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JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

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JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH

JABALPUR - 482 007

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FROM THE PEN OF THE EDITOR

J.P. Gupta
Director, JOTRI

Esteemed Readers

The issue of August 2009 JOTI Journal is in your hands. Keeping with the promise made in the earlier issue, we tried our best to bring out this issue with a little promptness.

The Institute started the second half of the year by calling recently promoted Additional District Judges (Fast Track Judges) in two batches for 'Advance Course Training' in the month of June 2009. The object of this training is to help the newly Promoted Judicial Officers in shouldering their new responsibilities efficiently and confidently. The idea was not to educate them but to refresh, up-date and systematize their knowledge base. The training programme also focused on various aspects of management and Information Technology which have the tremendous potentiality to enhance the qualitative and quantitative efficiency and output of judicial officers so that they may deliver quick and qualitative justice.

Recently, there is an upsurge of litigation relating to cheque bouncing and the Judicial Officers are facing lot of difficulties in disposing these cases effectively. Therefore, the Institute in the successive month organized a two days workshop on – Offences under Negotiable Instruments Act especially under Section 138 of the Act for Judicial Magistrates dealing cases under the Act. The idea behind organizing this workshop was to make them understand the intricacies of this particular branch of law in various dimensions and also to find out ways and means for effective implementation of relevant provisions of law so as to dispose of the case within the time frame prescribed by law.

In the month of July itself the Institute has also organized Refresher Course Training to the first batch of newly recruited Civil Judges Class II of 2008 batch in which forty Civil Judges participated. This one week training course was conducted with an objective to refresh and update their legal knowledge and to make them aware of the latest developments in the field of law. It also aimed at removing the difficulties faced by them in their day-to-day Court working.

We are all well aware of the fact that this is an era of Information and Communication Technology. It has become an indispensable part of human life in every sphere because of its wonderful output. With consistent use of this technology, a man or an Institute can enhance his/its productivity and efficiency in manifold ways with qualitative improvement. The working system of the entire world has changed drastically. The documentation of records on paper is being replaced in the form of electronic records. In such changed scenario of the world, we cannot remain mere spectators. This technology has an immense utility in the Justice Delivery System. Without adopting this technology, we cannot cope up with the immense work load. By using this technology, we can enhance the disposal of cases quantitatively without compromising with the quality, which is essential to maintain the faith of the common man in our judicial system. It also makes our task much easier by providing extra tools for managing and supervising the work of staff and to decrease dependency on them as well as to maintain integrity and secrecy of judgments.

Keeping the above utilities in mind, on the initiation of Supreme Court, a plan for implementation of ICT in Judiciary was prepared by the e-Committee and was released on 4th August, 2005. Under this Scheme, on 9th July, 2007, all the Judicial Officers of the District Courts have been provided with Laptops and equipped with broadband internet connections. Apart from that, High Court of Madhya Pradesh has provided AIR software which include AIR Supreme Court, AIR Supreme Court Weekly, High Courts and Criminal Law Journal.

Implementation of ICT in Judiciary was also adopted by the State of Madhya Pradesh and the entire Judiciary of the State is being computerized. Earlier, as per the scheme of the e-Committee, Laptop operation training was arranged but unfortunately it was imparted by the trainers who were not well acquainted with the Linux Operating System. Therefore, most of the Judicial Officers were not able to understand the working of Laptops effectively. On 7th December, 2008, District Judges Meeting was convened at NJA, Bhopal in which all the District Judges of Madhya Pradesh emphasized the need of a fresh laptop training before Hon'ble the Chief Justice Shri A.K. Patnaik and Hon'ble the Administrative Judge & Chairman of High Court Training Committee, Justice Shri R.S. Garg so as to achieve the goal of e-Committee.

Realizing the growing importance of ICT in the field of Judiciary and as per the directions of Hon'ble the Chief Justice and Hon'ble the Chairman of High Court Training Committee, the Institute decided to organize a series of training programmes on *Application of Information and Communication Technology to District Judiciary* to all the Judicial Officers of the State. The goal behind this training is to make all the Judges computer friendly and to cultivate skills of application of ICT in the District Judiciary.

The schemes of ADR and Plea Bargaining have been introduced and become a part of our Judicial System but then, these tools of arrears reduction have yet to be applied. For better application of these tools, Judicial Officers are required to be sensitized about the merits of applying these tools for achieving the goal of quick, qualitative and inexpensive justice without going for long drawn battle of litigation.

Therefore, training on *Application of ADR and Plea Bargaining Mechanisms* was also clubbed with the Computer Training as it was realized that integration of these tools with computer training can help the Judicial Officers in disposing of large number of cases within short time.

In Part I of this issue, we are including an article on *Human Rights Law: Current Issues and Contribution of the Madhya Pradesh High Court to the Growth of Human Rights Jurisprudence* by Hon'ble Shri Justice Ajit Singh and other bi-monthly articles. Part II is enriched with important judgments of the Apex Court and our own High Court.

A notification regarding *Madhya Pradesh Arbitration & Conciliation Rules, 1997* finds place in Part III of the Journal.

To conclude, the constant endeavour of the Institute is to cater to the needs of the judicial officers through this Journal. Therefore, you are free to send your legal problems to the Institute and the Institute in all its fairness will be ever anxious to help you.

Thank you.

HON'BLE SHRI JUSTICE ARYENDRA KUMAR SAXENA DEMITS OFFICE

Hon'ble Shri Justice Aryendra Kumar Saxena demitted office on 29.06.2009 on His Lordship's attaining superannuation. Born on 30.06.1947. Joined Judicial Service as Civil Judge Class -II on 06.07.1970, promoted as Civil Judge Class-I on 14.06.1982, as C.J.M. on 12.03.1984 and as Additional District Judge on 13.04.1987. Worked as Deputy Secretary (Law) from November 1991 to May 1993, Additional Welfare Commissioner, Bhopal gas Commission from June 1993 to May 1996, was District & Sessions Judge at Shahdol and Jabalpur, worked as Director, Judicial Officers' Training & Research Institute from 01.06.2002 to 06.08.2004. Also worked as Member-Secretary, M.P. State Legal Services Authority from 07.08.2004 till elevation. Took oath as Additional Judge of High Court of Madhya Pradesh on 13.04.2005 and Permanent Judge on 02.02.2007. Was accorded farewell ovation in the South Block on 29.06.2009.

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

●

Three things in life once gone never come back....

(i) Words

(ii) Parents

(iii) Time

Three things in life are never sure...

(i) Dreams

(ii) Success

(iii) Fortune

Three things in life that make you a great person...

(i) Hardwork

(ii) Sincerity

(iii) Success

Three things in life are most valuable...

(i) Love

(ii) Self respect

(iii) Friends

Three things in life must not be lost...

(i) Peace

(ii) Hope

(iii) Honesty

Three things in life that destroy a person...

(i) Greed

(ii) Pride

(iii) Anger

PART - I

HUMAN RIGHTS LAW: CURRENT ISSUES AND CONTRIBUTION OF THE MADHYA PRADESH HIGH COURT TO THE GROWTH OF HUMAN RIGHTS JURISPRUDENCE

Justice Ajit Singh
Judge, High Court of M.P.

Although the expression "human rights" emerged after Second World War in International Charters and Convention, its concept is as old as the ancient doctrine of " natural rights" founded on natural law. Ever since the beginning of civilized life it was noticed and came to be asserted that there were certain rights such as right to personal security, personal liberty and property which were superior to rights created by human authorities and were of universal application to men of all ages and these rights could not be violated by the authorities of the State. Later, they were codified into National Constitutions, International Covenants, Conventions and the Human Rights Acts. The framers of the Indian Constitution were much influenced with the deliberations which were going on for the universal declaration of human rights that they incorporated most of the rights enumerated in the Universal Declaration of Human Rights as "Fundamental Rights" and "Directive Principles" in the Constitution. While the Fundamental Rights guarantee the rights and liberties of the individual against unreasonable and arbitrary action of the State, the Directive Principles provide for attainment of certain economic and social goals, which would fulfill the basic needs of an individual. Thus, the status of Human Rights has been placed in a high pedestal in the Indian Constitution on almost all the aspects like civil, political, social, cultural and economic rights. The Fundamental Rights guaranteed under the Indian Constitution have also been observed by the Supreme Court as a modern name for what have been traditionally known as "natural rights" (See *Golaknath v. State of Punjab, AIR 1967 SC 1643*).

2. India adopted the International Covenant on Civil and Political Rights, 1966 in the year 1979 and to "strive for the promotion and observance of the rights recognized" has enacted the Protection of Human Rights Act, 1993 where in the expression "human rights" is defined to mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.

3. The most important current issue, which is a challenge to human rights, is terrorism. The Supreme Court of India in *Peoples Union for Civil Liberties v. Union of India, AIR 2004 SC 456,* though upholding the validity of Prevention of Terrorism Act, 2002 with certain safeguards, observed as follows :-

> "The Protection and promotion of human rights under the rule of law is essential in the prevention of terrorism. Terrorism often thrives where human rights are violated.

> The lack of hope for justice provides breeding grounds for terrorism. In all cases, the fight against terrorism must be respectful to the human rights."

4. This is also the general opinion in all democracies. The most often quoted words in this context are those by President Barak of the Supreme Court of Israel. The President said: –

> "This is the fate of democracy as not all means are acceptable to it, and not all methods employed by its enemies are always open to it. Sometimes democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and the strength allows it to overcome its difficulties."

5. The history of the High Court of Madhya Pradesh, which is a continuation of the High Court of Judicature at Nagpur, unfolds a glorious record of protecting the Right to Personal Liberty of individuals. This I say so because even during pre-independence period and at the difficult times of war years when the executive government was armed with special powers regarding preventive detention "for efficient prosecution of the war" the High Court stood up for personal liberty and declined to follow the infamous case of *Liversidge v. Anderson, (1941) 3 All E.R. 338 (H.L.)*. In this case, while dealing with the wartime regulation permitting preventive detention, the majority in the House of Lords interpreted the words' if the Minister has reasonable cause to believe', to mean 'if the minister thinks he has reasonable cause.' According to Lord Atkin, who dissented with the majority what was essential was the existence of reasonable cause', and not merely that the Minister thought that he had reasonable cause. The Nagpur High Court declined to follow the majority judgment and gave relief to detenues in many cases by insisting that the reasonable cause for detention must be demonstrated by filing requisite material before the Court. *Vimlabai Deshpande v. Emperor, AIR 1945 Nagpur 8* affirmed in *AIR 1946 PC 123* is one such case. Indeed, it must have needed great courage for a High Court in British India for declining to follow a recent judgment of the House of Lords. At that time it could not have been anticipated that in future the majority judgment in Liversidge will be condemned as "the House of Lords contribution to the war effort" and Lord Atkins's dissenting view will be recognized to be laying down the correct law.

6. After India became independent the testing time for up-holding personal liberties came during the emergency, when preventive detentions for 'effectively dealing with the emergency' became order of the day and the right to move any court for the enforcement of Fundamental Rights guaranteed under Articles 14, 21 and 22 were suspended. The Madhya Pradesh High Court in *Shivkant Shukla*

v. Additional District Magistrate, Jabalpur, 1975 MPLJ 662 and six other High Courts held that despite the suspension of the enforcement of Atricle 21, the High Court could interfere and release a detenue on certain grounds. In appeal, however, the Supreme Court by majority held that an order of detention could not be challenged on any ground whatsoever including mala fides or ultra vires character of the order (See *Additional District Magistrate, Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207*). It is now a matter of history that the majority judgment of the Supreme Court is regarded as the most regrettable judgment ever delivered by the Supreme Court and Justice Khanna's lone dissent, though it cost him the Chief Justiceship of India, like Lord Atkin's dissent in Liversidge, earned him universal respect and praise. It is to be noted that the majority judgment was silenced for the future by the 44th amendment which amended Article 359 as a result of which Articles 20 and 21 cannot now be suspended even during the emergency. All this narration of history is in order to emphasize that during difficult times when even the highest Courts like the House of Lords and the Supreme Court of India succumbed to the pressures of the day, the High Court of Madhya Pradesh showed great courage to maintain judicial integrity and independence.

7. The High Court of Madhya Pradesh has always provided adequate relief in cases where "right to life" in any of its form was either violated or impinged. Some such cases are these:

8. In *Hamid Khan v. State, AIR 1997 M.P. 191,* a Public Interest Litigation was filed disclosing that the hand pumps which were sunk by the State Government in the Tribal Mandla District to provide drinking water had excessive fluoride contents and on account of that, thousands of persons who consumed water suffered major set-back in their life either in terms of deformity of various nature, like skeletal fluorosis or dental fluorosis. On survey of the affected tube wells it was found that the water of hand pumps had excessive fluoride and before these tube wells were commissioned no fluoride test of water was undertaken by the State Government. In these circumstances, the then Chief Justice A.K. Mathur of the High Court, speaking for the Bench observes as follows:-

> "Under Art. 47 of the Constitution of India, it is the responsibility of the State to raise the level of nutrition and the standard of living of its people and the improvement of public health. It is incumbent on State to improve the health of public providing unpolluted drinking water. State in present case has failed to discharge its primary responsibility. It is also covered by Article 21 of the Constitution of India and it is the right of the citizens of India to have protection of life, to have pollution free air and pure water."

In this case the High Court reminded the State Government of its duty to provide unpolluted drinking water and directed to arrange free medical treatment of all the affected persons and also to pay Rs. 3000/- to each person who had to undergo surgery in addition to his free medical treatment.

9. In *Sayeed Maqsood Ali v. The State of M.P., AIR 2001 M.P. 220,* the house of the petitioner, a cardiac patient, was situated by the side of a Dharmshala. In the Dharmshala numerous religious functions were held through out the year and it was also given on rent for the purpose of holding marriages and other functions. Loudspeakers were, therefore, regularly used in the Dharmshala and music was played at a very high pitch, which created disturbance to the petitioner and other persons residing in the locality. The petitioner pleaded that due to the noise pollution emanating from the Dharmshala, his health was being adversely affected. Writing the judgment Justice Dipak Misra observed as under:-

> "It cannot be forgotten that excessive noise indubitably creates pollution. Every citizen is entitled under Article 21 of the Constitution to live in a decent environment and has the right to sleep peacefully at night. No one has a right to affect the rights of others to have proper sleep, peaceful living atmosphere and undisturbed thought. No citizen can be compelled to suffer annoying effects of noise as that eventually leads to many a malady which includes cardio vascular disturbance, digestive disorders and neuro psychiatric disturbance."

In this case the High Court directed the District Magistrate to see that citizenary spirit does not face any disquieting situation. Interestingly, the Supreme Court later in another case *Noise Pollution (V), in Re (2005)5 SCC 733 : AIR 2005 SC 3136,* also held that the noise pollution beyond permissible limits violated Article 21 of the Constitution.

10. In *Purushaindra Kumar Kaurav v. Union of India, 2004(2) M.P.H.T. 416,* a Public Interest Litigation was filed for a direction against the State Government to establish a Permanent Crisis Management Cell to deal effectively with calamities like earthquake as the residents of Jabalpur were living in fear. In the year 1997 the city of Jabalpur suffered three earthquakes one after another which resulted into declaration of the city within seismic zone by the scientists of the country. But no infrastructure was available with the State Government to meet the calamity resulting from earthquake. The residents, therefore, lived under fear. In this case, the High Court held that to live without fear is a significant facet of Article 21 of the Constitution and issued necessary directions for establishing a permanent crisis management cell.

11. In two cases The *State of Madhya Pradesh v. Smt. Shantibai, AIR 2005 MP 66* and *Brijendra Thakur v. State of M.P., AIR 2006 MP 28,* the State Government was directed by the High Court to pay damages to the relatives of deceased victims, whose deaths occurred due to indiscriminate police firing to disperse unruly mob, as the State Government was held to have acted in violation of Article 21 of the Constitution.

12. In *Medha Patkar v. State of M.P., 2007(4) MPHT 219,* a letter written from district jail by the petitioner on behalf of the people affected by the Sardar

Sarovar Project was directed to be registered as a Public Interest Litigation by the Chief Justice A.K. Patnaik. In this case, the petitioner and other agitators had assembled on a road and were shouting slogans demanding land for land and other rehabilitation measures. There was nothing in their conduct to show that they had any design to commit a cognizable offence or to give rise to even an apprehension that they will disturb the public tranquility, peace or public order. They were yet arrested under Section 151 of the Code of Criminal Procedure and forcibly dragged by the police and put in a van. On refusal by some of the agitators to furnish personal bonds under Section 107 of the Code of Criminal Procedure, the Sub-Divisional Magistrate sent them to jail where they were detained for a period of six days. In the circumstances of the case, the Chief Justice held that there was gross violation of the Fundamental Rights of agitators under Articles 19 (1) (a), 19(1)(b) and 21 of the Constitution. The State Government was, therefore, directed to pay compensation of Rs 10,000/- to each of the agitators who were arrested and thereafter detained in jail.

13. In a recent case of *Narmada Bachao Andolan v. State of M.P., A.I.R. 2008 M.P.142,* where it was found that a multipurpose Omkareshwar Dam had been constructed out of the resources of State Government and Central Government but the displaced persons were not rehabilitated as per the rehabilitation and resettlement plan particularly the assurance of right to land for land acquired of the oustees had not been honoured. High Court held that right to livelihood of the oustees (displaced persons), guaranteed under Article 21 of the Constitution, stood violated and prevented the submergence of villages till rehabilitation of oustees was complete.

14. In another recent case of *Narmada Bachao Andolan v. State of M.P., W.P. No. 14765/2007* decided on *21.8.2008,* filed as a Public Interest Litigation, alleging various irregularities and corruption in the implementation of measures for resettlement and rehabilitation of the project affected persons of the Sardar Sarovar Project, the High Court appointed a retired Judge as a commission to enquire into and submit a report so that the Fundamental Rights of the project affected persons, who belong to the under-privileged segment of society, can be enforced.

15. In *Ms. Shamim Modi v. Ms. Sudha Chowdhary, District Collector, W.P. No. 4644/2004* decided on *17.7.2008,* the High Court directed the State Government to pay compensation of Rs. 10,000/- to each of the three tribals who were arrested, handcuffed and paraded through the public thoroughfare during their transit to the Court of Sub-Divisional Magistrate and, thereafter, made to sit handcuffed outside the court for violation of their right under Article 21 of the Constitution.

16. In *S.P. Anand v. State of M.P., AIR 2007 MP 166,* the petitioner, by filing a Public Interest Litigation, took up the cause of prisoners lodged in the jails of

Madhya Pradesh and complained about the violation of their Fundamental Rights guaranteed under Articles 21 and 23 of the Constitution. On finding that as against the capacity to accommodate fifteen thousand prisoners there were more than thirty three thousand prisoners in different jails and they were being paid fixed meager wages of Rs. 8/- or Rs. 10/- for the work of labour taken by them, Chief Justice A.K. Patnaik observed :

> "We must be clear that a convict lodged in a jail is not denuded of all his fundamental rights and at the same time he does not enjoy all the fundamental rights like other persons because of the punitive detention in accordance with law. Hence a convict lodged in a jail must have reasonable accommodation to live a healthy life and enjoy his personal liberty to the extent permitted by law"

The Chief Justice also held that the wages determined for the services or the tasks performed by the prisoners must have rational basis and that the equitable wages so determined cannot be a pittance and have to be reasonable. In this case the State Government was directed to construct additional jails, sub-jails, wards, barracks and cells so that the prisoners may have reasonable accommodation to live a healthy life and enjoy their personal liberty. The State Government was also directed to revise and fix the equitable and reasonable wages for the prisoners and to compensate the victim or his family out of the common fund created from part of the wages of the prisoners who committed the offence.

17. In *Hardeep Singh Anand v. State of M.P., W.A. No. 1754/2007*, the appellant was running a Coaching Centre preparing students for taking Pre-Medical Test, Pre-Engineering Test etc. His house was raided at the instance of District Magistrate. He was thereafter arrested and handcuffed despite his good educational background. Later, he was put to trial for an offence under Section 420 of the Indian Penal Code and the prosecution took four years to examine five witnesses and five years to complete the trial. After acquittal, the appellant approached the High Court alleging that his fundamental right guaranteed under Article 21 of the Constitution was violated. In this case the High Court held that the appellant was a victim of unlawful handcuffing and delay in trial and directed the State Government to pay him a compensation of Rs. 70,000/-.

18. A survey of these cases goes to show that the High Court of Madhya Pradesh has not only contributed significantly to the growth of human rights jurisprudence in all crucial areas but has also readily protected these rights of the persons whenever required.

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TRIAL OF SUITS SUMMARILY UNDER ORDER 37 RULE 1 OF CPC AND MAIN CONSIDERATIONS TO GRANT LEAVE TO DEFEND SUCH SUITS – PROCEDURE

Judicial Officers
Districts Guna & Rewa

General Provisions

Rule 1 of Order 37 of C. P. C. provide the provisions relating to Summary Proceeding, which are as follows:

> **Courts and classes of suits to which the Order is to apply.** – (1) This order shall apply to the following Courts, namely:-.
>
> (a) High Courts, City Civil Courts and Courts of Small Causes; and
>
> (b) Other Courts:
>
> Provided that in respect of the Courts referred to in clause (b), the High Court may, by notification in the Official Gazette restrict the operation of this Order only to such categories of suits as it deems proper, and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the Official Gazette, further restrict, enlarge or vary, the categories of suits to be brought under the operation of this Order as it deems proper.
>
> (2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely:
>
> (a) suits upon bill of exchange, *hundies* and promissory notes;
>
> (b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising –
>
> (i) on a written contract; or
>
> (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or
>
> (iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

Thus, Order 37 clearly and specifically provides that only above mentioned classes of suits can be tried summarily.

In *Gwalior Distributing Co. v. Kanta, AIR 1978 MP 199,* our own High Court has held that a suit falling in classes of suits specified by O. 37 R. 2 (1) CPC can be filed at the option of the plaintiff either as a summary suit or as a suit in the ordinary manner. Having filed the suit once as a summary suit, there is no prohibition in the Civil Procedure Code to the effect that the plaintiff will not be allowed to give up the benefit of the procedure under O. 37 and request for trial of the suit in the ordinary manner. The option which the plaintiff has in the matter does not get exhausted by its initial exercise. The plaintiff can later on request for the suit being tried in ordinary manner. At the best, on such a change of option, the plaintiff may be saddled with costs, if any, occasioned upto that point of time; but the defendant cannot compel the plaintiff to get the suit tried as a summary suit only.

An analysis of Order 37 reveals that in Rules 2 to 6 certain restrictions are imposed on right of the defendant to defend. Rule 7 of Order 37 provides that save as provided by this Order (O. 37) the procedure in suits hereunder shall be the same as procedure in suits instituted in the ordinary manner. Therefore, what happens by deletion of reference to Order 37 from the plaint is that the right of the defendant to defend the suit becomes unfettered. The restriction on his right to defend imposed by the various rules of Order 37 also disappear. Therefore, the defendant cannot have any grievance if the plaintiff seeks deletion of the reference of Order 37 from the plaint. Provisions of Order 17 are applicable to the cases under Order 37. If the plaintiff has choice of taking advantage of summary procedure under Order 37, he has also the liberty of not claiming the benefit of that procedure.

Some illustrations of Summary Suits

1. The cheque given under Section 6 of the Negotiable Instruments Act comes within the purview of bill of exchange and summary suit could be brought for recovery (See: *M.D. Overseas Limited v. Umashankar Kamalnarayan, AIR 2006 Delhi 361*).
2. Likewise recovery for amount against promissory note with a revenue stamp, suit is also maintainable under Order 37 (See: *Premraj v. Sureshchand, 2006 (4) MPLJ 356*)
3. The suit based on the use of credit card is maintainable as summary suit. (See: *Central Bank of India v. Manipur Vasant Kini, AIR 1999 Bom 409*)
4. A suit based on invoices/bills is 'written contract' within the contemplation of O. 37. (See: *K.L.G. Systal Ltd. v. M/s Fuzit Sui ICIC Ltd., AIR 2001 Del 357*)

Procedure in Summary Suits

The classes of suits enumerated in Order 37 Rule (1)(2) must be instituted by presenting a plaint in the format as provided in Rule 2 of Order 37. The summons of the suit shall be in form No.4 in appendix "B" or in such other form which may be prescribed. The defendant shall not defend the suit unless he enters an appearance and in default of his entering an appearance, the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for in the sum, not exceeding the sum mentioned in the summons, together with interest @ specified, if any, up to the date of the decree, but it is to be borne in the mind that plaintiff is not automatically entitled to a decree for non-appearance of defendant but the Court shall look into the matter and will see that the allegations in the plaint are proved and supported by the original documents, if any, relied by the plaintiff.

Rule 3 of Order 37 prescribes the procedure for the appearance of the defendant and when the defendant enters an appearance, the plaintiff shall serve on the defendant a summons for judgment in form No.4 (A) in appendix "B" or such other form as may be prescribed, returnable not less than ten days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit, as provided by Sub-Rule 4 of Rule 3 of Order 37. Thereafter, Sub-Rule 5 of Rule 3 provides that the defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply for leave to defend such suit and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court to be just which is subject to two proviso as referred earlier.

Sub-Rule 6 of Rule 3 of Order 37 provides that if defendant has not applied for leave to defend, or if such application is refused, the plaintiff shall be entitled to judgment forthwith. If the defendant is not allowed to defend or the defendant does not comply with the terms of the order as to security, plaintiff shall be entitled to judgment forthwith when the defendant fails to comply such directions given by the Court.

Main considerations to grant leave to defend in Summary Suits

Sub- Rule 5 of Rule 3 of Order 37 C. P. C. is that in a summary suit the defendant is not entitled as of right to put in a defence. Defendant can apply for leave within ten days from service of summons (for judgment) by applying with the conditions under Rule 5. For the ready reference, Sub-Rule 5 of Rule 3 of Order 37 C.P.C. is reproduced here:

"(5) The defendant may (at any time within ten days from the service of such summons for judgment) by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant."

In *S. Kiranmoyee Dassi v. Dr. J. Chatterjee, (1945) 49 Cal WN 246,* Das J., after comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 37 CPC in the form of the following propositions:

(1) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(2) If the defendant raises a triable issue indicating that he has a fair or bona fide, or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(3) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiffs claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(4) If the, defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(5) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence. .

These principles are followed by Hon'ble the Supreme Court in *M/s Mechalec Engineers and Manufacturers v. M/s Basic Equipment Corporation, AIR 1977 SC 577, Sunil Enterprises v. S.B.I. Commercial and International Bank Ltd., AIR 1998 SC 2317, State Bank of Saurashtra v. M/s Ashit Shipping Services (P) Ltd., AIR 2002 SC 1993* and *Sify v. First Flight Couriers Ltd., (2008) 4 SCC 246.*

In *Raj Duggal v. Ramesh Kumar Bansal, AIR 1990 SC 2218,* the Apex Court held that leave to defend the suit brought under Order 37 Rule 2 CPC is declined where the Court is of the opinion that the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the Court is satisfied about that leave must be give. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he has a bona fide defence, he ought to have leave. Summary judgments under Order 37 should not be granted where serious conflict as to matter of fact or where any difficulty on issues as to law arises. The Court should not reject the defence of the defendant merely because of its inherent implausibility or its inconsistency.

Hon'ble the Supreme Court in *Neebha Kapoor v. Jayantilal Khandwala and others, AIR 2008 SC 1117,* held that when the suit is filed to recover money advanced on promissory note and plaintiff is unable to file originals of promissory note and cheques dishonoured then in such a case grant of unconditional leave to defend should be granted. Hon'ble the Supreme Court held that the question as to whether the defence of the respondent is moonshine or not is a matter which requires consideration and a decree could not have been granted on the basis of photo-stat copies of the documents and therefore, in such case leave to defend should be granted unconditionally.

In a latest judgment of *S. Raiu v. C. Sathammai, AIR 2008 SC 1104,* Hon'ble the Supreme Court held that the "Court should not take a very technical view of the matter and where the defendant is uneducated person seeking leave to defend the suit by plaintiff on basis of promissory note and where the stand of

the defendant is that plaintiff took his signature on blank stamp paper on pretext that these were the receipts of the payment made to him for work done and plaintiff used one of those signature to forge promissory note for filing suit then leave to defend should be granted subject to conditions of depositing part of plaintiff's claim.

These days due to globalization of the world trade and commerce a large number of cases of bank guarantee are coming up. In this regard Hon'ble the Supreme Court in *UBS AG v. State Bank of Patiala, AIR 2006 SC 2250* held that in cases of irrevocable letter of credit when fraud is alleged to be committed by beneficiary/constituent of respondent bank then even fraud cannot be set up even as plausible defence by respondent bank and since no triable issue arises, so respondent bank is not entitled to leave to defend. Thus, the Court must be very vigilant in the case of irrevocable bank guaranties.

The Court in appropriate cases must impose reasonable terms and should ask the defendant to deposit the amount of claim partially or fully particularly the amount which is admitted to be due should be deposited by the defendant in the Court and leave to defend should be granted subject to such deposit only. Because the second proviso of sub-rule (5) of Rule 3 of Order 37 CPC specifically mandates it evenwhere the defendant raised a plausible defence. (See: *Southern Sales & Services and ors. v. Sauermilch Design & Handles GMBH, AIR 2009 SC 320*)

Whether an ex parte decree passed in such suits may be set aside by the same court? If yes, on what grounds?.

Rule 4 of Order 37 CPC says that –

> *Power to set aside decree* – After decree the court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

A careful reading of Rule 4 shows that it empowers, under special circumstances, the Court which passed an ex parte decree under Order 37 to set aside the decree and grant one or both of the following reliefs, if it seems reasonable to the Court so to do and on such terms as the Court thinks fit:

(i) to stay or set aside execution, and (ii) to give leave to the defendant – (a) to appear to the summons, and (b) to defend the suit.

In *Rajni Kumar v. Suresh Kumar Malhotra, AIR 2003 SC 1322,* Hon'ble the Supreme Court held that **Rule 4 of the Order 37 is different from Rule 13 of Order 9 in as much as under Order 37 Rule 4 defendant has to show not only special circumstance which prevented him from appearing or applying for**

leave to defend but also the facts which entitle him leave to defend. Failure of defendant to disclose facts which would entitle him to defend the case, would result in rejection of application. Thus, the two conditions have to be satisfied before the Court would set aside an ex parte decree in the summary suit.

It is to be noted that mere 'sufficient ground' cannot be equated with 'special circumstances'. Special circumstances connotes that the defendant was prevented for appearing on account of reasonable circumstances beyond his control. Hon'ble the Supreme Court in Para 8 of the judgment in *Rajni Kumar's case* (supra) explained the meaning of expression 'special circumstances'. Hon'ble the Supreme Court held that 'in its ordinary dictionary meaning it connotes something exceptional in character, extraordinary, significant and uncommon'. It is neither practical nor advisable to enumerate such circumstances. The Court held that non-service of summons will be a special circumstance and the Court has to determine the question on the facts of each case.

It is important to note here that the power under Rule 4 of Order 37 is not confined to setting aside the ex parte decree, it extends to staying or setting aside the execution and giving leave to appear to the summons and, to defend the suit.

In *Karumilli Bharathi v. Prichikala Venkatachalam, AIR 1999 AP 427,* it was held that Rule 4 of Order 37 has not used the word 'ex parte' because under Rule 2 (3) whenever the defendant fails to appear in the suit or fails to seek leave of the Court, he is deemed to have admitted the allegation and accordingly a decree deemed to have been passed on merits. Therefore, Rule 4 does not use the word 'ex parte' because of the fiction provided by Rule 2 (3) of Order 37.

It is always undesirable, and indeed impossible, to lay down hard and fast rules in matters that affect discretion. But it is necessary to understand the reason for a special procedure of this kind in order that the discretion may be properly exercised. Taken by and large, the object is to see that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining an early decree by raising untenable and frivolous defences in a class of cases where speedy decisions are desirable in the interests of trade and commerce.

CONCLUSION

Thus, it can be summed up that the classes of suits enumerated in Sub-Rule 2 of Rule 1 of Order 37 can be tried summarily and leave to defend in such suit shall ordinarily be granted, if triable issue is raised and reasonable defence is made. Leave to defend may be granted unconditionally or on such terms as the Court thinks fit particularly looking to the second proviso of sub-section 5 of Rule 3 of Order 37 of CPC. An ex parte decree passed in such suit may be set aside by the same Court as provided by Order 37 Rule 4 of the Code if special circumstances are shown along with the grounds for leave to defend are shown to exist.

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DYING DECLARATION WITH SPECIAL REFERENCE TO ITS ADMISSIBILITY IN EVIDENCE AND THE RELIABILITY IN CRIMINAL TRIALS

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I. DYING DECLARATION – GENERAL INTRODUCTION:

The general rule is that all oral evidence must be direct viz., if it refers to a fact which could be seen it must be the evidence of the witness who says he saw it, if it refers to a fact which could be heard, it must be the evidence of the witness who says he heard it, if it refers to a fact which could be perceived by any other sense, it must be the evidence of the witness who says he perceived it by that sense. Similar is the case with opinion. These aspects are elaborated in Section 60. The best evidence must always be given and in this context hearsay evidence is excluded, but apart from others, one of such exceptions is dying declaration.

Though such an exception has not been used in any statute, but Section 32 (1) of the Indian Evidence Act makes it specifically relevant. It essentially means a statement, written or verbal, made by a person, who is dead as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question whether the person who made them was or was not at the time when it, was made under expectation of death and whatever may be the nature or proceedings in which the cause of his death comes into question.

