIR lodged but was unable to do so since the report of the chemical examiner had not yet been received by the police station concerned. In any event, it is also clear from the evidence of ASI Karnail Singh (PW 12) that Sukhdev Singh had submitted an application which was marked by SI Balbir Singh (PW 13), the Station House Officer of Police Station Amloh to him (Karnail Singh) on 18.10.1989. SI Balbir Singh also stated in his evidence that he had received an application made by Sukhdev Singh to the Senior Superintendent of Police at Patiala and it was then that he registered the FIR on 02.11.1988. As such, it cannot be said that there was any delay in lodging the FIR.

We have given considerable thought to this submission but find that the law prescribes a minimum of seven years' imprisonment for an offence under Section 304-B IPC. There is no provision for reducing the sentence for any reason whatsoever nor has any exception been carved out in law. Consequently, we cannot accept this plea.

•

132. INDIAN PENAL CODE, 1860 – Sections 395, 396 and 376 (2) (g)

(i) Can less than five persons or one person be convicted for offence of Dacoity? Held, Yes – If factum of five or more persons is either not disputed or is clearly established but the court may not be able to record a finding as to the identity of all the persons said to have committed dacoity and may not be able to convict them and order their acquittal, observing that their identity is not established, or that otherwise there is insufficient evidence to convict them – In such situation, conviction of less than five persons or even one person for dacoity can stand.

(ii) Effect of absence of injuries on the person of the prosecutrix to infer rape – Where the prosecutrix was overpowered by several men and threatened with death in case she cried out – Was not in a position to resist and fight – Other evidence to infer rape – Absence of injuries immaterial.

Manoj Giri v. State of Chhattisgarh

Judgment dated 08.05.2013 passed by the Supreme Court in Criminal Appeal No. 470 of 2012, reported in (2013) 5 SCC 798

Extracts from Judgment:

With regard to the appellant's conviction under Section 396 IPC for the murder of Domara Sahu in the case of dacoity, it was contended by the learned counsel for the appellant that since the other four accused who have been similarly charged were acquitted of the offence of dacoity, it would not be legal and proper to convict the appellant of the said charge. The argument is based on the presupposition that a conviction for dacoity with murder can be maintained only when five or more persons are convicted. Section 396 IPC reads as follows:

> "*396. Dacoity with murder*.- If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, everyone of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

This contention cannot be upheld in view of the observations made by this Court in ***Raj Kumar v. State of Uttaranchal, (2008) 11 SCC 709,*** which read as follows:

> "It is thus clear that for recording conviction of an offence of robbery, there must be five or more persons. In absence of such finding, an accused cannot be convicted for an offence of dacoity. In a given case, however, it may happen that there may be five or more persons and case the factum of five or more persons is either not disputed or is clearly established, but the court may not be able to record a finding as to identity of all the persons said to have committed dacoity and may not be able to convict them and order their acquittal observing that their identity is not established. In such case, conviction of less than five persons – or even one – can stand. But in absence of such finding less than five persons cannot be convicted for an offence of dacoity."

The observation in ***Raj Kumar case*** (supra) squarely apply to this case. Domara Sahu was killed in the assault by the five accused. The evidence against the other four was not sufficient to convict them. There is no doubt, the murder was committed during the conjoint commission of dacoity. If properly convicted each one of them were liable to be punished with death vide Section 396 IPC. Since that has not happened the conviction of five persons-or even one-can stand. We have, therefore, no hesitation in maintaining the conviction of the appellant for the incident in which there was gang rape, dacoity and a wanton murder of the hapless father-in-law.

It was next contented that there are no injuries on the prosecutrix to infer rape. There is no merit in this contention in view of the fact that the prosecutrix was a married woman and was overpowered by several men before she was raped. She was obviously not in a position to resist and to fight several men, who had threatened her with death in case she cried out. There is, however, ample evidence of rape in view of the forensic report regarding the clothes of the prosecutrix and those of the appellant. The report clearly discloses the presence of semen spot and human sperm on the clothes of the accused including the appellant and the prosecutrix. The entire evidence thus collected along with the proper and clear identification of the accused at identification parade and in the court by the prosecutrix leaves no manner of doubt that conviction of the appellant is well founded. In the result, we see, no merit in the appeal. It is hereby dismissed.

•

133. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 – Section 20

(i) Date of the incident, and not the date on which cognizance is taken by the Magistrate, is relevant for determination of juvenility.

(ii) During the pendency of an appeal before the High Court under the Act of 1986, Act of 2000 came into being – Provisions of Act of 2000 shall apply in view of Section 20 of the Act of 2000 – High Court may convict appellant but he should be referred to Juvenile Justice Board for further action.

Bharat Bhushan v. State of Himachal Pradesh

Judgment dated 26.04.2013 passed by the Supreme Court in Criminal Appeal No. 628 of 2013, reported in 2013 (2) Crimes 318 (SC)

Extracts from Judgment:

We have heard learned Counsel for the parties at some length. The legal position regarding the entitlement of the appellant who was more than 16 years but less than 18 years of age as on the date of commission of the offence on 2nd June, 1993, is in our view settled by the decision of this Court in ***Hari Ram v. State of Rajasthan, (2009) 13 SCC 211.*** This Court has, in that case, traced the history of the legislation and reviewed the entire case law on the subject. Relying upon the decision of the Constitution Bench of this Court in ***Pratap Singh v. State of Jharkhand and anr, (2005) 3 SCC 551*** this Court in ***Hari Ram's Case*** (supra) reiterated that the question of juvenility of a person in conflict with law has to be determined by reference to the date of the incident and not the date on which cognizance is taken by the Magistrate. Having said that, this Court held that the effect of the pronouncement in ***Pratap Singh's case*** (supra) on the second question, viz. whether the 2000 Act was applicable in a case where the proceedings were initiated under the 1986 Act and were pending when the 2000 Act came into force, stood neutralized by the amendments to Juvenile Justice (Care and Protection of Children) Act, 2000 by Act 33 of 2006. The amendments made the Provisions of the Act applicable even to juveniles who had not completed the age of 18 years on the date of the commission of offence said this Court. Speaking for the Court Altamas Kabir, j. (as his Lordship then was) observed:

> "Of the two main questions decided in ***Pratap Singh case*** (supra), one point is now well established that the juvenility of a persons in conflict with law has to be reckoned from the date of the incident and not from the date on which cognizance was taken by the Magistrate. The effect of the other part of the decision was, however, neutralized by virtue of the amendments to the juvenile Justice Act, 2000, by Act 33 of 2006, whereunder the provisions of the Act were also made applicable to juveniles who had not completed eighteen years of age on the date of commission of the offence.

> The law as now crystallized on a conjoint reading of Sections 2 (k), 2(1), 7-A, 20 and 49 read with Rules 12 and 98, places beyond all doubt that all persons who were below the age of 18 years on the date of commission of the offence even prior to 1-4-2001, would be treated as juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or before the date of commencement of the Act and were undergoing sentence upon being convicted.
>
> Accordingly, a juvenile who had not completed eighteen years on the date of commission of the offence was also entitled to the benefits of the Juvenile Justice Act, 2000, as if the provisions of Section 2 (k) had always been in existence even during the operation of the 1986 Act."

The attention of the High Court was, it is obvious, not drawn to the decision in ***Hari Ram's case*** (supra), although the same was pronounced on 5th May, 2009 i.e. almost a year earlier to the pronouncement of the impugned judgment in this case. Be that as it may, as on the date the offence was committed, the appellant was admittedly a juvenile having regard to the provisions of Sections 2 (k), 2(1), 7-A, 20 and 49 read with Rules 12 and 98 of the Rules framed under the Juvenile Justice (Care and Protection of Children) Act, 2000. He was, therefore, entitled to the benefit of the said provision, which benefit, it is evident, has been wrongly denied by the High Court only because the High Court remained oblivious of the pronouncement of this Court in ***Hari Ram's Case*** (supra).

In the present case, the appellant was not a juvenile under the 1986 Act as he had crossed the age of 16 years. This case was, however, pending before the High Court in appeal on the date the 2000 Act came into force and had, therefore, to be dealt with under Section 20 of the Act which required the High Court to record a finding about the guilt of the accused but stop short of passing an order of sentence against him. In as much as the High Court convicted the appellant, it did not commit any mistake for the power to do so was clearly available to the High Court under the provisions of Section 20. What was not permissible was passing of a sentence for which purpose the High Court was required to forward the juvenile to the Juvenile Board constituted under the Act. The order of sentence is, therefore, unsustainable and shall have to be set aside.

•

134. LAND ACQUISATION ACT, 1894 – Sections 4 (1), 23 and 24

A land-owner, who has been dispossessed prior to issuance of preliminary notification u/s 4 (1) of the Act, is entitled to recover the possession of his land by taking appropriate legal proceeding – In case the possession is not recovered, he would be entitled to rent or damages for use and occupation for the period during which Government retained the possession of the property.

Executive Engineer Nandur, Madhameshwar Canal v. Vilas Eknath Jadhav and others

Order dated 02.04.2013 passed by the Supreme Court in Civil Appeal No. 2919 of 2013, reported in (2013) 4 SCC 268

Extracts from Judgment:

In support of this, he relies on observations made in Para 18 of the judgment in ***R.L. Jain AIR 2004 SC 1904.*** In the aforesaid paragraph, this Court has observed as follows:

> "18. In a case where the landowner is dispossessed prior to the issuance of preliminary notification under Section 4 (1) of the Act, the Government merely takes possession of the land but the title thereof continues to vest with the landowner. It is fully open for the landowner to recover the possession of his land by taking appropriate legal proceedings. He is therefore, only entitled to get rent or damages for use and occupation for the period the Government retains possession of the property. Where possession is taken prior to the issuance of the preliminary notification, in our opinion, it will be just and equitable that the Collector may also determine the rent or damages for use of the property to which the landowner is entitled while determining the compensation amount payable to the landowner for the acquisition of the property. The provision of Section 48 of the Act lend support to such a course of action. For delayed payment of such amount appropriate interest at prevailing bank rate may be awarded."

•

135. LAND ACQUISTION ACT, 1894 – Sections 23 and 28

(i) Awarding Compensation – Acquisition of undeveloped land situated in municipality area – More realistic deduction against development cost would be one third i.e. 33-1/3%.

(ii) Non applicability of belting system – Where land is situated within municipal area having material potential for development of both residential and commercial complexes, belting system is not to be applied.

Ashrafi and others v. State of Haryana and others

Judgment dated 11.04.2013 passed by the Supreme Court in Civil Appeal No. 3279 of 2013, reported in (2013) 5 SCC 527

Extracts from Judgment:

In the case filed by Mukesh Kumar, being SLP (C) No. 19668 of 2007, relating to acquisition of 227.44 acres under the Notification dated 20.8.1992,

thelearned counsel for parties pointed out that the decision had been arrived at on the reasoning in ***Sarwan Singh v. State of Haryana, SLPs (C) Nos. 20144-50 of 2007*** and ***Atam Singh v. State of Haryana SLPs (C) Nos. 33337-40 of 2010,*** referred to hereinabove. The learned counsel urged that in ***Sarwan Sing*** case (supra), the High Court considered the location of the acquired lands and upon observing that they were situated next to prominent localities to the north of the acquired lands, it had no hesitation in arriving at the conclusion that the entire acquired land fall within the municipal limits of the District of Hisar with substantial potential for its development for residential and commercial purposes. Even the Division Bench in appeal, while rejecting the submissions made on behalf of the State, observed that having regard to the nature of the development of the surrounding areas, it would be improper to resort to the belting system and to award one set of compensation for the entire land.