There are two conditions necessary for reception of dying declaration, firstly before the statement may be admitted it must be proved that the person who made it, is dead. The burden of proving death is upon the person who wishes to prove the dying declaration. This is clear from Section 104 of the Evidence Act and Illustration (a) to that Section. Secondly, dying declaration must be that of a person competent to testify as a witness under Section 118 of the Evidence Act as the dying declaration of unsound mind person is not admissible. Even a dumb person may give his dying declaration in which he can make it intelligible as by writing or by signs

II. MODE AND MANNER OF DYING DECLARATION:

Dying declaration may be written or verbal. It may be by adopting words of another person by a nod or a shake of the head. It may be by signs or gestures on questions put to him, if he was unable to speak, but was conscious and able

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* The original articles received from Tikamgarh & Jhabua have been substantially edited by the Institute.

to make such signs or gestures. Verbal dying declaration may be one or more given to different persons at different time.

Similarly, written dying declaration may be in the form of letters, notes on personal diary, suicide note or written on a paper, even on the surface available at the place of incident by any means of expressions. Dying declaration may be written by a private person, police officers, doctors, executive or judicial Magistrate or other available officials. Dying declaration may be in the form of (a) *dehati nalishi* report or FIR under Section 154 CrPC; (b) report under Section 155 CrPC for non-cognizable offence; (c) statement under Section 161 or/and 164 CrPC; (d) entry in bedhead ticket on the basis of statement made by the deceased; (e) history of injury/incident given to the doctor while examination of the injured person and preparing of MLC report thereafter; and (f) written complaint about apprehension of death on account of conduct/threatening of a particular person. These are illustrative and not exhaustive instances. Written dying declaration may also be one or multiple dying declaration given to one or different persons at different time. Normally dying declaration should be recorded in the language in which the declarant has narrated the incident but it may be recorded in different languages in the given facts and circumstances of a case with proper explanation to justify them.

So it is clear from the aforesaid circumstances that at one hand dying declaration has its sanctity and on the other hand its recording in verbal or written form have multiformity. Even though all types of dying declarations are admissible if they fulfill the conditions enumerated in Section 32 (1) of the Indian Evidence Act, because admissibility of any evidence on relevant issue and reliability of that evidence are totally two different aspects. Dying declaration of a person admitted in evidence has to be evaluated as an independent piece of substantive evidence like any other piece of evidence – neither extra strong nor weak.

III. ADMISSIBILITY OF DYING DECLARATION:

The principle underlying admissibility of dying declaration is reflected in the well- known legal maxim: nemo moriturus praesumitur mentire i.e. a man will not meet his Maker with a lie in his mouth. A dying man is face to face with his Maker without any motive for telling a lie.

"Truth" said Mathew Arnold, "sits upon the lips of a dying man".

In *Babulal v. State of M.P., (2003) 12 SCC 490,* the Apex Court observed as under:

> "A person who is facing imminent death, with even a shadow of continuing in this world practically non-existent, every motive of falsehood is obliterated. The mind gets altered by most powerful ethical reasons to speak only the truth.

> Great solemnity and sanctity is attached to the words of a dying person because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person. The general principle on which the species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced and mind induced by the most powerful consideration to speak the truth; situation so solemn that law considers the same as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

The grounds of admission of dying declaration are: firstly, necessity for the victim being generally the only principal eye-witness to the crime, the exclusion of the statement might deflect the ends of justice; and secondly, the sense of impending death, which creates a sanction equal to the obligation of an oath.

Clause (1) of Section 32 of the Act has been enacted by the Legislature wisely as a matter of necessity as an exception to the general rule that 'hearsay evidence' is 'no evidence' and the evidence which cannot be tested by cross-examination of a witness is not admissible in a Court of Law. The purpose of cross-examination is to test the veracity of the statement made by a witness. The requirement of administering oath and cross- examination of a maker of a statement can be dispensed with considering the situation in which such statement is made, namely, at a time when the person making the statement is almost dying. A man on the death-bed will not tell lies. Moreover, if the dying declaration is excluded from admissibility of evidence, it may result in miscarriage of justice inasmuch as in a given case, the victim may be the only eye-witness of a serious crime. Exclusion of his statement will leave the Court with no evidence whatsoever and a culprit may go unpunished causing miscarriage of justice.

IV. PRINCIPLES EMERGING WITH THE VARIOUS PRONOUNCEMENTS OF APEX COURT GOVERNING DYING DECLARATION:

1. In *Khushal Rao v. State of Bombay, AIR 1954 SC 122,* the Apex Court summarized the principles underlined as under:

   (i) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;

   (ii) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;

(iii) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other piece of evidence;

(iv) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;

(v) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and

(vi) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

2. In *Smt. Paniben v. State of Gujarat, (1992) 2 SCC 474 = AIR 1992 SC 1817,* the Supreme Court held that a dying declaration is entitled to great weight. Once the Court is satisfied that the declaration is true and voluntary, it could base conviction without corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence and not a rule of law.

In *Smt. Paniben's case* (supra) the Apex Court, referring to earlier case law, summed up principles governing dying declaration as under (from S. No.3 to 13):

3. There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. [See *Munnu Raja v. State of M.P., (1976) 3 SCC 104 = AIR 1976 SC 2199*]

4. If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. [See *State of U.P. v. Ram Sagar Yadav, (1985) 1 SCC 552= AIR 1985 SC 416*]

5. The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. [See *K. Ramachandra Reddy v. Public Prosecutor, (1976) 3 SCC 618 = AIR 1976 SC 1994*]

6. Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. [See *Rasheed Beg v. State of M.P., (1974) 4 SCC 264 = AIR 1974 SC 332*]

7. Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [See *Kake Singh v. State of M.P., (1981) Supp. SCC 25 = AIR 1982 SC 1021*]

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

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

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

11. Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. [See *Nanhau Ram v. State of M.P., (1988) Supp. SCC 152 = AIR 1988 SC 912*]

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

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

OTHER PRINCIPLES:

14. An incomplete dying declaration is inadmissible. So when it could not be completed because of coma setting in, it is inadmissible. But although death

may stop the answer to further questions, if the statement so far made by deceased implicates the accused quite categorically and definitely, the dying declaration though otherwise not complete is admissible. (See : *Abdul Sattar v. State of Mysore, AIR 1956 SC 168*)

15. In cases wherein the part of the dying declaration which is not found to be correct is to be indissolubly locked with the other part that it is not possible to sever the two parts, the court may be justified in rejecting the whole. In cases where two parts may be severable and correctness of one part does not depend upon the correctness of other part, the court can act upon a part which is found to be correct and trustworthy, if it is corroborated in material particulars by other evidence on record, despite the fact that another part has not been proved to be correct. (See: *Godhu v. State of Rajasthan, AIR 1974 SC 2188*)

16. In *Ramawati Devi vs. State of Bihar, AIR 1983 SC 164*, the Apex Court observed that there is no requirement of law that such a statement must necessarily be made to a Magistrate. What evidentiary value or weight has to be attached to such statement must necessarily depend on the facts and circumstances of each particular case.

17. In the case of *Harjit Kaur v. State of Punjab, (1999) 6 SCC 545 = AIR 1999 SC 2571*, the dying declaration was recorded by Sub-Divisional Magistrate and the genuineness of which was challenged inter alia on the ground that there was an agitation by the relatives of the deceased and the declaration was recorded by the Sub-Divisional Magistrate under pressure. The Supreme Court, however, held that Sub-Divisional Magistrate being independent witness holding high position, had no reason to do anything which was not proper. It was therefore, held that genuineness of dying declaration could not be doubted and conviction recorded on that basis could not be faulted.

18. In *Laxman v. State of Maharashtra, (2002) 6 SCC 710 = AIR 2002 SC 2973*, a Constitution Bench in its authoritative pronouncement declared that:

> "The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or promoting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the

declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate absolutely necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

19. In *B. Shashikala v. State of Andhra Pradesh, AIR 2004 SC 1610,* it was held that if the Magistrate has taken all the precautions and there was not possibility of tutoring, then dying declaration made in Hindi but recorded by the Magistrate in English can be relied upon. [For similar type of cases in which dying declaration and recording there of was in different languages were taken into consideration. Please see: *Ravikumar Alias Kutti Ravi v. State of Tamil Nadu, AIR 2006 SC 1448 and Amarsingh Munnasingh Suryawanshi v. State of Maharashtra, AIR 2008 SC 479*]

20. In *Nallam Veera Satyanandam and others v. The Public Prosecutor, High Court of A.P., AIR 2004 SC 1708,* the Apex Court held that in the case of multiple dying declarations each dying declaration will have to be considered

independently on its merits as to its evidentiary value and one cannot be rejected because of the contents of the other. In cases where there are more than one dying declaration, it is the duty of the Court to consider each of them in its correct perspective and satisfy itself which one of them reflects the true state of affairs.

In *Kundula Bal Subramanyan v. State of A.P., (1993) 2 SCC 684,* the Apex Court observed that it is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. If the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declarations they should be consistent. However, in *Amol Singh v. State of Madhya Pradesh, (2008) 5 SCC 468,* the Apex Court held that if some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinizing the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances.

In connection with appreciation of multiple dying declarations, also see *Smt. Laxmi v. Om Prakash and others, AIR 2001 SC 2383* and *State of Maharashtra v. Sanjay D. Rajhans, AIR 2005 SC 97.*

21. In *Kulwant Singh and Ors. v. State of Punjab, AIR 2004 SC 2875,* it was held that Section 32 of the Indian Evidence Act, 1872 nowhere states that the dying declaration must be recorded in the presence of a Magistrate or in other words statement which has not been recorded before the Magistrate cannot be treated to be a dying declaration.

22. Further, in *Muthu Kutty v. State, (2005) 9 SCC 113 = AIR 2005 SC 1473* the Apex Court after reiterating the above enunciated principles also held that though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration.

23. In *P. Mani v. State of T.N., (2006) 3 SCC 161 = AIR 2006 SC 1319,* the Apex Court, held that conviction can be recorded on the basis of the dying declaration alone but the same must be wholly reliable. In a case where

suspicion can be raised as regards the correctness of the dying declaration, the Court before convicting an accused on the basis thereof would look for some corroborative evidence. The question as to whether a dying declaration is of impeccable character would depend upon several factors; physical and mental condition of the deceased is one of them.

24. In *Nallapati Sivaiah v. Sub-Divisional Officer, Guntur, A.P., AIR 2008 SC 19* the Apex Court held that:

> The court has to consider each case in the circumstances of the case. What value should be given to a dying declaration is left to court, which on assessment of the circumstances and the evidence and materials on record, will come to a conclusion about the truth or otherwise of the version, be it written, oral, verbal or by sign or by gestures. It is also a settled principle of law that dying declaration is a substantive evidence and an order of conviction can be safely recorded on the basis of dying declaration provided the court is fully satisfied that the dying declaration made by the deceased was voluntary and reliable and the author recorded the dying declaration as stated by the deceased. This court laid down the principle that for relying upon the dying declaration the court must be conscious that the dying declaration was voluntary and further it was recorded correctly and above all the maker was in a fit condition – mentally and physically – to make such statement.
>
> The Dying Declaration must inspire confidence so as to make it safe to act upon. Whether it is safe to act upon a Dying Declaration depends upon not only the testimony of the person recording Dying Declaration – be it even a Magistrate but also all the material available on record and the circumstances including the medical evidence. The evidence and the material available on record must be properly weighed in each case to arrive at proper conclusion. The court must satisfy to itself that the person making the Dying Declaration was conscious and fit to make statement for which purposes not only the evidence of persons recording dying declaration but also cumulative effect of the other evidence including the medical evidence and the circumstances must be taken into consideration.

V. RELIABILITY OF DYING DECLARATION:

On the basis of aforementioned principles governing dying declaration, the reliability of a dying declaration can be based as under: –

- It is unsafe to record conviction on the basis of a dying declaration alone in cases where suspicion is raised as regards the correctness of the dying declaration. In such cases, the court may have to look for some corroborative evidence by treating dying declaration only as a piece of evidence and must like any other evidence, satisfy that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. The Court must be satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant.
- Normally, the court places reliance on the medical evidence for reaching the conclusion whether the person making a dying declaration was in a fit state of mind, but where the person recording the statement states that the deceased was in a fit and conscious state, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of mind of the declarant, the dying declaration is not acceptable. What is essential is that the person recording the dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement without there being the doctor's opinion to that effect, it can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certificate by the doctor is essentially a rule of caution and, therefore, the voluntary and truthful nature of a statement can be established otherwise.

If after careful scrutiny the Court is satisfied that it is true, voluntary and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration as it cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

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EXTENT OF RIGHT TO RECOVER COMPENSATION IN MOTOR ACCIDENT CLAIMS BY CLAIMANTS IN CASES OF CONTRIBUTORY OR COMPOSITE NEGLIGENCE

Judicial Officers
Districts Mandsaur & Sheopur

INTRODUCTION:

Words 'negligence' or 'contributory negligence' or 'composite negligence' have been no where defined in the Motor Vehicles Act, 1988 or the Indian Penal Code, 1860, nor were defined in the earlier Motor Vehicles Act, 1939 either. These words emerged from the law of torts. However not only these terms have been explained and discussed in several judgments by Hon'ble the Apex Court and various High Courts, but the same has been done in respect of recovery of compensation from the tort-feasors from the view point of claimants also.

In *Jacob Mathew v. State of Punjab, AIR 2005 SC 3180,* Hon'ble the Apex Court has taken the term 'negligence' as the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations, which ordinarily regulate the conduct of human affairs would do, or doing something, which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect, the plaintiff suffers injury to his person or property.

The definition in Law of Torts by Ratanlal and Dhirajlal following were considered to be ingredients of negligence – (i) a legal duty to exercise due care on the part of the party complained of towards the party complaining the formers conduct within the scope of the duty; (ii) breach of the said duty; and (iii) consequential damage.

Cause of action for negligence arises only when damage occurs; it is then only when negligence becomes actionable.

CONTRIBUTORY NEGLIGENCE:

A contributory negligence may be defined as negligence in not avoiding the consequences arising from the negligence of some other person, when means and opportunities are afforded to do so. The question of contributory negligence would arise only when both parties are found to be negligent.

In the case of *Pramod Kumar Rasikbhai Thaveri v. Karmasey Kunbarji Tak and others, AIR 2002 SC 2864,* Hon'ble the Apex Court dealt with the concept of contributory negligence and said that when there has been some act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may, properly be described as "negligence". "Negligence" ordinarily means breach of a legal duty to care, but when used in the expression "contributory negligence", it does not mean breach of any duty.

It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an 'author of his own wrong'.

In *Municipal Corporation of Greater Bombay v. Laxman Iyer, AIR 2003 SC 4182,* the Apex Court observed that "negligence" does not mean absolute carelessness but want of such degree of care as is required in a particular circumstance. Negligence and duty are strictly co-relative terms. Negligence is not an absolute but a relative or rather a comparative term. Where an accident is due to negligence of both the parties, it is called contributory negligence.

Now, the question arises on which party liability depends and if comes on both the parties, then in what proportions?

In this regard one of the tests suggested is which party had last opportunity to avoid the accident, would be liable for the accident. If there has been an act or omission on the part of the plaintiff also which has materially contributed to the accident, then the court has ample power to apportion the loss between the parties as is just by applying the doctrine of contributory negligence. And apportionment in this context means that the damages are reduced to such an extent as the court, thinks just and proper having regard to the claim shared in the responsibility for the damage. Obviously, when question of contributory negligence on the part of the plaintiff is not placed, then question of apportioning also does not arise. In fact the doctrine of last opportunity in the matter of negligence evolved from the principle enunciated in *Davies v. Mann, 1842 (10) M&W 546* which according to Lord Denning was not a principle of law but a test of caution.

FEW ILLUSTRATIVE CASES OF CONTRIBUTORY NEGLIGENCE:

(i) Minor:

Ordinarily, the doctrine of contributory negligence is not applicable in case of children with the same force as in the case of adults but in the case of Muthuswami and another v. S.A.R. Annamalai and others, 1990 ACJ 974, it was held that "we do not intend to lay down a law that a child can never be guilty of contributory negligence but ordinarily the same is a question of fact." [*Also see Sudhir Kumar Rana v. Surinder Singh, AIR 2008 SC 2405*]

In *M.P.S.R.T.C. v. Abdul Rahaman, AIR 1997 M.P. 248,* a minor was not considered to be a fit person on which doctrine of contributory negligence could be applied.

(ii) Travelling on roof top of bus:

In *Bhuri Bai and another v. Shyam Sunder and others, 2007 ACJ 384,* the Division Bench of our High Court has held that when a passenger travels on the roof top of the bus, he himself calls for a risk of life and he knows its consequences and is also negligent while travelling on roof top of the bus. Therefore, it cannot be held that driver or conductor/cleaner who has granted permission to travel

on the roof top is solely liable when there is specific bar under Section 123 (2) of the Motor Vehicles Act, 1988. Even if the permission was granted by driver/ conductor, it was for the passenger to follow the rule of prudence and rule of opportunity to avoid risk and to refuse not to travel on the roof top of the bus. Hence a person who travelled on roof top of the bus was also contributed to negligence.

[Also see: *Oriental Insurance Company Limited v. Mantola, 2006 (3) MPHT 115*]

(iii) Pillion Rider:

In *Devi Singh v. Vikram Singh and others, 2008 ACJ 393,* it was held that by carrying more than one person as pillion rider by the driver of a motorcycle in violation of Section 128 of the Motor Vehicles Act, 1988, ipso facto was not sufficient to hold driver or such pillion rider for negligence or contributory negligence.

(iv) Driver having no driving licence:

In *Sudhir Kumar Rana* (supra) it was held that if a person drives a vehicle without a licence, he commits an offence. The same, by itself, in our opinion, may not lead to a finding of negligence as regards the accident. It is one thing to say that the appellant (driver of the two wheeler) was not possessing any licence but no finding of fact has been arrived at that he was driving the two-wheeler rashly and negligently. If he was not driving rashly and negligently which contributed to the accident, we fail to see as to how, only because he was not having a licence, he would be held to be guilty of contributory negligence.

EXTENT OF RIGHT TO RECOVER COMPENSATION THEREUNDER BY CLAIMANT/VICTIM IN CONTRIBUTORY NEGLIGENCE:

In *T.A. Anthony v. Karvaranan and others, (2008) 3 SCC 748,* the Apex Court has clarified the concept of contributory negligence and observed that:

> "In an accident involving two or more vehicles, if the claim is by one of the drivers himself for personal injuries, or by the legal heirs of one of the drivers for loss or on account of his death, or by the owner of one of the vehicles in respect of damage to his vehicle, then the issue that arises is not about the composite negligence of all the drivers, but about the contributory negligence of the driver concerned. Where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injury stands reduced in proportion to his contributory negligence."

Again the Apex Court in *A.P.S.R.T.C. & Anr. v. K. Hemalaltha & Ors., (2008) 6 SCC 767,* has laid down the procedure to determine the question as to who contributed to the happening of the accident. The Apex Court said that it becomes relevant to ascertain who was driving his vehicle negligently and rashly and in case both were so doing who is more responsible for the accident and who of the two had the last opportunity to avoid the accident. In case the damages are to be apportioned, it must also be found that the plaintiff's fault was one of the causes of the damage and once that condition is fulfilled, the damages had to be apportioned according to the apportioned share of the responsibility. If the negligence on the plaintiff's part has also contributed to damage, this cannot be ignored in assessing the damages, he can be found guilty of contributory negligence if he ought to have foreseen that if he did not act as a reasonable, reasoned man. He might himself be hit and he must take into account the possibility of other being careless.

It was observed in *Renukadevi, H. v. Bangalore Metropolitan Transport Corporation, AIR 2008 SC 1967,* that the spot mahazar (map) clearly indicated that the scooty driven by the appellant (injured claimant) hit the rear wheel of the bus indicating that the claimant was also negligent to a great extent. It was also found that the respondent (bus driver) was negligent and his responsibility was more, i.e., when a scooty was going on the left side of the road, the driver of the heavy vehicle ought to have utilized the road or when taking a turn towards east, he ought to have observed the light vehicles that were coming on the left side and then take a turn and not suddenly come and take a turn. Considering the entire material on record, it was held that scooty driver (appellant) has also contributed to the negligence to the extent of 50%.

In *Bijoy Kumar Dugar v. Bidyadhar Dutta & Ors., AIR 2006 SC 1255,* it was held by the Supreme Court that if the bus was being driven by the driver abnormally in a zigzag manner, it was but natural, as a prudent man for the deceased to have taken due care and precaution to avoid head-on collision when he had already seen the bus from the opposite direction. It was head-on collision in which both the vehicles were damaged and unfortunately the driver of the Maruti car died on the spot. The MACT, in our view, has rightly observed that had it been the knocking on one side of the car, the negligence or rashness could have been wholly fastened or attributable to the driver of the bus, but when the vehicles had a head-on collision, the drivers of both the vehicles should be held responsible to have contributed equally to the accident.

COMPOSITE NEGLIGENCE AND EXTENT OF RIGHT TO RECOVER COMPENSATION THEREUNDER BY CLAIMANT:

Composite negligence refers to the negligence on the part of two or more persons. Where a person is injured without his fault as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on

account of the composite negligence of those wrong doers. In the cases of *National Insurance Company Ltd. v. Lalita Prabhakar and others, 1998 ACJ 1124 and Manjula Devi Bhuta v. Manjusri Raha and others, 1968 JLJ 189,* it was held that it is well settled that where the accident has taken place as a result of the composite negligence of the drivers of two or more vehicles and without any negligence on the part of the injured or the deceased person, the drivers of such two or more vehicles are joint tort-feasors and they are liable to pay compensation jointly and severally. It is equally well settled that where there is a joint and several liability, it is always open to the claimant to sue any of the persons so liable without making the other a party. The claimant can sue the joint tort-feasors, either jointly or severally and can have a complete redress for the loss suffered by him from either of them.

In *National Insurance Company Limited, Jabalpur v. Kamla Prasad and others, 2003 (1) MPHT 406,* the Division Bench of our High Court has observed that: –

> "... It is well known that when death or injury to a person results from collision of two vehicles due to negligence of both the drivers it is called composite negligence. Both the drivers would be joint tort-feasors. In the case of composite negligence the victim has a choice of proceeding against all or anyone of more than one wrong-doers. Every joint tort-feasor is liable for the whole damage. In the case of composite negligence, the liability cannot be apportioned. In a case of composite negligence there is no method or indicia to bifurcate or apportion the liability and the only course open in such cases can be to make them both liable jointly or severally. So far as the claimants are concerned, they can realize the amount from any one of the insurance companies and then the insurance company, which pays the entire amount, can take steps for recovering half of the amount from the other insurance company. In *M.P.S.R.T.Corpn. v. Abdul Rahman, AIR 1997 MP 248,* our learned brother Dipak Misra, J., speaking for the Division Bench has held that the consistent view of this Court is that in cases of composite negligence, liability cannot be apportioned, and the joint tort-feasors are jointly and severally liable for the whole loss. Again a reference to Ratanlal's Law of Torts revised by Justice G.P. Singh is quite apposite. The law has been stated to be that where injury is caused by the wrongful act of two parties, the plaintiff is not bound to a strict analysis of the proximate or immediate cause of the event to find out whom he can sue. Subject to the rules as to remoteness of damage, the plaintiff is entitled

to sue all or any of the negligent persons and it is no concern of his whether there is any duty of contribution or indemnity as between those persons, though in any case he cannot recover on the whole more than his whole damage. He has a right to recover the full amount of damages from any of the defendants. The same legal position has been stated at page 207: 'Joint tort-feasors are jointly and severally liable for the whole damage resulting from the tort. They may be sued jointly or severally. If sued jointly, the damages may be levied from all or either. Each is responsible for the injury sustained by his common act.' "

In the case of *Sushila Bhadoriya and others v. M.P. State Road Transport Corporation and another, 2005 (1) MPLJ 372 (FB)* our own High Court held that, "owner, driver and insurer of one of the vehicles can be sued and it is not necessary to sue owner, driver and insurer of both the vehicles or any of them." It was further held that "there cannot be apportionment of the liability of joint tort-feasors. In case both joint tort-feasors are impleaded as a party and if there is sufficient material on record then the question of apportionment can be considered by the Tribunal. However, on general principles of law, there is no necessity to apportion the intense liability of joint tort-feasors."

CONCLUSION:

From the above discussions, the legal principles that emerge are that:

- In cases of contributory negligence the contributor of such negligence cannot claim for payment of compensation in whole without accounting for his part of contribution. The extent of role played by him as assessed by the court will be taken into account and consideration for the purpose of setting off to a corresponding extent the payment of compensation for the injuries sustained. In such a case apportionment is possible.
- In cases of composite negligence, the claimant/victim having no role to play either directly or remotely and having not contributed any negligence to the causative factor of the injury is therefore, entitled to seek compensation from all of the joint tort-feasors or from any one of them. It is a choice left to him and in such a case of composite negligence, there cannot be apportionment of the liability between the two joint tort-feasors. If there is sufficient material on record, then the question of apportionment can be considered by the Claims Tribunal in such a case only to fix the inter se liability of joint tort-feasors without affecting the right of the claimants to recover whole compensation from any one of the joint tort-feasors.

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IN WHAT FORM THE FIRST SUMMON TO THE DEFENDANT BE ISSUED BY A COURT UNDER CPC?
&
WHETHER IN THE ABSENCE OF THE DEFENDANT ON SUCH FIRST DATE FIXED BY THE COURT IN A CIVIL SUIT, AN ORDER OF *EX PARTE* CAN BE PASSED?

Judicial Officers
Districts Jabalpur, Dhar,
Damoh & Morena*

Section 27 of Civil Procedure Code, 1908 (as amended) reads as below: –

> **S.27.** – Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed on such day not beyond thirty days from the date of the institution of the suit.

The words "prescribed on such day not beyond thirty days from the date of the institution of the suit" do not mean that the summons must be served within 30 days from the date of institution of the suit. The Apex Court in *Salem Advocate Bar Association, Tamil Nadu v. Union of India, AIR 2003 SC 189* has held that: –

> " .... In our opinion, the said provisions read as a whole will not be susceptible to that meaning. The words added by amendment, it appears, fix outer time frame, by providing that steps must be taken within thirty days from the date of the institution of the suit, to issue summons. In other words, if the suit is instituted, for example, on 1st January, 2002, then the correct addresses of the defendants and the process fee must be filed in the Court within thirty days so that summons be issued by the Court not beyond thirty days from the date of the institution of the suit. The object is to avoid long delay in issue of summons for want of steps by the plaintiff. It is quite evident that if all that is required to be done by a party, has been performed within the period of thirty days, then no fault can be attributed to the party. If for any reason, the Court is not in a position or is unable to or does not issue summons within thirty days, there will, in our opinion, compliance with the provisions of Section 27 once within thirty days of the issue of the summons the party concerned has taken steps to file the process fee along with completing the other formalities which are required to enable the Court to issue the summons."

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* The articles received from the aforesaid districts are edited and compiled by the Institute.

In this section, the words "served in the manner prescribed" means prescribed by Rules [Section 2 (16) CPC]. Order 5 Rule 1 (1) provides that when a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence, if any, within thirty days from the date of service of summons on that defendant.

Section 89 has been inserted in the Code of Civil Procedure by way of amendment which provides an alternate to the prevalent adversarial system of adjudicating forums. Order 10 of CPC has also been amended by adding Rules 1-A to 1-C. To work out the modality of amended provisions of CPC and to ensure timely and qualitative justice, the High Court of M.P. in exercise of the powers conferred by Section 122, 126 r/w/s 127 and 128 of CPC with the previous approval of the State Government has made Rules namely *Madhya Pradesh Case Flow Management in the Trial Courts and First Appellate Subordinate Courts (Civil) Rules, 2006* (for short – 'the Rules').

The Rules make the provision of fixing the time limit while issuing summons. Rule 1 of the Rules runs as under : –

II. Original Suit –

1. Fixation of time limit while issuing notice:

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

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

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

Further, Rule 5 of the Rules needs to be quoted here which reads as under: –

5. Referral to Alternate Dispute Resolution :

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

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

Rule 6 of the Rules provides procedure to be followed on the failure of alternate dispute resolution. The said Rule says that when the matter comes back on failure of conciliation, mediation or Lok Adalat, and the parties are not keen about settlement, the Court shall frame the issues.

As per provisions of Order 5 Rule 5 of CPC, the Court shall determine at the time of issuing the summons whether it shall be for the settlement of issues only or for the final disposal of the suit; and the summons shall contain a direction accordingly. If the summons is for final hearing, further Rule 8 of Order 5 mandates that it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case. So that the first hearing can be either (a) for settlement of issues or (b) for final disposal of the suit. But Order 10 Rule 1 (a) says that after recording denial and admission of facts as are made in the plaint or written statement (if any) of the opposite party, the Court shall direct the parties to the suit to opt either mode of settlement outside the Court as specified in Section 89. It seems to be mandatory.

A conjoint reading of Order 5 Rule 1 (1) and Order 5 Rule 5 CPC makes it clear that summons to the defendant shall require him to appear and file written statement within 30 days from the date of service of summons and such summons shall also be for the settlement of issues.

In view of amended provisions of Order 5 Rule 1 (1) CPC, the format of summons (form No. 2 of Appendix B of Schedule I of CPC) for settlement of issues requires suitable amendment. Order 48 Rule 3 CPC permits to do so wherein it is provided that the form given in the appendices with such variation as the circumstances of each case may require shall be used for the purpose therein mentioned. Therefore, now the summon issued to the defendant should contain the indication as to the time limit of maximum 30 days prescribed by the CPC for filing written statement.

Thus, Court may use the form of summons of settlement of issues with requisite variation in form No. 2 of Appendix B of Schedule I of CPC as below:

FORM

SUMMONS FOR SETTLEMENT OF ISSUES

To,

.....

(Name, description and place of residence of defendant)

Whereas..... has instituted a suit against you for ..... You are hereby summoned to appear and answer the claim of the plaintiff by filing a written statement of your defence within 30 days from the date of service of summons upon you and also all documents in your possession or power upon which you base your defence or claim for set off or counter-claim, and where you rely on any other document whether in your possession or power or not, as evidence in support of your defence or claim for set-off, or counter-claim you shall enter such document in a list to be annexed to the written statement.

The day of ..... 2009 (if on the said date the Court is not working due to holiday or Court is closed for some other reason or the Presiding Officer is on leave, the next working day of the Court) has been fixed for settlement of issues. In default of your appearance on the date fixed, the suit will be heard and determined in your absence.

Given under my hand and the seal of the Court, this ..... day of 2009.

JUDGE

Next, the question whether the order of ex parte can be passed in absence of the defendant on the date fixed by the Court will depend upon its corollary question that whether the date so fixed is the date of hearing.

In literal sense, the word 'hearing' with regard to Court proceedings means 'the listening of evidence and pleading in court of law, the trial of a cause'. The expression 'at the first hearing of the suit' is also found in Order 10 Rule 1, Order 14 Rule 1 (5) and Order 15 Rule 1 of the Code of Civil Procedure.

The Hon'ble Supreme Court in *Sudershan Devi v. Sushila Devi, AIR 1999 SC 3688,* has observed that expression 'hearing' means date on which Court proposes to apply its mind to determine points in controversy and to frame issue, if necessary, and not date fixed for filing written statement.

In *Shah Ambalal Chhotalal v. Shah Babaldas Dayabhai, AIR 1964 Guj 9,* Gujarat High Court while dealing with the meaning of words 'the first day of the hearing of the suit' observed that the said words do not mean the day for the return of the summons or the returnable day, but the day on which the court applies its mind to the case which ordinarily would be at the time when either the issues are determined or evidence taken.

The Apex Court again in *Ved Prakash Wadhwa v. Vishwa Mohan, AIR 1982 SC 816* held that the words 'first hearing' meant 'after framing of issues' when the suit would be posted for production of evidence. The Apex Court referred in that context to Order 10 Rule 1, Order 14 Rule 1 (5) and Order 15 Rule 1 CPC and held that the 'first hearing of the suit' can never be earlier than the date fixed for preliminary examination of witnesses (Order 10 Rule 1) and the settlement of issues [Order 14 Rule 1 (5) CPC].

The date fixed for settlement of issues is a date fixed for hearing. The stage of framing of issues is an important one inasmuch as on that day the scope of the trial is determined by laying the path on which the trial shall proceed excluding diversions and departures therefrom. The date fixed for settlement of issues is, therefore, a date fixed for hearing. The real dispute between the parties is determined, the area of conflict is narrowed and the concave mirror held by the Court reflecting the pleadings of the parties, pinpoints into issues the disputes on which the two sides differ. (Please see *Makhan Lal Bangal v. Manas Bhunia, AIR 2001 SC 490*).

Now, we come to the question of consequences of non-appearance of defendant on the day fixed by the Court. In this regard, the relevant provision under sub-rule (1) of O. IX R. 6 of the Civil Procedure Code is as follows:-

> **6. Procedure only when plaintiff appears –** (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then –
>
> > **(a) When summons duly served –** If it is proved that the summons was duly served, the court may make an order that the suit be heard ex parte.
> >
> > **(c) When summons served but not in due time –** If it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

In this situation, when it is proved that the summons was duly served in due time, means the defendant got sufficient time to enable him to respond to the summons. The Court may make an order that the suit be heard ex parte. The provision casts an obligation on the court and simultaneously invokes the conscience of the Court to feel satisfied in the sense of being 'proved' that the summons was duly served.