In ***Sucha Singh v. Collector, SLP (C) CC No. 19038 of 2009,*** Mr Kapoor had submitted that the Land Acquisition Collector had awarded the compensation at the rate of Rs 40,000 per acre, which was enhanced by the Reference Court to Rs 4,60,000 up to one killa and to Rs 4,00,000 beyond one killa. On appeal to the High Court, the amounts were reduced to Rs 3,74,400 per acre up to one acre and Rs 2,24,640 per acre beyond one acre. According to Mr Kapoor, while the average sale price had been found to be Rs 6,23,997 per acre, together with increase of 12% per annum, the figure would amount to Rs 7,82,746 per acre. However, although the land belonging to Mr. Kapoor's clients feel within the municipal limits of Talwandi Bhai, a deduction of 40% was unjustified. On the other hand, a cut of 33-1/3% would be more realistic. Accordingly, the compensation for the said lands, after taking into consideration the deduction of 33-1/3% is assessed at Rs 7,25,000 per acre.

•

136. MOTOR VEHICLES ACT, 1988 – Section 147 (1)
EVIDENCE ACT, 1872 – Section 3
It is a matter of common experience that the driver of offending vehicle seldom enters the witness-box to depose as to how the accidence took place – Driver not only entered witness box but deposed that the deceased was on the road and was not employed as a workman on the tractor – Relying on FIR, the Tribunal disbelieved the statement of driver and exonerated the insurance company.
Whether deceased was not a third party and insurance company was rightly exonerated? Held, No – Deceased was a third party and insurance company is liable to pay compensation.

Mohan and another v. Rajik Sheikh and others
Judgment dated 20.04.2012 passed by High Court of Madhya Pradesh in M.A. No. 555 of 2009, reported in 2013 ACJ 1178

Extracts from Judgment:

So far as the appeal for enhancement is concerned, we find that in view of the evidence which is available on record, the Tribunal has rightly assessed the compensation taking into account the notional income of the deceased at Rs. 15,000. The accident took place in the year 2005 and considering the age of the deceased, it is highly improbable that he was getting Rs.100 as daily wages. Thus we find that there is no scope for enhancement of compensation, therefore, the appeal preferred by the parents for enhancement has no merit. However, so far as the liability of the insurance company is concerned, in our considered opinion the Claims Tribunal has failed to appreciate the evidence in proper perspective. It seems that Tribunal has attached undue importance to the F.I.R. and has very lightly brushed aside the statement made on oath by the driver of the vehicle. It is a matter of common experience that the driver of the offending vehicle seldom enters the witness-box to depose how the accident took place. From the evidence of driver, it is clear that the deceased was called in aid as the tractor was stuck up in the slush on the road. From the evidence it is clear that a patch of the road was in repair and because of slush which made the tractor immovable, efforts were made to move the tractor by putting stones. In that process suddenly the tractor moved in the reverse direction, as a result the accident took place and deceased died on the spot. The evidence of driver Rajik Sheikh remained unshaken in this regard and has withstood the cross-examination on this point. He has positively stated that the deceased was on the road and was not employed as a workman on the tractor. In view of this, we are of the opinion that the learned Claims Tribunal has wrongly exonerated the insurance company from its joint and several liability to pay compensation. We, therefore, partly allow the appeal of the parents to this extent as well as the appeal preferred by the owner of the tractor and direct that the insurance company is jointly and severally liable to pay compensation along with the owner.

•

137. MOTOR VEHICLES ACT, 1988 – Section 147(1)

Where insurance policy had not covered risk of any injury to the owner-insured himself, Insurance Company was not liable for death of owner-insured, travelling in the vehicle – An owner of a vehicle can claim only where a personal accident insurance has been taken out.

New India Assurance Co. Ltd. v. Prabha Devi and others

Judgment dated 13.03.2013, passed by the Supreme Court in C.A. No. 477 of 2007, reported in 2013 ACJ 1382.

Extracts from Judgment:

We have perused the judgment of this court in the case of ***Dhanraj v. New India Assurance Co. Ltd., 2005 ACJ 1 (SC).*** In that case, the appellant who was

the insured was travelling in the insured vehicle, which met with an accident. In the accident, the appellant as well as the other passengers received injuries. A number of claim petitions came to be filed. The appellant who was the insured also filed a claim petition. The M.A.C.T. held the driver of the jeep responsible for the accident. In, all the claim petitions filed by the other passengers, M.A.C.T. directed that the appellant (the owner) as well as the driver and the insurance company were liable to pay compensation. Furthermore, in the claim petition filed by appellant, the M.A.C.T. directed the driver and the insurance company to pay compensation to the appellant. The aforesaid finding of the M.A.C.T. was upheld by the High Court in the appeal filed by the insurance company. Insurance company was in appeal before this court challenging the judgment of the High Court awarding compensation to the owner of the insured vehicle. Taking into consideration the provision contained in section 147 of the Act, this court observed as follows:

> "Thus, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorized representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.
>
> In the case of ***Oriental Insurance Co. Ltd. v. Sunita Rathi, 1998 ACJ 121 (SC),*** it has been held that the liability of an insurance company is only for the purpose of indemnifying the insured against liabilities incurred towards third person or in respect of damages to property. Thus, where the insured, i.e., an owner of the vehicle has no liability to a third party, the insurance company has no liability also.
>
> In this case, it has not been shown that insurance policy covered any risk for injury to the owner himself. We are unable to accept the contention that the premium of Rs. 4,989 paid under the heading 'own damage' is for covering liability towards personal injury. Under the heading 'own damage', the words 'premium on vehicle and non-electrical accessories' appear. It is thus clear that this premium is towards damage to the vehicle and not for injury to the person of the owner. An owner of a vehicle can only claim provided a personal accident insurance has been taken out. In this case, there is no such insurance."

•

138. MOTOR VEHICLES ACT, 1988 – Section 147 (1) and 149 (2) (a)

Where the tractor was insured for agricultural purposes, premium was paid only for the driver, and not any labourer, no labourer is covered under the policy – The Insurance company is not liable to pay compensation for the death of any labourer as it is specific breach of condition of policy.

National Insurance Co. Ltd. v. Ramesh Sen and others

Judgment dated 20.04.2012 passed by High Court of M.P. in M.A. No. 448 of 2003, reported in 2013 ACJ 1171

Extracts from Judgment:

Learned counsel for the respondent Nos. 1 to 3 submits that the policy, Exh. D1, is not original and it has not been prepared from carbon copy and there exists no statement of witnesses of insurance company in this respect. On the other hand, learned counsel for the appellant submits that besides Exh. DI, original policy, Exh. D3 has been filed from owner's side and it is his copy and from its perusal it is very much clear that insurance is only for agricultural purpose and Rs.15 has been taken as premium for the driver and no premium has been taken for any other purpose and this is not only cover note or proposal but it is full policy and it has been endorsed in the last Para. From the perusal of Exh. D3 it is very much clear that it is original policy and the offending tractor was insured only for agricultural purpose and premium was taken for driver only.

If it is assumed that the tractor was driven for the agricultural purpose, still no labourer is covered and from the perusal of claim petition it is very much clear that there is a pleading that Raju was labourer. Hence, there is specific breach of condition of policy. The authorities which were cited by the appellant are directly applicable to the facts and circumstances of this case in comparison to the authorities cited by the learned counsel for the respondents.

•

139. MOTOR VEHICLES ACT, 1988 – Section 149 (2) (a) (I)

Defence of breach of policy on the account of overloading taken by the Insurance Company – It is proved that the bus was not carrying any passengers in excess of the permitted capacity but some pedestrians were also involved in the accident – So insurance company cannot be exonerated – It is liable to pay compensation to pedestrians also.

National Insurance Co. Ltd. v. Reena Devi and others

Judgment dated 20.02.2013 passed by Supreme Court in C.A. No. 1466 of 2013, reported in 2013 ACJ 1195

Extracts from Judgment:

One thing is certain and clear to us, in view of the finding of fact reached by the Tribunal that the bus in question on the date of the incident was not carrying passengers more than the permitted capacity. It is also the finding of the Tribunal that apart from the persons who were travelling in the bus, the persons walking on the road were also involved in the accident. If that is so, the Tribunal is justified in directing the insurance company to compensate all those persons, who died in the accident and also those who sustained injuries.

•

140. MOTOR VEHICLES ACT, 1988 – Section 166

Choice of multiplier for son or daughter – There cannot be any discrimination on the ground of gender while awarding compensation – A daughter, who was to be married shortly, would not have left her parents unattended in their old age or in the hour of need – So, instead of multiplier of five High Court choose multiplier of eleven.

Vimla Bai and another v. Mukesh Verma and others

Judgment dated 13.12.2011 passed by High Court of Madhya Pradesh in M.A. No. 1478 of 2007, reported in 2013 ACJ 1242

Extracts from Judgment:

Keeping in view the age of deceased and also keeping in view the age of parents who are the appellants, this court is of the view that the multiplier applied by the learned Tribunal on the ground that the deceased was the daughter and was in the age group of 18 years who was to be married shortly, cannot be a ground for choosing the multiplier. It is well settled that there cannot be any discrimination on the ground of gender while awarding compensation and also that a daughter would not have left her parents unattended in their old age or in the hour of need. In the opinion of this court, multiplier of 11 ought to have been applied instead of 5, keeping in view the age of appellants. So far as income of deceased is concerned, keeping in view the uncertainties of life and also the bright future of the deceased, this court is of the view that income of the deceased ought to have been taken as Rs. 8,000 per month and deduction ought to have been made half as deceased was a girl and would have married within 3-4 years.

•

141. MOTOR VEHICLES ACT, 1988 – Section 166

Contributory Negligence of claimant – Where driver of offending vehicle remained absent before claims tribunal and criminal case was also registered against him – Holding claimant responsible for 25% of contributory negligence only on the basis of spot map, is not justified – It is not justified to hold claimant liable to the extent of 25% for accident.

Jagdish v. Abdul Shakil and others
Judgment dated 13.07.2012 passed by High Court of M.P. in M.A. No. 118 of 2012, reported in 2013 ACJ 1148

Extracts from Judgment:

Since the respondent No.1 remained absent and criminal case was registered against him, therefore, this court is of the view that there was no justification on the part of the learned Tribunal in holding the appellant liable to the extent 25 per cent for the accident only on the basis of spot map. So far as amount is concerned, looking to the injuries sustained by the appellant amount awarded is on lower side which deserves to be enhanced. Appellant is entitled for the following amount:

For permanent disability	Rs.1,00,000
For medical expenses	Rs. 50,000
For Special diet	Rs. 20,000
For transportation	Rs. 20,000
For loss of income	Rs. 20,000
For pain and suffering	Rs. 20,000
For attendant	Rs. 20,000
Total	Rs.2,50,000

•

142. MOTOR VEHICLES ACT, 1988 – Sections 166 and 173
Whether 1/3rd of income of the claimant can be deducted as personal expenses for the purpose of assessment of compensation, in injury cases?
Held: No – Only in death claims, it is permissible to do so.

Madan Singh v. Prafful and others
Judgment dated 02.07.2012 passed by High Court of Madhya Pradesh in M.A. No. 3395 of 2005, reported in 2013 ACJ 1274

Extracts from Judgment:

Counsel relied on ***Ramachandrappa v. Manager, Royal Sundaram Alliance Insurance Co. Ltd., 2011 ACJ 2436 (SC),*** whereby the Supreme Court had held that while considering permanent disability it means loss or impairment of earning power and does not mean loss of a member of the body. When physical efficiency because of the injury has been substantially impaired or if he is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury and the Apex Court had enhanced the compensation. Similarly, relying on ***Raj Kumar v. Ajay Kumar, 2011 ACJ 1 (SC),*** counsel stated that the Apex Court had given several guidelines in the said case regarding the assessment of disability in case of injury and had

categorically held that while computing future loss of earning 1/3 rd or any other percentage to be deducted was not proper and had directed that it differs on the facts and circumstances of each case and only in a fatal case it was necessary to make the said deduction. Counsel for the appellant prayed for setting aside the impugned award judgment and prayed that appropriate amount be awarded to the claimant.

Counsel for the respondent insurance company, on the other hand, has vehemently opposed the grounds of limitation raised by the counsel for the appellant and stated that no permission was required to challenge the findings on the award. In fact he stated that there was no need to file cross-objections. By placing reliance on ***Ravinder Kumar Sharma v. State of Assam, AIR 1999 SC 3571,*** learned counsel stated that Apex Court had held that respondent can always question adverse findings against it without filing of cross- objections, it is optional and not mandatory. Counsel for the respondent vehemently urged the fact that there had been excessive amount assessed due to loss of earning capacity and relying on Schedule I to the Workmen's Compensation Act. Counsel stated that only 15 per cent loss of earning capacity ought to have been calculated. He, however, considered the fact that the Tribunal had erred in applying the appropriate multiplier and multiplier of 17 ought to have been applied. He also fully justified the medical expenses awarded by the Tribunal since he stated that there was no evidence produced by the claimant. He stated that only a marginal enhancement was required under the circumstances. He, however, fully supported the amount awarded and prayed for dismissal of the appeal.

On considering above submissions, the evidence on record and the impugned award, I find that the cross-objections filed by the respondent insurance company are time-barred since the notices of the appeal were served on the respondent No.3 and learned counsel has filed power on 3.1.2006 whereas the cross-objections have been filed on 12.9.2006 and I also place reliance on ***Ranjeet Singh v. Bhagwan, 2007 ACJ 1629 (MP),*** whereas counsel for respondent insurance company has relied on ***Ravinder Kumar Shama*** (supra) , which is of no help to him since matter pertained to a decree passed by a Civil Court and there was no bar as under section 170 of the Motor Vehicles Act.

•

143. MOTOR VEHICLES ACT, 1988 – Section 168

(i) The claims tribunal has a duty to award a just, equitable, fair and reasonable compensation, irrespective of the claim made in the claim petition.

(ii) Assessment of compensation – Future prospects – Can a person who was self-employed or engaged on fixed wages may also get advantage of formula of increase of income for future prospects like a person who was in a permanent job as adopted in *Sarla Verma's case* ? Held, Yes, at the rate of 50% of actual

income for persons below 40 years, 30% of actual income for age group of 40 to 50 years and in addition thereto, 15% for age group of 50 to 60 years – Actual income means income after deducting the tax.

(iii) Assessment of compensation – Consortium and funeral expenses – It would only be just and reasonable that the Tribunals award at least Rs.1 lakh towards loss of consortium.

At least an amount of Rs. 25,000/- should be awarded in the head of funeral expenses, in the absence of evidence to the contrary for higher expenses.

(iv) Consortium – What is? Consortium is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affections and sexual relation his or her mate.

(v) The ratio of a decision of this court on a legal issue is a precedent – But an observation made by this court, mainly to achieve uniformity and consistency on a socio-economic issue, as contrasted from a legal principle, though a precedent, can be, and in fact ought to be, periodically revisited.

(*Readers are advised to read to Reshma Kumari v. Madan Mohan, 2013 ACJ 1253 (Three Judges Bench) for future prospects)*

Rajesh and others v. Rajbir Singh and others
Judgment dated 12.04.2013 passed by the Supreme Court in C.A. No. 3860 of 2013, reported in 2013 ACJ 1403 (Three-Judge Bench)

Extracts from Judgment:

Since the court in ***Santosh Devi v. National Insurance Co. Ltd., 2012 ACJ 1428 (SC),*** actually intended to follow the principle in the case of salaried persons as laid down in ***Sarla Verma v. Delhi Transport Corporation, 2009 ACJ 1298 (SC)***, and to make it applicable also to self-employed and persons on fixed wages, it is clarified that the increase in the case of those groups is not 30 per cent always; it will also have a reference to the age. In other words, in the case of self-employed or persons with fixed wages, in case the deceased victim was below 40 years, there must be an addition of 50 per cent to the actual income of the deceased while computing future prospects. Needless to say that the actual income should be income after paying the tax, if any. Addition should be 30 per cent, in case the deceased was in the age group of 40 to 50 years.

In ***Sarla Verma's case*** (supra), it has been stated that in the case of those above 50 years, there shall be no addition. Having regard to the fact that in the case of those self-employed or on fixed wages, where there is normally no age of superannuation, we are of the view that it will only be just and equitable to provide an addition of 15 per cent in the case where the victim is between the age group of 50 and 60 years so as to make the compensation just, equitable, fair and reasonable. There shall normally be no addition thereafter.

In a report on accident, there is no question of any reference to any claim for damages, different heads of damages or such other details. It is the duty of the Tribunal to build on that report and award just, equitable, fair and reasonable compensation with reference to the settled principles on assessment of damages. Thus, on that ground also we hold that the Tribunal/ court has a duty, irrespective of the claims made in the application, if any, to properly award a just, equitable, fair and reasonable compensation, if necessary, ignoring the claim made in the application for compensation.

The ratio of a decision of this court on a legal issue is a precedent. But an observation made by this court, mainly to achieve uniformity and consistency on a socio-economic issue, as contrasted from a legal principle, though a precedent, can be, and in fact ought to be, periodically revisited, as observed in ***Santosh Devi*** (supra). We may, therefore, revisit the practice of awarding compensation under conventional heads:

(i) loss of consortium to the spouse;

(ii) loss of love, care and guidance to children; and

(iii) funeral expenses.

It may be noted that the sum of Rs. 2,500 to Rs. 10,000 under those heads was fixed several decades ago and having regard to inflation factor, the same needs to be increased. In ***Sarla Verma's*** (supra) it was held that compensation for loss of consortium should be in the range of Rs. 5,000 to Rs. 10,000. In legal parlance, 'consortium' is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., which the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world, more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the further years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least Rs. 1,00,000 towards loss of consortium.

We may also take judicial notice of the fact that the Tribunals have been quite frugal with regard to award of compensation under the head 'funeral expenses'. The 'price index', it is a fact, has gone up in that regard also. The

head ‘funeral expenses’ does not mean the fee paid in the crematorium or the fee paid for the use of space in the cemetery. There are many other expenses in connection with funeral and, if the deceased is follower of any particular religion, there are several religious practices and conventions pursuant to death in a family. All those are quite expensive. Therefore, we are of the view that it will be just, fair and equitable, under the head of ‘funeral expenses’, in the absence of evidence to the contrary for higher expenses, to award at least an amount of Rs. 25,000.

•

144. MURDER TRIAL – Circumstantial evidence – Murder of wife – Circumstances are:

(i) The premises had been taken on rent by accused from landlady.

(ii) The landlady lodged an FIR after hearing commotion in rented premises.

(iii) The police found house of accused locked from outside. It was broken and opened in presence of witnesses.

(iv) Dead-body of the wife of the accused was found on the ground with a pillow on her face.

(v) Accused had absconded for long.

(vi) He did not take plea of alibi and was unable to explain where he was on the fateful night, and how the door was locked from outside.

(vii) He had not taken any step to report to the police, the unnatural death of his wife.

(viii) There was suspicion in the mind of the accused regarding infidelity.

There was an unbroken chain of circumstances proved beyond all reasonable doubt – Conviction held proper.

Sooguru Subrahmanyam v. State of Andhra Pradesh

Judgment dated 04.04.2013 passed by the Supreme Court in Criminal Appeal No. 164 of 2008, reported in (2013) 4 SCC 244

Extracts from Judgment:

It is to be borne in mind that suspicion pertaining to fidelity has immense potentiality to commit irreversible wrongs as it corrupts the mind and corrodes the sense of rational thinking and further allows liberty to the mind to pave the path of evil. In fact, it brings in baseness. It quite often impures the mind, takes it to the devil’s den and leads one to do unjust acts than just deeds. In any case, it does not give licence to commit murder. Thus, the submission pertaining to the absence of motive has no substance.

In view of the aforesaid analysis, we conclude and hold that all the links in the chain of evidence are established beyond reasonable doubt and the

established circumstances are consistent with the singular hypothesis that the accused is guilty of the crime and it is totally inconsistent with his innocence. We have said so on the basis of the pronouncements in ***Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622, Padala Veera Reddy v. State of A.P., AIR 1990 SC 79, Balwinder Singh v. State of Punjab, AIR 1996 SC 607, Harishchandra Ladaku Thange v. State of Maharashtra AIR 2007 SC 2957*** and ***Jagroop Singh State of Punjab AIR 2012 SC 2600.***

•

***145. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 141**
CRIMINAL PROCEDURE CODE, 1973 – Section – 200

(i) Cognizance – Public Servant – Every employee of a Govt. Company is Public Servant entitled to exemption under Clause (a) of proviso to Section 200 of Cr.P.C. with regard to complaint relating to offence under Section 138 of Act, 1881.

(ii) Notice to Company – A demand notice under Section 138 sent to the Director of the Company, signing cheque on its behalf, amounts to notice to the Company itself.

(iii) Winding up of Company – A company cannot escape from penal liability under section 138 of the N.I. Act, on the premise that a petition for winding up of the Company was presented prior to the company being called upon by a notice to pay the amount.

(iv) Vicarious Liability – It is not necessary to reproduce the language of Section 141 verbatim in complaint – If the substance of the allegations made in the complaint fulfills the requirements of section 141, the complaint has to proceed and is required to be proceeded with – Hyper-technical approach should not be adopted so as to quash the same.

(v) Vicarious Liability – Resignation – Acceptance of resignation of the Director would not assume importance, as the complainant may still prove that change in the management of the Company was effected only to avoid constructive liability.

Arjun Dev Nagpal v. Madhya Pradesh State Industrial Development Corporation Limited
Judgment dated 31.10.2012 passed by the High Court of M.P. in M.Cr. C. No. 12847 of 2011, reported in ILR (2013) M.P. S.N. 1

•

146. REGISTRATION ACT, 1908 – Section 17
Document, whether compulsorily registerable or not – If rights are relinquished/extinguished/created in a property which is worth more than Rs. 100/-, it should be registered – Mere lists of property do not form an instrument of partition, and therefore, do not require any registration.

Dinesh Kumar & ors. v. Smt. Sarveshari & ors.
Order dated 19.12.2012 passed by the High Court of M.P. in W.P. No. 6609 of 2012, reported in ILR (2013) M.P. 345

Extracts from Order:

In ***Narayan Sakharam Patil v. Co-operative Central Bank Malkapur, AIR 1938 Nag 434,*** the Division Bench of this Court has held that mere lists of property do not form an instrument of partition, and therefore, does not require any registration. However, what is required to be determined is whether these documents are mere lists or in themselves purport to create, declare, assign, limit or extinguish any right, title or interest. In a property which is admittedly over Rs.100 of value, if any right is created, declared, assigned, extinguished etc., registration is necessary. The same view is followed in ***Roshan Singh and others v. Zile Singh and others, AIR 1988 SC 881.*** The principle of law laid down is the same i.e. nature of the document which will determine whether it was required to be registered.

Applying the aforesaid tests on the aforesaid document would show that certain rights are extinguished and few are created in favour of the other brothers. A microscopic reading of document 34 (A) shows that rights are relinquished/extinguished/created and declaration in this regard is made. Thus, the document aforesaid is not only a list of events of earlier partition, but in fact and in effect is a document which created extinguished rights etc. Thus, it should have been registered. I find no legal flaw in the order of the Board of Revenue wherein it is held that in absence of registration of this document, no rights are created in favour of the petitioners. Since no rights are created, the petitioners, by no stretch of imagination, can enter into the shoes of a 'person interested', and therefore, they were not required to be noticed by the Tahsildar. This finding of Board of Revenue is in accordance with law and does not require any interference from this Court. The petitioner although has relied on certain judgments including the judgment in ***Suresh Kumar Agarwal v. State of M.P., 2011 (3) MPLJ 91***, but a detailed examination of this judgment would show that it is based on the aforesaid judgment of Nagpur Bench in ***Narayan Sakharam Patil*** (supra). This Court has not deviated from the principle of law laid down by the Nagpur Bench.

•

147. SPECIFIC RELIEF ACT, 1963 – Section 19
TRANSFER OF PROPERTY ACT, 1882 – Section 52
CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 10 and Order 22 Rule 10
(i) What is doctrine of lis pendens? It is well settled that the doctrine of lis pendens is a doctrine based on the ground that it is necessary for the administration of justice that the decision of a court in a suit should be binding not only on the litigating parties but on those who derive title pendente lite – The provision of this section does not indeed annul the conveyance or the

transfer otherwise but renders it subservient to the rights of the parties to a litigation.