The Court is conferred with a discretion to make an order that the suit be heard ex parte. The date appointed for hearing the suit for which the defendant is summoned to appear is a significant date of hearing requiring a conscious

application of mind on the part of the Court to satisfy itself on the service of summons. Any default or casual approach on the part of the Court, may result in depriving a person of his valuable right to participate in the hearing by passing as *ex parte* decree or order in the suit causing harm to the defendant for no fault of his. [*Sushil Kumar Sabharwal v. Gurpreet Singh, AIR 2002 SC 2370*]

Order 8 Rule 1 CPC provides that the defendant shall within 30 days from the date of service of summons on him, present a written statement of his defence. Further Rule 9 says that no pleading subsequent to the written statement of a defendant other than by way of defence to set off or counter-claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit; but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time of not more than thirty days for presenting the same. Order 8 Rule 10 provides procedure to be followed on the failure of presentation of the written statement required under Rule 1 or Rule 9. Rule 10 says 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, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

It would be apposite to mention here that if the suit proceeds ex parte even in the absence of a written statement, the applicability of Order 8 Rule 10 of the CPC is attracted and the court acts thereunder, the necessity of proof by the plaintiff of his case to the satisfaction of the court cannot be dispensed with. In the absence of denial of plaint averments, the burden of proof by the plaintiff is not very heavy. A prima facie proof of the relevant facts constituting the cause of action would suffice and the court would grant the plaintiff such relief as to which he may in law be found entitled. In a case which has proceeded ex parte the court is not bound to frame issues under Order 14 and deliver the judgment on every issue as required by Order 20 Rule 5. Yet the trial court would scrutinize the available pleadings and documents, consider the evidence adduced and would do well to frame the 'points for determination' and proceed to construct the ex parte judgment dealing with the points at issue one by one. Merely because the defendant is absent the Court shall not admit evidence, the admissibility whereof is excluded by law nor permit its decision being influenced by irrelevant or inadmissible evidence. [*Ramesh Chandra Ardhavatiya v. Anil Panjawani, AIR 2003 SC 2508*]

As it is clear from the provisions herein above mentioned that the summons to the defendant shall require him to appear and file written statement within 30 days from the date of service of summons on him. In other words, the defendant shall have full period of 30 days for filing written statement.

If the suit is duly instituted and correct address of the defendant and the process fee is filed in the Court within thirty days of the date of the institution of the suit but due to some or other reason summons could not be served upon the defendant before 30 days of date fixed for settlement of issues, Court cannot proceed ex parte against the defendant. In such a situation the defendant is not obliged to file written statement on the date of so called date for settlement of issues, as the defendant has an absolute right of 30 days from date of service of summons to file written statement.

If the defendant does not appear and answer the claim of the plaintiff by filing a written statement of his defence within 30 days from the date of service of summons upon him, the court cannot proceed ex parte since the defendant has merely been directed to appear and file written statement. It is pertinent to mention here that issues are not to be settled on the date when defendant appears within 30 days of service of summons. Therefore, if the defendant does not appear and file written statement within 30 days of service of summons, Court cannot proceed ex parte. But on the date of hearing of the suit (i.e. the date for settlement of issues) if 30 days time from the date of service has elapsed and the defendant does not appear, Court can proceed ex parte.

Therefore, the logical conclusions arrived at on account of aforementioned discussions are as under: –

(a) If the suit is duly instituted and correct address of the defendant and the process fee is filed in the Court within thirty days of the date of the institution of the suit and summons is also served upon the defendant before 30 days of date fixed for settlement of issues, Court can proceed ex parte against the defendant if he remains absent on the date fixed for settlement of issues in the summons.

(b) If the suit is duly instituted and correct address of the defendant and the process fee is filed in the Court within thirty days of the date of the institution of the suit but due to some other reason summons could not be served upon the defendant before 30 days of date fixed for settlement of issues, Court cannot proceed ex parte against the defendant.

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विधिक समस्याऐं एवं समाधान

(न्यायिक दायित्वों के निर्वहन के क्रम में अनेक प्रकार की विधिक समस्यायें समय–समय पर न्यायाधीशों के समक्ष उपस्थित होती हैं। ऐसी समस्याओं के विधि सम्मत समाधान के सुस्पष्ट सोच के अभाव में न केवल न्यायादान में विलम्ब की सम्भावना बढ़ जाती है अपितु न्याय के हनन का खतरा भी आसन्न रहता है। फरवरी 2006 अंक के साथ प्रारंभ इस स्तम्भ के माध्यम से हम ऐसी कुछ महत्वपूर्ण समस्याओं के विषय में नियमित रूप से विचार विमर्श करते आ रहे हैं। प्रयास यह होगा कि समस्या के सम्यक समाधान के विषय में विश्लेषणात्मक दृष्टिकोण अपनाया जावे)

क्या आपराधिक मामले की जांच या विचारण के किसी भी प्रक्रम पर न्यायालय अभियुक्त को एक ही आदेश से एक से अधिक तिथियों के लिये व्यक्तिगत उपस्थिति से अभिमुक्ति प्रदान कर सकता हैं ? क्या ऐसी अभिमुक्ति सेशन न्यायालय द्वारा भी अनुज्ञात की जा सकती हैं?

सामान्य रूप से किसी आपराधिक मामले की जांच एवं विचारण के अनुक्रम में दण्ड प्रक्रिया संहिता 1973 की धारा 205 के अधीन जांच एवं विचारण करने वाले मजिस्ट्रेट द्वारा अभियुक्त की उपस्थिति के लिए समन जारी करते समय अथवा ऐसी तिथि पर अभियुक्त के आवेदन पर उसे एक से अधिक नियत तिथियों अथवा एक अंतराल के लिए व्यक्तिगत उपस्थिति से अभिमुक्ति प्रदान की जा सकती है तथा ऐसी अवधि में अभियुक्त का प्रतिनिधित्व उसके अभिभाषक द्वारा स्वीकार किया जाता है। ऐसी अभिमुक्ति अनुज्ञात करते समय मजिस्ट्रेट के समक्ष अभियुक्त की व्यक्तिगत उपस्थिति अपेक्षित नहीं हैं। यह धारणा सही नही है कि धारा – 205 द.प्र.सं. के अधीन अभियुक्त को व्यक्तिगत उपस्थिति से अभिमुक्ति प्रदान करने के पूर्व उसे न्यायालय के समक्ष व्यक्तिगत रूप से उपस्थित होना चाहिए। (देखें *R.P.Gupta v. The State of M.P. 2007 (1) MPHT 412*)

वस्तुतः यह अभिमुक्ति समन जारी करने वाले मजिस्ट्रेट द्वारा अनुज्ञात की जाती है तथा प्रकट रूप से धारा 205 द.प्र.सं. का क्षेत्र सेशन न्यायालय तक विस्तारित नहीं हैं। समन जारी करने वाला मजिस्ट्रेट जांच या विचारण प्रारंभ होने के पूर्व धारा 205 द.प्र.सं. के प्रावधान के अधीन अभियुक्त को व्यक्तिगत उपस्थिति से अभिमुक्ति प्रदान करने हेतु सशक्त है जबकि जांच या विचारण के प्रक्रम पर ऐसी अभिमुक्ति द.प्र.सं. की धारा 317 (1) के अधीन ही प्रदान की जा सकती हैं।

दण्ड प्रक्रिया संहिता 1973 की धारा 317 (1) के अधीन जांच एवं विचारण के किसी भी प्रक्रम पर मजिस्ट्रेट अथवा न्यायाधीश किसी अभियुक्त को एक से अधिक तिथियों अथवा एक अंतराल के लिए व्यक्तिगत उपस्थिति से अभिमुक्ति अपने समाधान के कारणों को लेखबद्ध करते हुए अनुज्ञात कर सकते हैं। आवश्यक होने पर पश्चात्वर्ती प्रक्रम पर ऐसे अभियुक्त को व्यक्तिगत उपस्थिति हेतु निर्देशित किया जा सकता है। अभियुक्त की अनुपस्थिति में अभियुक्त का प्रतिनिधित्व उसके अभिभाषक द्वारा किया जाएगा।

ऐसी अभिमुक्ति अनुज्ञात करते समय अभियुक्त से न्यायालय की संतुष्टि योग्य यह परिवचन (Undertaking) प्राप्त किया जाना चाहिए कि वह मामले में अपनी पहचान को विवादित नहीं करेगा और नियत तिथियों पर उसके अभिभाषक उसकी ओर से न्यायालय में उपस्थित रहेंगे तथा उसकी अनुपस्थिति में साक्ष्य लिए जाने पर कोई आपत्ति नहीं करेंगे।

यदि अधिकृत अभिभाषक, जिनके द्वारा अभियुक्त का प्रतिनिधित्व किया जा रहा है, उपस्थित नहीं होते है अथवा मामले के विचारण में सहयोग नहीं करते है तो ऐसे अभियुक्त को मामले की कार्यवाही के पश्चातवर्ती प्रक्रम पर व्यक्तिगत रूप से उपस्थित रहने हेतु संहिता की धारा 205 (2) अथवा 317 (1) के अधीन निर्देशित किया जा सकता है। इस बिंदु पर माननीय उच्चतम न्यायालय का न्याय दृष्टांत *M/S Bhaskar Industries Ltd. v. M/S Bhiwani Denim and Apparels Ltd., AIR 2001 SC 3625* अवलोकनीय है।

संहिता की धारा 317 (1) में मजिस्ट्रेट के अतिरिक्त न्यायाधीश शब्द को प्रयुक्त किया गया है जिसका स्पष्ट विधायी आशय यह है कि ऐसी अभिमुक्ति सेशन न्यायालय द्वारा भी अनुज्ञात की जा सकती हैं।

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क्या किसी असंज्ञेय अपराध से संबंधित परिवाद पर संस्थित आपराधिक प्रकरण में न्यायालय द्वारा आरोपी के अभियोजन में परिवादी द्वारा उपगत व्यय राशि उसे अदा करने के लिए आरोपी को निर्देशित किया जा सकता है एवं क्या व्यतिक्रम करने पर ऐसे आरोपी को अतिरिक्त कारावास की दण्डाज्ञा दी जा सकती है ?

यद्यपि किसी भी दाण्डिक प्रकरण में दोष सिद्धि पर न्यायालय द.प्र.सं. की धारा 357 (1) के प्रावधानों के अन्तर्गत आरोपी पर अधिरोपित अर्थदण्ड में से विक्षुब्ध व्यक्ति/आहत/परिवादी को उक्त उपधारा के खण्ड (ख) के अन्तर्गत संबंधित अपराध से कारित हानि या क्षति के लिये प्रतिकर के साथ–साथ उक्त उपधारा के खण्ड (क) के अन्तर्गत अभियोजन में उचित रूप से उपगत व्ययों के भुगतान करने का आदेश भी दे सकता है किन्तु यदि न्यायालय द्वारा असंज्ञेय अपराध से संबंधित परिवाद पर संस्थित प्रकरण में कारावास की दण्डाज्ञा के साथ अर्थदण्ड अधिरोपित नहीं करते हुए धारा 357 (3) के प्रावधानों के अन्तर्गत आरोपी को विक्षुब्ध व्यक्ति/आहत/परिवादी को प्रतिकर देने का आदेश दिया जाता है, (उदाहरणार्थ धारा 138 परक्राम्य लिखत अधिनियम 1881 के मामले में) तब न्यायालय अभियोजन में उपगत व्यय के भुगतान का आदेश नहीं दे सकता हैं क्यों कि धारा 357 (1) के खण्ड (क) जैसा प्रावधान धारा 357 (3) में न होकर उसमें केवल धारा 357(1) के खण्ड (ख) के समान प्रावधान हैं।

ऐसी स्थिति में यदि न्यायालय ऐसे उपगत व्यय के भुगतान का आदेश देना चाहता है तब उसे धारा 359 द.प्र.सं. के प्रावधानों का उपयोग करना होगा जो किसी असंज्ञेय अपराध से संबंधित परिवाद में विचारण न्यायालय को यह शक्ति प्रदान करती है कि वह आरोपी को किसी अपराध के लिए दोष सिद्ध ठहराये जाने की स्थिति में उस पर दण्डाज्ञा अधिरोपित करने के अतिरिक्त यह आदेश भी दे सकता है कि वह परिवादी द्वारा अभियोजन में उपगत व्यय राशि में से, जिसमें आदेशिका शुल्क तथा साक्षियों एवं अधिवक्ता का शुल्क सम्मिलित है, संपूर्ण या आंशिक धनराशि परिवादी को अदा करें।

इसके अतिरिक्त न्यायालय व्यतिक्रम में आरोपी को तीस दिन तक के साधारण कारावास की अतिरिक्त दण्डाज्ञा भी अधिरोपित कर सकता है। यहाँ यह भी उल्लेखनीय है कि उक्त धारा के अन्तर्गत कोई आदेश अपीलीय न्यायालय द्वारा एवं पुनरीक्षण शक्तियों का प्रयोग करते हुए सत्र न्यायालय अथवा उच्च न्यायालय द्वारा भी दिया जा सकता है।

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नोट:–स्तंभ 'समस्या एवं समाधान' के लिये न्यायिक अधिकारी अपनी विधिक समस्याएं संस्थान को भेज सकते हैं। चयनित समस्याओं के समाधान आगामी अंको में प्रकाशित किये जाएंगे – **संचालक**

PART - II

NOTES ON IMPORTANT JUDGMENTS

***231. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 (1) (b), 14 & 43 (3)**

Sub-letting of the tenanted premises without consent of the landlord, criminal consequence of – Letting out the tenanted premises to sub-tenant without permission of the landlord is prohibited under Section 14 of the Act – Therefore, any act of sub-letting in contravention of Section 14 of the Act makes the tenant liable to face penalty under Section 43 (3) of the Act and the complaint is maintainable before the Judicial Magistrate against the tenant but not against the sub-tenant.

Manisha Lalwani (Smt.) v. Dr. D.V. Paul

Judgment dated 20.03.2009 passed by the High Court in Writ Petition No. 1537 of 2009, reported in 2009 (II) MPJR 196

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***232. ADMINISTRATIVE LAW:**

Administrative order involving civil consequences, requirement therefor – An administrative order which involves civil consequences, can only be passed after complying with the rules of natural justice.

M/s Chandni Marble v. State of Madhya Pradesh and others

Judgment dated 05.05.2008 passed by the High Court in Writ Petition No. 2737 of 2003, reported in 2009 (3) MPHT 89

Held:

The State Government while exercising *suo motu* power of review under Rule 57 (5) has passed the order dated 06.08.2003 by which the original lease area of the petitioner has been reduced from 3.42 hectares to 2.57 hectares. By the original order dated 28.06.2003 the petitioner was sanctioned 3.42 hectares and by the review order dated 06.08.2003 the said area is reduced to 2.57 hectares. If any adverse order was to be passed against the petitioner in exercise of the *suo motu* review power then it was necessary for the Review Authority to comply with the principles of natural justice and give an opportunity of hearing to the petitioner. It is the settled law that an administrative order, which involves civil consequences, can only be passed after complying with the rules of natural justice. Supreme Court in the case of *Baldev Singh and others* v. *State of Himachal Pradesh, (1987) 2 SCC 510,* held in para 5 as under : –

> It is a fact that the Orissa Act provides in clear terms a right of hearing whereas Section 256 of the Himachal Act makes no such provision, but the settled position in law is that where exercise of a power results in civil consequences to citizens,

unless the statute specifically rules out the application of natural justice, the rules of natural justice would apply.

Supreme Court in the case of *State of Haryana v. Ram Kishan and others, AIR 1988 SC 1301,* while considering the premature termination of mining lease without affording opportunity of hearing held in paragraph 8 as under : –

> 8. Considered in this light, the section must be interpreted to imply that the person who may be affected by such a decision should be afforded an opportunity to prove that the proposed step would not advance the interest of mines and mineral development. Not to do so will be violative of the principles of natural justice. Since there is no suggestion in section to deny the right of the affected persons to be heard, the provisions have to be interpreted as implying to preserve such a right. Reference may be made to the observations of this Court in *Baldev Singh v. State of Himachal Pradesh, (1987) 2 SCC 510 = AIR 1987 SC 1239,* that where exercise of a power results in civil consequences to citizens, unless the statute specifically rules out the application of natural justice, such rules would apply. The cases, *Union of India v. Cynamide India Ltd., AIR 1987 SC 1802, D.C. Saxena v. State of Haryana, AIR 1987 SC 1463* and *State of Tamil Nadu v. Hind Stone etc., (1981) 2 SCR 742 = AIR 1981 SC 711,* relied upon by Mr. Mohanty do not help the appellant. The learned Counsel placed reliance on the observations in Paragraphs 5 to 7 of the judgment in *Union of India v. Cynamide Ltd.* (supra) which were made in connection with legislative activity which is not subject to the rule of *audi alteram partem.* The principles of natural justice have no application to legislative activities, but that is not the position here. It has already been pointed out earlier that the existing mining leases were not brought to their end directly by Section 4-A itself. They had to be terminated by the exercise of the Executive Authority of the State Government. Somewhat similar was the situation with regard to Section 4-A of Haryana Board of School Education Act, 1969 which was under consideration in *D.C. Saxena v. State of Haryana, AIR 1987 SC 1463.* A matter of policy adopted and included by the Legislature in the impugned section. Besides, the validity of the section was not under challenge there, as was expressly stated in Paragraph 6 of the judgment. So far as the case, *State of Tamil Nadu v. Hind Stone* (supra) is concerned, the learned Counsel for the appellant cited it only with a view to emphasis the importance of the mineral wealth of the nation

which nobody denies. We, therefore, hold that a final decision to prematurely terminate a lease can be taken only after notice to the lessee.

Supreme Court in *Canara Bank and others v. Shri Debasis Das and others, AIR 2003 SC 2041* while considering the meaning of civil consequences has held in para 19 as under: –

> 19. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative order, which involves civil consequences, must be consistent with the rules of natural justice. Expression 'civil consequences' encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

Reduction of lease area after grant of lease will have civil consequences adversely affecting the interest of lease holders and without giving an opportunity of hearing to the petitioner the respondent No. 1 could not have reviewed its earlier order dated 28.06.2003 by which certain rights had already accrued in favour of the petitioner.

Thus, the review order dated 06.08.2003 cannot be sustained and the same is accordingly set aside and the matter is remitted back to the respondent No. 1 to pass fresh order after giving an opportunity of hearing to all the effected parties. It would be open for the petitioner to raise all such grounds, which they have raised in the writ petition.

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233. ARBITRATION AND CONCILIATION ACT, 1996 – Section 7

Existence of an agreement to refer the dispute to arbitration can be clearly ascertained in the facts and circumstances of the case – That in turn may depend upon the intention of the parties to be gathered from the correspondence exchanged between the parties to the agreement in question and the surrounding circumstances – Act does not prescribe any form for an arbitration agreement.

Nandan Biomatrix Limited v. D 1 Oils Limited

Judgment dated 11.02.2009 passed by the Supreme Court in Arbitration Application No. 6 of 2007, reported in (2009) 4 SCC 495

Held:

The disputed arbitration clause in the present case is clause 15.1, mentioned in the Supply Agreement, which is reproduced as under:

> "15.1. Any dispute that arises between the parties shall be resolved by submitting the same to the institutional arbitration in India under the provisions of Arbitration and Conciliation Act, 1996."

Arbitration agreement is defined under Section 7 of the 1996 Act. It does not prescribe any particular form as such.

This Court in *Rukmanibai Gupta v. Collector, Jabalpur, (1980) 4 SCC 556,* has held that what is required to be ascertained, while construing a clause is :

> "whether the parties have agreed that if disputes arise between them in respect of the subject matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement."

In *M. Dayanand Reddy v. A.P. Industrial Infrastructure Corpn. Ltd., (1993) 3 SCC 137,* this Court has held that

> "8. ....an arbitration clause is not required to be stated in any particular form. If the intention of the parties to refer the dispute to arbitration can be ascertained from the terms of the agreement, it is immaterial whether or not the expression "arbitration" or "arbitrator" or "arbitrators" has been used in the agreement."

The Court is required, therefore, to decide whether the existence of an agreement to refer the dispute to arbitration can be clearly ascertained in the facts and circumstances of the case. This, in turn, may depend upon the intention of the parties to be gathered from the correspondence exchanged between the parties, the agreement in question and the surrounding circumstances. What is required is to gather the intention of the parties as to whether they have agreed for resolution of the disputes through arbitration.

The 1996 Act does not prescribe any form for an arbitration agreement. The arbitration agreement is not required to be in any particular form. [See: *Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd., (2003) 7 SCC 418*]. What is required is to gather the intention of the parties as to whether they have agreed for resolution of the disputes through arbitration.

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***234. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 7 & 9**
SPECIFIC RELIEF ACT, 1963 – Section 10
CONTRACT ACT, 1872 – Section 55
Agreement to sale of immovable property – Whether time is the essence of the contract? Held, in contract for sale of immovable

property, normally it is presumed that time is not the essence of the contract – Even if there is an express stipulation to that effect, the said presumption can be rebutted – It is well settled that to find out whether time was the essence of contract, it is better to refer to the terms and conditions of the contract itself.

ARBITRATION CLAUSE, SURVIVAL THERE OF – Agreement to sale containing arbitration clause – It is well settled that even if an agreement ceases to exist, the arbitration clause remains in force and in a dispute pertaining to the agreement ought to be resolved according to conditions mentioned in arbitration clause.

INTERIM MEASURES – Maintanabilty of an application for injunction till the disposal of arbitration proceedings restraining the opposite party from transferring, alienating or creating any third party interest in respect of the property in dispute – Held, if the order restraining the non-applicant from creating any third party interest or their transferring the property in dispute is not granted till an award is passed, the appellant will suffer irreparable loss and injury and the entire award if passed in his favour, would become totally negated – That being the position, pending disposal of the arbitration proceedings, interim measure to safeguard the interest is required to be taken – Further held – Since the application is under Section 9 of the Act for interim measures to secure the interest of the applicant in the event of his succeeding to an award before the arbitrator, it would be in the interest of justice to put the applicant on terms – We are of the view that the parties should be directed to maintain status quo in the matter of transferring, alienating or creating any third-party interest in the same till the award is passed by the sole arbitrator and for that reason, the respondent would not be entitled to transfer, alienate the property in dispute during the pendency of the arbitration proceeding and considering the balance of convenience and inconvenience of the parties, we feel it proper to direct the appellant to deposit the balance amount within a period of three months from the date of supply of a copy of this order to the court concerned in fixed deposit for a minimum period of six months initially in a nationalized bank in favour of the respondent and renew the same till the disposal of the dispute before the arbitrator – The original fixed deposit receipt shall be kept with the arbitrator – In the event of failure of deposit of the aforesaid amount, the order of status quo as granted by the Trial Court and affirmed by this Court, shall automatically stand vacated.

N. Srinivas v. Kuttikaran Machine Tools Limited

Judgment dated 18.02.2009 passed by the Supreme Court in Civil Appeal No. 1098 of 2009, reported in (2009) 5 SCC 182

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*235. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 7, 31 (8) & 38
Requirement in arbitration clause for security deposit in case contractor invoked arbitration clause against Government and while no such restriction on Government – Held, not challengeable as unconscionable, as concept of unequal bargaining power has no application in case of commercial contracts – Such condition is not in conflict with Section 31 (8) r/w/s 38 of Arbitration and Conciliation Act, 1996 as these provisions are to operate in the absence of agreement with regard to costs and cannot be pressed into service to get over arbitration clause.

S.K. Jain v. State of Haryana and another

Judgment dated 23.02.2009 passed by the Supreme Court in Civil Appeal No. 1156 of 2009, reported in (2009) 4 SCC 357 (3-Judge Bench)

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*236. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 21 & 43
Arbitration proceedings, commencement of and limitation therefor – In respect of a particular dispute, it commences on the date on which a notice containing request for that dispute to be referred to arbitration is received by the respondent – Therefore, the determining factor in order to compute the limitation is the date of receipt of notice.

Prashant Kumar Sahu v. M/s Optel Telecommunications Ltd. and others

Judgment dated 24.01.2008 passed by the High Court in Miscellaneous Appeal No. 2066 of 2003, reported in 2009 (2) MPHT 402 (DB)

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237. CIVIL PROCEDURE CODE, 1908 – Section 9
Civil Courts can try all suits, unless barred by a stature, either expressly or by necessary implication – Civil Court being a court of plenary jurisdiction has the power to determine its jurisdiction upon considering averments made in the plaint but that does not mean that plaintiff can circumvent provisions of law in order to invest jurisdiction on civil court which it may not otherwise possess – There is a presumption that a civil court has jurisdiction – Ouster of civil court's jurisdiction is not to be readily inferred – A person taking a plea contra must establish the same – Even in a case where jurisdiction of a civil court is sought to be barred under a statute, the civil court can exercise its jurisdiction in respect of some matters particularly when the statutory authority or tribunal acts without jurisdiction.

Rajasthan State RoadTransport Corporation and another v. Bal Mukund Bairwa (2)

Judgment dated 12.02.2009 passed by the Supreme Court in Civil Appeal No. 328 of 2005, reported in (2009) 4 SCC 299 (3-Judge Bench)

Held:

Civil courts can try all suits, unless barred by a statute, either expressly or by necessary implication. Civil court being a court of plenary jurisdiction has the power to determines its jurisdiction upon considering averments made in the plaint but that does not mean that plaintiff can circumvent provisions of law in order to invest jurisdiction on civil court which it may not otherwise possess. There is a presumption that a civil court has jurisdiction. Ouster of civil court's jurisdiction is not to be readily inferred. A person taking a plea contra must establish the same. Even in a case where jurisdiction of a civil court is sought to be barred under a statute, the civil court can exercise its jurisdiction in respect of some matters particularly when the statutory authority or tribunal acts without jurisdiction.

Section 9 of the Code is in enforcement of the fundamental principles of law laid down in the maxim ubi jus ibi remedium. A litigant, thus, having a grievance of a civil nature has a right to institute a civil suit in a competent civil court unless its cognizance is either expressly or impliedly barred by any statute. Ex facie, in terms of Section 9 of the Code, civil courts can try all suits, unless bared by statute, either expressly or by necessary implication.

The civil court, furthermore, being a court of plenary jurisdiction has the jurisdiction to determine its jurisdiction upon considering the averments made in the plaint but that would not mean that the plaintiff can circumvent the provisions of law in order to invest jurisdiction on the civil court although it otherwise may not possess. For the said purpose, the court in given cases would be entitled to decide the question of its own jurisdiction upon arriving at a finding in regard to the existence of the jurisdictional fact.

It is also well settled that there is a presumption that a civil court will have jurisdiction and the ouster of civil court's jurisdiction is not to be readily inferred. A person taking a plea contra must establish the same. Even in a case where jurisdiction of a civil court is sought to be barred under a statute, the civil court can exercise its jurisdiction in respect of some matters particularly when the statutory authority or Tribunal acts without jurisdiction.

In *Dhulabai v. State of M.P. AIR 1969 SC 78* this Court held as under:

> "(1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
>
> (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act

to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply."

[See also *Church of North India v. Lavaji Bhai Ratanji Bhai, (2005) 10 SCC 760* and *United India Insurance Co. Ltd. v. Ajay Sinha* and, *(2008) 7 SCC 454*]

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238. CIVIL PROCEDURE CODE, 1908 – Section 24

Power u/s 24 of C.P.C., exercise of – Is a discretionary power – Court must act in judicious manner while dealing with an application for transfer of case.

Jitendra Singh v. Bhanu Kumari and others

Judgment dated 11.04.2008 passed by the High Court of M.P. in Civil Appeal No. 2786 of 2008, reported in 2009 (2) MPLJ 463 (SC)

Held:

The purpose of Section 24, Civil Procedure Code is merely to confer on the Court a dis4ecretionary power. A Court acting under Section 24, Civil Procedure Code may or may not in its judicial discretion transfer a particular case. Section 24 does not prescribe any ground for ordering the transfer of a case. In certain cases it may be ordered suo motu and it may be done for administrative reasons. But when an application for transfer is made by a party, the Court is required to issue notice to the other side ad hear the party before directing transfer. To put it differently, the Court must act judicially in ordering a transfer on the application of a party. (Para 9)

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239. CIVIL PROCEDURE CODE, 1908 – Sections 47 & 152

(i) Executing Court, powers of – The Court executing a decree cannot go behind the decree – Legal position explained.

(ii) Scope of S. 47 – In a peculiar situation arising in the case, the question of identity of the judgment debtor would be adjudicated under this Section – Position explained on factual scenario.

(iii) Amendment in decree, scope of – Held, power of the Court under Section 152 is led to rectification of clerical and arithmetical errors arising out of any accidental slip or omission – There cannot be re-consideration of merits of the matter.

(iv) Civil Practice – Imposition of cost – Misuse of judicial process by unscrupulous litigants and by raising frivolous plea of identity – Cost imposed.

Century Textiles Industries Limited v. Deepak Jain and another

Judgment dated 20.03.2009 passed by the Supreme Court in Civil Appeal No. 1743 of 2009, reported in (2009) 5 SCC 634

Held:

There is no quarrel with the general principle of law and indeed, it is unexceptionable that a court executing a decree cannot go behind the decree; it must take the decree according to its tenor; has no jurisdiction to widen its scope and is required to execute the decree as made. However, the question which falls for consideration in the present case is that when a specific issue regarding the identity of the judgment-debtor had been raised and entertained by the High Court in the first Civil Revision Petition, decided on 21st August,

2002, and the Court having remitted the matter to the Executing Court, the enquiry conducted by the Executing Court in furtherance of the said direction, could its order be said to be without jurisdiction?

In our opinion, on facts in hand, the Executing Court had no option but to determine the question of identity of the judgment-debtor because of the direction of the High Court and the issues raised before it. Indeed, no objection to the jurisdiction of the Executing Court to determine the issue could or was raised. It is also manifest that the said direction by the High Court was keeping in view the provisions of Section 47 of the CPC.

Section 47 of the CPC contemplates that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of decree, have got to be determined by the court executing the decree and not by a separate suit.

In the instant case, the controversy before the High Court, in the first instance, was whether the decree against "M/s Surya Trading, Proprietor, D.K. Jain" could be executed against Deepak Jain, who according to the decree holder, was no one else but D.K. Jain. It is true that Deepak Jain, as such, was not a party to the suit but the fact remains that "M/s Surya Trading Company, Proprietor, D.K. Jain" was Deepak Jain himself and, therefore, the question referred to the Executing Court by the High Court for determination was whether "D.K. Jain" and "Deepak Jain" were two different entities.

We have no hesitation in holding that in the peculiar situation arising in the case, the said issue could be adjudicated under Section 47 of the CPC, notwithstanding the fact that Deepak Jain was not a party in the suit, wherein the decree in question was passed. Moreover, it is evident from the order of the Executing Court that no plea regarding the applicability of Section 47 of the CPC was raised on behalf of the judgment-debtor before that Court.

We are unable to persuade ourselves to agree with the High Court that the only course available to the decree holder was to seek amendment of the decree under Section 152 of the CPC, as was canvassed before us by learned counsel for the respondents. A bare reading of Section 152 CPC makes it clear that the power of the Court under the said provision is limited to rectification of clerical and arithmetical errors arising from any accidental slip or omission. There cannot be re- consideration of the merits of the matter and the sole object of the provision is based on the maxim actus curiae neminem gravabit i.e., an act of court shall prejudice no man. In our judgment, the issue requiring adjudication by the Executing Court did not call for and was clearly beyond the scope of Section 152 CPC.

Before parting, we note with some anguish that this case is a classic example of how the judicial process can be misused by unscrupulous litigants, more so, when the person concerned himself appears to be an advocate. In the first instance, neither "D.K. Jain" nor "Deepak Jain", actually one and the same person, challenged the ex parte decree dated 10.03.1997 and it was only when execution proceedings were initiated against "Deepak Jain", that to obstruct execution, he

raised a frivolous plea of the identification of the judgment-debtor with the result that although over a decade has gone by, yet the decree-holder has not been able to enjoy the fruits of the money decree so far.

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240. CIVIL PROCEDURE CODE, 1908 – Sections 94 & 151, Order 39 Rules 1 & 2

(i) Inherent power to grant temporary injunction, exercise of – Civil Court has power to grant temporary injunction in the circumstances which are not covered under Order 39 or Rules made thereunder – However, when the case is squarely covered under Order 39 and Rules 1 & 2 of the Code, inherent power cannot be exercised for grant of injunction.

(ii) Application under Section 94 CPC for grant of temporary injunction without filing a suit, maintainability of – Application under Section 94 of the Code for temporary injunction without filing a suit is not maintainable unless there exist some legal impediment in bringing the suit and there exist rare and exceptional circumstances in which the party concerned has no suitable alternative remedy to prevent mischief.

Surendra Rathore v. Vishwanath Bhasin and another

Judgment dated 25.03.2009 passed by the High Court in Writ Petition No. 1693 of 2009, reported in 2009 (3) MPHT 60 (DB)

Held:

It is apparent from the provision of Section 94 of CPC that to prevent the ends of justice from being defeated, it is open under Section 94 (c) to grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison an order that his property be attached and sold. Section 94 (e) empowers the Court to make such other interlocutory orders as may appear to the Court to be just and convenient. Section 94 is a leading provision with respect to power of the Court to grant injunctions. The power under Section 94 is not in derogation to the other provisions it is supplemental. Inherent powers can be exercised to grant relief in case the case does not fall under any of the rules prescribed.