(ii) Order 1 Rule 10 C.P.C. empowers the court to add any person as party at any stage of the proceeding if the person whose presence before the court is necessary or proper for effective adjudication of the issues involved in the suit.

(iii) It is manifest that a contract for specific performance may be enforced against the parties to the contract and the persons mentioned in the section 19 of the Specific Relief Act – Clause (b) of Section 19 makes it very clear that a suit for specific performance cannot be enforced against a person who is a transferee from the vendor for valuable consideration and without notice of the original contract which is sought to be enforced in the suit.

Thomson Press (India) Limited v. Nanak Builders and Investors Private Limited and others

Judgment dated 21.02.2013 passed by the Supreme Court in Civil Appeal No. 1518 of 2013, reported in (2013) 5 SCC 397

Extracts from Judgment:

It would be worth discussing some of the relevant laws in order to appreciate the case on hand. Section 52 of the Transfer of Property Act speaks about the doctrine of lis pendens. Section 52 reads as under:

> *"52. Transfer of property pending suit relating thereto* – During the pendency in any court having authority within the limits of India excluding the State of Jummu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under the decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.
>
> *Explanation.* – For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or

> has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

It is well settled that the doctrine of lis pendens is a doctrine based on the ground that it is necessary for the administration of justice that the decision of a court in a suit should be binding not only on the litigating parties but on those who derive title pendente lite. The provision of this section does not indeed annul the conveyance or the transfer otherwise, but to render it subservient to the rights of the parties to a litigation.

Discussing the principles of lis pendens, the Privy Council in ***Gouri Dutt Maharaj v. SK. Sukur Mohammed, AIR 1948 PC 147*** observed as under:

> ".... The broad purpose of Section 52 is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. The applicability of the section cannot depend on matters of proof or the strength or weakness of the case on one side or the other in bona fide proceedings. To apply any such test is to misconceive the object of the enactment and, in the view of the Board, the learned Subordinate Judge was in error in this respect in laying stress, as he did, on the fact that the agreement of 8-6-1932, had not been registered."

In ***Kedar Nath Lal v. Ganesh Ram, AIR 1970 SC 1717*** this Court referred the earlier decision in ***Samarendra Nath Sinha v. Krishna Kumar Nag, AIR 1967 SC 1440*** and observed:

> "... The purchaser pendent elite under this doctrine is bound by the result of the litigation on the principle that since the result must bind the party to it so must it bind the person deriving his right, title and interest from or through him. This principle is well illustrated in ***Radhamadhub Holder v. Monohur Mookerji (1887-88) 15 IA 97*** where the facts were almost similar to those in the instant case. It is true that Section 52 strictly speaking does not apply to involuntary alienations such as court sales but it is well established that the principle of lis pendens applies to such alienations. (See: ***Nilakant Banerji v. Suresh Chunder Mullick, (1884-85) 12 IA 171*** and ***Moti Lal v. Karrab-ul-Din, (1896-97) 24 IA 170, (Samarendra Nath case*** (supra***)***.

The aforesaid Section 52 of the Transfer of Property Act again came up for consideration before this Court in ***Rajender Singh v. Santa Singh, AIR 1973 SC 2537*** and Their Lordships with approval of the principles laid down in ***Jayaram Mudaliar v. Ayyaswami, (1972) 2 SCC 200*** reiterated:

> "The doctrine of lis pendens was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court, in which a dispute on rights or interests in immovable property is pending, by private dealings which may remove the subject-matter of litigation from the ambit of the court's power to decide a pending dispute or frustrate its decree. Alienees acquiring any immovable property during a litigation over it are held to be bound, by an application of the doctrine, by the decree passed in the suit even though they may not have been impleaded in it. The whole object of the doctrine of lis pendens is to subject parties to the litigation as well as others, who seek to acquire rights in immovable property, which are the subject-matter of a litigation, to the power and jurisdiction of the court so as to prevent the object of a pending action from being defeated."

In the light of the settled principles of law on the doctrine of lis pendens, we have to examine the provisions of Order 1 Rule 10 of the Code of Civil Procedure. Order 1 Rule 10 empowers the court to add any person as party at any stage of the proceedings if the person whose presence before the court is necessary or proper for effective adjudication of the issue involved in the suit.

At this juncture, we would also like to refer to Section 19 of the Specific Relief Act which reads as under:

> *"19. Relief against parties and persons claiming under them by subsequent title.* – Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against –
>
> (a) either party thereto;
>
> (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;
>
> (c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;
>
> (d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;
>
> (e) when the promoters of a company have, before its incorporation entered into a contract for the purpose of the

company and such contract is warranted by the terms of the incorporation, the company:

Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract."

From the bare reading of the aforesaid provision, it is manifest that a contract for specific performance may be enforced against the parties to the contract and the persons mentioned in the said section. Clause (b) of Section 19 makes it very clear that a suit for specific performance cannot be enforced against a person who is a transferee from the vendor for valuable consideration and without notice of the original contract which is sought to be enforced in the suit.

•

148. SUCCESSION ACT, 1925 – Section 63

Duty of plaintiff regarding suspicious circumstances of Will – If Will is surrounded by suspicious circumstances, it is the duty of plaintiff to remove them and if he fails to fulfill the duty i.e. fail to discharge his burden to remove the suspicious circumstances, the decree cannot be based on such Will.

Subhash Kumar Tiwari v. Shankerlal

Judgment dated 04.12.2012 passed by the High Court of M.P. in F.A. No. 747 of 2008, reported in 2013 (1) MPLJ 304

Extracts from Judgment:

In ***Balathandayutham v. Ezhilarasan, (2010) 5 SCC 770*** the Supreme Court has held that when a Will is surrounded by suspicious circumstances, the person propounding the Will has a very heavy burden to discharge and unless it is satisfactorily discharged, Courts will be reluctant to treat the document as the last Will of the testator.

The plaintiff has claimed his title over the suit property solely on the basis of Will, Ex.P1. We, therefore, have to examine whether the Will is surrounded by suspicious circumstances and the plaintiff has discharged his burden in removing them. Because if he has failed to do so, his suit will fail.

The Will, Ex.P.1, is handwritten and unregistered. The plaintiff in para 10 of his cross-examination has clearly admitted that Birji Bai due to old age was unable to speak and sign. Rekhlal Soni (P.W. 3) states that Birji Bai was aged 90 years and he had written the Will as told by her in the presence of Dr. Dayanand Joshi, Dalchand and Laxmi Prasad. He, however, says that Birji Bai did not dictate the Will. But there is no recital in the Will that it was read over and explained to her. Also Dr. Dayanand Joshi (P.W. 2), the only attesting witness examined by the plaintiff, says that he does not know who wrote the Will. Birji Bai was illiterate. It, therefore, cannot be held with certainty that Rekhlal Soni wrote what was actually told by Birji Bai more particularly when the plaintiff himself says that

she was unable to speak. The statement of Dr. Dayanand Joshi about his not knowing who wrote the Will also creates a suspicion that it was written in the presence of Birji Bai.

There is yet another reason which creates a suspicion that the plaintiff and his witnesses Dr. Dayanand Joshi and Rekhlal Soni are not speaking truth in respect of the execution of Will, Ex. P1. A closer look of the Will shows that the thumb impression of Birji Bai was obtained on a plain paper before it was actually written. We say so because we find that gaps between the lines of Will become smaller and smaller towards the end so as to adjust with the already obtained thumb impression despite there being sufficient space left in the paper. This mode of writing with no explanation by the plaintiff regarding narrowing of the gaps between the lines creates a very strong suspicious circumstance against the genuineness of the Will. In fact, it leads to an inference that the Will has been prepared fraudulently.

There is one more circumstance which creates a suspicion about execution of Will, Ex. P1, by Birji Bai in favour of the plaintiff. The plaintiff has admitted in his evidence that the defendant had been living with Birji Bai ever since he was 12 years of age. The plaintiff has also admitted that he lived separately from them at a place called Sarekha. The plaintiff even says that although his wife and children did not visit him, they visited the defendant who is in occupation of the suit property. The plaintiff then says that the cremation of Pooranlal was performed by the defendant. Dr. Dayanand Joshi has also deposed that the last rites of Birji Bai were performed by the defendant. From this evidence, it can safely be held that the love and affection of Birji Bai lay with the defendant. It is, therefore, difficult to believe that Birji Bai would execute her Will in favour of the plaintiff who has been living separately from her at a different place.

It is also to be noted that vide order 02.07.1993, Ex.P4, the Tahsildar in a revenue case has mutated the suit property in the name of defendant and the plaintiff's appeal against that order has been dismissed. There is a presumption of correctness of the proceedings before a quasi-judicial authority. The defendant being in possession has a title over the suit property against all except the one who has a better title.

The plaintiff solely relied on the Will, Ex. P1, to prove his title. But as earlier discussed the Will, Ex. P1, is not reliable and encircled by suspicious circumstances. The plaintiff has, thus, failed to prove any title over the suit property and his suit must fail.

•

149. TRANSFER OF PROPERTY ACT, 1882 – Section 108(e)
CONTRACT ACT, 1872 – Section 56

(i) Leased property was destroyed during the period of lease – The lease can be avoided at the option of lessee as per provision of Section 108 (e) of T.P. Act – If the lessee decides to retain his possession on the property, he will be liable to pay the rent for the said property.

(ii) Doctrine of Frustration – The doctrine given in section 56 of Contract Act is not applicable to the matters of lease because in a lease, the mutual rights and obligations of lessor and lessee arises under a transfer of property.

Shankar Prasad and others v. State of M.P. and others
Judgment dated 26.06.2012 passed by the High Court of M.P. in F.A. No. 30 of 1996, reported in 2013 (1) MPJR 55

Extracts from Judgment:

If during subsistence of lease period any material part of the property is wholly destroyed or rendered substantially and permanently unfit for the purpose for which it was let-out because of fire, the lease, at the option of the lessee, can be avoided and in this regard the aforesaid clause (e) of section 108 of T.P. Act applies. Indeed, the land upon which the godown was constructed was leased out to the 4th defendant and the godown will also include the land upon which the superstructure of the godown was built; therefore, since the possession of the land was still with the 4th defendant and it was never handed over to the plaintiff by the lessee holding the lease to be void, therefore, 4th defendant is liable to pay the rent for the period from July 1991 to 30.4.1992. In this regard I may profitably place reliance on the decision of Supreme Court in ***Raja Dhruv Dev Chand v. Raja Harmohinder Singh and another, AIR 1968 SC 1024***.

As a matter of fact, as it appears from the pleadings of the defendants that because the godown itself is not in existence, therefore, the question of making any payment of rent for the lease period does not arise. Indeed the defendants are raising the plea of doctrine of "frustration" which is applicable to section 56 of the Indian Contract Act, 1872. To me, this doctrine is not applicable as far as lease is concerned, because in a lease the mutual rights and obligations of lessor and lessee are settled subject to a contract to contrary by clause (e) to section 108 of the T.P. Act (see Transfer of Property Act by Mulla 8th edition page 856). The Supreme Court in ***Raja Dhruv Dev Chand*** (supra), in para 8 has also held that this doctrine cannot be extended by analogies borrowed from the English common law. By placing reliance on its earlier decision ***Satyabrata Ghose v. Mugneeram Bangur and Co., AIR 1954 SC*** 44 in para 13 it has been held by their Lordships in ***Raja Druv Dev Chand*** (supra), that authorities in the Courts in India have generally taken the view that section 56 of the Contract Act is not applicable when the rights and obligations of the parties arise under a transfer of property

under a lease. Therefore, according to me, the plea of doctrine of "contract of frustration" which has been taken by defendants (including 4th defendant) is not applicable in the present case.

•

150. WORDS AND PHRASES:

'Vis major' and 'force majeure' - meaning of and distinction between the phrases - 'vis major' is synonym to the "act of God i.e. the loss resulting immediately from a natural cause without human intervention and could not have been prevented by exercise of prudence, diligence and care; whereas, 'force majeure' indicates an event which is out of the control of human beings and prevent one or other party performing their contractual obligations i.e. the performance of the contractual obligations becomes impossible or impracticable due to an event or effect – It does not include the act of God or an act of nature by virtue of inevitable necessity.