The meaning of the words 'if it is so prescribed' in Section 94 has been considered by the Apex Court in *Manoharlal Chopra v. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527.* The majority view of the Apex Court is that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of expression 'if it is so prescribed' in Section 94 is only this that when the rules in Order 39, CPC prescribe the circumstances in which the temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to

see whether the circumstances of the case bring it within the prescribed rule. If the provisions of Section 94 were not there in the Code, the Court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. It is in the incidence of the exercise of the power of the Court to issue temporary injunction that the provisions of Section 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it. Further, when the Code itself recognizes the existence of the inherent power of the Court, there is no question of implying any powers outside the limits of the Code. Thus, there being no such expression in Section 94 which expressly prohibits the issue of a temporary injunction in circumstances not covered by Order 39 or by any rules made under the Code, the Courts have inherent jurisdiction to issue temporary injunction in circumstances which are not covered by Order 39, CPC. No doubt about it that Court has the power to grant injunction in the circumstances which are not covered under Order 39 or rules made thereunder. In the exceptional circumstances using the inherent power under Section 151, the order of injunction can be granted.

The Apex Court has considered the question of grant of interim relief under Section 94 in *Vareed Jacob v. Sosamma Geevarghese and others, 2004 AIR SCW 4269,* in which the majority of the Apex Court has laid down that source of power of the Court to grant interim relief is under Section 94. However, exercise of that power can only be done if the circumstances of the case fall under the rules. Therefore, when a matter comes before the Court, the Court has to examine the facts of each case and ascertain whether the ingredients of Section 94 read with the rules in an order are satisfied and accordingly grant an appropriate relief. It is only in cases where circumstances do not fall under any of the rules prescribed, that the Court can invoke its inherent power under Section 151, CPC. Accordingly the Courts have to grant relief of attachment before judgment. The Court will grant temporary injunction if the case satisfied Order 39. So depending on the circumstances falling in the prescribed rules, the power of the Court to grant specified reliefs would vary. Therefore, each set of rules prescribed are distinct and different from the other and therefore, one cannot equate rules of temporary injunction with rules of attachment before judgment although all are broadly termed as interlocutory orders.

There may be cases where plaint is presented before the Court but notice period has not expired, such suits are used to be registered as MJC earlier before amendment of Section 80, CPC, if the period for notice has not expired. After amendment of Section 80, it is for the Court to grant permission to institute the suit as per sub-section (2) of Section 80. Nonetheless, earlier the plaint used to be filed along with the applications. Even under Municipal Corporation Act if period of notice has not expired, the method is adopted of filing of the plaint along with the application for injunction which is registered as MJC but nonetheless plaint is presented, it is registered later on after expiry of period of

notice. In such a case in exceptional circumstances Court used to grant injunction under inherent power. In our opinion, for grant of injunction under Section 94 read with inherent power it is necessary to seek main relief by filing the plaint. It is a different matter whether Court has not allowed to register it due to some legal impediments, in case it exists, then the inherent power can be exercised by the Court for grant of injunction as the case is not covered under Order 39 Rules 1 and 2. When the case is squarely covered under Order 39 and Rules 1 and 2, inherent power cannot be exercised for grant of such an injunction. Inherent power is exercised to grant injunction which are not covered under Order 39 Rules 1 and 2 but this power is supplemental not to violate the provisions.

We have to distinguish between the cases where main relief is claimed by filing the application in a case where plaint has not been presented at all and person is waiting for amicable settlement out of Court and seeks grant of injunction till limitation expires for filing of the suit from a case where there is legal impediment to register a case but plaint is filed before the Court. In the instant case ultimately a suit may itself be not presented, in case mediation succeeds. In our opinion, in such circumstances there is no power under CPC, even inherent power cannot be exercised by the Court to grant injunction particularly in vie of the fact that there is no legal impediment in filing of the suit. Merely on the ground that some talks are going on between the parties, would not clothe the applicant with right to invoke Section 94 read with Section 151 of CPC to claim interim injunction, which he can seek in properly instituted suit under Order 39 Rules 1 and 2. As suit has not been filed, which could have filed, recourse of filing of the application by indirect method to seek injunction, cannot be permitted to be resorted to. Such an application cannot be said to be maintainable. Main relief itself has not been asked in plaint by filing it. The grant of temporary injunction is supplemental to main relief, cannot be the main relief.

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241. CIVIL PROCEDURE CODE, 1908 – Order 18 Rule 17 and Order 47

Power to recall any witness can be exercised by the Court either on its own motion or on an application filed by any of the parties to the suit – Some of the principles akin to review under Order 47 CPC may be applied.

Vadiraj Naggappa Vernekar (Dead) through LRs v. Sharadchandra Prabhakar Gogate

Judgment dated 24.02.2009 passed by the Supreme Court in Civil Appeal No. 1172 of 2009, reported in (2009) 4 SCC 410

Held:

In our view, though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said rule is to enable the Court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined.

As indicated by the learned Single Judge, the evidence now being sought to be introduced by recalling the witness in question, was available at the time when the affidavit of evidence of the witness was prepared and affirmed. It is not as if certain new facts have been discovered subsequently which were not within the knowledge of the applicant when the affidavit evidence was prepared.

In the instant case, Sadanand Shet was shown to have been actively involved in the acquisition of the flat in question and, therefore, had knowledge of all the transactions involving such acquisition. It is obvious that only after cross-examination of the witness that certain lapses in his evidence came to be noticed which impelled the appellant to file the application under Order 18 Rule 17 CPC. Such a course of action which arises out of the fact situation in this case, does not make out a case for recall of a witness after his examination has been completed.

The power under the provisions of Order 18 Rule 17 CPC is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC.

It is now well settled that the power to recall any witness under Order 18 Rule 17 CPC can be exercised by the Court either on its own motion or on an application filed by any of the parties to the suit, but as indicated hereinabove, such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination.

Of course, if the evidence on re-examination of a witness has a bearing on the ultimate decision of the suit, it is always within the discretion of the Trial Court to permit recall of such a witness for re-examination-in-chief with permission to the defendants to cross-examine the witness thereafter. There is nothing to indicate that such is the situation in the present case.

Some of the principles akin to Order 47 CPC may be applied when a party makes an application under the provisions of Order 18 Rule 17 CPC, but it is ultimately within the Court's discretion, if it deems fit, to allow such an application. In the present appeal, no such case has been made out.

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***242. CIVIL PROCEDURE CODE, 1908 – Order 21 Rules 54, 66 & 89**

House, valued more than 10 lac rupees, auctioned by court in execution of ex parte decree valued Rs. 75,305 – Application for setting-aside the sale on the ground of non-compliance of provisions of law – Executing court dismissed the application as barred by time – Held, applicant was never served either in suit or in execution proceedings – In execution of ex parte decree Court ought to have to be extra cautious – Mandatory provisions of law were not complied – Sale set-aside on following certain terms and conditions – Appeal disposed of accordingly.

Gurbej Singh Khanuja (Dr.) v. Union of India & ors.
Judgment dated 16.09.2008 passed by the High Court in M.A. No. 1073 of 2007, reported in I.L.R. (2009) M.P. 476

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243. CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 58
Adjudication of objection to attachment of property under O.21 R.58 C.P.C., scope of – Law explained.
Serious dispute between parties as to the identity of the property purchased in execution – Executing Court is required to decide such a dispute on merit by holding an inquiry.
Mukesh Kumar Sanghvi v. Saifuddin and others
Judgment dated 10.12.2008 passed by the High Court of M.P. in First Appeal No. 422 of 2007, reported in 2009 (2) MPLJ 475

Held:

On close reading of provisions contained in Order XXI, Rule 58 of the Civil Procedure Code it is clear that it gives a statutory and substantial right to a party to get his claim or objection to be adjudicated. The aforesaid provision makes it clear when claim is preferred or any objection is made invoking provisions of Rule 58 of Order XXI of the Civil Procedure Code the Court has power either to dismiss such an application in limine on the ground that property attached had already been sold out or when it holds that the claim or the objection was designedly made to delay the proceedings. Sub-clause 5 of Rule 58 of Order XXI of the Civil Procedure Code empowers the party against whom the Court has passed an order under proviso to sub-rule (1) by refusing to entertain the claim or objection, to file a suit to establish the right, which he claims to the property in dispute. However, if the claim or objection is not dismissed under Clause (1) (a) or (b) of Rule 58 the questions including right, title or interest in the property attached arising between the parties to proceeding are required to be determined by the Court dealing with the claim or objection and not by a separate suit.

Thus a duty is cast on the Court to hold an inquiry to adjudicate the claim or objection to the attachment of the property. The determination of the adjudication necessarily implies and cast a mandatory duty upon the executing Court to give an opportunity to the parties to adduce all necessary evidence in support of the claim or to resist such claim, and pass appropriate orders either by allowing the claim or objection and release the property from attachment either wholly or to such extent as to think fit or disallow the claim or objection or continue the attachment subject to any mortgage, charge or other interest in favour of any person or pass such order as in the circumstances of the case it deems it fit. Sub-clause (4) of Rule 58 provides that where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to same conditions as to appeal or otherwise as if it were a decree.

On going through the records of the Execution Case Nos. 18-A/02-04 and 28-B/02-06, the documents filed by the parties, I find that there is a serious dispute between the parties as to the identity of the property purchased by the appellant in Execution Case No. 28-B/02-06. The appellant is contending the he has purchased the same property in Execution Case No. 28-B/02-06 which has been attached and put to auction in the present Execution CaseNo. 18-A/ 02-04. However the first respondent is disputing the said contention and is alleging manipulation in the description of the property by the appellant in the Execution Case No. 28-B/02-06. Having regard to the serious dispute between the parties about the identity and the boundaries of the property which the appellant has purchased in the auction in execution Case No. 28-B/02-06 and the property which has been attached and put to auction in the present Execution Case No. 18-A/02-04 in my considered view the appellants objection filed under Order 21, Rule 58 of the Civil Procedure Code was required to have been decided by the executing Court by holding an inquiry about the controversy after affording the parties to lead their respective evidence.

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244. CIVIL PROCEDURE CODE, 1908 – Order 21 Rules 102, 98 & 100
Doctrine of lis pendens, effect of – It prohibits a party from dealing with the property, which is the subject matter of suit.
Execution of decree – Resistance or obstruction by purchaser during pendency of litigation – He has no right to resist or obstruct execution of decree passed by the competent Court.
Dilip Kumar v. Vijay Bahadur Singh and others
Judgment dated 17.03.2009 passed by the High Court of M.P. in S.A. No. 116 of 2008, reported in 2009 (2) MPLJ 587

Held:

It is settled law that a purchaser of suit property during the pendency of litigation has no right to resist or obstruct execution of decree passed by competent Court. The doctrine of "lis pendens" prohibits a party from dealing with the property, which is the subject-matter of suit. "Lis pendens" itself is treated as constructive notice to a purchaser that he is bound by a decree to be entered in the pending suit. Rule 102, therefore, clarifies that there should not be resistance or obstruction by a transferee pendente lite. It declares that if the resistance is caused or obstruction is offered by a transferee pendente lite of the judgment debtor, he cannot seek benefit of Rules 98 or 100 of Order 21.

The Apex Court in the case of *Silverline Forum (P) Ltd. v. Rajiv Trust, (1998) 3 SCC 723* has held that where the resistance is caused or obstruction is offered by a transferee pendent lite, the scope of adjudication is confined to a question whether he was a transferee during the pendency of a suit in which the decree was passed. Once the finding is in the affirmative, the executing Court must hold that he had no right to resist or obstruct and such person cannot seek protection from the executing Court. The Apex Court stated:

"It is true that Rule 99 of Order 21 is not available to any person until he is dispossessed of immovable property by the decree holder. Rule 101 stipulates that all questions "arising between the parties to a proceeding on an application under Rule 97 or Rule 99" shall be determined by the executing Court, if such questions are "relevant to the adjudication of the application". A third party to the decree who offers resistance would thus fall within the ambit of Rule 101 if an adjudication is warranted as a consequence of the resistance or obstruction made by him to the execution of the decree. No doubt if the resistance was made by a transferee pendente lite of the judgment-debtor, the scope of the adjudication would be shrunk to the limited question whether he is such a transferee and on a finding in the affirmative regarding that point the execution Court has to hold that he has no right to resist in view of the clear language contained in Rule 102. Exclusion of such a transferee from raising further contentions is based on the salutary principle adumbrated in section 52 of the Transfer of Property Act."

Thus, purchasing the property from the judgment debtor during the pendency of the suit has no independent right to property and to resist or obstruct or object to the execution of a decree. Resistance at the instance of transferee or judgment debtor during the pendency of the proceedings cannot be said to be resistance or obstruction by a person in his own right and therefore is not entitled to get his claim adjudicated.

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***245. CIVIL PROCEDURE CODE, 1908 – Order 22 Rule 5**

Abatement of appeal against eviction decree – Original tenant died – Substitution as his legal representative sought by the son of the tenant was objected on the ground that he had separated from joint family – Held, this question cannot be decided without evidence of parties – Therefore, without deciding status of the son, dismissal of appeal as abated is not proper – Matter was remanded with direction for deciding the matter according to the provision of Order 21 Rule 5 CPC.

M/s Kanhiya Singh Santok Singh & Ors. v. Kartar Singh

Judgment dated 04.03.2009 passed by the Supreme Court in Civil Appeal No. 1525 of 2009, reported in AIR 2009 SC 1600

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246. CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 and 2

Temporary injunction, grant of – Grant of temporary injunction in absence of prima facie case or balance of convenience in favour of plaintiff and in absence of any probability of irreparable loss to him is contrary to law.

Padam Chand and others v. Ashok and others

Judgment dated 20.03.2009 passed by the High Court of M.P. in Misc. Appeal No. 1363 of 2008, reported in 2009 (2) MPLJ 559

Held:

It is clear that in pursuance to the arbitration agreement the Arbitrators pronounced their award. Thereafter the appellants filed an application before the District Court under the provisions of the Arbitration Act for making the award as rule of the Court. In the aforesaid proceedings the respondents filed objections. Their objections were rejected by the trial Court vide order dated 19-12-1990 passed in Civil Suit No. 43-A/84. Thereafter a revision was filed before this Court by the respondents challenging the aforesaid order. It was registered as Civil Revision No. 34/91 and decided by this Court vide order dated 24-02-1992. Thereafter, vide order dated 2-8-2000 the Additional District Judge ordered making the award as a rule of the Court and passed the judgment and decree in accordance with the Arbitration award dated 15-09-1983. The aforesaid order dated 2-8-2002 was challenged by the respondents before this Court in Misc. appeal No. 674/2000. This Court dismissed the appeal. Thereafter, appellants filed execution proceedings for execution of the judgment and decree passed in terms of the award by the Court in Civil Suit No. 43-A/84. In the aforesaid proceedings the respondents again filed an application for stay. That application was rejected. Thereafter a writ petition was filed before this Court challenging the order of rejection. It was registered as Writ Petition No 1518/08. This Court dismissed the writ petition vide order dated 12-08-2008 with a cost. Again, the respondents filed an injunction application before the trial Court. That has been accepted by the trial Court and the trial Court has granted interim injunction by the impugned order to the effect that the defendants shall not execute the sale-deed of the suit house in execution proceedings upto the decision in Civil Suit No. 43-A/84.

In my opinion, the injunction order granted by the trial Court is clearly in contravention of the orders passed by this Court in Misc. Appeal No. 674/2000 and Writ Petition No. 1518/2008. The effect of granting injunction passed by the trial Court is that by the aforesaid order the trial Court has nullified the effect of the orders passed by this Court in Misc. Appeal No. 674/2000 and Writ Petition No. 1518/2000. In my opinion, the trial Court has acted arbitrarily, illegally and against the well settled principle of law in granting the order of injunction. It has not at all considered properly the effect of the orders passed by this Court in Misc. appeal No. 674/2000 and Writ Petition No. 1518/2000. There is no prima facie case or balance of convenience lies in favour of the respondents neither there is any

irreparable loss. Contrary to this, the order passed by the trial Court is clearly in violation of the order passed by this Court in Writ Petition No. 1518/2000. Hence, the impugned order is contrary to law and is liable to be quashed.

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247. CIVIL PROCEDURE CODE, 1908 – Order 39 Rule 2-A

(i) Disobedience of the order of injunction – "Order of Injunction", meaning of – An interim direction to defendant tenant in a suit by the creditor against the landlords/borrowers, to deposit the arrears of rent in Court and to continue to deposit the rent in Court cannot be considered to be an order of "injunction" – On breach of such order no action under O. 39 R. 2-A of CPC is permissible.

(ii) "Garnishee defendant", connotation of – Direction of Court to garnishee to pay a sum of money – Non-compliance of – Proper remedy is to levy execution – The action under O. 39 R.2-A of CPC or Contempt of Courts Act cannot be taken.

(iii) Application under Order 39 Rule 2-A of C.P.C. – *Locus standi* – Only a person aggrieved by the alleged breach of the order can file such application.

(iv) Action under Order 39 Rule 2-A of C.P.C.– Nature – Held, the power exercised by the Court under Order 39 Rule 2-A of the Code is punitive in nature, akin to the power to punish for civil contempt under the Contempt of Courts Act, 1971. Such power should be exercised with great caution and responsibility.

Food Corporation of India v. Sukh Deo Prasad

Judgment dated 24.03.2009 passed by the Supreme Court in Civil Appeal No. 380 of 2007, reported in (2009) 5 SCC 665

Held :

Brief facts of the case:

The plaintiff (Bank) filed a suit against the respondent for recovery of loan amount seeking an interim direction to FCI (co-defendant/ tenant) to restrain it from paying the rent for the said godown to defendants 1, 2 and 3 (landlord) and for a further interim direction to FCI to deposit the rents relating to the godown to the loan account of defendants 1, 2 and 3 with the Bank. The Trial Court allowed the said application and directed to FCI to deposit the loan payable to the defendants 1, 2 and 3. Later on FCI vacated the said godown and stopped depositing rent. The defendant No. 1 filed an application under Order 39 Rule 2-A alleging that FCI had disobeyed the order and consequently the District Manager and some other officials be sent to civil jail and properties of FCI should be attached and auctioned. The Trial Court allowed the said application.

The Apex Court held that an interim direction to a defendant-tenant in a suit by the creditor against the landlords/borrowers, to deposit the arrears of rent in court and to continue the deposit the rents in court with a condition that the

tenant will have to pay interest if the rent was not so deposited, cannot be considered to be an order of 'injunction'. In a general sense, though every order of a court which commands or forbids is an injunction, but in its accepted legal sense, an injunction is a judicial mandate operating in personam by which, upon certain established principles of equity, a party is required to do or refrain from doing a particular thing [see Howard C. Joyce - A Treatise on the Law relating to injunctions (1909) S. 1 at 2-3]. A direction to pay money either by way of final or interim order, is not considered to be an 'injunction' as assumed by the courts below.

Admittedly the application dated 12.1.1996, on which the order dated 27.5.1996 was passed, did not fall under Rule 1 of Order 39 as the prayer therein did not relate to any of the three matters mentioned in clauses (a), (b) and (c) of the said rule. It did not also fall under Rule 2 of Order 39 as admittedly there was no contract between the bank and FCI nor any allegation that FCI was committing any injury of any kind to the bank. Therefore, the order dated 27.5.1996 was not an order under either Rule 1 or Rule 2 of Order 39 of the Code. The suit itself was for recovery of the amounts due by the borrowers, by sale of the mortgaged properties belonging to the borrowers (defendants 1 to 3) and to recover the balance personally from the borrowers and guarantors (defendants 1 to 6).

When FCI was subsequently added as seventh defendant at the instance of defendants 1 to 3, no relief was sought against FCI nor was the prayers amended seeking any decree against FCI. If there was no prayer in the suit against FCI, obviously no interim relief could have been sought against FCI as a defendant. Even assuming that the final relief was sought against FCI also, the position is that FCI was only a 'garnishee defendant' and not a 'principal defendant'. The order dated 27.5.1996 was not an injunction order, but an interim prohibitory (garnishee) order by way of attachment before judgment, in regard to the rents payable for one godown taken by it on lease in June, 1994.

An application under Order 39, Rule 2A of the Code is maintainable only when there is disobedience of any 'injunction' granted or other order made under Rule 1 or Rule 2 of Order 39 or breach of any of the terms on which the injunction was granted or the order was made.

We have already noticed that the application by the bank, on which the said order dated 27.5.1996 was passed, was neither under Rule 1 nor under Rule 2 of Order 39 CPC and none of the ingredients required for an application under either Rule 1 or Rule 2 of Order 39 existed was found in the application by the bank. As the order dated 27.5.1996 was neither under Rule 1 or 2 of Order 39, the application under Rule 2A of Order 39 was not maintainable.

Even otherwise, the respondent had no locus to file an application under Order 39 Rule 2A alleging disobedience of the order dated 27.5.1996. The plaintiff bank which filed the application dated 12.1.1996 on which the said order dated 27.5.1996 was passed, did not complain of any disobedience or breach of the order dated 27.5.1996, nor sought any action or relief against FCI alleging non-

compliance or disobedience of the order dated 27.5.1996. As the interim order dated 27.5.1996 was not made on an application made by the respondent and as the interim order was not intended for the benefit to the respondent who was the first defendant in the suit, he could not be said to be a person aggrieved by the alleged disobedience or breach of the order dated 27.5.1996.

At all events, if a garnishee, or a defendant, who is directed to pay any sum of money, does not pay the amount, the remedy is to levy execution and not in an action for contempt or disobedience/breach under Order 39 Rule 2A. This is evident from Rule 46B of Order 21 read with Rule 11A of Order 38 of the Code. Contempt jurisdiction, either under the Contempt of Court Act, 1971, or under Order 39 Rule 2A of the Code, is not intended to be used for enforcement of money decrees or directions/orders for payment of money. The process and concept of execution is different from process and concept of action for disobedience/contempt.

The power exercised by a court under Order 39, Rule 2A of the Code is punitive in nature, akin to the power to punish for civil contempt under the Contempt of Courts Act, 1971. The person who complains of disobedience or breach has to clearly make out beyond any doubt that there was an injunction or order directing the person against whom the application is made, to do or desist from doing some specific thing or act and that there was disobedience or breach of such order. While considering an application under Order 39 Rule 2A, the court cannot construe the order in regard to which disobedience/breach is alleged, as creating an obligation to do something which is not mentioned in the 'order', on surmises suspicions and inferences. The power under Rule 2A should be exercised with great caution and responsibility.

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***248. CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1966 (M.P.) – Rule 29**

Rule 29 of M.P. Civil Services (Classification, Control and Appeal) Rules, 1996, scope of –The word 'any' used in the Rule is wide enough to cover all and every order from which an appeal is allowed but from which no appeal has been preferred or from which no appeal has been allowed – Further held, the word 'any order' in Rule 29 is not confined to an original order by the Disciplinary Authority under the Rules – Since no appeal is allowed under the Rules against an order passed by the Appellate Authority, therefore, a review is available against an order passed by the Authority – Circular dated 20.01.2000 quashed in so far as it states that no review under Rule 29 of the Rules is permissible against an appellate order.

O.P. Pandey v. State of M.P. and another

Judgment dated 11.11.2008 passed by the High Court of M.P. in W.P. No. 12356 of 2008, reported in 2009 (2) MPLJ 455 (DB)

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249. CONSTITUTION OF INDIA – Articles 19 (1) (a) to (c) & (2) to (4) and 32
PREVENTION OF DAMAGE TO PUBLIC PROPERTY ACT, 1984
TORTIOUS ACT – Public nuisance

(i) Public nuisance – Organization of demonstration – To effectuate the modalities for preventive action – Guidelines issued by the Supreme Court – Further, in the absence of legislation, to assess damage to the property, takes place due to mass protest, the guidelines are to be observed.

(ii) Powers of the Supreme Court to laying down guidelines – Held, when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory powers to implement it, the Supreme Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till suitable law is enacted.

Destruction of Public and Private Properties, in Re v. State of Andhra Pradesh and others

Judgment dated 16.04.2009 passed by the Supreme Court in Writ Petitions (Crl,) No. 77 of 2007, reported in (2009) 5 SCC 212 (3-Judge Bench)

Held:

Taking a serious note of various instances of large-scale destruction of public and private properties in the name of agitation, bandhs, hartals and the like, suo motu proceedings were initiated by the Supreme Court in the matter of Destruction of Public and Private Properties, In *Re, (2007) 4 SCC 474.* After perusing the various reports filed, two Committees were appointed; one headed by Justice K.T. Thomas, Retired Judge of the Supreme Court and the other Committee headed by Mr. F.S. Nariman, Senior Member of the Legal Profession. Two reports were submitted by the Committees. The recommendations made by the Committees were accepted and approved by the Supreme Court and issued guidelines in the matter.

To effectuate the modalities for preventive action and adding teeth to enquiry/investigation following guidelines are to be observed:

As soon as there is a demonstration organized:

(I) The organizer shall meet the police to review and revise the route to be taken and to lay down conditions for a peaceful march or protest;

(II) All weapons, including knives, lathis and the like shall be prohibited;

(III) An undertaking is to be provided by the organizers to ensure a peaceful march with marshals at each relevant junction;

(IV) The police and State Government shall ensure videograph of such protests to the maximum extent possible;

(V) The person in charge to supervise the demonstration shall be the SP (if the situation is confined to the district) and the highest police officer in the State, where the situation stretches beyond one district;

(VI) In the event that demonstrations turn violent, the officer-in-charge shall ensure that the events are videographed through private operators and also request such further information from the media and others on the incidents in question.

(VII) The police shall immediately inform the State Government with reports on the events, including damage, if any, caused

(VIII) The State Government shall prepare a report on the police reports and other information that may be available to it and shall file a petition including its report in the High Court or Supreme Court as the case may be for the Court in question to take suo motu action.

In the absence of legislation the following guidelines are to be adopted to assess damages:

(I) Wherever a mass destruction to property takes place due to protests or thereof, the High Court may issue suo motu action and set up a machinery to investigate the damage caused and to award compensation related thereto.

(II) Where there is more than one state involved, such action may be taken by the Supreme Court.

(III) In each case, the High Court or Supreme Court, as the case may be, appoint a sitting or retired High Court judge or a sitting or retired District judge as a Claims Commissioner to estimate the damages and investigate liability.

(IV) An Assessor may be appointed to assist the Claims Commissioner.

(V) The Claims Commissioner and the Assessor may seek instructions from the High Court or Supreme Court as the case may be, to summon the existing video or other recordings from private and public sources to pinpoint the damage and establish nexus with the perpetrators of the damage.

(VI) The principles of absolute liability shall apply once the nexus with the event that precipitated the damage is established.

(VII) The liability will be borne by the actual perpetrators of the crime as well as organisers of the event giving rise to the liability - to be shared, as finally determined by the High Court or Supreme Court as the case may be.

(VIII) Exemplary damages may be awarded to an extent not greater than twice the amount of the damages liable to be paid.

(IX) Damages shall be assessed for:

(a) damages to public property;

(b) damages to private property;

(c) damages causing injury or death to a person or persons;

(d) Cost of the actions by the authorities and police to take preventive and other actions

(X) The Claims Commissioner will make a report to the High Court or Supreme Court which will determine the liability after hearing the parties.

The recommendations of Justice K.T. Thomas Committee and Mr. F.S. Nariman Committees above which have the approval of this Court shall immediately became operative. They shall be operative as guidelines.

These guidelines shall cease to be operative as and when appropriate legislation consistent with the guidelines indicated above are put in place and/ or any fast track mechanism is created by Statute(s).

The power of this Court also extends to laying down guidelines. In *Union of India v. Association for Democratic Reforms, (2002) 5 SCC 294,* this Court observed:

> "...It is not possible for this court to give any directions for amending the Act or statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules. However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted."

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250. CONSTITUTION OF INDIA – Articles 21, 32 & 226

(i) Infringement of fundamental right to life and personal liberty – Duty of the State to pay compensation therefor – The liability of the State to pay compensation for deprivation of the fundamental right of life and personal liberty is a new liability in public law created by the Constitution and not vicarious liability or a liability in tort.

(ii) Doctrine of sovereign immunity, scope and application of – Doctrine of sovereign immunity is not available when the State or its Officers, acting in the course of employment, infringe a person's fundamental right to life and personal liberty guaranteed under Article 21 of the Constitution.

Pooran Singh v. State of Madhya Pradesh and others

Judgment dated 16.03.2009 passed by the High Court in Writ Petition No. 14593 of 2008, reported in 2009 (2) MPHT 435 (DB)

Held:

There is, thus, no dispute in this case nor there is any doubt that the petitioner was detained illegally in prison for almost five years after his sentence was reduced in criminal appeal by this Court. By which officer or the employee of State this damage was done to him is a matter of enquiry which we will order hereinafter. But the fact remains he was incarcerated in jail for no fault of his by the State Government or by its officers while acting in the course of employment. The question, therefore, which calls for our consideration is what relief the petitioner can be granted in this petition.

The liability of the State to pay compensation for deprivation of the fundamental right of life and personal liberty is a new liability in public law created by the Constitution and not vicarious liability or a liability in tort. For this reason, this new liability is not hedged in by the limitations, including the doctrine of sovereign immunity, which ordinarily apply to State's liability in tort. This view is strongly supported by the decision of the Privy Council in *Maharaj v. Attorney-General of Trinidad and Tobago, (1978) 2 All ER 670.* Section 1 of the Constitution of Trinidad and Tobago recognizes amongst other "the right of the individual of life, liberty, security of person and the right not to be deprived thereof except by due process of law". Any person alleging contravention of this right and other human rights and freedoms recognized under sections 1 and 2 can apply under section 6 for redress to the High Court which is empowered to issue appropriate orders, writs and directions for enforcement or securing the protection of provisions of the aforesaid sections. The appellant in the case was a barrister and was committed to seven days imprisonment by a judge of the High Court which committal was set aside by the Privy Council in appeal on the ground that particulars of the specific nature of the contempt were not told to the appellant and the judge had thereby failed to observe a fundamental rule of natural justice. The appellant had in the meantime applied for redress under section 6 on the ground that he was deprived of his liberty without due process of law. This application was dismissed by the High Court, but appellant again came up in appeal, to the Privy Council. The Privy Council held that section 6 of the Constitution impliedly allowed the High Court to award compensation as that may be the only practicable form of redress in some cases. The Privy Council also held that as the appellant's committal was in violation of the rules of natural justice, he was deprived of his liberty without due process of law in contravention

of section 1 of the Constitution and was entitled to claim compensation from the State under section 6 thereof. In meeting the argument that a judge cannot be made personally liable for anything done or purporting to be done in the exercise or purported exercise of his judicial functions, Lord Diplock speaking for the majority observed: "The claim for redress under section 6(1) for what has been done by a judge is a claim against the State for what has been done in the exercise of judicial power of the State. This is not vicarious liability : it is liability of the State itself. It is not a liability in tort at all : it is a liability in public law of the State, not of the judge, which has been created by sections 6(1) and (2) of the Constitution." As to the measure of compensation Lord Diplock said: "The claim is not a claim in private law for damages for the tort of false imprisonment under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration."

The above view was accepted by the Supreme Court in *Nilabati Behra v. State of Orissa, AIR 1993 SC 1960.* In that case the petitioner's son died as a result of injuries inflicted on him while he was in police custody. A letter sent by the petitioner to the Supreme Court was treated as a petition under Article 32 of the Constitution. The Supreme Court directed the State of Orissa to pay Rs. 1,50,000 as compensation to the petitioner. In directing so J. S. Verma, J. observed: "Award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. This is a distinction between the two remedies." Verma, J. further explained that the State's plea of sovereign immunity for tortuous acts of its servants is confined to the sphere of liability in tort, which is distinct from the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme, and is no defence to the constitutional remedy under Articles 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights when the only practicable mode of enforcement of the fundamental rights can be the award of compensation. Concurring with Verma, J., Dr. A. S. Anand, J. in the same case observed: "The purpose of the public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights – This court and the High Court being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 32 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to

repair the damage done by its officers to the fundamental rights of the citizens, notwithstanding the right of the citizen to the remedy by way of a suit or criminal proceedings. The state of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law through appropriate proceedings." Dr. Anand, J. also observed: "There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his rights to life."

The case of *Nilbati Behra* (supra) was followed in *D. K. Basu v. State of West Bengal, AIR 1997 SC 610* which lays down general principles relating to custodial death cases. The judgment in this case was delivered by Dr. Anand, J., who reviewed the earlier authorities. It was reiterated that the relief of compensation against the state based "on the principles of strict liability" under the public law is one to which the defence of sovereign immunity does not apply and that this relief is in addition to the traditional remedies and the compensation awarded in a given case is adjusted against any amount awarded to the claimant by way of damages in civil suit. It was also held that in the assessment of compensation under Article 32 or 226 "the emphasis has to be on the compensatory and not on the punitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal court in which the offender is prosecuted, which the state in law is duty bound to do.

Although the cases of Nilbati Behra and D. K. Basu discussed above which laid the basis for the concept of public law wrong, related to violation of Article 21, the observations in them are general that violation of fundamental rights will be public law wrong redressable under Article 226 and 32. A three judge bench of the Supreme Court, however, in *Hindustan Papers Corporation v. Ananta Bhattarcharjee, (2004) 6 SCC 213* has held that "the public law remedy for the purpose of grant of compensation can be resorted to only when the fundamental right of a citizen under Article 21 is violated and not otherwise". The court further said that "it is not every violation of the provisions of the constitution or a statute which would enable the court to direct grant of compensation."

Earlier also, in the case of *Rudul Shah v. State of Bihar, AIR 1983 SC 1086* which arose on a petition under Article 32 of the Constitution complaining prolonged detention of the petitioner even after his acquittal, the Supreme Court directed the State to pay Rs.30,000 as interim measure without precluding the petitioner from bringing a suit to recover further damages. The court while overruling the objection that the petitioner should be left entirely to the remedy of a suit and no damages or compensation should be allowed even as an interim measure observed: "The petitioner can be relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. But where the court has already found, as in the present case, that the petitioner's prolonged detention

in prison after his acquittal was wholly unjustified and illegal, there can be no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit." Similarly, in *Bhim Singh v. State of J & K, AIR 1986 SC 494,* which was again a case under Article 32 of the Constitution, the Supreme Court directed the State of Jammu and Kashmir to pay Rs.50,000 as compensation to the petitioner who was an M.L.A. and was illegally arrested and detained to prevent him from attending the assembly session.