Pan Steels Pvt. Ltd. v. M.P. State Electricity Board
Order Dated17.09.2012 passed by the High Court of M.P. in WP No. 4094 of 2005, reported in 2013(1) MPLJ 172

Extracts from Order

'Vis major' is synonym to the "act of God or vis-divina" meaning thereby the loss resulting immediately from a natural cause without the intervention of human beings and could not have been prevented by the exercise of prudence, diligence and care. It can safely be observed that any of the acts which includes violent gale of wind, an earthquake over and above by a natural and inevitable necessity, which is wholly beyond the control of human agency, human action or negligence or neglect of the human being. It can safely be observed that an act of the God, which cannot be prevented by the exercise of prudence, diligence and care of human being would be called a ***"vis major"***.

While 'force majeure' indicates an event which is out of the control of the human beings and prevent one or other party from performing their contractual obligations, meaning thereby that the performance of the contractual obligations becomes impossible or impracticable due to an event or effect. It also does not include the act of God or an act of nature by virtue of inevitable necessity. Thus, phrase "vis major" indicates an act and event not within the control of human beings or can be prevented by prudence, care and due diligence.

•

PART - III
CIRCULARS/NOTIFICATIONS

NOTIFICATIONS OF MINISTRY OF HOME AFFAIRS REGARDING RECIPROCAL ARRANGEMENTS WITH OTHER COUNTRIES FOR SERVICE OF PROCESSES IN CRIMINAL MATTERS

BANGLADESH

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 1801, dated 12th September, 2012.

No. S.O. 2150(E), dated September 12, 2012.- Whereas arrangements have been made by the Central Government with the Government of **the People's Republic of Bangladesh** for service or execution of summons or warrant in relation to criminal matters, on any person in the People's Republic of Bangladesh, and therefore, in pursuance of clause (ii) of sub-section (1) of **Section 105 of the Code of Criminal Procedure**, 1973 (2 of 1974), the Central Government hereby directs that-

(a) a summons to an accused person; or

(b) a warrant for the arrest of an accused person; or

(c) a summons to any person requiring him to attend and produce a document or other thing, or to produce it; or

(d) a search-warrant,

may be issued by a court in India, in duplicate, to the court, Judge or Magistrate having authority, under the law in force in that country, through the Central Authority in the Government of the People's Republic of Bangladesh directing that court, Judge or Magistrate to serve such summons or execute such warrant on the person named therein.

2. The Central Government further directs that such summons or warrant shall be sent to IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi, for transmission to the Central Authority in the People's Republic of Bangladesh.

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 1801, dated 12th September, 2012.

No. S.O. 2151(E), dated September 12, 2012.- Whereas arrangements have been made by the Central Government with the Government of the **People's Republic of Bangladesh** for services or execution of summons or warrant in relation to criminal matters, on any person in the People's Republic of Bangladesh, and therefore, in pursuance of sub-section (2) of Section 105 of

the Code of Criminal Procedure, 1973 (2 of 1974), the Central Government hereby specifies that a competent court, Judge or Magistrate in the People's Republic of Bangladesh having authority, under the law in force in that country, to issue a summons to an accused person, or a warrant for the arrest of an accused person, or summons to any person requiring him to attend and produce a document or other thing, or to produce it, as the court by which such summons or warrant may be issued to persons residing in India in relation to criminal matters.

2. The Central Government further directs that in a case where a summons or a search warrant received from the Government of the People's Republic of Bangladesh has been executed, the documents or things produced or things found in the search shall be forwarded to the court issuing the summons or search warrant through IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi, for transmission to the Central Authority in the People's Republic of Bangladesh.

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 1801, dated 12th September, 2012.

No. S.O. 2152(E), dated September 12, 2012.- Whereas arrangements have been made by the Central Government with the Government of **the People's Republic of Bangladesh** for service or execution of summons or warrant in relation to criminal matters, on any person in **the People's Republic of Bangladesh,** and therefore, in pursuance of sub-section (1) of Section 105-B of the Code of Criminal Procedure, 1973 (2 of 1974), the Central Government hereby directs that warrant from a court in India for arrest of a person to attend or produce a document or other thing, to be executed in any place in the People's Republic of Bangladesh shall be issued in the form annexed hereto and that such warrant shall be sent in duplicate to IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi, for transmission to the Central Authority in the People's Republic of Bangladesh.

FORM

Warrant to bring up a Witness

[See Section 105-B of the Code of Criminal Procedure, 1973]

To,

The Court.....! Judge or Magistrate (in the Government of the People's Republic of Bangladesh).

(Through the Central Authority, the Government of the People's Republic of Bangladesh).

Whereas complaint has been made before me that (name and description of the accused) of (address) has (or is suspected to have) committed an offence of (mention the offence concisely), and it appears to me that (name and description

of witness) is likely to give evidence concerning the said complaint; and, whereas, it appears that the said witness is residing within the local limits of your jurisdiction;

And whereas, I have good and sufficient reason to believe that the said witnesses will not attend or produce the following documents or other things unless compelled to do so :

(i) (The list of documents or things to be produced are to be given here).

I. ....., have the honour to request and hereby do request that for the reasons aforesaid and for the assistance of the said court, you will be pleased to cause the said (Name of the witness) to be arrested and also require such person to produce the document or things listed above, which may be in his/her possession and to forward the person in custody along with the documents or things to the undersigned through IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi.

Given under my hand and the seal of the court this .....day of .....20.....

Seal of the court Signature of the Judge/Magistrate

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 1801, dated 12th September, 2012.

No. S.O. 2153(E), dated September 12, 2012.- Whereas arrangements have been made by the Central Government with the Government of the People's Republic of Bangladesh for services or execution of summons or warrant in relation to criminal matters on any person in the People's Republic of Bangladesh, and therefore, in pursuance of sub-section (2) of Section 105-B of the Code of Criminal Procedure, 1973 (2 of 1974), the Central Government hereby directs that a summons or warrant, as the case may be, for attendance of a person during the investigation or inquiry in any criminal case, to be served or executed in any place in the People's Republic of Bangladesh shall be issued in Form A or Form B annexed hereto, as the case may be, and such summons or warrant shall be sent to IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi, for transmission to the Central Authority in the People's Republic of Bangladesh.

FORM A
Summons to Witness
[See sub-section (2) of Section 105-B of the Code of Criminal Procedure, 1973]

To,

.....

(Through the Central Authority in the Government of the People's Republic of Bangladesh).

Whereas an application has been made before me that (Name of the accused) of (address) has (or is suspected to have) committed the offence of (state the offence concisely with time and place) and it appears to me that you are likely to give material evidence or to produce any document or other thing for the prosecution;

You are hereby summoned to appear before the court on the ..... day of ..... at ..... AM/PM to produce such document or thing or to testify what you know concerning the matter of the said application, and not to depart then without the order of the court, and you are hereby warned that, if you shall without just cause neglect or refuse to appear on the said date, a warrant will be issued to compel your attendance.

Given under my hand and the seal of the court this ..... day of ..... 20 .....

Seal of the court Signature of the Judge/Magistrate

•

FORM B

Warrant to bring up a Witness

[See sub-section (2) of Section 105-B of the Code of Criminal Procedure, 1973]

To,

The Court/Judge/Magistrate in the Government of the People's Republic of Bangladesh

(Through the Central Authority in the Government of the People's Republic of Bangladesh)

Whereas, an application has been made before me that ..... (name and description of the accused) ..... of (address) has (or is suspected to have) committed an offence of .....(state the offence concisely with time and place) and it appears to me that ..... (name and description of witness) is likely to give material evidence or to produce any document or other thing for the prosecution; and whereas, the said witness is residing within the local limits of your jurisdiction; and whereas, I have good and sufficient reason to believe that the said witnesses will not attend the investigation or inquiry of the said case unless compelled to do so;

I, ..., have the honour to request and hereby do request that for the reasons aforesaid and for the assistance of the said court, you will be pleased to cause the said ..... (name of person) to be arrested and to forward the said person in custody to the undersigned, through IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi.

Given under my hand and the seal of the court this ..... day of ..... 20 .....

Seal of the court Signature of the Judge/Magistrate

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 1801, dated 12th September, 2012.

No. S.O. 2154(E), dated September 12, 2012.- Whereas arrangements have been made by the Central Government with the Government of the **People's Republic of Bangladesh** for taking the evidence of witnesses residing in the People's Republic of Bangladesh in relation to criminal matters in Courts of India, and therefore, in pursuance of sub-section (3) of Section 285 of **the Code of Criminal Procedure, 1973 (2 of 1974),** the Central Government hereby directs that-

(a) Commission for examination of witnesses in the People's Republic of Bangladesh shall be issued by the Courts in India in the Form annexed hereto, any competent Criminal Court of the People's Republic of Bangladesh having authority under the law in force in the People's Republic of Bangladesh; and

(b) such Commission shall be sent to IS-II Division for the Ministry of Home Affairs, Government of India, New Delhi, for transmission to the Central Authority in the Government of the People's Republic of Bangladesh.

FORM

Commission to Examine Witness Outside India

[See sub-section (3) of Section 285 of the Code of Criminal Procedure, 1973 (2 of 1974)]

In the Court of .....

.....

To,

.....

(Through the Ministry of Home Affairs, Government of India, New Delhi.)

Whereas it appears to me that the evidence of ..... is necessary for the ends of justice in case No. ..... vs. ..... in the Court of ..... and that such witness is residing within the local limits of your jurisdiction and his/her attendance cannot be procured without unreasonable delay, expense or inconvenience, I, have the honour to request and do hereby request that for the reasons aforesaid and for the assistance of the said court, you will be pleased to summon the said witness to attend at such time and place as you shall appoint and that you will cause such witness to be examined upon the interrogatories which accompany this Commission (for viva voce);

Any party to the proceeding may appear, before you by his/her counselor, agent or, if not in custody, in person, and may examine, cross-examine or re-examine (as the case may be) the said witness;

And, I, further have the honour to request that you will be pleased to cause the answers of the said witness to be reduced into writing and all books, letters, papers and documents produced upon such examination to be duly marked for identification and that you will be further pleased to authenticate such examination by your official seal and signature and to return the same together with this Commission to the undersigned through IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi.

Given under my hand and the seal of the Court this ..... day of ..... 20 .....

Seal of the court Signature of the Judge/Magistrate

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 1801, dated 12th September, 2012.

No. S.O. 2155(E), dated September 12, 2012.- Whereas arrangements have been made by the Central Government with the Government of the **People's Republic of Bangladesh** for service or execution of summons or warrant in relation to criminal matters on any person in the People's Republic of Bangladesh, and, therefore, in pursuance of clause (b) of sub-section 290 of **the Code of Criminal Procedure, 1973 (2 of 1974),** the Central Government hereby specifies all courts, Judges or Magistrates exercising jurisdiction in the People's Republic of Bangladesh having authority, under the law in force in the People's Republic of Bangladesh as the courts by whom Commission for the examination of witnesses residing in India may be issued.

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 1801, dated 12th September, 2012.

No. S.O. 2156(E), dated September 12, 2012.- Whereas arrangements have been made by the Central Government with the Government of the **People's Republic of Bangladesh** for service or execution of summons or warrant in relation to criminal matters on any person in the People's Republic of Bangladesh, and therefore, in exercise of the powers conferred by Section 105-L of **the Code of Criminal Procedure, 1973 (2 of 1974),** the Central Government hereby directs that the provisions of Chapter VII-A of the said Code shall apply without any condition, exception or qualification in relation to the People's Republic of Bangladesh with effect from the date of publication of this notification in the Official Gazette.

•

AUSTRALIA

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 2016, dated 11th October, 2012

No. S.O. 2434 (E), dated October 11, 2012.- Whereas arrangements have been made by the Central Government with the Government of Australia for service or execution of summons or warrant in relation to criminal matters, on any person in Australia and therefore, in pursuance of clause (ii) of sub section (1) of Section 105 of the Code of Criminal Procedure, 1973 (2 of 1974), the Central Government hereby directs that-

(a) a summons to an accused person; or

(b) a warrant for the arrest of an accused person; or

(c) a summons to any person requiring him to attend and produce a document or other thing, or to produce it; or

(d) a search- warrant,

may be issued by a court in India, in duplicate, to the court, Judge or Magistrate having authority, under the law in force in that country, through the Central Authority in the Government of Australia directing that court, Judge or Magistrate to serve such summons or execute such warrant on the person named therein.

2. The Central Government further directs that such summons or warrant shall be sent to IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi, for transmission to the Central Authority in Australia.

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 2016, dated 11th October, 2012.

No. S.O. 2435(E), dated October 11, 2012.- Whereas arrangements have been made by the Central Government with **the Government of Australia** for service or execution of summons or warrant in relation to criminal matters on any person in Australia, and therefore, in pursuance of sub-section (2) of Section 105 of **the Code of Criminal Procedure, 1973** (2 of 1974), the Central Government hereby specifies that a competent court, Judge or Magistrate in Australia having authority, under the law in force in that country, to issue a summons to an accused person, or a warrant for the arrest of an accused person, or summons to any person requiring him to attend and produce a document or other thing, or to produce it, as the court by which such summons or warrant may be issued to persons residing in India in relation to criminal matters.

2. The Central Government further directs that in a case where a summons or a search warrant received from the Government of Australia has been executed, the documents or things produced or things found in the search shall be forwarded to the court issuing the summons or search warrant through IS-II

Division of the Ministry of Home Affairs, Government of India, New Delhi, for transmission to the Central Authority in Australia.

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 2016, dated 11th October, 2012.

No. S.O. 2436(E), dated October 11, 2012.- Whereas arrangements have been made by the Central Government with **the Government of Australia** for service or execution of summons or warrant in relation to criminal matters on any person in the Australia, and therefore, in pursuance of sub-section (1) of Section 105-B of **the Code of Criminal Procedure, 1973** (2 of 1974), the Central Government hereby directs that a warrant for arrest of a person to attend or produce a document or other thing issued by a court in India and to be executed by a Competent Court, Judge or Magistrate in any place in Australia shall be issued in the Form annexed hereto and such warrant shall be sent in duplicate to IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi, for transmission to the Central Authority in Australia.

FORM

Warrant to bring up a Witness

[See Section 105-B of the Code of Criminal Procedure, 1973]

To,

The Court.....! Judge or Magistrate (in the Government of Australia).

(Through the Central Authority in the Government of Australia).

Whereas complaint has been made before me that (name and description of the accused) of (address) has (or is suspected to have) committed an offence of (mention the offence concisely). And it appears to me that (name and description of witness) is likely to give evidence concerning the said complaint; and, whereas, it appears that the said witness is residing within the local limits of your jurisdiction;

And whereas, I have good and sufficient reason to believe that the said witnesses may not attend or produce the following documents or other things unless compelled to do so:

(i) (The list of documents or things to be produced are to be given here).

I, ... have the honour to request and hereby do request that for the reasons aforesaid and for the assistance of the said court, you will be pleased to cause the said (Name of the witness) to be arrested and also require such person to produce the document or things listed above, which may be in his/her possession and to forward the person in custody along with the documents or things to the undersigned through IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi.

Given under my hand and the seal of the court this .....day of .....20.....

Seal of the court Signature of the Judge/Magistrate

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 2016, dated 11th October, 2012.

No. S.O. 2437(E), dated October 11, 2012.- Whereas arrangements have been made by the Central Government with **the Government of Australia** for service or execution of summons or warrant in relation to criminal matters on any person in Australia, and therefore, in pursuance of sub-section (2) of Section 105-B of **the Code of Criminal Procedure, 1973** (2 of 1974), the Central Government hereby directs that a summons or warrant, as the case may be, against a person who is in any place in Australia and required in connection with the investigation or inquiry of an offence in any criminal case in India shall be issued in duplicate in Form A or, as the case may be, in Form B annexed hereto, and such summons or warrant, as the case may be, shall be sent to IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi, for transmission to the Central Authority in Australia.

FORM A
Summons to Witness
[See sub-section (2) of Section 105-B of the Code of Criminal Procedure, 1973]

To,

.....

(Through the Central Authority in the Government of Australia).

Whereas an application has been made before me that (Name of the accused) of (address) has (or is suspected to have) committed the offence of (state the offence concisely with time and place), and it appears to me that you are likely to give material evidence or to produce any document or other thing for the prosecution;

You are hereby summoned to appear before the court on the .....day of .....at .....AM/PM to produce such document or thing or to testify what you know concerning the matter of the said application, and not to depart then without the order of the court and you are hereby warned that. If you shall without just cause neglect or refuse to appear on the said date, a warrant will be issued to compel your attendance.

Given under my hand and the seal of the court this .....day of ..... 20 .....

Seal of the court Signature of the Judge/Magistrate

•

FORM B
Warrant to Bring up a Witness
[See sub-section (2) of Section 105-B of the Code of Criminal Procedure, 1973]

To,

The Court/Judge/Magistrate in the Government of Australia

(Through the Central Authority in the Government of Australia)

Whereas an application has been made before me that ..... (name and description of the accused) .....of (address) has (or is suspected to have) committed an offence of ..... (state the offence concisely with time and place). And it appears to me that ..... (name and description of witness) is likely to give material evidence or to produce any document or other thing for the prosecution;

And whereas, the said witness is residing within the local limits of your jurisdiction;

And whereas, I have good and sufficient reason to believe that the said witnesses will not attend the investigation or inquiry of the said case unless compelled to do so;

I, ... have the honour to request and hereby do request that for the reasons aforesaid and for the assistance of the said court. You will be pleased to cause the said ..... (name of person) to be arrested and to forward the said person in custody to the undersigned, through IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi.

Given under my hand and the seal of the court this .....day of .....20.....

Seal of the court Signature of the Judge/Magistrate

●

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 2016 dated 11th October, 2012.

No. S.O. 2438(E), dated October 11, 2012.- Whereas arrangements have been made by the Central Government with **the Government of Australia** for taking the evidence of witnesses residing in Australia in relation to criminal matters in courts of India, and therefore, in pursuance of sub-section (3) of Section 285 of **the Code of Criminal Procedure, 1973** (2 of 1974), the Central Government hereby directs that-

(a) the Commission for examination of witnesses in Australia shall be issued by the Courts in India in the Form annexed hereto, to any competent Criminal Court of Australia having authority under the law in force in Australia; and

(b) such Commission shall be sent to IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi, for transmission to the Central Authority in the Government of Australia.

FORM
Commission to Examine Witness Outside India
[See sub-section (3) of Section 285 of the Code of Criminal Procedure, 1973 (2 of 1974)]

In the Court of .....

.....

To,

.....

(Through the Ministry of Home Affairs, Government of India, New Delhi.)

Whereas it appears to me that the evidence of ..... is necessary for the ends of justice in Case No..... vs. ..... in the Court of jurisdiction and his/her attendance cannot be procured without unreasonable delay, expense or inconvenience, I, have the honour to request and do hereby request that for the reasons aforesaid and for the assistance of the said court, you will be pleased to summon the said witness to attend at such time and place as you shall appoint and that you will cause such witness to be examined upon the interrogatories which accompany this Commission (for viva voce);

Any party to the proceeding may appear before you by his/her Counselor agent or, if not in custody, in person, and may examine, cross-examine or re-examine (as the case may be) the said witness;

And, I, further have the honour to request that you will be pleased to cause the answers of the said witness to be reduced into writing and all books, letters, papers and documents produced upon such examination to be duly marked for identification and that you will be further pleased to authenticate such examination by your official seal and signature and to return the same together with this Commission to the undersigned through IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi.

Given under my hand and the seal of the court this ..... day of .....20.....

Seal of the court Signature of the Judge/Magistrate

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 2016, dated 11th October, 2012.

No. S.O. 2439(E), dated October 11, 2012.- Whereas arrangements have been made by the Central Government with **the Government of Australia** for service or execution of summons or warrant in relation to criminal matters on any person in Australia, and therefore, in pursuance of clause (b) of sub-section (2) of Section 290 of **the Code of Criminal Procedure, 1973** (2 of 1974), the Central Government hereby specifies all Courts, Judges or Magistrates exercising jurisdiction in Australia and having authority under the law in force in Australia as the Courts, Judges or Magistrates by whom Commission for the examination of witnesses residing in India may be issued.

●

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 2016, dated 11th October, 2012.

No. S.O. 2440(E), dated October 11, 2012.- Whereas arrangements have been made by the Central Government with the Government of Australia for service or execution of summons or warrant in relation to criminal matters on any person in Australia, and therefore, in exercise of the powers conferred by Section 105-L of **the Code of Criminal Procedure, 1973** (2 of 1974) the Central Government hereby directs that the provisions of Chapter VII-A of the said Code shall apply without any condition, exception or qualification in relation to Australia with effect from the date of publication of this notification in the Official Gazette.

•

IRAN

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 2017, dated 11th October, 2012.

No. S.O. 2441(E), dated October 11, 2012.- Whereas reciprocal arrangements have been made by the Central Government with **the Government of the Islamic Republic of Iran** for service, or execution of summons or warrant in relation to criminal matters, and therefore, in exercise of the powers conferred by clause (ii) of sub-section (1) of Section 105 of **the Code of Criminal Procedure, 1973** (2 of 1974), the Central Government hereby directs that-

(a) a summons to an accused person; or

(b) a warrant for the arrest of an accused person; or

(c) a summons to any person requiring him to attend and produce a docu ment or other thing, or to produce it; or

(d) a search- warrant,

may be issued by a court in India, in duplicate, to the court, Judge or Magistrate having authority, under the law in force in the Islamic Republic of Iran, through the Central Authority i.e. Ministry of Justice in the Government of that country directing that Court, Judge or Magistrate to serve such summons or execute such warrant on the person named therein residing in the Islamic Republic of Iran.

2. The Central Government further directs that such summons or warrant shall be sent to IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi, for transmission to the Central Authority in the Islamic Republic of Iran i.e. Ministry of Justice.

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 2017, dated 11th October, 2012.

No. S.O. 2442(E), dated October 11, 2012.- Whereas reciprocal arrangements have been made by the Central Government with **the Government of the Islamic Republic of Iran** for service or execution of summons or warrant in relation to criminal matters, and therefore, in exercise of the powers conferred by sub-section (2) of Section 105 of **the Code of Criminal Procedure, 1973** (2 of 1974), the Central Government hereby specifies that a competent Court, Judge or Magistrate in the Islamic Republic of Iran having authority, under the law in force in that country, to issue a summons to an accused person, or a warrant for the arrest of an accused person, or summons to any person requiring him to attend and produce a document or other thing, or to produce it, as the court by which such summons or warrant may be issued to persons residing in India in relation to criminal matters.

2. The Central Government further directs that in a case where a summons or a search warrant received from the Government of the Islamic Republic of Iran has been executed, the documents or things produced or things found in the search shall be forwarded to the court issuing the summons or search warrant through IS-II Division the Ministry of Home Affairs, Government of India, New Delhi, for transmission to the Central Authority in the Islamic Republic of Iran i.e. Ministry of Justice.

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 2017, dated 11th October, 2012.

No. S.O. 2443(E), dated October 11, 2012.- Whereas reciprocal arrangements have been made by the Central Government with **the Government of the Islamic Republic of Iran** for service or execution of summons or warrant in relation to criminal matters, on any person in the Islamic Republic of Iran, and therefore, in exercise of the powers conferred by sub-section (1) of Section 105-B of **the Code of Criminal Procedure, 1973** (2 of

1974), the Central Government hereby directs that a warrant from a Court in India for arrest of a person to attend or produce a document or other thing, to be executed in any place in the Islamic Republic of Iran, shall be issued in the form annexed hereto and that such warrant shall be sent in duplicate to IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi, for transmission to the Central Authority in the Islamic Republic of Iran i.e. Ministry of Justice.