A survey of the cases referred above goes to show that it is now well settled that the defence of sovereign immunity is not available when the State or its officers, acting in the course of employment, infringe a person's fundamental right of life and personal liberty as guaranteed by Article 21 of the Constitution and the State can be directed in a writ jurisdiction under Articles 32 and 226 to repair the damage done to the victim by paying appropriate compensation. We, therefore, having regard to the fact that petitioner was kept under illegal detention for almost five years in prison, direct the State Government to pay him compensation of rupees three lac within two months from today. We have awarded this amount as compensation feeling that the amount is just and proper. While doing so, as held by the Supreme Court in the case of *D. K. Basu* (supra), we have not taken into account the punitive element as the objective is to apply balm to the wounds of petitioner and not to punish the transgressor. We, however, make it clear that if the petitioner feels dissatisfied with the amount awarded, he will be at liberty to resort to traditional remedies and the compensation awarded in the present case will be adjusted against any amount awarded to him by way of damages in civil suit.

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***251. CONSUMER PROTECTION ACT, 1986**

Medical negligence, ascertainment of liability therefor – In *State of Punjab v. Shiv Ram, (2005) 7 SCC 1,* **a three-Judge Bench of this Court while dealing with the case of medical negligence by the doctor in conducting sterilization operations reiterated and reaffirmed that unless negligence of doctor is established, the primary liability cannot be fastened on the medical practitioner. In para 6 of the judgment it is said: (SCC p. 7)**

> **"6. Very recently, this Court has dealt with the issues of medical negligence and laid down principles on which the liability of a medical professional is determined generally and in the field of criminal law in particular. Reference may be had to** *Jacob Mathew v. State of Punjab, (2005) 6 SCC 1.* **The Court has approved the test as laid down in** *Bolam v. Friern Hospital Management Committee, (1957) 1 WLR 582* **popularly known as Bolam test, in its applicability to India."**

It is not the case of the appellant that the doctors named in the complaint are not qualified doctors and specialized in their respective fields to treat the patient whom they agreed to treat. All the doctors who treated the patient are skilled and duly qualified specialists in their respective fields and they have tried their best to save the life of Priya Malhotra by joining their hands and heads together and performed their professional duties as a teamwork.

In the instant case the appellant has not challenged the post-mortem report dated 24.08.1989 submitted by J.J. Hospital wherein it has been stated that before Priya Malhotra was admitted to Bombay Hospital, she was sick since last four months by loose motions and vomiting and finally it was opined by doctors that the death of Priya Malhotra was due to peritonitis with renal failure.

In the light of the propositions of law settled in the above cited judgments of this Court, we are of the view that both on facts and in law no case is made out by the appellant against the respondents. The allegations made in the complaint do not make out a case of negligence or deficiency in service on the part of the respondents.

INS. Malhotra (Ms.) v. Dr. A. Kriplani and others

Judgment dated 24.03.2009 passed by the Supreme Court in Civil Appeal No. 1386 of 2001, reported in (2009) 4 SCC 705

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252. CONSUMER PROTECTION ACT, 1986 – Section 2 (1) (g) (o) (r)
CONTRACT ACT, 1872 – Sections 17 & 18

(i) Misrepresentation by College about its affiliation with Magadh University, Bodh Gaya and grant of recognition by Dental Council of India for admission to BDS course – Tantamounts to deficiency in service and unfair trade practice under Consumer Protection Act.

(ii) Compensation for loss of two valuable years of the aggrieved students and cost of litigation awarded.

Buddhist Mission Dental College and Hospital (2) v. Bhupesh Khurana and others

Judgment dated 13.02.2009 passed by the Supreme Court in Civil Appeal No. 1135 of 2001, reported in (2009) 4 SCC 473

Held:

This is an admitted position that the appellant institute is neither affiliated with the Magadh University nor recognized by the Dental Council of India. In absence of affiliation by the Magadh University and recognition by the Dental Council of India, the appellant institute could not have started admissions in the four years degree course of BDS.

The Commission rightly came to the conclusion that reading the advertisement and prospectus as a whole, there is no manner of doubt that the impression given was that the College was affiliated with the Magadh University and was recognized by the Dental Council of India. If the College has not been affiliated and recognized, there was no occasion in admitting the students and wasting their valuable academic years. Moreover, the opposite parties have been admitting the students right from the year 1991-92 upto the year 1995 on this representation that the College was affiliated and recognized by the Dental Council of India. It cannot be denied that without affiliation to the Magadh University and recognition granted by the Dental Council of India, the so-called dental degree of BDS is just a useless piece of paper. The representation given in the advertisement that the College was under Magadh University and by the Dental Council of India could be taken by a common person to mean that the college had been given recognition by the Dental Council of India and was affiliated to the Magadh University.

The Commission also held that this Court in *Bangalore Water Supply and Sewerage Board v. A. Rajappa, (1978) 2 SCC 213* held as under:

> "95. ...In the case of the University or an educational institution, the *nature* of the activity is, ex hypothesi, education which is a service to the community. Ergo, the University is an industry."

The Commission further held as under:

> "Imparting of education by an educational institution for consideration falls within the ambit of 'service' as defined in the Consumer Protection Act. Fees are paid for services to be rendered by way of imparting education by the educational institutions. If there is no rendering of service, question of payment of fee would not arise. The complainants had hired the services of the respondent for consideration so they are consumers as defined in the Consumer Protection Act."

Therefore, the Commission rightly came to the conclusion that this was a case of total misrepresentation on behalf of the institute which tantamount to unfair trade practice. The respondents were admitted to the BDS course for receiving education for consideration by the appellant College which was neither affiliated nor recognized for imparting education. This clearly falls within the purview of deficiency as defined under Section 2 (1) (g) of the Consumer Protection Act. Therefore, the Commission rightly held that there was deficiency in service on the part of the institute and the claimants respondents are entitled to claim the relief as prayed in the plaint.

As far as the cross objections filed by the respondents are concerned, we are of the opinion that the appellant institute by giving totally misleading and false advertisement clearly misled the respondents that the institute is affiliated by the Magadh University and recognized by the Dental Council of India. The

respondents have lost their two valuable academic years which would have tremendous impact on their future career. Though the respondents have clearly stated in the affidavit that they had paid capitation fee/donation of Rs. one lakh each and despite repeated requests, receipts were not given, which fact has been denied by the appellant. In view of the disputed question of fact, it is difficult for us to give any specific finding allowing the contention of the respondents and to give direction to refund this amount with interest to them. However, we strongly feel that the appellant institute has played with the career of the students and virtually ruined their career and the respondents have lost two valuable academic years.

In our considered view, on consideration of the totality of the facts and circumstances of the case and in the interest of justice, we deem it appropriate to pass the following directions:

(i) The respondents (complainants) would be entitled to the compensation as directed by the National Consumer Disputes Redressal Commission. In case the amount has been deposited, the respondents would be entitled to withdraw the same.

(ii) We further direct the appellant institute to additionally pay compensation of Rs. one lakh to each of the respondents (complainants).

(iii) We also direct the appellant institute to pay cost of litigation which is quantified at Rs. one lakh to each of the respondents (complainants).

(iv) The appellant institute is directed to pay the amount of compensation and costs within a period of two months.

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253. CONTRACT ACT, 1872 – Section 10

Insurance contract is like any other contract – There are four essentials of it (i) definition of risk; (ii) duration of risk; (iii) premium; and (iv) amount of insurance.

Vikram Greentech India Limited and another v. New India Assurance Company Limited

Judgment dated 01.04.2009 passed by the Supreme Court in Civil Appeal No. 2080 of 2002, reported in (2009) 5 SCC 599

Held:

An insurance contract, is a species of commercial transactions and must be construed like any other contract to its own terms and by itself. In a contract of insurance, there is requirement of *uberimma fides* i.e. good faith on the part of the insured. Except that, in other respects, there is no difference between a contract of insurance and any other contract.

The four essentials of a contract of insurance are, (i) the definition of the risk, (ii) the duration of the risk, (iii) the premium and (iv) the amount of insurance. Since upon issuance of insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the insurance policy, its terms have to be strictly construed to determine the extent of liability of the insurer.

The endeavour of the court must always be to interpret the words in which the contract is expressed by the parties. The court while construing the terms of policy is not expected to venture into extra liberalism that may result in re-writing the contract or substituting the terms which were not intended by the parties. The insured cannot claim anything more than what is covered by the insurance policy. [*General Assurance Society Ltd. v. Chandumull Jain and another, AIR 1966 SC 1644, Oriental Insurance Co. Ltd. v. Sony Cheriyan, (1999) 6 SCC 451, and United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal, (2004) 8 SCC 644*]

A Document like proposal form is a commercial document and being an integral part of policy, reference to proposal form may not only be appropriate but rather essential. However, the surveyors' report cannot be taken aid of nor can it furnish the basis for construction of a policy. Such outside aid for construction of insurance policy is impermissible.

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254. COURT FEES ACT, 1870 – Section 7 (iv) (c) and Article 17 (iii) of Schedule II (As applicable in Madhya Pradesh)
Suit for possession and declaration of sale deed as null and void, by plaintiff being parties to it – Court fees, determination of – Held, the plaintiffs are parties to the document and the consequential relief is also prayed – Therefore, *ad valorem* Court Fee is required to be paid.
Shyamacharan Paul and another v. Roopali Promoters and Constructions (M/s) and others
Judgment dated 02.02.2009 passed by the High Court in Writ Appeal No. 1134 of 2008, reported in 2009 (3) MPHT 113 (DB)

Held:

Relief Clause for the civil suit clearly mentions for declaring the document executed by defendant No. 3 in favour of the respondent Nos. 10 to 30 as null and void and to deliver the possession and prayed for other ancillary reliefs. On a perusal of the relief clause, it is clear as crystal that it contains consequential reliefs. That apart, the plaintiff are parties to the documents. They intend to declare the sale-deed null and void. As is manifest from the order of learned Single Judge, he has referred to the decision rendered in *Pratap and another v. Punia bai and others, AIR 1977 MP 108*

In this context we may profitably refer to the decision rendered in *Kunti Devi w/o Ramda v. Roshanlal s/o Ramdas, 1987 MPLJ 25,* wherein this Court, after referring to the decisions rendered in *Shamsher Singh v. Rajinder Prashad and others, AIR 1973 SC 2384, Ashok v. Narsinghrao and others, 1974 MPLJ 900, Dattaji Parashramji Patil, v. Mst. Bhagirathi and others, ILR 1939 Nag. 373* and *Santosh Chandra and others v. Gyan Sunder Bai and others, 1970 MPLJ 363 (FB),* held that the plaintiffs, being parties to the sale deed, are *prima facie* bound by it and the relief of declaration simpliciter is not available. The declaration claimed by the plaintiffs necessarily involved a prayer for consequential relief of cancellation of the sale deed, therefore, the Court fee is payable under Section 7 (iv) (c) of the Court Fees Act.

In *Mohammad Jameel Khan and others v. Miththulal Khushal Singh Gujar and others, 1999 (1) MPLJ 37,* it has been held that while considering the question of payment of Court fee, the allegations contained in the plaint have to be seen. The plaintiff cannot be permitted to mould the facts and circumstances and the real intention. It transpires that the intention of the plaintiff was something different than what had been claimed. The Court cannot overlook it. In case where the plaintiff sought a declaratory relief only, but in substance aimed at setting aside the sale deeds, the Court fee has to be paid in accordance with the law governed by Section 7 (iv) (c) of the Court Fees Act. The third parties without notice of the alleged fraud can acquire rights and interest in the property and get it enforced against the person defrauded. It cannot, under the circumstances, be taken that he was not a party to the document. Unless the document is got cancelled by a decree of Court, it remains a valid document. The relief of declaration cannot be sufficient. The plaintiff has to ask for a consequential relief of cancellation of the sale-deed in order to avoid it. Consequently, a consequential relief of cancellation of sale deed is necessary and the plaintiff was required to pay ad valorem Court fee on the value of the sale deeds under Section 7 (iv) (c) of the Court Fees Act.

In the case at hand, the plaintiffs are parties to the sale deed. In view of the same, in law enunciated in the aforesaid decision is applicable and therefore, they are liable to pay ad valorem Court fee and not the fixed Court fee. That apart, there is a consequential prayer in the suit. Thus considering the factual scenario in entirely, we are of the considered opinion that the concurrence of the learned Single Judge with the order passed by the learned Additional District Judge which requires the plaintiff to pay ad valorem Court fee cannot be found fault with.

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*255. **COURT FEES (MADHYA PRADESH AMENDMENT) ACT, 2008 – Sections 3 and Article 1-A**

Whether Court fee is payable under Court Fees (Madhya Pradesh Amendment) Act, 2008 in cases filed prior to amendment? Held, No – Further held, the Act is prospective in nature and in absence of specific provision, such amendment cannot be given retrospective effect.

Fatehchand v. Land Acquisition & Rehabilitation Officer & Ors.

Judgment dated 02.04.2009 passed by the High Court in First Appeal No. 47 of 2009, reported in 2009 (II) MPJR 206 (DB)

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*256. **CRIMINAL PROCEDURE CODE, 1973 – Sections 31, 427 & 428**
NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138

Sentence, concurrent running of – Accused issued different cheques in relation to family transaction to the complainant – Upon cheques being dishonoured, separate complaints filed before separate courts in respect of those cheques – Accused convicted by different courts u/s 138 NI Act – Order of the High Court to run concurrent sentence in respect of the three convictions upheld.

State of Punjab v. Madan Lal

Judgment dated 05.03.2009 passed by the Supreme Court in Criminal Appeal No. 529 of 2004, reported in (2009) 5 SCC 238

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*257. **CRIMINAL PROCEDURE CODE, 1973 – Sections 91, 311, 397 (2) & 401**

Interlocutory orders – Connotation of – Order passed by the Trial Court refusing to call the documents under Section 91 and order rejecting the application for recalling the witness for cross examination under Section 311 does not decide anything final – Therefore, such orders are orders of interlocutory nature and revision against these orders is barred under Section 397 (2) CrPC.

Sethuraman v. Rajamanickam

Judgment dated 18.03.2009 passed by the Supreme Court in Criminal Appeal No. 486 of 2009, reported in (2009) 5 SCC 153

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258. **CRIMINAL PROCEDURE CODE, 1973 – Section 125**

Maintenance to earning wife – Husband is liable to pay maintenance if the earning of wife is not sufficient to maintain herself.

Minakshi Gaur v. Chitranjan Gaur & Anr.

Judgment dated 14.07.2008 passed by the Supreme Court in Criminal Appeal No. 1080 of 2008, reported in AIR 2009 SC 1377

Held:

According to the case of the appellant, her husband, who is Respondent No. 1 herein, is a graduate in Engineering and his income is Rupees twenty

thousand. In the counter affidavit filed before this Court, the fact that the income of the husband is Rupees twenty thousand per month has not been denied. However, it has been asserted that wife's returned income is Rs, 98,820/- per annum, which shows that she was earning even less than Rupees nine thousand per month. Both the wife and husband are residing at Agra. In our view, it is not possible for the wife to maintain herself in the town of Agra with the income of less than Rupees nine thousand per month. The husband, who is earning at least Rupees twenty thousand per month, as stated by the appellant in this appeal and not controverted, is liable to pay some amount of maintenance to the wife so that she may be able to maintain herself. In the facts and circumstances of the case, we are of the view that it would be just and expedient to direct the husband to pay Rupees five thousand per month to the wife by way of maintenance from the date of filing of the petition under Section 125 CrPC.

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259. CRIMINAL PROCEDURE CODE, 1973 – Sections 125, 437 & 438

(i) While granting anticipatory bail, the Court can impose conditions as enumerated under Sections 438 (2) and 437 (3) CrPC – Any other harsh, onerous and excessive conditions which frustrate the very object of anticipatory bail would be beyond jurisdiction of the power conferred on Court under Section 438.

(ii) Payment of maintenance to the wife and child could not be a pre-condition for release of accused on bail.

Munish Bhasin and others v. State (Government of NCT of Delhi) and another

Judgment dated 20.02.2009 passed by the Supreme Court in Criminal Appeal No. 344 of 2009, reported in (2009) 4 SCC 45

Held:

From the perusal of the provisions of sub-section (2) of section 438, it is evident that when the High Court or the Court of Session makes a direction under sub-section (1) to release an accused alleged to have committed non-bailable offence, the Court may include such conditions in such direction in the light of the facts of the particular case, as it may think fit, including (i) a condition that a person shall make himself available for interrogation by police officer as and when required, (ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer, (iii) a condition that the person shall not leave India without the previous permission of the Court and (iv) such other conditions as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

It is well settled that while exercising discretion to release an accused under Section 438 of the Code neither the High Court nor the Session Court would be justified in imposing freakish conditions. There is no manner of doubt that the

Court having regard to the facts and circumstances of the case can impose necessary, just and efficacious conditions while enlarging an accused on bail under Section 438 of the Code. However, the accused cannot be subjected to any irrelevant condition at all.

The conditions which can be imposed by the Court while granting anticipatory bail are enumerated in sub-section (2) of Section 438 and sub-section (3) of Section 437 of the Code. Normally, conditions can be imposed (i) to secure the presence of the accused before the investigating officer or before the Court, (ii) to prevent him from fleeing the course of justice, (iii) to prevent him from tampering with the evidence or to prevent him from inducing or intimidating the witnesses so as to dissuade them from disclosing the facts before the police or Court or (iv) restricting the movements of the accused in a particular area or locality or to maintain law and order etc. To subject an accused to any other condition would be beyond jurisdiction of the power conferred on Court under Section 438 of the Code.

While imposing conditions on an accused who approaches the Court under Section 438 of the Code, the Court should be extremely chary in imposing conditions and should not transgress its jurisdiction or power by imposing the conditions which are not called for at all. There is no manner of doubt that the conditions to be imposed under Section 438 of the Code cannot be harsh, onerous or excessive so as to frustrate the very object of grant of anticipatory bail under Section 438 of the Code.

Hence the order to pay Rs. 3,00,000/- for past maintenance and a sum of Rs. 12,500/- per month as future maintenance as pre-condition for release of accused on anticipatory bail, held unjustified.

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260. CRIMINAL PROCEDURE CODE, 1973 – Section 309
EVIDENCE ACT, 1872 – Sections 40, 41, 42 & 43

(i) Simultaneous civil and criminal proceedings – Stay of criminal proceeding – A civil proceeding, as also a criminal proceeding can proceed simultaneously – Question as to whether in facts and circumstances of the case, one or the other proceeding would be stayed, would depend upon several factors including the nature and stage of the case – Position explained.

(ii) Relevancy of judgment – Judgment of probate Court is a judgment in rem – Is binding on all Courts and authorities and will have effect over other judgments – Legal principles discussed.

(iii) Judgment of Civil Court – Whether binding on Criminal Court or vice versa ? Case law reiterated.

Syed Askari Ali Augustine Imam and another v. State (Delhi Administration) and another

Judgment dated 03.03.2009 passed by the Supreme Court in Criminal Appeal No. 416 of 2009, reported in (2009) 5 SCC 528

Held:

The factual matrix involved in the case is as under:

A criminal case under Sections 420/468/444/34 IPC was instituted against the appellants alleging commission of forgery of a Will by them. Prior to the said case, a civil suit was filed against the appellants, which was still pending, questioning the genuineness of the said Will based on which the appellants had claimed mutation in respect of the property concerned.

Cognizance of offences in the said criminal case was taken in the year 2002. The appellants were granted anticipatory bail. On or about 30.01.2003, the appellants filed an application under Section 276 of the Succession Act, 1925 before the Jharkhand High Court for grant of probate in respect of the said Will. Thereafter, the appellants preferred a writ petition before the Delhi High Court for quashing of the FIR. The said petition was disposed of making observations that the petitioners therein (i.e. the accused) could move the trial court by filing an application for stay of the criminal trial pending adjudication of the question of genuineness of the Will by the civil court.

Pursuant to the said order of the High Court, the appellants filed an application under Section 309 CrPC before the Magistrate concerned seeking stay of the criminal proceedings. But that application was dismissed. Aggrieved thereby, the appellants preferred a criminal revision petition but they did not succeed. Hence, the present appeal.

Indisputably, in a given case, a civil proceeding as also a criminal proceeding may proceed simultaneously. Cognizance in a criminal proceeding can be taken by the criminal court upon arriving at the satisfaction that there exists a prima facie case. The question as to whether in the facts and circumstances of the case one or the other proceedings would be stayed would depend upon several factors including the nature and the stage of the case.

It is, however, now well settled that ordinarily a criminal proceeding will have primacy over the civil proceeding. Precedence to a criminal proceeding is given having regard to the fact that disposal of a civil proceeding ordinarily takes a long time and in the interest of justice the former should be disposed of as expeditiously as possible.

In *M.S. Sheriff v. State of Madras, AIR 1954 SC 397,* a Constitution Bench of this Court was seized of a question as to whether a civil suit or a criminal case should be stayed in the event both are pending; it was opined that the criminal matter should be given precedence.

In regard to the possibility of conflict in decisions, it was held that the law envisages such an eventuality when it expressly refrains from making the decision of one Court binding on the other or even relevant, except for certain limited purposes, such as sentence or damages. It was held that the only relevant consideration was the likelihood of embarrassment.

If primacy is to be given to a criminal proceeding, indisputably, the civil suit must be determined on its own merit, keeping in view the evidences brought before it and not in terms of the evidence brought in the criminal proceeding.

The question came up for consideration in *K.G. Premshanker v. Inspector of Police, (2002) 8 SCC 87,* wherein this Court inter alia held:

> "30. What emerges from the aforesaid discussion is – (1) the previous judgment which is final can be relied upon as provided under Sections 40 to 43 of the Evidence Act; (2) in civil suits between the same parties, principle of res judicata may apply; (3) in a criminal case, Section 300 CrPC makes provision that once a person is convicted or acquitted, he may not be tried again for the same offence if the conditions mentioned therein are satisfied; (4) if the criminal case and the civil proceedings are for the same cause, judgment of the civil court would be relevant if conditions of any of Sections 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in Section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein.
>
> Further, the judgment, order or decree passed in a previous civil proceeding, if relevant, as provided under Sections 40 and 42 or other provisions of the Evidence Act then in each case, the court has to decide to what extent it is binding or conclusive with regard to the matter(s) decided therein. Take for illustration, in a case of alleged trespass by A on B's property, B filed a suit for declaration of its title and to recover possession from A and suit is decreed. Thereafter, in a criminal prosecution by B against A for trespass, judgment passed between the parties in civil proceedings would be relevant and the court may hold that it conclusively establishes the title as well as possession of B over the property. In such case, A may be convicted for trespass. The illustration to Section 42 which is quoted above makes the position clear. Hence, in each and every case, the first question which would require consideration is – whether judgment, order or decree is relevant, if relevant – its effect. It may be relevant for a limited purpose, such as, motive or as a fact in issue. This would depend upon the facts of each case."

It is, however, significant to notice that the decision of this Court in *M/s Karam Chand Ganga Prasad v. Union of India, (1970) 3 SCC 694,* wherein it was categorically held that the decisions of the civil courts will be binding on the criminal courts but the converse is not true, was overruled, stating:

> "33. Hence, the observation made by this Court in *V.M. Shah v. State of Maharashtra (1995) 5 SCC 767,* that the finding recorded by the criminal court stands superseded by the finding recorded by the civil court is not correct enunciation of law. Further, the general observations made in Karam Chand case are in context of the facts of the case stated above. The Court was not required to consider the earlier decision of the Constitution Bench in M.S. Sheriff case as well as Sections 40 to 43 of the Evidence Act."

Axiomatically, if judgment of a civil court is not binding on a criminal court, a judgment of a criminal court will certainly not be binding on a civil court.

We have noticed hereinbefore that Section 43 of the Evidence Act categorically states that judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42 are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provisions of the Act. No other provision of the Evidence Act or for that matter any other statute has been brought to our notice.

Relying inter alia on *M.S. Sheriff* (supra), it was furthermore held:

> "32. Coming to the last contention that an effort should be made to avoid conflict of findings between the civil and criminal courts, it is necessary to point out that the standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor any legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein."

The question yet again came up for consideration in *P. Swaroopa Rani v. M. Hari Narayana @ Hari Babu, AIR 2008 SC 1884,* wherein it was categorically held:

> "13. It is, however, well-settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case."

Section 41 of the Evidence Act speaks about a judgment. Section 41 of the Evidence Act would become applicable only when a final judgment is rendered. Rendition of a final judgment which would be binding on the whole world being conclusive in nature shall take a long time. As and when a judgment is rendered in one proceeding subject to the admissibility thereof keeping in view Section 43 of the Evidence Act may be produced in another proceeding.

It is, however, beyond any cavil that a judgment rendered by a probate court is a judgment in rem. It is binding on all courts and authorities. Being a judgment in rem it will have effect over other judgments. A judgment in rem indisputably is conclusive in a criminal as well as in a civil proceeding.

A three judge Bench of this Court had the occasion to consider the legal effect of a judgment vis-a-vis Section 41 of the Evidence Act in *Surinder Kumar v. Gian Chand, AIR 1957 SC 875.* Kapur, J. speaking for the Bench, opined:

> "It is clear that the probate was applied for and obtained after the judgment of the High Court and therefore could not have been produced in that Court. The judgment of the Probate Court must be presumed to have been obtained in accordance with the procedure prescribed by law and it is a judgment in rem. The objection that the respondents were not parties to it is thus unsustainable because of the nature of the judgment itself."

Herein, however, criminal case had already been instituted. Whether the same would be allowed to be continued or not is the question.

We have noticed hereinbefore the decision in *K.G. Premshanker* (supra). Mr. Dwivedi, however, would submit that the court therein was concerned with a case involving Section 42 of the Evidence Act. The learned counsel may be correct as it was held that Section 41 is an exception to Sections 40, 42 and 43 of the Act providing as to which judgment would be conclusive proof of what is stated therein.

The question, however, would be as to whether despite the same should we interfere with the impugned judgment. We do not think that we should. Firstly, because the criminal case was instituted much prior to the initiation of the probate proceeding and secondly because of the conduct of the appellant and the stage in which the probate proceedings are pending.

We, therefore, are of the opinion that it is not a fit case where we should exercise our discretionary jurisdiction under Article 136 of the Constitution of India having regard to the facts and circumstances of the present case.

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***261.CRIMINAL PROCEDURE CODE, 1973 – Sections 319 & 401**

The ingredients of Section 319 are unambiguous and indicate that where in the course of inquiry into, or trial of an offence, it appears from the evidence that any person not being the accused has committed any offence, for which such person could be tried together with the accused, the court may proceed against such person for the offence he has committed.

All that is required by the Court for invoking its powers under Section 319 CrPC is to be satisfied that from the evidence adduced before it, a person against whom no charges had been framed, but whose

complicity appears to be clear, should be tried together with the accused – It is also clear that the discretion is left to the court to take a decision on the matter.

In the instant case despite the above, the Trial Court rejected the application under Section 319 – High Court while exercising revisional powers, directed the Trail Court to issue summons against the appellants for their appearance as accused and to stand trial alongwith the co-accused – Direction given by the High Court, held proper

Ram Pal Singh and others v. State of Uttar Pradesh and another

Judgment dated 13.02.2009 passed by the Supreme Court in Criminal Appeal No. 297 of 2009, reported in (2009) 4 SCC 423

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*262. CRIMINAL PROCEDURE CODE, 1973 – Section 391

(i) Accused filed application for adducing additional evidence by calling the seized opium in court and its fresh weightment at appellate stage – Held, accused persons did not avail several opportunities, which were available to them during trial – Application filed after 20 years from seizure of opium with the expectation to get some sort of favour by weightment – Accused failed to explain the delay – Application is filed deliberately with mala fide intention – Provision cannot be invoked – Application dismissed.

(ii) The provision u/s 391 cannot be invoked lightly – Power should be used sparingly – It is mandatory for the appellate court to record reasons while allowing the application filed u/s 391 of the Code.

Ibrahim & ors. v. Union of India (CBN)

Judgment dated 04.09.2008 passed by the High Court in Criminal Appeal No. 780 of 2008, reported in I.L.R. (2009) M.P. 518

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263. CRIMINAL PROCEDURE CODE, 1973 – Sections 436 & 482

(i) Bail – Right to claim bail in bailable offence is absolute and indefeasible right – There is no question of discretion in granting bail as the words of Section 436 (1) are imperative – If accused is prepared, the Court/police is bound to release him on bail if he is willing to abide by reasonable conditions which may be imposed on him.

(ii) If the conduct of the accused subsequent to his release is found to be prejudiced, to a fair trial, he forfeits his right to be released on bail and this forfeiture can be made effective by invoking inherent powers of High Court under Section 482 of the Code.

Rasiklal v. Kishore

Judgment dated 20.02.2009 passed by the Supreme Court in Criminal Appeal No. 343 of 2009, reported in (2009) 4 SCC 446

Held:

There is no doubt that under Section 436 of the Code of Criminal Procedure a person accused of a bailable offence is entitled to be released on bail pending his trial. As soon as it appears that the accused person is prepared to give bail, the police officer or the court before whom he offers to give bail, is bound to release him on such terms as to bail as may appear to the officer or the court to be reasonable. It would even be open to the officer or the court to discharge such person on his executing a bond as provided in the Section instead of taking bail from him.

The position of persons accused of non-bailable offence is entirely different. The right to claim bail granted by Section 436 of the Code in a bailable offence is an absolute and indefeasible right. In bailable offences there is no question of discretion in granting bail as the words of Section 436 are imperative. The only choice available to the officer or the court is as between taking a simple recognizance of the accused and demanding security with surety. The persons contemplated by Section 436 cannot be taken into custody unless they are unable or unwilling to offer bail or to execute personal bonds. There is no manner of doubt that bail in a bailable offence can be claimed by accused as of right and the officer or the court, as the case may be, is bound to release the accused on bail if he is willing to abide by reasonable conditions which may be imposed on him.

It may be noticed that sub-Section (2) of Section 436 of the 1973 Code empowers any court to refuse bail without prejudice to action under Section 446 where a person fails to comply with the conditions of bail bond.

There is no express provision in the Code prohibiting the court from rearresting an accused released on bail under Section 436 of the Code. However, the settled judicial trend is that the High Court can cancel the bail bond while exercising inherent powers under Section 482 of the Code.

According to this Court a person accused of a bailable offence is entitled to be released on bail pending his trial, but he forfeits his right to be released on bail if his conduct subsequent to his release is found to be prejudicial to a fair trial. And this forfeiture can be made effective by invoking the inherent powers of the High Court under Section 482 of the Code. [See *Talab Haji Hussain v. Madhukar Purshottam Mondkar, AIR 1958 SC 376* reiterated by a Constitution Bench in *Ratilal Bhanji Mithani v. Collector of Customs, AIR 1967 SC 1639*]

However, it is well settled that bail granted to an accused with reference to bailable offence can be cancelled only if the accused

(1) misuses his liberty by indulging in similar criminal activity,

(2) interferes with the course of investigation,

(3) attempts to tamper with evidence of witnesses,

(4) threatens witnesses or indulges in similar activities which would hamper smooth investigation,

(5) attempts to flee to another country,

(6) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency,

(7) attempts to place himself beyond the reach of his surety, etc.

These grounds are illustrative and not exhaustive.

However, a bail granted to a person accused of bailable offence cannot be cancelled on the ground that the complainant was not heard. As mandated by Section 436 of the Code what is to be ascertained by the officer or the court is whether the offence alleged to have been committed is a bailable offence and whether he is ready to give bail as may be directed by the officer or the court. When a police officer releases a person accused of a bailable offence, he is not required to hear the complainant at all. Similarly, a court while exercising powers under Section 436 of the Code is not bound to issue notice to the complainant and hear him.

Principles of natural justice is not a 'mantra' to be applied in vacuum in all cases. The question as to what extent, the principles of natural justice are required to be complied with, will depend upon the facts of the case. They are not required to be complied with when it will lead to an empty formality [See *State Bank of Patiala v. S.K. Sharma, (1996) 3 SCC 364 and Karnataka SRTC v. S.G. Kotturappa, (2005) 3 SCC 409*]. The impugned order is, therefore, liable to be set aside.

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264. CRIMINAL PROCEDURE CODE, 1973 – Section 482
INDIAN PENAL CODE, 1860 – Section 420
Petition challenging issuance of process by JMFC on complaint of non-applicant – Allegation of cheating – Brochure-cum-advertisement published by company showing length of screen of television larger than the actual length – Held, when a person relies upon an assurance made by the other parties, pays him money to purchase the article and later on finds that article sold to him is not what was assured, then an offence punishable u/s 420 of IPC is made out – Issuance of process cannot be condemned – Petition dismissed.
General Manager & anr. v. State of M.P. & anr.
Judgment dated 19.08.2008 passed by the High Court in M.Cr.C. No. 4227 of 2006, reported in I.L.R. (2009) M.P. 591

Held:

The question before this Court is whether the brochure-cum-advertisement published by the Company was to mislead the party/purchaser or to create an

impression in the mind of consumer that he was purchasing an article as projected in the brochure or advertisement.

True it is that in the advertising world, things are sold on the strength of a fact, which is projected in its high spirit but in the consumer world, it would not be so because a consumer would be entitled to the articles projected for sale on the price fixed by the seller. Once a Company says that it is selling a particular item/article then the products so sold must certify to and meet to the standard as provided in the brochure/ advertisement. A Company cannot be allowed to say that though they advertised that the product was of 29 inches but they would be entitled to sell 26 inches television with an explanation later that part of the picture tube is covered under the cabinet.

The brochure Annexure P/1 on which reliance is placed by the applicants would clearly show that each and every product is shown to be of a particular measurement. On the last page of the brochure, the length of the picture tube is shown to be 74 cm, 64 cm, 53 cm, 43 cm, 38 cm etc. but it is nowhere mentioned that that would be the total length of the picture tube and a part of the same would be covered under the cabinet. When a person purchases an article, he relies upon the honesty and sincerity of a Company, which proposes to sell its article in the market. When a Company of the repute submits in the market that they are selling a television, which has 74 centimeter screen then they are obliged to sell a television of 74 centimeter screen and after the sale is over, they cannot be allowed to say that infact the television screen is not 74 centimeter but is only 68/69 centimeter. If they were to sell it honestly, they could have clearly shown in the advertisement/brochures that 74 centimeter is the total length of the picture tube and atleast 5 centimeter or 2 inches of the picture tube is covered under the cabinet and the covered area would not be showing any picture. When a person, relies upon an assurance made by the other parties, pays him money to purchase the article and later on finds that article sold to him is not what was assured then obviously an offence punishable under Section 420 of the Indian Penal Code is made out.

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***265. CRIMINAL PROCEDURE CODE, 1973 – Section 482**

Stay of criminal proceedings – Pendency of writ petition against the decision of election petition shall have no effect on criminal proceedings – Order of postponement of criminal proceeding till disposal of writ petition set-aside.

Manorama (Smt.) v. State of M.P. & anr.

Judgment dated 12.09.2008 passed by the High Court in M.Cr.C. No. 6316 of 2007, reported in I.L.R. (2009) M.P. 594

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***266. CRIMINAL PROCEDURE CODE, 1973 – Section 482**

Quashing of charge-sheet for the offence u/s 306/34 of IPC on the ground that there is no incitement or direct involvement of applicant in commitment of suicide – Held, suicide note and statement recorded u/s 161 of Code clearly states that deceased has taken the extreme step because the applicant used to beat and demand money forcefully – A prima facie case u/s 306/34 IPC is made out against the applicant – Application dismissed.

Ashish Rindey v. State of M.P.

Judgment dated 06.11.2008 passed by the High Court in M.Cr.C. No. 6378 of 2007, reported in I.L.R. (2009) M.P. 600

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267. CRIMINAL TRIAL:

EVIDENCE ACT, 1872 – Sections 45 & 59

Discrepancies between medical and ocular evidence – How to be appreciated, reiterated.

Rangnath Shamrao Dhas and others v. State of Maharashtra

Judgment dated 27.02.2009 passed by the Supreme Court in Criminal Appeal No. 194 of 2002, reported in (2009) 4 SCC 33

Held:

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 eye-witnesses. 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 eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. [See: *Solanki Chimanbhai Ukabhai v. State of Gujarat, AIR 1983 SC 484*]

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268. ELECTRICITY RULES, 1956 – Rules 87 and 88

TORTS:

Negligence, duty to take care, breach of – Death due to electrocution – Liability of Electricity Board – Damages, how to be determined – Deceased, a young boy of about 26 years old, came in contact with falling live supply wire and died on the spot due to electrocution – Neither maintenance conducted from nearly five months when accident took place nor safety measures were taken by the Board – Held, carelessness and negligence on the part of the Board correctly found to be proved by the trial Court – Further held, assessment of monthly income to be Rs. 3,000/- per month by the trial Court and

after deduction of personal expenses award of Rs. 3,00,000/- as compensation appears to be just and reasonable looking to the facts, circumstances and uncertainties.

Chairman, M.P. State Electricity Board, Jabalpur (M.P.) and others v. Mullu @ Moolchandra and others

Judgment dated 15.04.2009 passed by the High Court of M.P. in First Appeal No. 388 of 2006, reported in 2009 (2) MPLJ 638

Held:

The main point is that whether the act of the appellants comes within the purview of negligence. Negligence may mean a mental element in tortuous liability or it may mean an independent tort. Negligence as a tort is the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff. Thus, its ingredients are: (a) a legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of the duty;(b) breach of that duty; (c) consequential damage to B. Because the concept of foreseeability plays a part in all of these elements they cannot always be kept apart, and it has been said that "they are simply three different ways of looking at one and the same problem. It is true that it is not for every careless act that a man may be held responsible in law, nor even for every careless act that causes damage. He will only be liable in negligence if he is under a legal duty to take care. In the tort of negligence, breach of "duty" is the chief ingredient of the tort; in fact there is no other except damage to the plaintiff.

In this case, the main defence taken by the appellants is that the incident occurred as a squirrel came in contact with the wires resulting to a short-circuit which lead to snapping of the pin insulator of the wire due to which the wire snapped from the pole and fell to the ground but no such plea is taken by the respondent No. 3/defendant No. 1 in its written statement. Further, a party cannot be permitted to go beyond its pleadings. Apart from this, defendant witness Vijay Ahuja (D.W.1), in cross-examination, admits that there is no record in the office that the incident had occurred due to squirrel and he is telling this fact on affidavit on the basis of experience and not on record. Therefore, the testimony regarding the incident occurred due to squirrel is not acceptable because there is no such pleading and further the evidence which was given by the defence witness is also not reliable.

It is also relevant to note that as per the evidence adduced by the appellants regarding the safety measures taken by the department from time to time is not convincing because the last time maintenance had taken place on 22.10.2002 and the incident occurred on 31.03.2003. It appears that no maintenance was conducted from nearly five months when the accident took place. Both the parties referred Rules 87 (3) and 88 but no satisfactory evidence has been adduced regarding the safety measures, which are taken by the appellants.

Therefore, the finding of the trial Court regarding careless and negligent act of the appellants does not require any interference.

Now, I will discuss about the quantum of compensation. It is submitted by the learned counsel for the appellants that the deceased was an agriculturist and also doing the business of milk. It is further submitted that the income of Rs. 3,000/- per month as accepted by the trial Court is not correct because no supporting documentary evidence has been adduced about the income from agricultural produce and from selling milk. Further, the dependency has also not been calculated properly. He relied on *Halkibai and another vs. Managing Director, Rajasthan State Road Transport Corporation and another, reported in 2003 (4) MPLJ 466.*

On the other hand, it is submitted by the counsel for the respondents No.-1 and 2 that in the suit compensation of Rs. 4,00,000/- was claimed by the respondents No. 1 and 2 but the trial Court already granted amount to the tune of Rs. 3,00,000/-. He relied on the decision rendered in the case of *Jagdish and others vs. Naresh Soni and others, reported in 2007 (2) MPLJ 513.* In this case, the Court assessed the income of the deceased at Rs. 1000/- per month and awarded compensation to the tune of Rs. 2,00,000/-, which is upheld by this Court. He also made oral prayer regarding the enhancement of the amount by way of cross-objections. However, this prayer cannot be acceptable.

Under the tort, the Acts do not provide the principle on which damages are to be assessed. The English Act merely says that "damages may be awarded as are proportioned to the injury resulting from the death to the dependants respectively". The Indian Act similarly says that "the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively".

The assessment of damages to compensate the dependants is be set with difficulties because from the nature of things, it has to take into account many imponderables, e.g., the life expectancy of the deceased and the dependants, the amount that deceased would have earned during the remainder of his life, the amount that he would have contributed to the dependants during that period, the chances that the deceased may not have lived or the dependants may not live up to the estimated remaining period of their life expectancy, the chances that the deceased might have got better employment or income or might have lost his employment or income altogether. That sum, however, has to be taxed down by having regard to the facts, circumstances and uncertainties.

In this case also the income was assessed by the trial Court at Rs. 3,000/- per month and after deduction of personal expenses awarded Rs. 3,00,000/- as compensation to the respondents. Looking to the facts, circumstances and as discussed earlier, the compensation as awarded by the trial Court appears to be just and reasonable and thus, no interference is called for.

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269. INDIAN PENAL CODE, 1860 – Sections 109, 363, 366, 376/511
EVIDENCE ACT, 1872 – Sections 35

(i) Meaning of 'abetment' explained.

(ii) Materials that may be considered for determination of age of prosecutrix and scope of expert opinion in this regard enumerated.

(iii) In the facts and circumstances of the case, though rape does not appear to have been committed, but kidnapping and attempt to commit rape is clearly established.

Arjun Singh v. State of Himachal Pradesh

Judgment dated 06.02.2009 passed by the Supreme Court in Criminal Appeal No. 224 of 2009, reported in (2009) 4 SCC 18

Held:

(i) Under Section 109 the abettor is liable to the same punishment which may be inflicted on the principal offender; (1) if the act of the latter is committed in consequence of the abetment, and (2) no express provision is made in the IPC for punishment for such an abetment. This section lays down nothing more than that if the IPC has not separately provided for the punishment of abetment as such then it is punishable with the punishment provided for the original offence. Law does not require instigation to be in a particular form or that it should only be in words. The instigation may be by conduct. Whether there was instigation or not is a question to be decided on the facts of each case. It is not necessary in law for the prosecution to prove that the actual operative cause in the mind of the person abetting was instigation and nothing else, so long as there was instigation and the offence has been committed or the offence would have been committed if the person committing the act had the same knowledge and intention as the abettor. The instigation must be with reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetmen by instigation. Further the act abetted should be committed in consequence of the abetment or in pursuance of the conspiracy as provided in the Explanation to Section 109. Under the Explanation an act or offence is said to be committed in pursuance of abetment if it is done in consequence of (a) instigation, (b) conspiracy, or (c) with the aid constituting abetment. Instigation may be in any form and the extent of the influence which the instigation produced in the mind of the accused would vary and depend upon facts of each case. The offence of conspiracy created under Section 120-A is bare agreement to commit an offence. It has been made punishable under Section 120-B. The offence of abetment created under the second clause of Section 107 requires that there must be something more than mere conspiracy. There must be some act or illegal omission in pursuance of that conspiracy. That would be evident by Section 107 (secondly), 'engages..... in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy'. The

punishment for these two categories of crimes is also quite different. Section 109 IPC is concerned only with the punishment of abetment for which no express provision has been made in the IPC. The charge under Section 109 should, therefore, be along with charge for murder which is the offence committed in consequence of abetment. An offence of criminal conspiracy is, on the other hand, an independent offence. It is made punishable under Section 120-B for which a charge under Section 109 is unnecessary and inappropriate. [See *Kehar Singh v. State (Delhi Admn.), AIR 1988 SC 1883*]. Intentional aiding and active complicity is the gist of offence of abetment. [As observed in *Ranganayaki v. State, (2004) 12 SCC 521*]

(ii) So far as the age aspect is concerned in *Vishnu v. State of Maharashtra, (2006) 1 SCC 283* it was inter alia held as follows:

> "20. It is urged before us by Mr Lalit that the determination of the age of the prosecutrix by conducting ossification test is scientifically proved and, therefore, the opinion of the doctor that the girl was of 18-19 years of age should be accepted. We are unable to accept this contention for the reasons that the expert medical evidence is not binding on the ocular evidence. The opinion of the Medical Officer is to assist the court as he is not a witness of fact and the evidence given by the Medical Officer is really of an advisory character and not binding on the witness of fact."

In *State of Chhattisgarh v. Lekhram, (2006) 5 SCC 736,* it was held that the register maintained in a school is admissible evidence to prove the date of birth of the person concerned in terms of Section 35 of the Indian Evidence Act, 1872. It may be true that in the entry of the school register is not conclusive but it has evidentiary value.

(iii) The offence of rape occurs in Chapter XVI of IPC. It is an offence affecting the human body. In that Chapter, there is a separate heading for 'Sexual offences', which encompasses Sections 375, 376, 376-A, 376-B, 376-C, and 376-D. 'Rape' is defined in Section 375. Sections 375 and 376 have been substantially changed by Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act, i.e. sections 376-A, 376-B, 376-C and 376-D. The fact that sweeping changes were introduced reflects the legislative intent to curb with iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is 'the ravishment of a woman, without her consent, by force, fear or fraud', or as 'the carnal knowledge of a woman by force against her will'. 'Rape' or 'Raptus' is when a man hath carnal knowledge of a woman by force and against her will (Co. Litt. 123-B); or as expressed more fully, rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will' (Hale PC 628). The essential words in an indictment for rape are *rapuit* and *carnaliter cognovit;* but *carnaliter cognovit,* nor *any other*

circumlocution without the word *rapuit,* are not sufficient in a legal sense to express rape; [1 Hon.6, 1a, 9 Edw. 4, 26 a, (Hale PC 628)]. In the crime of rape, 'carnal knowledge' means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation (Stephen's "Criminal Law" 9th Edn. p.262). In 'Encyclopoedia of Crime and Justice' (Vol. 4, page 1356) it is stated '.....even slight penetration is sufficient and emission is unnecessary'. In Halsbury's Statutes of England and Wales (Fourth Edition) Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation with violence of the private person of a woman – an outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order. [See *Bhupinder Sharma v. State of H.P., (2003) 8 SCC 551*]

The evidence of the doctor clearly rules out the commission of rape. The medical officer (PW 9) has stated that rape had not been committed and sexual intercourse had not taken place. In the instant case though rape does not appear to have been committed but the attempt to commit rape is clearly established. That being so, conviction for the offence punishable under Section 376 IPC is not made out but the offence punishable under Section 511 is clearly made out. conviction under Sections 363, 366 and 376/511 corresponding to sentence imposed thereunder by the Trial Court, held proper.

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270. INDIAN PENAL CODE, 1860 – Section 149

Principles regarding applicability of Section 149 reiterated.

Raj Nath v. State of Uttar Pradesh

Judgment dated 16.01.2009 passed by the Supreme Court in Criminal Appeal No. 76 of 2009, reported in (2009) 4 SCC 334

Held:

Whether Section 149, IPC has any application for fastening the constructive liability which is the sine qua non for its operation.

The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word 'object'

means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149 IPC may be different on different members of the same assembly.

'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot *eo instanti*.

Section 149 IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be called out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first part, but offences committed in prosecution of the common object would be generally, if not always, be within the second part, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. (See *Chikkarange Gowda and others v. State of Mysore, AIR 1956 SC 731.*)

In *State of U.P. v. Dan Singh, (1997) 3 SCC 747* it was observed that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act. Reference was made to *Lalji v. State of U.P. (1989) 1 SCC 437* where it was observed that:

> "9. ....while overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149".

This position has been elaborately stated by this Court in *Gangadhar Behera v. State of Orissa (2002) 8 SCC 381.*"

(See *Shivjee Singh v. State of Bihar, (2008) 11 SCC 631*)

In the instant case one appellant accused armed with his licensed gun and other five appellants accused armed with country made pistols alleged to have opened fire on prosecution party resulting in death of four persons and causing injuries to others. There was property dispute and evidence of eye witness including one injured witness found reliable by the Trial Court to sustain conviction under Section 302 r/w/s 149, Section 307 r/w/s 149 and Section 148 IPC and sentence thereunder held proper.

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***271. INDIAN PENAL CODE, 1860 – Sections 279, 304-A & 338**

Respondent/accused was convicted for rash driving of tempo (motor vehicle) causing death of boy aged 16 years and grievous injury to another passenger by the Trial Court and sentenced under Section 338 of six months rigorous imprisonment and fine of Rs. 1,000/- with default stipulation and under Section 304-A for one year rigorous imprisonment and fine of Rs. 5,000/- with default stipulation – The Additional Sessions Judge dismissed the appeal – The High Court found that the accused was rightly convicted for the offence punishable under Sections 279, 338 and 304-A but after having so observed without any basis or reasons, the custodial sentence was waived and only fines of Rs. 1,000/- and Rs. 5,000/- under Sections 338 and 304-A respectively with default stipulation were imposed – After referring the judgments of *Prabhakaran v. State of Kerala, (2007) 14 SCC 269 and State of M.P. v. Ghanshyam Singh, (2003) 8 SCC 13,* **the Apex Court set aside the judgment of the High Court and restored the Trial Court's judgment.**

State of Karnataka v. Muralidhar

Judgment dated 16.03.2009 passed by the Supreme Court in Criminal Appeal No. 428 of 2002, reported in (2009) 4 SCC 463

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272. INDIAN PENAL CODE, 1860 – Section 302 r/w/s 149

(i) Death penalty – Law reiterated.

(ii) Appreciation of evidence – Incident occurred around midnight when six members of a family were murdered one after another and three were injured – In such circumstances, it would be difficult for an injured witness to remember with precision the kind of weapon used by the particular accused and it was also practically not possible for any witness to ascribe pinpointed role or the kind of weapons with which blows were given – Evidence of the witnesses is not liable for rejection on the hypothetical, so called medical discrepancies.

State of Uttar Pradesh v. Sattan alias Satyendra and others
Judgment dated 27.02.2009 passed by the Supreme Court in Criminal Appeal No. 314 of 2001, reported in (2009) 4 SCC 736

Held:

Nine members of the family were present and sleeping in their houses when this ghastly incident occurred. Four were of Shiv Singh's family and rest belonged to Sheo Pal's family. All of them sustained injuries. Smt. Bala, Baby Kapil and Km. Guddi survived but before statement of Guddi could be recorded at the trial she was also murdered. Baby Kapil was a child of about three years old. Thus the prosecution was left with no alternative except to examine at the trial Smt. Bala, the sole surviving member of the above two families. She was the only eye witness examined at the trial. Smt. Bala PW 1 widow of the deceased Shiv Singh corroborated the facts stated by her in the FIR. The Trial Court found the evidence of the witness to be credible and cogent and directed conviction and imposed death sentence to four accused persons and life imprisonment to other co-accused under Section 120-B IPC. On appeal, the High Court after analyzing the evidence acquitted all except two accused Sattan and Upendra, but their sentence of the death penalty altered to life imprisonment.

According to learned amicus curiae, incident was of the year 1992, the death sentence was awarded in 1999 and by the impugned judgment which is of the year 2000, alteration have been directed and at this length of time there should not be any interference.

It is stated by learned amicus curiae that motive is not clearly established. This is contrary to the conclusions of the High Court. In fact, the High Court has treated that an entire family was eliminated and if the evidence of Smt. Bal (PW 1) is considered reliable and trustworthy, the inadequacy and insufficiency of motive pales into insignificance and recedes behind the curtain. So far as the specific overt acts are considered, it is to be noted that apart from the accused persons who faced trial three of these persons, namely, absconding accused Mukesh, Dhirendra and Rakesh were described as the accused. Six persons were killed. It is not expected that a lady witnessing such a massacre would note the details.

This Court has observed in *Sahdeo v. State of U.P., (2004) 10 SCC 682* that though in the particular facts of the case the death sentence was converted to imprisonment for life, yet it cannot be said that the accused persons cannot be awarded death sentence in cases where the conviction was recorded under Section 302 read with Section 149 IPC.

So far as the alleged discrepancy between medical evidence and ocular evidence is concerned, it is to be noted as rightly done by the High Court that the incident occurred around midnight when six murders were committed one after another. In such circumstances it was practically not possible for any witness to ascribe pinpointed role or the kind of weapons with which blows were given.

In an incident when killing of so many persons took place, it would be difficult for a witness to remember with precision the kind of weapon used by a particular accused. It is to be noted that evidence of the witnesses are not liable for rejection on the hypothetical so-called medical discrepancy.

It is submitted by learned counsel for the respondent that when number of death is not the determinative factor and since the High Court about eight years back has altered the conviction, the life sentence may be clarified to be one for 20 years as have been done in some cases for example in *Ram Anup Singh v. State of Bihar, (2002) 6 SCC 686.*

After referring the legal position about the imposition of death sentence highlighted in *Bantu v. State of U.P., (2008) 11 SCC 113,* it was observed that murder of six members of a family including helpless women and children having been committed in a brutal, diabolic and bristly (sic grisly) manner and the crime being one which is enormous in proportion which shocks the conscience of law, the death sentence as awarded in respect of accused Sattan and Guddu was the appropriate sentence and the High Court ought not to have altered it.

Accordingly allowing the State's appeal so far as accused Sattan and Upendra are concerned, on conviction the death sentence as was awarded by the Trial Court was restored. So far other acquitted accused persons are concerned, their acquittal as directed by the High Court was affirmed as held justified.

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***273. INDIAN PENAL CODE, 1860 – Section 304-B**

Deceased (wife) dying on 18.03.1995, within one year and three months from the date of marriage (26.12.1993), while residing in her matrimonial home with appellant (husband) – Her dead body found hanging from the ceiling fan – The day before the occurrence, the deceased came to her father's house and informed that the accused (husband) was torturing her as they had to purchase a new house and they were demanding Rs. 1,00,000/- from her – Agreement deed dated 09.02.1995 for the purchase of house produced in evidence revealed that the sale deed was to be executed on 08.05.1995, which amply established that the family required money for purchase of plot – In these circumstances, conviction under Section 304-B held proper.

Jagjit Singh v. State of Punjab

Judgment dated 06.03.2009 passed by the Supreme Court in Criminal Appeal No. 444 of 2009, reported in (2009) 4 SCC 759

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274. INDIAN PENAL CODE, 1860 – Section 304-B

(i) Dowry death – Cruelty – 'Soon before her death', meaning of – No fixed period of time for every case – It has to be considered upon the facts of each case – To be understood in relative and flexible sense.

(ii) Persistent demand of dowry and cruelty in connection with the demand proved – Deceased was thrown into the well after death, also proved – In such circumstances, defence plea that deceased fell down in well accidentally – Not reliable – Conviction upheld.

Deen Dayal & Ors v. State of U.P.

Judgment dated 07.01.2009 passed by the Supreme Court in Criminal Appeal No. 67 of 2006, reported in AIR 2009 SC 1238

Held:

The undisputed facts are thus that Asha Devi, the deceased was married with appellant No. 3 in June 1997. Fifteen months later she died on September 6, 1998. At the time of her death she was living with the appellants. Her dead body was taken out of a well situate at a distance of about four hundred paces from the house of the appellants. Here it must be stated that her death was not caused by drowning. According to the prosecution, Asha Devi was killed by the appellants and her dead body was thrown into the well. The appellants, however, have a different story. Their case is that she had gone to fetch water and while pulling up the pail of water she accidentally slipped and fell down into the well and died.

At this stage we may take a look at the medical evidence. P.W. 3, the doctor holding post-mortem on the dead body of Asha Devi found the following two injuries –

1. Swelling 3 x 3 cm in front upper part of nose.
2. Swelling mark 5 x 5 cm on top and middle of head.

On internal examination he found the following injuries:

> "Left parietal bone of head was fractured. Membrane was soiled in blood. There was blood in brain. Bone of nose was fractured. There was 2 ounce clotted blood in nose. There was 2 ounce watery fluid in stomach."

He opined that death was caused due to coma resulting from head injury. He stated before the court that the injuries were possibly caused by some blunt weapon. He found no water in the lungs or the windpipe. He further said that if there was water in the well then those injuries couldn't possibly have been caused (by falling down into it). In cross-examination he said that both the injuries could be caused by dashing against two different projections; those could not be caused by a single projection. Under persistent cross-examination he further said that as a result of falling from a high place with mouth (sic. face) facing downward injury No. 1 could possibly be caused and injury No. 2 could be caused by dashing against some stone.

The medical evidence thus fully corroborates the prosecution case that Asha Devi was thrown into the well when she was already dead or was dying. At any rate she had stopped breathing as indicated by the absence of any water in her lungs or windpipe.

The words 'soon before her death' occurring in section 304-B of the Penal Code are to be understood in a relative and flexible sense. Those words cannot be construed as laying down a rigid period of time to be mechanically applied in each case. Whether or not the cruelty or harassment meted out to the victim for or in connection with the demand of dowry was soon before her death and the proximate cause of her death, under abnormal circumstances, would depend upon the facts of each case. There can be no fixed period of time in this regard. From the evidence on record, it is clear that there was an unrelenting demand for dowry and Asha Devi was persistently subjected to cruelty and harassment for and in connection with the demand. Both her parents and her brother (PW-1, PW-5 and PW-2) deposed before the court that appellant No. 1 had once again raised his demand when he had gone to their house in July 1998 to bring Asha Devi to his place. Their inability to meet his demand had caused him annoyance and anger. Asha Devi was naturally apprehensive and was very reluctant to go with him. But they somehow prevailed upon her and made her depart with him. There is thus direct and positive evidence of her being subjected to harassment. There is nothing to show that after she was brought to the appellants' place and till her death on September 6, 1998 merely about two months later the situation had radically changed, the demand of dowry had ceased and relations had become cordial between the deceased and the three appellants. In the facts and circumstances of the case, we are satisfied that in connection with the appellants' demand for dowry Asha Devi was subjected to cruelty and that was the proximate cause of her homicidal death.

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***275. INDIAN PENAL CODE, 1860 – Section 306**
CRIMINAL PROCEDURE CODE, 1973 – Section 397/401
Commission of suicide, abetment of – There were illicit relations between the deceased and the accused since 8 years – The accused was residing with his family members at village Nohata – On the date of incident, at late night, the deceased went to the village Nohata and knocked the door of the accused – On the door being not opened by the accused, she consumed poisonous pills and as a result of that, she died – On charge sheet being filed, the trial Court framed charges against the accused u/s 306 of I.P.C. – In the revision, it was held that the accused cannot be said to have abetted her to commit suicide – The accused was discharged in respect of the offence u/s 306 I.P.C.

Hariram v. State of Madhya Pradesh

Judgment dated 18.04.2009 passed by the High Court of M.P. in Criminal Revision No. 623 of 2009, reported in 2009 (3) MPHT 24

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276. INDIAN PENAL CODE, 1860 – Section 307

(i) Conviction for attempt to murder can be based on gruesome nature of offence and grievous injury caused thereby, bodily injury capable of causing death is not essential – Such intention may be deduced from other circumstances of the case.

***(ii) Reducing the sentence at appellate stage – When there is no similarity in the period of sentence already suffered by the accused persons, uniform reduction of sentence of all the accused persons to the period already undergone, is not proper.**

State of Madhya Pradesh v. Kashiram and others

Judgment dated 02.02.2009 passed by the Supreme Court in Criminal Appeal No. 191 of 2009, reported in (2009) 4 SCC 26

Held:

Section 307 IPC relates to attempt to murder. To justify a conviction under this Section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The Section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this Section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The Section makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. Therefore, an accused charged under Section 307 IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt.

This position was highlighted in *State of Maharashtra v. Balram Bama Patil, (1983) 2 SCC 28, Girija Shanker v. State of UP, (2004) 3 SCC 793* and *R. Parkash v. State of Karnataka, (2004) 9 SCC 27.*

Whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case. The circumstances that the injury inflicted by the accused was simple or minor will

not by itself rule out application of Section 307 IPC. The determinative question is intention or knowledge, as the case may be, and not nature of the injury. [See *State of M.P. v. Saleem, (2005) 5 SCC 554*]

In this case Doctor PW 1 had noted that 1/3rd of the leg was chopped off below the knee. He had categorically stated that the injury could have caused death. The Doctor (PW14) i.e. the Radiologist clearly stated that the aforesaid chopping of the leg was grievous in nature.

The evidence of PW5, the victim clearly shows the gruesome nature of the attack and the intention of the accused persons. According to him, accused Ram Singh and Bapulal caught hold of him. He was laid down on the ground and the accused Krishan Lal chopped out the left foot and Ram Singh caught hold of his left leg and Bapulal caught hold of his right leg, Arjun caught hold of his leg and Krishan Lal kept his legs on his left hand and put clothes in his mouth and caught hold of his head. Leela Krishan said that his foot jaw has been chopped off and the heels should also be chopped out. Accused Suraj Singh kept his leg on a log of wood and Leela Krishan chopped out his feet by axe from above the ankle. The trial court noticed that the leg was chopped out between the knee and the ankle.

In these circumstances conviction u/s 307 IPC and sentence therefor as given by the Trial Court restored for all the accused persons

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***277. INDIAN PENAL CODE, 1860 – Section 316**

Causing death of quick unborn child – When would amount to culpable homicide – 'R' was carrying a pregnancy of nearly six months – At the time of incidence when she was picking plants, the accused came there and assaulted her with a lathi – One of the blows hit the side of her womb which resulted in death of the unborn child – When 'R' was subjected to medical examination, no external injury was found on her body by the doctor – Statements of eye witnesses suffered from serious infirmities on the nature of the assault allegedly made by the accused – Held, Section 316 of IPC punishes the offence against child in womb if a person strikes a pregnant woman and thereby causes death of her quick unborn child, he would be guilty of the offence, provided the blow was intended by him to cause woman's death or was one which he knew or had reason to believe to be likely to cause it – Further held, there is absence of the evidence to prove all the essential ingredients of the offence under Section 316 of IPC in the case in hand – Therefore, the accused cannot be convicted for the offence.

Bhaskar Prasad v. State of Madhya Pradesh

Judgment dated 24.02.2009 passed by the High Court in Criminal Appeal No. 1415 of 1995, reported in 2009 (3) MPHT 116

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278. INDIAN PENAL CODE, 1860 – Section 320/34

Common intention – Appellant was charged u/s 302/34 IPC and another accused charged only u/s 302 IPC – Neither there is a charge nor evidence that the appellant has shared any common intention with another accused or any third person – Conviction of appellant set aside.

Arun v. State by Inspector of Police, Tamil Nadu

Judgment dated 11.12.2008 passed by the Supreme Court in Criminal Appeal No. 1657 of 2007, reported in AIR 2009 SC 1256

Held:

In the present case, the appellant alone was charged for the offence punishable under Section 302 read with 34, IPC and whereas A-4 has been charged for the offence punishable under Section 302, IPC. Section 34 IPC which is nothing but rule of evidence provides that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The burden lies on prosecution to prove that actual participation of more than one person for commission of criminal act was done in furtherance of common intention of all at a prior concert. However, it is not required for the prosecution to establish that there was a prior conspiracy or pre-meditation, common intention can be found in the course of occurrence. In the present case, the question is whether the appellant shared any common intention and if so, with whom? Neither there is any charge nor evidence against A-4 that he committed the murder of the deceased in furtherance of common intention shared with A-4. The trial court as well as the appellate court found A-4 guilty for the offence punishable under Section 302, IPC only. There is no third person involved with whom the appellant could have shared common intention. PWs-1 and 2 in their evidence did not attribute any overt or covert act as against the appellant. No circumstances were brought on record from which it could be reasonably inferred that the appellant shared common intention with A-4 and in turn, A-4 committed the murder of the deceased in furtherance of such common intention. There is no evidence that there was prior meeting of mind developed at the spur of moment and A-4 shot the deceased in furtherance of such common intention resulting in death.

In *Suresh and another v. State of U.P., (2001) 3 SCC 673* this Court after referring to number of its earlier judgments and the judgments of the Privy Council observed that 'it is difficult to conclude that a person, merely because he was present at or near the scene without doing anything more, without even carrying a weapon and without even marching alongwith the other assailants, could also be convicted with the aid of Section 34, IPC for the offence committed by the other accused.' In the present case, the FIR shows that at about 9.15 p.m. the appellant and A-4 entered the house and stood there; on seeing them, the deceased got up from his chair and moved towards them "asking them who

are they" whereupon A-4 shot the deceased causing bleeding injury due to which deceased fell down, the appellant and A-4 ran away towards the street. The contents of the FIR and the evidence of PW-1 and PW-2 read together make it clear that the appellant was not armed as erroneously held by the High Court. In the circumstances, it would be impossible to draw any inference that A-4 committed murder in furtherance of common intention shared by the appellant. In fact, neither there is any charge nor any evidence even as against A-4 that he shared common intention alongwith the appellant to commit murder of the deceased. There must be more than one person to share common intention to commit criminal act for attracting the applicability of Section 34 IPC. It is clear from the evidence that A-4 did not act conjointly with the appellant in committing the murder. If he did not act conjointly with the appellant, the appellant could not have acted conjointly with A-4.

On consideration of the evidence and the material available on record and in the light of the legal principles referred to hereinabove, it is clear that the accusations made against the appellant making him constructively liable for the criminal act of murder committed by A-4 with the aid of Section 34 IPC were not established. So far as the present appellant is concerned, there is no evidence whatsoever available on record to show sharing of any common intention.

We, accordingly affirm the judgment of the trial court acquitting the appellant of the offence punishable under Section 302 IPC read with Section 34 IPC. Consequently, the judgment of the High Court convicting the appellant under Section 302 read with Section 34 IPC is set aside.

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***279. INDIAN PENAL CODE, 1860 – Section 396**
EVIDENCE ACT, 1872 – Section 9

(i) The offence of dacoity with murder – When made out?
In the instant case, the accused persons were charged u/s 396 of IPC – The evidence on record clearly reveals that the accused persons entered the premises of the deceased Hiralal for committing dacoity – They had looted a licensed gun and other articles and in the process they killed Hiralal and Aidal Singh and injured Smt. Longshree and Chandan Giri – In these facts and circumstances, the trial court was justified in arriving at the conclusion that the accused were correctly charged under Section 396 IPC and on the basis of clear evidence on record, the accused persons were held guilty of the offence under Section 396 IPC.

(ii) When identification parade is not required? Explained.
Whether test identification parade is necessary or not would depend on the facts and circumstances of each case –This Court in a series of cases has taken the view that the test identification parade under Section 9 of the Evidence Act is to test the veracity

of the witness and his capacity to identify the unknown persons whom the witness must have seen only once but in the instant case all the witnesses have stated that they had otherwise known the accused persons and they were not strangers to them – In the moonlight and lantern light they clearly identified them – Therefore, the test identification parade was really not necessary in this case.