FORM

Warrant to bring up a Witness

[See Section 105-B of the Code of Criminal Procedure, 1973]

To,

The Court ...../Judge or Magistrate

in the Government of the Islamic Republic of Iran.

(Through the Central Authority, the Government of the Islamic Republic of Iran i.e. Ministry of Justice).

Whereas complaint has been made before me that (name and description of the accused) of (address) has (or is suspected to have) committed an offence of (mention the offence concisely), and it appears to me that (name and description of witness) is likely to give evidence concerning the said complaint;

And, whereas, it appears that the said witness is residing within the local limits of your jurisdiction;

And whereas, I have good and sufficient reason to believe that the said witnesses will not attend or produce the following documents or other things unless compelled to do so:

(i) (The list of documents or things to be produced are to be given here).

I, ... have the honour to request and hereby do request that for the reasons aforesaid and for the assistance of the said court, you will be pleased to cause the said witness (name of the witness) to be arrested and also require such person to produce the document or things listed above, which may be in his/her possession and to forward the person in custody along with the documents or things to the undersigned through IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi.

Given under my hand the seal of the court this ..... day of .....20.....

Seal of the court Signature of the Judge/Magistrate

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 2017, dated 11th October, 2012.

No. S.O. 2444(E), dated October 11, 2012.- Whereas reciprocal arrangements have been made by the Central Government with **the Government of the Islamic Republic of Iran** for service or execution of summons or warrant in relation to criminal matters on any person in the Islamic Republic of Iran, and therefore, in exercise of the powers conferred by sub-section (2) of Section 105-B of **the Code of Criminal Procedure, 1973** (2 of 1974), the Central Government hereby directs that a summons or warrant, as the case may be, requiring attendance of a person during the investigation or inquiry in any criminal case, to be served or executed in any place in the Islamic Republic of Iran, shall be issued in Form A or Form B annexed hereto, as the case may be, and such summons or warrant shall be sent to IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi, for transmission to the Central Authority in the Islamic Republic of Iran i.e. Ministry of Justice.

FORM A
Summons to Witness
[See sub-section (2) of Section 105-B of the Code of Criminal Procedure, 1973]

To,

.....

(Through the Central Authority in the Government of the Islamic Republic of Iran, i.e. Ministry of Justice)

Whereas an application has been made before me that (Name of the accused) of (address) has (or is suspected to have) committed the offence of (state the offence concisely with time and place), and it appears to me that you are likely to give material evidence or to produce any document or other thing for the prosecution;

Therefore, you are hereby summoned to appear before the court on the ..... day of .....at ..... AM/PM to produce such document or thing or to testify what you know concerning the matter of the said application, and not to depart then without the order of the court, and you are hereby warned that if you shall, without just cause, neglect or refuse to appear on the said date, a warrant will be issued to compel your attendance.

Given under my hand and the seal of the court this ..... day of .....20 .....

Seal of the court Signature of the Judge/Magistrate

•

FORM B
Warrant to bring up a Witness
[See sub-section (2) of Section 105-B of the Code of Criminal Procedure, 1973]

To,

The Court/Judge/Magistrate in the Government of the Islamic Republic of Iran

(Through the Central Authority in the Government of the Islamic Republic of Iran i.e. Ministry of Justice) Whereas, an application has been made before me that .....(name and description of the accused)..... of (address) has (or is suspected to have) committed an offence of ..... (state the offence concisely with time and place), and it appears to me that..... (name and description of witness) is likely to give material evidence or to produce any document or other thing for the prosecution;

And whereas, the said witness is residing within the local limits of your jurisdiction;

And whereas, I have good and sufficient reason to believe that the said witnesses will not attend the investigation or inquiry of the said case unless compelled to do so;

I, ... have the honour to request and hereby do request that for the reasons aforesaid and for the assistance of the said court, you will be pleased to cause the said witness (name of person) to be arrested and to forward the said person in custody to the undersigned, through IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi.

Given under my hand and the seal of the court this ..... day of .....20 .....

Seal of the court Signature of the Judge/Magistrate

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 2017, dated 11th October, 2012.

No. S.O. 2445(E), dated October 11, 2012.- Whereas reciprocal arrangements have been made by the Central Government with **the Government of the Islamic Republic of Iran** for taking the evidence of witnesses residing in the Islamic Republic of Iran in relation to criminal matters in courts of India, and therefore, in exercise of the powers conferred by sub-section (3) of Section 285 of the Code of Criminal Procedure, 1973 (2 of 1974), the Central Government hereby directs that-

(a) Commission for examination of witnesses in the Islamic Republic of Iran shall be issued by the courts in India in the Form annexed hereto, to any competent Criminal Court of the Islamic Republic of Iran having authority under the law in force in the Islamic Republic of Iran; and

(b) such Commission shall be sent to IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi, for transmission to the Central Authority in the Government of the Islamic Republic of Iran i.e. Ministry of Justice.

FORM
Commission to Examine Witness Outside India
[See sub-section (3) of Section 285 of the Code of Criminal Procedure, 1973 (2 of 1974)]

In the Court of .....

.....

To,

.....

(Through the Ministry of Home Affairs,

Government of India.

New Delhi.)

Whereas it appears to me that the evidence of (name of witness) is necessary for the ends of justice in case No. ..... vs. ..... in the court of ..... and that such witness is residing within the local limits of your jurisdiction and his/her attendance cannot be procured without unreasonable delay, expense or inconvenience;

Therefore, I have the honour to request and do hereby request that for the reasons aforesaid and for the assistance of the said court, you will be pleased to summon the said witness to attend at such time and place as you shall appoint and that you will cause such witness to be examined to upon the interrogatories which accompany this Commission (for viva voce);

And, any party to the proceeding may appear before you by his/her counselor agent or, if not in custody, in person and may examine, cross-examine or re-examine (as the case may be) the said witness;

And, I, further have the honour to request that you will be pleased to cause the answers of the said witness to be reduced into writing and all books, letters, papers and documents produced upon such examination to be duly marked for identification and that you will be further pleased to authenticate such examination by your official seal and signature and to return the same together with this Commission to the undersigned through IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi.

Given under my hand and the seal of the court this ..... day of .....20.....

Seal of the court Signature of the Judge/Magistrate

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 2017, dated 11th October, 2012.

No. S.O. 2446(E), dated October 11, 2012.- Whereas reciprocal arrangements have been made by the Central Government with the Government of the Islamic Republic of Iran for service or execution of summons or warrant in relation to criminal matters on any person in the Islamic Republic of Iran, and therefore, in exercise of the powers conferred by clause (b) of sub-section (2) of Section 290 of the Code of Criminal Procedure, 1973 (2 of 1974), the Central Government hereby specifies all Courts, Judges or Magistrates exercising jurisdiction in the Islamic Republic of Iran having authority, under the law in force in the Islamic Republic of Iran as the courts by whom Commission for the examination of witnesses residing in India may be issued.

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 2017, dated 11th October, 2012.

No. S.O. 2447(E), dated October 11, 2012.- Whereas reciprocal arrangements have been made by the Central Government with the Government of the Islamic Republic of Iran for service or execution of summons or warrant in relation to criminal matters on any person in the Islamic Republic of Iran, and therefore, in exercise of the powers conferred by Section 105-L of the Code of Criminal Procedure, 1973 (2 of 1974), the Central Government hereby directs that the provisions of Chapter VII-A of the said Code shall apply without any condition, exception or qualification in relation to the Islamic Republic of Iran with effect from the date of publication of this notification in the Official Gazette.

•

MYANMAR

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 1802, dated 12th September, 2012.

No. S.O. 2157(E), dated September 12, 2012.- Whereas arrangements have been made by the Central Government with the Government of **the Union of Myanmar** for service, or execution of summons or warrant in relation to criminal matters, on any person in the Union of Myanmar, and therefore, in pursuance of clause (ii) of sub-section (1) of Section 105 of **the Code of Criminal Procedure, 1973** (2 of 1974), the Central Government hereby directs that-

(a) a summons to an accused person; or

(b) a warrant for the arrest of an accused person; or

(c) a summons to any person requiring him to attend and produce a document or other thing, or to produce it; or

(d) a search-warrant,

may be issued by a court in India, in duplicate, to the court, Judge or Magistrate having authority, under the law in force in that country, through the Central Authority in the Government of the Union of Myanmar directing that court, Judge or Magistrate to serve such summons or execute such warrant on the person named therein.

2. The Central Government further directs that such summons or warrant shall be sent to IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi, for transmission to the Central Authority in the Union of Myanmar.

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii) , No. 1802, dated 12th September, 2012.

No. S.O. 2158(E), dated September 12, 2012.- Whereas arrangements have been made by the Central Government with the Government of **the Union of Myanmar** for services or execution of summons or warrant in, relation to criminal matters, on any person in the Union of Myanmar, and therefore, in pursuance of sub-section (2) of Section 105 of the Code of Criminal Procedure, 1973 (2 of 1974), the Central Government hereby specifies that a competent court, Judge or Magistrate in the Union of Myanmar having authority, under the law in force in that country, to issue a summons to an accused person, or warrant for the arrest of an accused person, or summons to any person requiring him to attend and produce a document or other thing, or to produce it, as the court by which such summons or warrant may be issued to persons residing in India in relation to criminal matters.

2. The Central Government further directs that in a case where a summons or search warrant received from the Government of the Union of Myanmar has been executed, the documents or things produced or things found in the search shall be forwarded to the Court issuing the summons or search warrant through IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi, for transmission to the Central Authority in the Union of Myanmar.

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii) , No. 1802, dated 12th September, 2012.

No. S.O. 2159(E), dated September 12, 2012.- Whereas arrangements have been made by the Central Government with the Government of **the Union of Myanmar** for service or execution of summons or warrant in relation to criminal matters on any person in the Union of Myanmar, and therefore, in pursuance of sub-section (1) of Section 105-B of the Code of Criminal Procedure, 1973 (2 of 1974), the Central Government hereby directs that warrant from a Court in India for arrest of a person to attend or produce a document or other thing, to be executed in any place in the Union of Myanmar shall be issued in the Form annexed hereto and that such warrant shall be sent in duplicate to IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi, for transmission to the Central Authority in the Union of Myanmar.

FORM
Warrant to Bring Up a Witness
(See Section 105-B of the Code of Criminal Procedure, 1973)

To,

The Court ...../Judge or Magistrate in the Government of the Union of Myanmar (Through the Central Authority, the Government of the Union of Myanmar) Whereas complaint has been made before me that (name and description of the accused) of (address) has (or is suspected to have) committed an offence of (mention the offence concisely), and it appears to me that (name and description of witness) is likely to give evidence concerning the said complaint; and, whereas, it appears that the said witness is residing within the local limits of your jurisdiction;

And whereas, I have good and sufficient reason to believe that the said witnesses will not attend or produce the following documents or other things unless compelled to do so;

(i) (The list of documents or things to be produced are to be given here)

I, ..., have the honour to request and hereby do request that for the reasons aforesaid and for the assistance of the said Court, you will be pleased to cause the said (Name of the witness) to be arrested and also require such person to produce the document or thing listed above, which may be in his/her possession and to forward the person in custody along with the documents or things to the undersigned through IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi.

Given under my hand and the seal of the Court this ..... day of .....20 .....

Seal of the court Signature of the Judge/Magistrate

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 1802, dated 12th September, 2012.

No. S.O. 2160(E), dated September 12, 2012.- Whereas arrangements have been made by the Central Government with the Government of **the Union of Myanmar** for service or execution of summons or warrant in relation to criminal matters or any person in the Union of Myanmar, and therefore, in pursuance of sub-section (2) of Section 105-B of **the Code of Criminal Procedure, 1973** (2 of 1974), the Central Government hereby directs that a summons or warrant, as the case may be; for attendance of a person during the investigation or inquiry in any criminal case, to be served or executed in any place in the Union of Myanmar, shall be issued in Form A or Form B annexed hereto, as the case may be, and such summons or warrant shall be sent to IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi for transmission to the Central Authority in the Union of Myanmar.

FORM A
Summons to Witness
[See sub-section (2) of Section 105-B of the Code of Criminal Procedure, 1973]

To,

.....

(Through the Central Authority in the Government of the Union of Myanmar)

Whereas an application has been made before me that (Name of the accused) of (address) has (or is suspected to have) committed the offence of (state the offence concisely with time and place) and it appears to me that you are likely to give material evidence or to produce any document or other thing for the prosecution;

You are hereby summoned to appear before the Court on the ..... day of..... at.....AM/PM to produce such document or thing or to testify what you know concerning the matter of the said application, and not to depart then without the order of the Court, and you are hereby warned that, if you shall without just cause neglect or refuse to appear on the said date, a warrant will be issued to compel your attendance.

Given under my hand and the seal of the Court this .....day of .....20.....

Seal of the court Signature of the Judge/Magistrate

•

FORM B
Warrant to Bring Up a Witness
[See sub-section (2) of Section 105-B of the Code of Criminal Procedure, 1973]

To,

The Court/Judge/Magistrate in the Government of the Union of Myanmar

(Through the Central Authority in the Government of the Union of Myanmar)

Whereas, an application has been made before me that ..... (name and description of the accused) ..... of (address) has (or is suspected to have) committed and offence of ..... (state the offence concisely with time and place) and it appears to me that ..... (name and description of witness) is likely to give material evidence or to produce any document or other thing for the prosecution; and whereas, the said witness is residing within the local limits of your jurisdiction; and whereas, I have good and sufficient reason to believe that the said witnesses will not attend the investigation or inquiry of the said case unless compelled to do so;

I, ..., have the honour to request and hereby do request that for the reasons aforesaid and for the assistance of the said Court, you will be pleased to cause the said ..... (name of person) to be arrested and to forward the said person in custody to the undersigned, through IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi.

Given under my hand and the seal of the Court this ..... day of .....20.....

Seal of the court Signature of the Judge/Magistrate

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 1802, dated 12th September, 2012.

No. S.O. 2161(E), dated September 12, 2012.- Whereas arrangements have been made by the Central Government with the Government of **the Union of Myanmar** for taking the evidence of witnesses residing in the Union of Myanmar in relation to criminal matters in Courts of India, and therefore, in pursuance of sub-section (3) of Section 285 of **the Code of Criminal Procedure, 1973** (2 of 1974), the Central Government hereby directs that-

(a) Commission for examination of witnesses in the Union of Myanmar shall be issued by the Courts in India in the Form annexed hereto, to any competent Criminal Court of the Union of Myanmar having authority under the law in force in the Union of Myanmar; and

(b) such Commission shall be sent to IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi for transmission to the Central Authority in the Government of the Union of Myanmar.

FORM

Commission to Examine Witness Outside India

[See sub-section (3) of Section 285 of the Code of Criminal Procedure, 1973 (2 of 1974)

In the Court of .....

.....

To,

.....

(Through the Ministry of Home Affairs,

Government of India, New Delhi)

Whereas it appears to me that the evidence of ..... is necessary for the ends of justice in case No. ..... vs..... in the Court of .....and that such witness residing within the local limits of your jurisdiction and his/her attendance cannot be procured without unreasonable delay, expense or inconvenience. I, have the honour to request and do hereby request that for the reasons aforesaid and for the assistance of the said Court, you will be pleased to summon the said witness to attend at such time and place as you shall appoint and that you will cause such witness to be examined upon the interrogatories which accompany this Commission (for viva voce);

Any party to the proceeding may appear before you by his/her Counselor agent or, if not in custody, in person, and may examine, cross-examine or re-examine (as the case may be) the said witness;

And, I, further have the honour to request that you will be pleased to cause the answers of the said witness to be reduced into writing and all books, letters, papers and documents produced upon such examination to be duly marked for identification and that you will be further pleased to authenticate such examination by your official seal and signature and to return the same together with this Commission to the undersigned through IS-II Division of the Ministry of Home Affairs, Government of India, New Delhi.

Given under my hand and the seal of the Court this ..... day of .....20 .....

Seal of the court Signature of the Judge/Magistrate

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii) , No. 1802, dated 12th September, 2012.

No. S.O. 2162(E), dated September 12, 2012.- Whereas arrangements have been made by the Central Government with the Government of **the Union of Myanmar** service or execution of summons or warrant in relation to criminal matters on any person in the Union of Myanmar, and, therefore, in pursuance of clause (b) of sub-section (2) of Section 290 of the Code of Criminal Procedure, 1973 (2 of 1974), the Central Government hereby specifies all Courts, Judges or Magistrates exercising jurisdiction in the Union of Myanmar having authority, under the law in force in the Union of Myanmar as the Courts by whom Commission for the examination of witnesses residing in India may be issued.

•

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 1802, dated 12th September, 2012.

No. S.O. 2163(E), dated September 12, 2012.- Whereas arrangements have been made by the Central Government with the Government of **the Union of Myanmar** for service or execution of summons or warrant in relation to criminal matters on any person in the Union of Myanmar, and therefore, in exercise of the powers conferred by Section 105-L of **the Code of Criminal Procedure, 1973** (2 of 1974), the Central Government hereby directs that the provisions of Chapter VII-A of the said Code shall apply without any condition, exception or qualification in relation to the Union of Myanmar with effect from the date of publication of this notification in the Official Gazette.

•

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE COURT-FEES (MADHYA PRADESH AMENDMENT) ACT, 2012

(The following Act of the Madhya Pradesh Legislature received the assent of the Governor on 8th January, 2013 and was published in the Madhya Pradesh Gazette Extra-ordinary, dated 9th January, 2013).

MADHYA PRADESH ACT NO. 3 OF 2013

An Act further to amend the Court-fees Act, 1870 in its application to the State of Madhya Pradesh.

Be it enacted by the Madhya Pradesh Legislature in the Sixty-third year of the Republic of India as follows:-

1. Short title.- This Act may be called the **Court-fees (Madhya Pradesh Amendment) Act, 2012**

2. Amendment of Central Act No. VII of 1870 in its application to the State of Madhya Pradesh.- The Court-fees Act, 1870 (No. VII of 1870) (hereinafter referred to as the principal Act), in its application to the State of Madhya Pradesh be amended in the manner hereinafter provided.

3. Amendment of Schedule II.- In Schedule II to the principal Act, in article 11, in clause (a), in sub-clause (i), in the column pertaining to proper fee, for the words “Ten percent of the enhanced amount claimed in appeal”, the words “Two and one half percent of the enhanced amount claimed in appeal subject to a maximum of one lac rupees” shall be substituted.

•

THE MADHYA PRADESH ADHIVAKTA KALYAN NIDHI (SANSHODHAN) ADHINIYAM, 2012

The following Act of the Madhya Pradesh Legislature received the assent of the Governor on 8th January, 2013 and was published in the Madhya Pradesh Gazette, Extra-ordinary, dated 9th January, 2013.

MADHYA PRADESH ACT NO. 4 OF 2013

An Act further to amend the Madhya Pradesh Adhivakta Kalyan Nidhi Adhiniyam, 1982.

Be it enacted by the Madhya Pradesh Legislature in the Sixy-third year of the Republic of India as follows:-

1. Short title.- This Act may be called the Madhya Pradesh Adhivakta Kalyan Nidhi (Sanshodhan) Adhiniyam, 2012.

2. Amendment of Section 18.- In Section 18 of the Madhya Pradesh Adhivakta Kalyan Nidhi Adhiniyam, 1982 (No. 9 of 1982) (hereinafter referred to as the Principal Act), for sub-section (1), the following sub-section shall be substituted. Namely:-

> "(1) The State Government shall, on the requisition made by the Bar Council of Madhya Pradesh, print or cause to be printed in such form and in such manner as may be prescribed in consultation with the Bar Council, adhesive stamps bearing the words "Madhya Pradesh Adhivakta Kalyan Nidhi Stamp" of the value of twenty rupees and fifty rupees for being supplied to the Bar Council for distribution and sale on 10 percent commission basis.".

3. Amendment of Section 19.- In Section 19 of the Principal Act,-

(i) in sub-section (1), for the words "ten rupees", the words "twenty rupees" shall be substituted;

(ii) in sub-section (2), for the words "twenty rupees", the words "fifty rupees" shall be substituted.

[For reference provisions of CHAPTER VI and CHAPTER VII of Madhya Pradesh Adhivakta Kalyan Nidhi Adhiniyam, 1982 are reproduced here]

CHAPTER VI
Stamps and their Distribution

17-a. Definitions. - In this Chapter,-

(a) “Court” means a civil, revenue, criminal, labour or any other Court or Tribunal or Authority, by whatever name called, acting in the proceedings of judicial or quasi-judicial nature;

(b) “memo of appearance” includes Vakalatnama and any authorisation, under Order III of the First Schedule to the Code of Civil Procedure, 1908 (V of 1908), by whatever name called, for acting or pleading before a court.

18. Printing of “Madhya Pradesh Adhivakta Kalyan Nidhi Stamps.- (1) The State Government shall on the requisition made by the Bar Council of Madhya Pradesh, print or cause to be printed in such form and in such manner as may be prescribed in consultation with the Bar Council, adhesive stamps bearing the words “Madhya Pradesh Adhivakta Kalyan Nidhi Stamp” of the value of Rs. four and Rs. ten for being supplied to the Bar Council for distribution and sale on commission basis.

(2) Any Bar Association or Stamp Vendor who purchases Adhivakta Kalyan Nidhi Stamps worth-

(a) one thousand rupees or more from the counter of the Bar Council shall be entitled for a commission of ten percent; and

(b) less than one thousand rupees or through Postal Service shall be entitled for a commission of five percent.

19. Memo of appearance to bear stamps.- (1) A memo of appearance filed in any court other than the High Court shall bear the Madhya Pradesh Adhivakta Kalyan Nidhi Stamp of the value of ten rupees.

(2) A memo of appearance filed in the High Court shall bear the Madhya Pradesh Adhivakta Kalyan Nidhi Stamp of the value of twenty rupees.

(3) It shall be duty of the Advocates to affix on the memo of appearance stamps under sub-section (1) and (2) and no court including the High Court shall accept such memo of appearance unless it is so stamped.

20. Cancellation etc. of the stamps.- Every stamp so affixed on the memo of appearance shall be cancelled in a manner provided in the Court Fees Act, 1870 (VII of 1870) for cancellation of court fee stamps.

21. Contribution to Advocates Welfare Fund.- Net proceeds received from the distribution and sale of the Madhya Pradesh Adhivakta Kalyan Nidhi Stamps shall be contributed by the Bar Council to the Madhya Pradesh Adhivakta Kalyan Nidhi.

22. Value of the stamp shall not be chargeable from the clients.- No advocate shall charge the value of the Madhya Pradesh Adhivakta Kalyan Nidhi Stamps from any client and contravention thereof shall be deemed to be a misconduct.

CHAPTER VII
Miscellaneous

23. Protection of action taken in good faith.- (1) No suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done in pursuance of this Act or any rule made thereunder.

(2) No suit or other legal proceedings shall lie against the Trustee Committee or the Bar Council for any damage caused or likely to be caused by anything which is in good faith done or intended to be done in pursuance of this act or any rule made thereunder.

24. Bar of jurisdiction of Civil Courts.- No civil court shall have jurisdiction to settle, decide or deal with any question or to determine any matter which is by or under this Act required to be settled, decided or dealt with or to be determined by the Trustee Committee or the Bar Council.

25. Power to make rules.- (1) The Trustee Committee may, with the previous approval of the State Government, by notification, make rules for the purpose of carrying into effect the provisions of this Act:

Provided that before giving approval to the rules framed by the Trustee Committee, the State Government shall consult the Bar Council.

(2) All rules made under this Act shall be laid on the table of the Legislative Assembly.

26. Repeal.- The Madhya Pradesh Adhivakta Kalyan Nidhi Adhyadesh, 1981 (No. 14 of 1981) is hereby repealed.

•