State of Uttar Pradesh v. Sukhpal Singh and others

Judgment dated 12.01.2009 passed by the Supreme Court in Criminal Appeal No. 1285 of 2001, reported in (2009) 4 SCC 385

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*280. INDIAN PENAL CODE, 1860 – Sections 405 & 409

Temporary embezzlement – Accused as public servant on 04.06.1998 had taken a cash amount of Rs. 12,000/- towards the travelling allowance (TA) and daily allowance (DA) from his office for himself and on behalf of some other officials to be utilized by him and other officials for dogs' training commencing from 05.06.1998 – He did not used the money for particular purpose for which he received it but remained absent from duty till 14.07.1998 – Thereafter, he returned the amount to his office – *Mens rea* involved – Offence made out.

Shabbir Ahmed Sherkhan v. State of Maharashtra

Judgment dated 20.03.2009 passed by the Supreme Court in Criminal Appeal No. 1042 of 2005, reported in (2009) 5 SCC 22 (3 Judge Bench)

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281. INDIAN PENAL CODE, 1860 – Sections 498-A & 306

DOWRY PROHIBITION ACT, 1961 – Section 3

Marriage performed in the year 1989 and death of the wife took place on 17.05.1999 on committing suicide – Letters wrote to the in-laws by the accused (husband) demanding Rs. 40,000/- persistently for purchasing the house – Wife subjected to mental and physical torture soon after two years of marriage and was also taunted by the accused for not bringing sufficient dowry at the time of marriage – Abetment of suicide not proved, as more active role, which can be described as "instigating" or "aiding" for abetment is required, but in view of the material on record, particularly the letters on which specific emphasis has been laid by the Trial Court and High Court, amply demonstrate the commission of offence under Section 498-A IPC and Section 3 of the Dowry Prohibition Act.

Kishangiri Mangalgiri Goswami v. State of Gujarat

Judgment dated 28.01.2009 passed by the Supreme Court in Criminal Appeal No. 169 of 2009, reported in (2009) 4 SCC 52

Held:

Section 306 IPC deals with abetment of suicide. The said provision reads as follows:

> '**306 Abetment of Suicide.** – If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.'

Abetment involves a mental process of instigating a person or intentionally aiding that person in doing of a thing. In cases of conspiracy also it would involve that mental process of entering into conspiracy for the doing of that thing. More active role which can be described as instigating or aiding the doing of a thing it required before a person can be said to be abetting the commission of offence under Section 306 of IPC.

In *State of West Bengal v. Orilal Jaiswal, AIR 1994 SC 1418,* this Court has observed that the courts should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end her life by committing suicide. If it transpires to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.

Section 107 IPC defines abetment of a thing. The offence of abetment is a separate and distinct offence provided in the Act as an offence. A person, abets the doing of a thing when (1) he instigates any person to do that thing; or (2) engages with one or more other persons in any conspiracy for the doing of that thing; or (3) intentionally aids, by act or illegal omission, the doing of that thing. These things are essential to complete abetment as a crime. The word "instigate" literally means to provoke, incite, urge on or bring about by persuasion to do any thing. The abetment may be by instigation, conspiracy or intentional aid, as provided in the three clauses of Section 107. Section 109 provides that if the act abetted is committed in consequence of abetment and there is no provision for the punishment of such abetment, then the offender is to be punished with the punishment provided for the original offence. 'Abetted' in Section 109 means the specific offence abetted. Therefore, the offence for the abetment of which a person is charged with the abetment is normally linked with the proved offence.

In cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. The mere fact that the husband treated the deceased wife with cruelty is not enough. [See *Mahinder Singh v. State of M.P. (1995 AIR SCW 4570)*].

The aforesaid aspects were highlighted in *Kishori Lal v. State of M.P., (2007) 10 SCC 797, Randhir Singh v. State of Punjab (2004) 13 SCC 129 and Sohan Raj Sharma v. State of Haryana, (2008) 11 SCC 215.*

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***282. INSURANCE ACT, 1938 – Section 45**

Repudiation of Insurance policy by the Insurance Company on the ground of suppression of material facts, propriety of – It is not enough that the statement must be of a material matter or must suppress the facts which was material to disclose – It is also necessary to prove on the part of the Insurer that suppression was made fraudulently by the policy holder and the policy holder must have known at the time of making of the statement that it was false or that it suppressed the material facts.

Repudiation by the Insurance Company on the ground that about 2½ years prior to submission of proposal form, the insured was on medical leave for about 57days on the ground that he was suffering from IDDMM and IHD diseases and he had suppressed this fact when taking out his insurance policy – Held, it was for the Insurance Company to prove that the alleged suppression was fraudulently done by the policy holder – The insured had been examined by the panel doctor of the Insurance Company who found him fit for the policy – It is also not on record why the information given by the deceased about his being healthy was not cross-checked by the doctor or the Insurance Company – Moreover, the information about the health in the form was filled-in by the agent, although the insured was a literate man – Under these circumstances, it was to be held that the Insurance Company had failed to establish that there was fraudulent suppression of material fact on the part of policy holder – Dismissal of the suit for recovery of insurance money set aside.

Narmadabai Chouhan and others v. Regional Manager, LIC of India and others

Judgment dated 21.01.2008 passed by the High Court in First Appeal No. 25 of 2007, reported in 2009 (2) MPHT 496

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283. INTELLECTUAL PROPERTY:

COPYRIGHT ACT, 1957 – Sections 2 (h), (o), 13 (1) (a), 16, 18, 52 (1) (a), (i) & (1), 14 & 55

SPECIFIC RELIEF ACT, 1963 – Sections 37 & 38

CIVIL PROCEDURE CODE, 1908 – Order 39 Rule 1

(i) A dramatic work, may also come within the purview of literary work, being a part of dramatic literature – However, the provisions of the Copyright Act, 1957 make a distinction between a "literary work", and a "dramatic work" – Keeping in view the statutory

provisions, there cannot be any doubt whatsoever that copyright in respect of performance of "dance" would not come within the purview of the literary work but would come within the purview of the definition of "dramatic work"

(ii) A decree for injunction is an equitable relief – The Courts while passing a decree for permanent injunction would avoid multiplicity of proceedings – The Court while passing such a decree, is obliged to consider the statutory provisions governing the same – For the said purpose, it must be noticed (in the present case under the Copyright Act), as to what is a copyright and in respect of which matters the same cannot be claimed or otherwise the same is lodged by conditions and subject to statutory limitation.

Academy of General Education, Manipal and another v. B. Malini Mallya

Judgment dated 23.01.2009 passed by the Supreme Court in Civil Appeal No. 389 of 2008, reported in (2009) 4 SCC 256

Held:

A dramatic work may also come within the purview of literary work being a part of dramatic literature. However, the provisions of the Copyright Act, 1957 make a distinction between a "literary work" and "dramatic work". Keeping in view the statutory provisions, there cannot be any doubt whatsoever that copyright in respect of performance of "dance" would not come within the purview of the literary work but would come within the purview of the definition of "dramatic work".

A decree for injunction is an equitable relief. The courts while passing a decree for permanent injunction would avoid multiplicity of proceedings. The court while passing such a decree, is obligated to consider the statutory provisions governing the same. For the said purpose, it must be noticed (in the present case under the Copyright Act) as to what is a copyright and in respect of which matters the same cannot be claimed or otherwise the same is lodged by conditions and subject to statutory limitation.

Yakshagana' is a form of ballet dance. It has its own heritage. Indisputably, Dr. Kota Shivarama Karanth (for short, "Dr. Karanth"), a Jnanapeeth awardee, who was a Novelist, Play Writer, Essayist, Encyclopediationist, Cultural Anthropologist, Artist, Writer of Science, Environmentalist. He developed a new form of `Yakshagana'. He was a Director of the appellant linstitute.

On or about 18.6.1994, he executed a Will in favour of the respondent. Dr. Karanth expired on 9.12.1997.

Yakshagana Ballet dance as developed by Dr. Karanth was performed in New Delhi on or about 18.9.2001. Respondent filed a suit for declaration, injunction and damages alleging violation of the copyright in respect of the said

dance vested in her in terms of the said Will stating that Dr. Karanth developed a new distinctive dance, drama troop or theatrical system which was named by him as 'Yaksha Ranga' which in his own words mean "creative extension of traditional Yakshagana" and, thus, the appellants infringed the copyright thereof by performing the same at New Delhi without obtaining her prior permission.

It was stated that Dr. Karanth had composed seven verses or prasangas for staging Yaksharanga Ballet apart from bringing in changes in the traditional form thereof on its relevant aspects, namely, Raga, Tala, Scenic arrangement, Costumes etc. These prasangas are: (i) Bhishma Vijaya; (ii) Nala Damayanthi; (iii) Kanakangi or Kanakangi Kalyana; (iv) Abhimanyu or Abhimanyu Vadha; (v) Chitrangadha or Babruvahana Kalaga; (vi) Panchavati; and (vii) Ganga Charitha.

The respondent-plaintiff admittedly claimed copyright in respect of 'literary and artistic works' in her favour in terms of clauses 11 and 12 of the said Will dated 18.6.1994.

The new *Encyclopaedia Britannica (Vol. IV), 15th Edn.*, provides the following information about "dramatic literature".

> "Dramatic literature.— The texts of plays that can be read, as distinct from being seen and heard in performance."

We must, however, notice that the provisions the Act make a distinction between the 'literary work' and 'dramatic work'. Keeping in view the statutory provisions, there cannot be any doubt whatsoever that copyright in respect of performance of 'dance' would not come within the purview of the literary work but would come within the purview of the definition of 'dramatic work'.

For the aforementioned reasons, we agree with Dr. Dhavan that paragraph 12 of the Will, namely, residuary clause shall apply in the instant case apart from the areas which are otherwise covered by paragraph 11 of the Will. The residuary clause will apply because it is well settled that no part of the stay lies in limbo. It was also not a case where respondent in any manner whatsoever waived her right.

Decree for injunction is an equitable relief. The courts while passing a decree for permanent injunction would avoid multiplicity of proceedings. The court while passing such a decree, is obligated to consider the statutory provisions governing the same. For the said purpose, it must be noticed as to what is a copyright and in respect of the matters the same cannot be claimed or otherwise the same is lodged by conditions and subject to statutory limitation.

In *R.G. Anand v. M/s Delux Films, 1978 (4) SCC 118,* this Court held:

> "46. Thus, on a careful consideration and elucidation of the various authorities and the case law on the subject discussed above, the following propositions emerge:

1. There can be no copyright in an idea, subject-matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work..

2. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.

3. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

4. Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.

5. Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences appearing in the two works are clearly incidental no infringement of the copyright comes into existence.

6. As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by the case-law discussed above.

7. Where however the question is of the violation of the copyright of stage play by a film producer or a director the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play a film has a much broader prospective, wider field and a bigger background

> where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work has expressed the idea. Even so, if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved."

Yet again in *Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1,* this Court held:

> "57. The Copyright Act is not concerned with the original idea but with the expression of thought. Copyright has nothing to do with originality or literary merit. Copyrighted material is that what is created by the author by his own skill, labour and investment of capital, maybe it is a derivative work which gives a flavour of creativity. The copyright work which comes into being should be original in the sense that by virtue of selection, coordination or arrangement of pre-existing data contained in the work, a work somewhat different in character is produced by the author. On the face of the provisions of the Copyright Act, 1957, we think that the principle laid down by the Canadian Court would be applicable in copyright of the judgments of the Apex Court. We make it clear that the decision of ours would be confined to the judgments of the courts which are in the public domain as by virtue of Section 52 of the Act there is no copyright in the original text of the judgments. To claim copyright in a compilation, the author must produce the material with exercise of his skill and judgment which may not be creativity in the sense that it is novel or non-obvious, but at the same time it is not a product of merely labour and capital. The derivative work produced by the author must have some distinguishable features and flavour to raw text of the judgments delivered by the court. The trivial variation or inputs put in the judgment would not satisfy the test of copyright of an author."

The High Court, in our opinion, should have clarified that the appellants can also take the statutory benefit of the provisions contained in clauses (a), (i) and (l) of sub-section (1) of Section 52 of the Act.

Section 52 of the Act provides for certain acts which would not constitute an infringement of copyright. When a fair dealing is made, inter alia, of a literary or dramatic work for the purpose of private use including research and criticism or review, whether of that work or of any other work, the right in terms of the provisions of the said Act cannot be claimed. Thus, if some performance or

dance is carried out within the purview of the said clause, the order of injunction shall not be applicable.

Similarly, appellant being an educational institution, if the dance is performed within the meaning of provisions of clause (i) of sub-section (1) of Section 52 of the Act strictly, the order of injunction shall not apply thereto also. Yet again, if such performance is conducted before a non-paying audience by the appellant, which is an institution if it comes within the purview of amateur club or society, the same would not constitute any violation of the said order of injunction.

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284. LAND ACQUISITION ACT, 1894 – Section 23

(i) Principle for determination of appropriate market value for the land acquired reiterated.

(ii) Factors to be considered for yearly escalation over the rate of exemplar and deductions for developmental costs stated – In the instant case, 10% yearly escalation price per acre over the base year for exemplar registered sale deed and 1/3rd deductions, held suitable.

Revenue Divisional Officer-cum-Land Acquisition Officer v. Shaik Azam Saheb and others

Judgment dated 13.01.2009 passed by the Supreme Court in Civil Appeal No. 8984 of 2003, reported in (2009) 4 SCC 395 (3-Judge Bench)

Held:

Determination of market value of a land acquired in terms of the provisions of the said Act depends upon a large number of factors; the first being the nature and quality of the land, i.e., whether agricultural land or homestead land. Apart from nature and quality of land in the event the agricultural lands are acquired the other factors relevant therefor are also required to be considered, namely, as to whether they are irrigated or non- irrigated, extent of facilities available for irrigation, location of the land, closeness thereof from any road or highway, the evenness of land, its position in different seasons particularly in rainy season, existence of any building or structure as also the development in and around the area. A host of other factors will also have a bearing on determining the valuation of land.

The mode and manner in which determination of such valuation is to be carried out would also depend upon the facts and circumstances of each case, namely, whether any deed of sale executed in respect of similarly situated land near about the date of issuance of notification under Section 4 (1) of the Act is available, or in absence of any such exemplars whether the claim can be determined on yield basis or in case of an orchard on the basis of the number of fruit-bearing trees and the yield therefrom.

One other important factor which also should be borne in mind is that it may not be safe to rely only on an award involving a neighbouring area irrespective of the nature and quality of the land. For determination of market value again, the positive and negative factors germane therefor should be taken into consideration, as laid down by this Court in *Viluben Jhalejar Contractor v. State of Gujarat, (2005) 4 SCC 789,* namely:

"Positive factors	**Negative factors**
(i) Smallness of size	(i) Largeness of area
(ii) Proximity to a road	(ii) situation in the interior at a distance from the road
(iii) Frontage on a road	(iii) narrow strip of land with very small frontage compared to depth
(iv) Nearness to developed area	(iv) lower level requiring the depressed portion to be filled up
(v) Regular shape	(v) Remoteness from developed locality
(vi) Level *vis-a-vis* land under	(vi) Some special disadvantageous acquisition factors which would deter a purchaser
(vii) Special value for an owner of an adjoining property to whom it may have some very special advantage"	

In the instant case the acquired lands are situated about four kms. away from the Kurnool District abutting National Highway 18. The lands in question have been held to have the requisite potential value as building site as also for constructing industrial complexes.

On the date of acquisition, it was found that the vicinity surrounding the land was well developed.

Indisputably, a big chunk of land, namely, 87 acres 96 cents was acquired for the purpose of establishing an institution known as Sri Krishna Devaraya University.

The lands are situated in two different villages. It appears that the lands situated in Pasupula Village are better placed than the lands situated in B. Thandrapadu Village. Such a distinction had also been kept in mind not only by the Land Acquisition Collector but also by the Reference Court.

We agree with the judgment of this Court in Civil Appeal No. 5206- 5228 of 1997 (*A.P. Industrial Infrastructure Corpn. Ltd. v. G. Mohan Reddy*) that the market value of the land would also depend upon the situation thereof.

Applying the said formula, if we rely on Exhibit B-3, the market value of the land in question would come to about Rs. 1,25,000/- per acre. It is, however, not possible to agree with the submissions of Mrs. Amareswari that we should

determine the market value only on that basis upon addition of 10 per cent enhancement of the market value each year. It must be borne in mind that the lands in question were agricultural lands whereas the lands which were the subject-matter of the said deed of sale was a homestead land, thus, some amount, therefore, will have to be deducted towards the development cost.

Indisputably while comparing the market value of developed lands with that of undeveloped lands, the court has to make suitable deductions towards the cost of development. We, however, may notice that this Court, at different times, has spoken in different voices.

In *A.S. Krishna and Co. (P) Ltd. v. Land Acquisition Officer, (1992) 1 SCC 141* this Court refused to interfere with the judgment of the High Court which had given a deduction of 20% towards development charges.

Recently, a Division Bench of this Court in *Mummidi Apparao v. Nagarjuna Fertilizers and Chemicals Ltd. (2009) 4 SCC 402* did not interfere with the decision of the High Court which had given a direction for deduction of 50% as development charges. However, we are not oblivious of the fact that this Court had observed in *Viluben Jhalejar Contractor* (supra):

> "29. In *Hasanali Khanbhai & Sons v. State of Gujarat, (1995) 5 SCC 422* and *Land Acquisition Officer v. Nookala Rajamallu (2003) 12 SCC 334* it has been noticed that where lands are acquired for specific purposes deduction by way of development charges is permissible.
>
> 30. We are not, however, oblivious of the fact that normally one-third deduction of further amount of compensation has been directed in some cases. (See *Kasturi v. State of Haryana, (2003) 1 SCC 354, Tejumal Bhojwani v. State of U.P., (2003) 10 SCC 525, V. Hanumantha Reddy v. Land Acquisition Officer & Mandal R. Officer (2003) 12 SCC 642, H.P. Housing Board v. Bharat S. Negi (2004) 2 SCC 184* and *Kiran Tandon v. Allahabad Development Authority, (2004) 10 SCC 745.*"

In the facts and circumstances of the present case, one-third deduction, in our opinion, should be made towards development costs for the lands situated both in Pasupala village as also B. Thandrapadu village. Keeping in view the fact that the lands are abutting National Highway and near the district town, where a large number of educational institutions have come up, 10 per cent escalation per year has to be added. Thus, Rs. 1,41,666.66 per acre may be fixed for the lands in Pasupala village.

The lands in another village B. Thandrapadu Village being situated away from the NH 18, another 10 per cent from the amount fixed for the lands in Pasupala village must be deducted. Thus, Rs. 1,27,499.99 per acre may be fixed for the lands in B. Thandrapadu Village.

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*285. LAND ACQUISITION ACT, 1894 – Section 23

Acquisition of land – Determination of compensation, matters to be considered therefor – While determining compensation for compulsory acquisition, the relevant factors are – The purpose for which the land was acquired, potentiality of the land, its potential use, its location, market price of the land sold in near proximity just prior to the acquisition and the appreciation of the value of the land for every subsequent year – The Courts for making assessment can safely take into account the documentary as well as the oral evidence led by the parties in support of these factors – The Court has also to take into consideration in order to avoid element of speculation for fixation of market value with reference to comparable sales as to whether the sale is within the reasonable time of the date of notification, whether it is bonafide sale, whether it is for the land adjacent to the land acquired and whether it possess similar advantages – Certified copies of sale-deeds relating to similar lands situated in the vicinity can be relied upon without examining vendee or vendor or anybody else connected with the sale – Increase of 15% per year on the sale deed comparable can be taken for assessment of the market value on the date of notification under Section 4 of the Land Acquisition Act – Sale deed representing highest value out of the different transactions has to be preferred – However, for determination of market value on the basis of comparable sale transaction, application of principle of average price is illegal – In absence of sale deed, in respect of market value of a particular village, sale-deeds of contiguous, similarly situated village can also be considered.

Sitabai and others v. State of M.P. and others

Judgment dated 21.01.2009 passed by the High Court in First Appeal No. 40 of 2001, reported in 2009 (2) MPHT 442

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286. LAND ACQUISITION ACT, 1894 – Sections 23 & 24

(i) Principles and matters to be considered in determination of compensation of land acquired reiterated.

(ii) Determination of compensation on comparable sales method enunciated – As the acquired land found to be agricultural and comparatively underdeveloped, having lesser potential as against the land which was in vicinity and was under comparison – Market value arrived at by giving cumulative increase of 7.5% p.a. over the land rate awarded in previous acquisition and 20% deduction of resultant.

Faridabad Gas Power Project, National Thermal Power Corporation Limited and others v. Om Prakash and others

Judgment dated 05.02.2009 passed by the Supreme Court in Civil Appeal No. 493 of 2007, reported in (2009) 4 SCC 719

Held:

Regarding determination of the market value in *State of M.P. v. Shantabhai, 1995 Supp (2) SCC 28* this Court observed that fixation of market value by the civil court equivalent with reference to contemporaneous sale transaction was proper.

In *Shakuntalabai (Smt.) v. State of Maharashtra, (1996) 2 SCC 152,* it was held that:

> "4. if there is evidence or admission on behalf of the claimants as to the market value commanded by the acquired land itself, the need to travel beyond the boundary of the acquired land is obviated."

Further, when the owner himself has purchased the land under acquisition few years earlier to the Notification under Section 4 of the Act, the consideration mentioned in the sale deed would form the basis to determine the market value and it is unnecessary to travel beyond that evidence and consider the market value prevailing in the adjacent lands.

In *Krishi Utpadan Mandi Samiti v. Bipin Kumar, (2004) 2 SCC 283,* it is held that basic valuation register maintained for stamp duty purposes cannot be relied upon while determining the market value of the acquired land and further that comparable sales method is the best acceptable method for such determination.

In *V. Hanumantha Reddy v. Land Acquisition Officer, (2003) 12 SCC 642,* this Court held that while determining the market value of the acquired land lying in the interior areas, the sale instances of the land abutting the National Highway cannot be relied on for determining the compensation of land which was situated 100 yards from the national highway.

In *K.S. Shivadevamma v. Assistant Commissioner & Land Acquisition Officer, (1996) 2 SCC 62; Basavva v. Land Acquisition Officer, (1996) 9 SCC 640 and in Kasturi v. State of Haryana, (2003) 1 SCC 354,* this Court held that in respect of agricultural land or undeveloped land which has potential value for housing or commercial purposes, deductions between 53% to 33.33% should be deducted towards the cost of development out of the amount calculated with reference to market value of developed land. In some cases where the acquired land is semi-developed or having road and other facilities, this Court has restricted the deduction even to 20%, but that is in exceptional circumstances. In short, the extent of deduction depends upon the nature, location, extent of expenditure involved for development of the land so as to make the plots for residential or commercial purposes and the area required for laying out roads and other civic amenities.

This Court in *Union of India v. Pramod Gupta, (2005) 12 SCC 1* reiterated that one of the modes of computing the market value would be with reference to judgments and awards passed in respect of acquisitions of similar land subject to such increase or decrease thereupon as may be applicable having regard to the accepted principles laid down therefor. The extent of the land, the nature thereof, advantages and disadvantages occurring therein amongst others would be relevant factors for determining the actual market value of the property. This Court also reiterated that for the purpose of determining the market value of the acquired lands on the basis of the comparable sales method, the land sought to be compared must be similar in potentiality and nature. It also took note of the fact that the market value of agricultural lands is lower than that of the land suitable for commercial purposes.

This Court in *Pramod Gupta case* (supra) also cautioned that the enormity of financial implication of enhancement in view of the size of the land acquired for a particular project should be kept in mind.

In *Land Acquisition Officer v. Nookala Rajamallu, (2003) 12 SCC 334* (para 9)], it was observed:

> "It can be broadly stated that the element of speculation is reduced to a minimum if the underlying principles of fixation of market value with reference to comparable sales are made:
>
> (i) when sale is within a reasonable time of the date of notification under Section 4 (1);
>
> (ii) it should be a bona fide transaction;
>
> (iii) it should be of the land acquired or of the land adjacent to the land acquired; and
>
> (iv) it should possess similar advantages."
>
> In *Panna Lal Ghosh v. Collector (LA), (2004) 1 SCC 467,* this Court said that
>
> "5. .....the most reliable way to determine the value is to rely on the instances of sale portions of the same land as has been acquired or adjacent lands made shortly before or after the Section 4 Notification."

In *Suresh Kumar v. Town Improvement Trust, (1989) 2 SCC 329,* in a case under the Madhya Pradesh Town Improvement Trust Act, 1960, this Court has held that the rates paid for small parcels of land do not provide a useful guide for determining the market value of the land acquired. While determining the market value of the land acquired, it has to be correctly determined and paid so that there is neither unjust enrichment on the part of the acquirer nor undue deprivation on the part of the owner.

In *Mehta Ravindrarai Ajitrai v. State of Gujarat, (1989) 4 SCC 250,* this Court held that:

> "the market value of a property for purposes of Section 23 of the Land Acquisition Act is the price at which the property changes hands from a willing seller to a willing, but not too anxious a buyer, dealing at arms length. Prices fetched for similar lands with similar advantages and potentialities under bona fide transactions of sale at or about the time of the preliminary notification are the usual and, indeed the best evidences of market value."

Nelson Fernandes v. Land Acquisition Officer, (2007) 9 SCC 447 is the ratio to similar effect.

In *Ranjit Singh v. UT of Chandigarh, (1992) 4 SCC 659,* this Court held that the market value of lands acquired pursuant to the preliminary notification could not have been frozen at the same market value fixed for similar lands acquired under a previous notification after lapse of period of one year and the general increase of land prices during that period, higher market value say about 10% per year should be awarded.

In *DDA v. Bali Ram Sharma, (2004) 6 SCC 533,* it is held that in cases where the purpose of acquisition was the same but the notification under Section 4(1) was issued on a subsequent date, obviously there would be escalation of prices in regard to those lands. Hence, it would be just and appropriate to give an annual increase of 10% in the market value in respect of the lands which were acquired by a subsequent notification.

In *ONGC Ltd. v. Rameshbhai Jivanbhai Patel, (2008) 14 SCC 745* it is held that increase in market value in urban/semi-urban areas was about 10% to 15% per annum, the corresponding increase in rural areas would at best be around half of it, that is about 5% to 7.5% per annum, in the absence of evidence of sudden spurts or fall in prices.

In *Viluben Jhalejar Contractor v. State of Gujarat, (2005) 4 SCC 789,* it is reiterated that the relevant factors for the determination of compensation are comparable instance has to be identified having regard to the proximity from time angle as well as proximity from situation angle. For determining the market value of the land under acquisition, suitable adjustment has to be made having regard to various positive and negative factors *vis-a'-vis* the land under acquisition by placing the two in juxtaposition. The positive factors are (i) smallness of size (ii) proximity to a road; (iii) frontage on a road; (iv) nearness to developed area; (v) regular shape, (vi) level vis-a'-vis land under acquisition and (vii) special value for an owner of an adjoining property to whom it may have some very special advantage and the negative factors are: (i) largeness of area; (ii) situation in the interior at a distance from the road; (iii) narrow strip of land with very small frontage compared to depth; (iv) lower level requiring the depressed portion to be filled up; (v) remoteness from developed locality and (vi) some special disadvantageous factors which would deter a purchaser.

In *ONGC Ltd. v. Sendhabhai Vastram Patel, (2005) 6 SCC 454,* it is held that instances of sale in respect of the similar land situated in the same village and/ or neighbouring villages can be taken as guiding factors for determination of market value.

In *Union of India v. Harinder Pal Singh, (2005) 12 SCC 564,* this Court observed that in the absence of any contemporaneous document, the market value of the acquired land in a village which was acquired at the same time as the lands in other villages, was considered to be correct comparative unit for determination of the market value of the acquired lands.

On the other hand in *Kanwar Singh v. Union of India, (1998) 8 SCC 136,* this Court cautioned that transactions of neighbouring village are not reliable where the situation and potentialities of lands in the two villages were different.

(ii) The evidence also shows that the distance between the two lands separated by the Agra canal may vary from 1 km to 2.5 km.

The acquired land was agricultural land which was surrounded by left-out agricultural lands of the owners.

On an independent scrutiny of the above referred to entire evidence placed on record, it is proved that the entire chunk of acquired land was purely agricultural in quality and of lesser potentiality. The lands acquired for Sector-II, Faridabad, as per notification dated 23.11.1992 were situated in a better developed area with greater potentiality than the lands acquired for NTPC.

On the facts and circumstances of the matters before us and difference in quality and potentiality of the lands acquired, we are of the view that the market value of the acquired lands for NTPC when compared to the lands acquired for Sector II, Faridabad, should be reduced by at least one- fifth (20%). The value of Sector II lands had been determined at Rs. 291/- per square yard with reference to a preliminary notification issued on 23.11.1992.

The solatium, additional amount and interest awarded by the Reference Court and confirmed by the High Court were left intact.

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***287. LAND REVENUE CODE, 1959 (M.P.) – Section 124**

Rules regarding boundaries and boundary marks, survey marks – Demarcation and measurement of land, method therefor – Section 124 of the Code provides two types of boundaries, one of village and another of all survey numbers or plot numbers in the village – The Revenue Officer performing work of demarcation of plot must firstly ascertain whether there are permanent marks as per Section 124 of the Code or not and in absence of such boundary marks, he is required to ascertain the correct boundaries of nearby survey numbers and after ascertaining the correct location of disputed land and only thereafter he should submit his report in the Court.

Jagdish Prasad v. State of M.P. and another

Judgment dated 09.02.2009 passed by the High Court in Writ Petition No. 548 of 2009, reported in 2009 (2) MPHT 459 (DB)

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***288. LAND REVENUE CODE, 1959 (M.P.) – Section 165 (6)**
SPECIFIC RELIEF ACT, 1963 – Section 16
Whether Meena Adivasi of Guna district belong to aboriginal tribe? Held, No – Further held, no permission of the Collector is required for transfer of rights of Bhumiswami belonging to Meena Adivasi of Guna district.

Gajari Bai (dead) through L.Rs Kaluram and others v. Kashinath and another

Judgment dated 18.06.2008 passed by the High Court in First Appeal No. 129 of 1999, reported in 2009 (3) MPHT 130

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289. LIMITATION ACT, 1963 – Article 54

(i) Period of limitation for suit of specific performance under Article 54 of the Limitation Act – Meaning of the words "date" and "fixed" explained – The use of the aforesaid terms is suggestive of specific date in the calendar.

(ii) The date was fixed or not, the plaintiff had noticed that performance is refused and the date thereof has to be established with reference to materials and evidence available on record.

Ahmadsahab Abdul Mulla (2) (dead) by proposed LRs v. Bibijan and others

Judgment dated 01.04.2009 passed by the Supreme Court in Civil Appeal No. 4190 of 2000, reported in (2009) 5 SCC 462

Held:

(i) The relevant question is whether the use of the expression "date" used in Article 54 of the Schedule to Limitation Act, 1963 (in short the 'Act') is suggestive of a specific date in the calendar.

According to Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edition 2005, the word 'date' means as follows:

> "Date. (As a noun) The point of time at which a transaction or event takes place; time given or specified; time in some way ascertained and fixed; in a deed, that part of the deed or writing which expresses the day of the month and year in which it was made, (2 Bl. Commn. 304; Tomlin). In *Bement v. Trenton Locomotive, etc., Mfg. Co., 32 NLJ 513 (515),* it is said : 'The primary signification of the word date, is not time in the abstract, nor time taken absolutely but, as its derivation

plainly indicates, time given or specified time in some way ascertained and fixed; this is the sense in which the word is commonly used. When we speak of the date of a deed, we do not mean the time when it was actually executed but the time of its execution, as given or stated in the deed itself.

"Where a deed bears no date, or an impossible date, and in the deed reference is made to the 'date', that word must be construed 'delivery'; but if the deed bears a sensible date, the word 'date', occurring in the deed, means the day of the date, and not that of the delivery" (Elph. 123, citing *Styles v. Wardle, 4 B&C 908*);

"Date", though sometimes used as the shortened form of "day of the date", is not its synonym; but mean the particular time on which an instrument is given, executed, or delivered *(Howard's Case, 1 Raym. Ld 480; Armitt v. Breame, 2 Raym Ld 1076; Pewtress v Annan, 9 Dowl 828,* at pp. 834, 835).

"The word 'date' is much more commonly descriptive of a day than of any smaller division of time" (per *Simpson v. Marshall, 37 SLR 316*).

"Date" means day, so that where a cover note providing for temporary insurance of a motor car expires "15 days after date of commencement" it runs for the full 15 days after the day on which it was to commence *(Cartwright v. Mac Cormack; Trafalgar Insurance Co. (Third Party), (1963) 1 WLR 18)."*

'Fixed' in essence means having final or crystallized form or character not subject to change or fluctuation.

The inevitable conclusion is that the expression 'date fixed for the performance' is a crystallized notion. This is clear from the fact that the second part "time from which period begins to run" refers to a case where no such date is fixed. To put it differently, when date is fixed it means that there is a definite date fixed for doing a particular act. Even in the second part the stress is on 'when the plaintiff has notice that performance is refused'. Here again, there is a definite point of time, when the plaintiff notices the refusal. In that sense both the parts refer to definite dates. So, there is no question of finding out an intention from other circumstances.

Whether the date was fixed or not the plaintiff had notice that performance is refused and the date thereof are to be established with reference to materials and evidence to be brought on record. The expression 'date' used in Article 54 of the Schedule to the Act definitely is suggestive of a specified date in the calendar.

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290. MOTOR VEHICLES ACT, 1988 – Sections 140, 166, 147 & 149

(i) Liability of the Insurance Company – The accident occurred due to collusion of two vehicles – One of them, of which driver was at fault, was not insured – The insurer of another vehicle of which driver was not driving rashly and negligently, cannot be held liable to pay compensation – Position explained.

(ii) Gratuitous passenger – Travelling in any vehicle, the Insurance Company would not be liable to indemnify under the statutory policy – Case law discussed.

New India Assurance Company Limited v. Bismillah Bai and others
Judgment dated 20.03.2009 passed by the Supreme Court in Civil Appeal No. 1799 of 2009, reported in (2009) 5 SCC 112

Held:

The question as to whether the driver of the jeep or the truck and/or both of them were responsible for negligence in driving their respective vehicles, which led to the said accident is essentially a question of fact. While reversing the said finding of fact, so as to fasten the liability on the insurance company, the High Court was required to assign sufficient and cogent reasons. No such finding to the effect that both driver as also the jeep contributed to the negligence having been recorded by the High Court, the question of fastening the joint liability by the insurance company did not arise.

Only because the truck was not insured, the same by itself did not mean that the appellant-insurance company can be held liable to reimburse the claim to the claimants wherefor liability had been incurred by the owner and driver of the truck and, therefore, no liability has been incurred by the driver and owner of the jeep is concerned.

The Tribunal has categorically recorded a finding that the driver of the jeep was not driving his jeep rashly and negligently and he was not at fault and that the accident occurred due to rash and negligent driving of truck by its driver. Since, the High Court has not reversed this finding of the Tribunal, fastening of the liability on the insurance company which is the insurer of the jeep did not arise.

Even otherwise, the insurance company cannot be held liable to pay compensation to the claimants in view of the decision of this Court in *Oriental Insurance Company Limited v. Sudhakaran K.V.,(2008) 7 SCC 428* wherein this Court opined:

> "17. This Court in a catena of decisions has categorically held that a gratuitous passenger in a goods carriage would not be covered by a contract of insurance entered into by and between the insurer and the owner of the vehicle in terms of Section 147 of the Act. [See *New India Assurance Co. Ltd. v. Asha Rani (2003) 2 SCC 223*]

18. A Division Bench of this Court in *United India Insurance Co. Ltd., Shimla v. Tilak Singh and Ors., (2006) 4 SCC 404* extended the said principle to all other categories of vehicles also, stating as under:

"21. In our view, although the observations made in Asha Rani case were in connection with carrying passengers in a goods vehicle, the same would apply with equal force to gratuitous passengers in any other vehicle also. Thus, we must uphold the contention of the appellant Insurance Company that it owed no liability towards the injuries suffered by the deceased Rajinder Singh who was a pillion rider, as the insurance policy was a statutory policy, and hence it did not cover the risk of death of or bodily injury to a gratuitous passenger."

It was held in *Sudhakaran case* (Supra) :

"20. The provisions of the Act and, in particular, Section 147 of the Act were enacted for the purpose of enforcing the principles of social justice. It, however, must be kept confined to a third party risk. A contract of insurance which is not statutory in nature should be construed like any other contract.

21. We have noticed the terms of the contract of insurance. It was entered into for the purpose of covering the third party risk and not the risk of the owner or a pillion rider. An exception in the contract of insurance has been made, i.e., by covering the risk of the driver of the vehicle. The deceased was, indisputably, not the driver of the vehicle.

22. The contract of insurance did not cover the owner of the vehicle, certainly not the pillion rider. The deceased was travelling as a passenger, stricto sensu may not be as a gratuitous passenger as in a given case she may not be a member of the family, a friend or other relative. In the sense of the term which is used in common parlance, she might not be even a passenger. In view of the terms of the contract of insurance, however, she would not be covered thereby."

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291. MOTOR VEHICLES ACT, 1988 – Section 149 (2) (a) (ii)
EVIDENCE ACT, 1872 – Section 106

(i) Distinction between "effective licence" and "duly licenced" drawn in *Swaran Singh's case, (2004) 3 SCC 297* – The appellant held a learner's licence which had expired and was not valid on the date of the accident, he cannot be said to be duly licensed – Position explained by applying decision of *Swaran Singh* (supra).

(ii) Burden of proof – The burden of proof ordinarily would be on

the Insurance Company to establish that there has been a breach of conditions of the contract of insurance – However, wherein owner raised a specific plea that he was not driving the vehicle but some other person was driving the same at the time of accident, the burden of proof, therefore, to prove such fact being especially within his knowledge would be upon him.

Bhuwan Singh v. Oriental Insurance Company Limited and another

Judgment dated 05.03.2009 passed by the Supreme Court in Civil Appeal No. 1537 of 2009, reported in (2009) 5 SCC 136

Held:

(i) The word effective licence is defined in Section 3 of the Act. Sub-section 2 of Section 149, however, uses the word duly licensed. In *National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297*, a three Judge Bench of this Court has drawn a distinction between the said two terms.

The Act provides for grant of a learner's licence. It indisputably is a licence within the meaning of provisions thereof. A person holding a learner's licence is also entitled to drive a vehicle but it is granted for a specific period. The terms & Conditions for grant of a learner's licence are different from those of a regular licence. Holding of a learner's licence is imperative for filing an application for grant of licence as provided for in Rule 4 of the Rules. Converse however is not true. Only because the appellant held a learner's licence which had expired and was not valid on the date of accident, he cannot be said to be duly licensed. It is true that despite expiry of a regular licence, it may be renewed, but no provision has been brought to our notice providing for automatic renewal of learner's licence.

In *Ram Babu Tiwari v. United India Insurance Co. Ltd., (2008) 8 SCC 165,* this Court held :

> "18. It is beyond any doubt or dispute that only in the event an application for renewal of licence is filed within a period 30 days from the date of expiry thereof, the same would be renewed automatically which means that even if an accident had taken place within the aforementioned period, the driver may be held to be possessing a valid licence. The proviso appended to Sub-section (1) of Section 15, however, clearly states that the driving licence shall be renewed with effect from the date of its renewal in the event the application for renewal of a licence is made more than 30 days after the date of its expiry. It is, therefore, evident that as, on renewal of the licence on such terms, the driver of the vehicle cannot be said to be holding a valid licence, the insurer would not be liable to indemnify the insured."

(ii) Appellant herein raised a specific plea that he was not driving the vehicle and one Diwan Singh was driving the same. The said fact was within his special knowledge. Burden of proof, therefore, to prove the same was on him. He did not examine Diwan Singh. The claimants in their claim petition described the appellant as owner as well as driver of the vehicle.

The burden of proof ordinarily would be on insurance company to establish that there has been a breach of conditions of the contract of insurance. In this case, however, the burden in terms of Section 106 of the Evidence Act was on the appellant. He failed to discharge the said burden. As indicated hereinbefore, not only a criminal case was pending against him, he was also charge-sheeted.

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***292. MOTOR VEHICLES ACT, 1988 – Sections 166, 50 & 168**

Motor accident claim – Registered owner, liability of – Tractor trolley met with an accident on 02.12.2004 due to rash and negligent driving of the driver in which 3 labourers died – In a claim petition, the appellant/owner took defence without submitting any sale memo that he had sold the tractor much before the accident on 03.09.2004 – Subsequently, the vehicle was registered in the name of purchaser on 07.01.2005 – Claims Tribunal held the appellant/owner liable for payment of compensation – Held, the appellant/owner cannot escape from the liability to pay compensation on the plea of such sale.

Ramesh Chandra v. Smt. Shrivati and others

Judgment dated 13.02.2009 passed by the High Court in Miscellaneous Appeal No. 130 of 2006, reported in 2009 (2) MPLJ 438 (DB)

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293. N.D.P.S. ACT, 1985 – Section 2 (xxiii-a), 2 (vii-a) & 21 (a)

Only actual quantity in terms of percentage of narcotic drugs or psychotropic substances found in the mixture (substance) seized, is relevant for the purpose of imposition of punishment.

State of NCT of Delhi v. Ashif Khan alias Kalu

Judgment dated 03.03.2009 passed by the Supreme Court in Criminal Appeal No. 428 of 2009, reported in (2009) 4 SCC 42

Held:

The quantity of substance recovered from the accused was 310 gms. which was prima facie detected to be heroin. Two samples of five grams were taken and those were sent for Forensic Science Laboratory for testing. After testing the said samples the Laboratory gave a report on 5.2.2004. The report revealed that samples were found to contain 0.95% diacetylmorphine. In view of the percentage contained the weight of heroin came to be 2.945 gms. of heroin.

It was observed by the High Court that in a mixture of a narcotic drug or a psychotropic substance with one or more neutral substance the quantity of the neutral substance or substances is not to be taken while considering whether small

quantity or a commercial quantity of the narcotic drug or psychotropic substance is recovered but only the actual contents by weight of the narcotic drug or psychotropic substance as the case may be, relevant for determining whether it would constitute a small quantity or commercial quantity. Hence, the quantity seized was a small quantity and, therefore, the conviction would be under Section 21(a).

After referring the legal position in this regard enunciated in *E. Micheal Raj v. Narcotic Control Bureau, (2008) 5 SCC 161 and in Ouseph v. State of Kerala, (2004) 4 SCC446* the order of conviction u/s 21 (a) held proper.

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294. N.D.P.S. ACT, 1985 – Section 15
CRIMINAL PROCEDURE CODE, 1973 – Section 313

(i) Conscious possession of contraband articles is to be determined with reference to factual backdrop in each case.

(ii) Questioning of accused under Section 313 CrPC is not an empty formality – Essence of acquisition in this case particularly relating to conscious possession has to be brought to the notice of the accused while examining under Section 313 CrPC – Legal position in this regard reiterated.

State of Punjab v. Hari Singh and others

Judgment dated 16.02.2009 passed by the Supreme Court in Criminal Appeal No. 319 of 2009, reported in (2009) 4 SCC 200

Held:

(i) Section 15 makes possession of contraband articles an offence. It deals with punishment for contravention in relation to poppy straw.

The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Superintendent & Remembrancer of Legal Affairs v. Anil Kumar Bhunja, AIR 1980 SC 52,* to work out a completely logical and precise definition of "possession" uniformally applicable to all situations in the context of all statutes.

The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

As noted in *Gunwantlal v. State of M.P., AIR 1972 SC 1756* possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the persons whom physical possession is given holds it subject to that power or control.

The word 'possession' means the legal right to possession (See *Health v. Drown, (1972) (2) All ER 561 (HL).* In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. [See *Sullivan v. Earl of Caithness, 1976 (1) All ER 844 (DC)*].

Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. This position was highlighted in *Madan Lal v. State of Himachal Pradesh, (2003) 7 SCC 465.*

[See also *Megh Singh v. State of Punjab, (2003) 8 SCC 666*]

It is highlighted that unless the possession was coupled with requisite mental element, i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 15 is not attracted.

(ii) In the present case, though, there was evidence regarding conscious possession, but, unfortunately, no question relating to possession, much less conscious possession was put to the accused under Section 313 Cr.P.C. The questioning under Section 313 Cr.P.C. is not an empty formality.

In *Bibhuti Das Gupta v. State of W.B., AIR 1969 SC 381* this Court held that the pleader cannot represent the accused for the purpose of Section 342 of the Code of Criminal Procedure, 1898 (hereinafter referred to as 'Old Code') which is presently Section 313 Cr.P.C.

In *Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793* the three-Judge Bench made the following observations therein: (SCC p.806, para 16)

> "It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction."

The above approach shows that some dilution of the rigour of the provision can be made even in the light of a contention raised by the accused that non-questioning him on a vital circumstance by the trial court has caused prejudice to him. The explanation offered by the counsel of the accused at the appellate stage was held to be a sufficient substitute for the answers given by the accused himself.

What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that it is "for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him". In *Jai Dev v. State of Punjab, AIR 1963 SC 612* Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focussed on the ultimate test in determining whether the provision has been fairly complied with. He observed thus:

> "The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to inquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity".

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295. N.D.P.S. ACT, 1985 – Section 37

Cancellation of bail in a case relating to the offence under NDPS Act on the ground of second report of analysis – Whether an order of bail granted in favour of accused can be cancelled on the basis of second report of analysis of the articles recovered from him containing heroin? Held, No.

Sami Ullaha v. Superintendent, Narcotic Central Bureau

Judgment dated 07.11.2008 passed by the Supreme Court in Criminal Appeal No. 1748 of 2008, reported in AIR 2009 SC 1357

Held:

Whether an order of bail granted in favour of the appellant herein could have been directed to be cancelled on the basis of a report of analysis of the articles recovered from him containing 'heroin' is the core question involved herein.

We are concerned with a question involving cancellation of an order of bail. The authorized laboratory at Neemuch categorically found that the seized substance did not contain any contraband. For the purpose of grant of bail, the court cannot be said to have committed any illegality in relying thereupon.

There exists a difference of opinion insofar as the Central Revenue Control Laboratory, New Delhi, has since opined that the sample contained 2.6% heroin.

The effect of said contradictory report must be gone into only at trial. A person's liberty is protected in terms of Article 21 of the Constitution of India. When two views are possible, the view which leans in favour of an accused must be favoured.

Furthermore, for the purpose of cancellation of bail, the statutory requirements must be satisfied. Appellant has failed to do so.

We may notice that in *State (Delhi Administration) v. Sanjay Gandhi, (1978) 2 SCC 411,* this Court held:

> "13. Rejection of bail when bail is applied for is one thing; cancellation of bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such a case. Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fail trial to allow the accused to retain his freedom during the trial. The fact that prosecution witnesses have turned hostile cannot by itself justify the inference that the accused has won them over. A brother, a sister or a parent who has seen the commission of crime, may resile in the Court from a statement recorded during the course of investigation. That happens instinctively, out of natural love and affection, not out of persuasion by the accused. The witness has a stake in the innocence of the accused and tries therefore, to save him from the guilt. Likewise, an employee may, out of a sense of gratitude, oblige the employer by uttering an untruth without pressure or persuasion. In other words, the objective fact that witnesses have turned hostile must be shown to bear a causal connection with the subjective involvement therein of the respondent. Without such proof, a bail once granted cannot be cancelled on the off chance or on the supposition that witnesses have been won over by the accused. Inconsistent testimony can no more be ascribed by itself to the influence of the accused than consistent testimony, by itself, can be ascribed to the pressure of the prosecution. Therefore, Mr. Mulla is right that one has to countenance a reasonable possibility that the employees of Maruti like the approver Yadav might have, of their own volition, attempted to protect the respondent from involvement in criminal charges. Their willingness now to oblige the respondent would depend upon how much the respondent has obliged them in the past. It is therefore, necessary for the prosecution to show some act or conduct on the part of the respondent from which a

reasonable inference may arise that the witnesses have gone back on their statements as a result of an intervention by or on behalf of the respondent."

For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The order dated 15.03.2005 cancelling the bail is set aside and the revision application filed in the High Court stands allowed. The appeal is allowed.

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296. N.D.P.S. ACT, 1985 – Section 52-A
CRIMINAL PROCEDURE CODE, 1973 – Sections 6 & 29

(i) Disposal of seized narcotics drugs and psychotropic substances – Provision is meant for disposal of the property during the pendency of the trial – Disposal means final disposal and the property would not remain in custody of Police, Excise Department or Central Narcotics Bureau.

(ii) In sub-section (2) of Section 52-A of the Act, the word used 'any Magistrate' means any executive or judicial Magistrate as defined in Code under Sections 6 and 20.

(iii) The purpose of Section 52-A is to allow the disposal of property at the earliest point of time during the course of investigation so that same may not be vulnerable to theft, substitution, constraints of proper storage, space of any other kind of destruction, after following the procedure mentioned in sub-section (2) of Section 52-A of the Act.

Nirmal & ors. v. State of M.P.

Judgment dated 08.09.2008 passed by the High Court in Criminal Appeal No. 1274 of 2007, reported in I.L.R. (2009) M.P. 848

Held:

The provision of Section 52-A of N.D.P.S. Act regarding disposal of seized narcotic drugs and psychotropic substances is meant for disposal of the property during the pendency of the trial and meaning of disposal means final disposal, and the property would not remain in Police custody or in the custody of the Court or in custody of Excise Department or Central Narcotics Bureau, Neemuch (MP). Sub-section 1 of Section 52-A of "the Act" is assigning reason for disposal of the property and for which notification would be published by the Central Government for the official gazette specifying such narcotic drugs or psychotropic substances or clause of narcotic drugs or clause of psychotropic substances. Notification shall also specify the Officer and the manner of disposal from time to time. Before disposal of the seized property, the concerned agency will follow the procedure prescribed in sub-sections 2, 3 and 4 of Section 52-A of "the Act", after producing the substance before any Magistrate. Any Magistrate means any executive or judicial Magistrate, as defined in Criminal Procedure Code under Sections 6 and 20. The inventory of the property would be prepared and

learned Magistrate shall certify the correctness of inventory or in his presence photographs of such drugs or substances will be taken and certified by the learned Magistrate or representative samples of such drugs or substances in presence of Magistrate will be taken and Magistrate will certify the correctness of list of samples. Sub-section 3 of Section 52-A of "the Act" is issuing mandate for allowing the application filed by the police or prosecution under sub-section 2 of Section 52-A of "the Act" as early as possible and sub-section 4 of Section 52-A of "the Act" is giving status to inventory, photographs, list of samples as a primary evidence in respect of such offence, in which the narcotic drugs or psychotropic substances were seized, during the course of trial for proving the prosecution case.

The purpose of Section 52-A of "the Act" is to allow the disposal of the property at the earliest point of time during the course of investigation so that same may not be vulnerable to theft, substitution, constraints of proper storage, space or any other kind of distinction, after following the procedure mentioned in sub-section 2 of Section 52-A of "the Act", by which the evidence has to be preserved to establish the prosecution case regarding quantity, kind of drugs or psychotropic substances, its identity with the seizure memo and the statement of the prosecution witnesses who will prove the photographs, seizure memo, inventory, packets of sample etc.

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297. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
CRIMINAL PROCEDURE CODE, 1973 – Section 391

(i) Dishonour of cheque – Complaint by partnership firm through one of partners – Held, complaint is maintainable.

(ii) Application to submit additional documents filed in appeal after dismissal of complaint – Contented by appellant that documents were in possession of previous counsel who did not file before trial court – Held, on previous occasion also on the same ground appellant was permitted to submit documents – Provision is not to fill up the lacuna but to subserve the ends of justice – Application dismissed.

(iii) Dishonour of cheque – Alteration in date of issuance of cheque – Cheque presented for encashment even after 5 months of altered date – No explanation about revalidation of cheque and delay in presentation – Held, complaint rightly rejected by court below – Appeal dismissed.

Daccan Lubes Terfe (M/s) v. M/s Chakradhar Construction
Judgment dated 06.11.2008 passed by the High Court in Criminal Appeal No. 804 of 2008, reported in I.L.R. (2009) M.P. 870

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298. PARTNERSHIP ACT, 1932 – Sections 4, 5 & 69
COMPANIES ACT, 1956 – Section 3

(i) Partnership firm – Difference between partnership firm and company – Explained

(ii) Registration of partnership firm – Not compulsory – Consequence of non-registration – Explained.

V. Subramaniam v. Rajesh Raghuvandra Rao

Judgment dated 20.03.2009 passed by the Supreme Court in Civil Appeal No. 7438 of 2000, reported in (2009) 5 SCC 608

Held:

The English law in so far as it makes registration compulsory for a firm and imposes a penalty for non-registration was not followed when the Partnership Act was made in India in 1932 as it was considered that this step would be too drastic and would introduce several difficulties. Hence registration was made optional at the discretion of the partners, but following the English precedent, any firm which was not registered by virtue of sub-sections (1)& (2) of Section 69 disabled a partner or the firm (as the case may be) from enforcing certain claims against the firm or third parties (as the case may be) in a Civil Court. An exception to this disability with regard to an unregistered firm was made in sub-section (3)(a) to Section 69, and this clause enabled the partners in an unregistered firm to sue for the dissolution of the firm or for accounts or for realizing the property of the dissolved firm. This exception in clause (a) of Section 69(3) was made on the principle that while registration of a firm is designed primarily to protect third parties, the absence of registration does not mean that the partners of an unregistered firm lose all rights in the said firm or its property and hence cannot sue for accounts or for its dissolution or for realizing their property in the firm.

It may be mentioned that a partnership firm, unlike a company registered under the Indian Companies Act, is not a distinct legal entity, and is only a compendium of its partners. Even the registration of a firm does not mean that it becomes a distinct legal entity like a company. Hence the partners of a firm are co-owners of the property of the firm, unlike shareholders in a company who are not co-owners of the property of the company.

The primary object of registration of a firm is protection of third parties who were subjected to hardship and difficulties in the matter of proving as to who were the partners. Under the earlier law, a third party obtaining a decree was often put to expenses and delay in proving that a particular person was a partner of that firm. The registration of a firm provides protection to the third parties against false denials of partnership and the evasion of liability. Once a firm is registered under the Act the statements recorded in the Register regarding the constitution of the firm are conclusive proof of the fact contained therein as against the partner. A partner whose name appears on the Register cannot deny that he is a partner except under the circumstances provided. Even then

registration of a partnership firm is not made compulsory under the Act. A partnership firm can come into existence and function without being registered.

As already stated above there is no legal requirement, unlike in England, which makes registration of a firm compulsory, rather in India it is voluntary. Both registered and unregistered are legal though of course registration and non registration have different legal consequences as stated above.

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299. PREVENTION OF CORRUPTION ACT, 1988 – Sections 7, 13 (1) (d) & 13 (2)

PRECEDENTS:

(i) Demand and acceptance of bribe – If the prosecution case relating to part of demand and acceptance of bribe not proved, whole case would not fail – Remaining part of the case may be accepted. *[Haridevi Sharma v. State (Delhi Administration), (1977) 3 SCC 352* **distinguished on factual matrix]**

(ii) Precedents – Applicability of *ratio decidendi* **– Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision in which reliance is placed – Disposal of cases, by blindly placing reliance on a decision, is not proper.**

State of Andhra Pradesh v. M. Radha Krishna Murthy

Judgment dated 06.03.2009 passed by the Supreme Court in Criminal Appeal No. 386 of 2002, reported in (2009) 5 SCC 117

Held:

In appeal the High Court held that since part of the prosecution version about demand and acceptance has not been proved, the remaining part of the case cannot be accepted. It was pointed out that according to the prosecution an amount of Rs. 4,000/- was demanded and accepted and the first vital part of the prosecution version was that payment of Rs. 2,000/- said to have been accepted by the respondent is not proved, therefore, when the part of the same is not accepted the remaining part of the case shall also not be accepted. Placing reliance on a decision of this Court in *Hari Dev Sharma v. State (Delhi Admn.), (1977) 3 SCC 352* the conviction as recorded was set aside.

The High Court found that the prosecution case was that there was demand and an amount of Rs. 2,000/- was paid on 13.6.1989 which has not been proved and with regard to the trap conducted by the prosecution while the accused was receiving Rs. 2,000/- from P.W.1 on 19.6.1989. Even if the trap is proved beyond all reasonable doubt, the prosecution version cannot be upheld in view of the aforesaid decision of this court in *Hari Dev Sharma's case* (supra).

In support of the appeal, learned counsel for the appellant submitted that the conclusions of the High Court are without any foundation and legal basis. Learned counsel for the accused on the other hand supported the judgment of

the High Court contending that the decision of this Court in *Hari Dev Sharma's case* (supra) is clearly applicable.

On a bare reading of the judgment in *Hari Dev Sharma's case* (supra), it is clear that no rule of universal application was laid down that whenever a part of the case relating to demand and acceptance is not acceptable, the whole case would fail even if the case relating to trap, recovery of money and chemical test by the prosecution is established. When part of the prosecution version relating to demand and acceptance of bribe stands by itself, the ratio of the decision does not apply.

Unfortunately, in the instant case the High Court has lost sight of the aforesaid aspects and by placing reliance on the aforesaid decision has directed acquittal.

Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton, (1951 AC 737 at p.761)*, Lord Mac Dermot observed:

> "The matter cannot, of course, be settled merely by treating the *ipsissima vertra* of Willes, J as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge."

In *Home Office v. Dorset Yacht Co., (1970 (2) All ER 294)* Lord Reid said, "Lord Atkin's speech.....is not to be treated as if it was a statute definition It will require qualification in new circumstances." Megarry, J in *(1971) 1 WLR 1062* observed: "One must not, of course, construe even a reserved judgment of even Russell L.J. as if it were an Act of Parliament." And, in *Herrington v. British Railways Board, (1972 (2) WLR 537)* Lord Morris said:

> "There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

The following words of Lord Denning in the matter of applying precedents have become locus classicus:

> "Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

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> "Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

[See *Union of India v. Amrit Lal Manchanda, (2004) 3 SCC 75*]

In that view of the matter the judgment of the High Court is clearly unsustainable and is set aside and that of the trial Court is restored.

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***300. PREVENTION OF FOOD ADULTERATION ACT, 1954 – Section 16-A and proviso 2**

Section 16-A provides summary trial of all the offences under sub-section 1 of Section 16 mandatory – But if the Trial Court has not observed it and proceeded in a manner provided for trial of warrant case and the prosecution was directed to lead pre-charge evidence and such evidence was led and at no stage there was any challenge to the procedure adopted and in fact second proviso to Section 16-A permits such a course to be adopted – No prejudice has been shown by the accused – Held, Section 16-A not violated.

Radhey Shyam Aggarwal v. State, NCT of Delhi

Judgment dated 06.02.2009 passed by the Supreme Court in Criminal Appeal No. 423 of 2002, reported in (2009) 4 SCC 212

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301. PROBATION OF OFFENDERS ACT, 1958 – Section 3
ESSENTIAL COMMODITIES ACT, 1955 – Section 7
The accused was convicted u/s 7 of the Essential Commodities Act for violation of Lubricating Oils and Greeses (Processing, Supply and Distribution Regulation) Order, 1987 – Activity of the accused is anti-social – He is a security risk – Benefit of probation cannot be extended in such cases.

M/s Precious Oil Corporation & Ors. v. State of Assam

Judgment dated 05.02.2009 passed by the Supreme Court in Criminal Appeal No. 212 of 2008, reported in AIR 2009 SC 1566 (3-Judges Bench)

Held:

The Trial Court and the High Court had rightly decided that there has been contravention of Clause 3 of the Control Order. In that view of the matter the conclusions cannot be faulted. Coming to the question whether the Probation Act can be applied, this Court had an occasion to deal with the same.

The kindly application of the probation principles is negatived by the imperatives of social defence and the improbabilities of moral proselyti-sation. No chances can be taken by society with a man whose anti-social operations, disguised as a respectable trade, imperil numerous innocents. He is a security risk. Secondly, these economic offences committed by white-collar criminals are unlikely to be dissuaded by the gentle probationary process. Neither casual provocation nor motive against particular persons but planned profit-making from number of consumers furnishes the incentive – not easily humanized by the therapeutic probationary measure. It is not without significance that the 47th report of the Law Commission of India has recommended the exclusion of the Act to social and economic offences by suitable amendments. It observed:

> "We appreciate that the suggested amendment would be in apparent conflict with current trends in sentencing. But ultimately, the justification of all sentencing is the protection of society. There are occasions when an offender is so anti-social that his immediate and sometimes prolonged confinement is the best assurance of society's protection. The consideration of rehabilitation has to give way, because of the paramount need for the protection of society. We are, therefore, recommending suitable amendment in all the Acts, to exclude probation in the above cases."

In the current Indian conditions the probation movement has not yet attained sufficient strength to correct these intractables. May be, under more developed conditions a different approach may have to be made. For the present we cannot accede to the invitation to let off the accused on probation.

The aforesaid position was also highlighted in *Pyarali K. Tejani v. Mahadeo Ramchandra Dange and Ors., (1974) 1 SCC 167*

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***302. QANOON MAL OF GWALIOR STATE SAMVAT 1983 – Section 253**
HINDU SUCCESSION ACT, 1956 – Sections, 14 & 15
HINDU ADOPTIONS AND MAINTENANCE ACT, 1956 – Section 11

(i) Devolution of property under Section 253 of Qanoon Mal of Gwalior State Samvat 1983 – As per Section 253, after death of Kashtkar Sakitul Milkiyat or Maurasi Kashtkar (holder) the property would devolve in his wife alongwith other heirs enumerated in the Section and would not devolve in his daughter – Further held, after the commencement of "Act of 1956" such wife (widow) became absolute owner of the property in terms of Section 14 of the Hindu Succession Act – After her death the property will devolve in the heirs in accordance with Section 15 of the Hindu Succession Act.

(ii) Valid adoption, requirement of – Evidence in proof of the adoption should be free from all suspicion of fraud or so consistent and probable so as to give no room for doubting its truth – Adoption should be proved strictly in accordance with the law – Heavy burden lies to prove adoption on him who seeks to displace natural succession – Actual or physical giving and taking of a child is essential.

Anokhilal & Anr. v. Sajjan Singh & Ors.

Judgment dated 19.12.2008 passed by the High Court in S.A. No. 263 of 1997, reported in 2009 (II) MPJR 126

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303. REGISTRATION ACT, 1908 – Sections 47 & 48
EVIDENCE ACT, 1872 – Section 92
TRANSFER OF PROPERTY ACT, 1882 – Sections 54 & 55
Registration of sale deed is *prima facie* proof of an intention to transfer – True test is the intention of parties which primarily can be gathered from recitals of the sale deed – Where recitals are insufficient or ambiguous, the surrounding circumstances and conduct of parties can be looked into subject to provisions of Section 92 of the Evidence Act.

Kaliaperumal v. Rajagopal and another

Judgment dated 20.02.2009 passed by the Supreme Court in Civil Appeal No. 5800 of 2002, reported in (2009) 4 SCC 193

Held:

The question posed for our consideration is whether title to the disputed properties passed to the appellant when the sale deed dated 26.6.1983 was registered on October 26, 1983, though admittedly no amount was paid towards

consideration to the respondents.

Sale is defined as being a transfer of ownership for a price. In a sale there is an absolute transfer of all rights in the properties sold. No rights are left in the transferor. The price is fixed by the contract antecedent to the conveyance. Price is the essence of a contract of sale. There is only one mode of transfer by sale in regard to immovable property of the value of Rs. 100 or more and that is by a registered instrument.

It is now well settled that payment of entire price is not a condition precedent for completion of the sale by passing of title, as Section 54 of Transfer of Property Act, 1882 (the 'Act' for short) defines 'sale' as "a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. If the intention of parties was that title should pass on execution and registration, title would pass to the purchaser even if the sale price or part thereof is not paid. In the event of non- payment of price (or balance price as the case may be) thereafter, the remedy of the vendor is only to sue for the balance price. He cannot avoid the sale. He is, however, entitled to a charge upon the property for the unpaid part of the sale price where the ownership of the property has passed to the buyer before payment of the entire price, under Section 55 (4) (b) of the Act.

Normally, ownership and title to the property will pass to the purchaser on registration of the sale deed with effect from the date of execution of the sale deed. But this is not an invariable rule, as the true test of passing of property is the intention of parties. Though registration is prima facie proof of an intention to transfer the property, it is not proof of operative transfer if payment of consideration (price) is a condition precedent for passing of the property.

The answer to the question whether the parties intended that transfer of the ownership should be merely by execution and registration of the deed or whether they intended the transfer of the property to take place, only after receipt of the entire consideration, would depend on the intention of the parties. Such intention is primarily to be gathered and determined from the recitals of the sale deed. When the recitals are insufficient or ambiguous the surrounding circumstances and conduct of parties can be looked into for ascertaining the intention, subject to the limitations placed by Section 92 of Evidence Act.

Applying the abovementioned principles to the facts of this case, we find that the parties intended that ownership of the property would be transferred to the appellant only after receipt of the entire consideration by the vendors, as a condition precedent. The Sub-Registrar has also clearly recorded that no amount was tendered or paid by the purchaser to the vendors in his presence. Therefore title in fact did not pass either on execution or registration of the sale deed.

There is yet another circumstance to show that title was intended to pass only after payment of full price. Though the sale deed recites that the purchaser is entitled to *hold, possess* and *enjoy* the scheduled properties from the date of sale, neither the possession of the properties nor the title deeds were delivered

to the purchaser either on the date of sale or thereafter. It is admitted that possession of the suit properties purported to have been sold under the sale deed was never delivered to the appellant and continued to be with the respondents.

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***304. SERVICE LAW:**

CONSTITUTION OF INDIA – Article 226

(i) Departmental Enquiry – Principles of natural justice, compliance of – He who chooses not to participate in the DE, cannot complain of violation of such principles.

(ii) Departmental Enquiry – Permission to engage an Advocate, necessity of – Delinquent not permitted to engage Advocate – Presenting Officer engaged by the Bank was a bank employee and not an Advocate – No complex question of law was involved in the matter – Held, engagement of any Advocate was not necessary and therefore, it cannot be held that there has been violation of principles of natural justice.

R.K. Geete v. Deputy Managing Director and Corporate Development Officer and others

Judgment dated 22.02.2008 passed by the High Court in Writ Appeal No. 551 of 2006, reported in 2009 (2) MPHT 409 (DB)

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***305. STAMP ACT, 1899 – Article 5 (b) of Schedule I**

EVIDENCE ACT, 1872 – Sections 63 & 65

(i) Agreement – To constitute document to be an agreement, there has to be copulation and conjunction of two or more minds in anything done or to be done and a compact between parties who are thereby subjected to the obligation or to whom the contemplated right is thereby served – *Panch Faisla* not signed by any of the parties – Cannot be treated as agreement.

(ii) Secondary evidence – Unless the existence of original is proved, secondary evidence of a document cannot be given as a matter of course – Signatory of document has denied the existence of original – Secondary evidence cannot be led.

Rajesh Kumar v. Rakesh Kumar & anr.

Judgment dated 13.10.2008 passed by the High Court in W.P. No. 3217 of 2004, reported in I.L.R. (2009) M.P. 402

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306. SUCCESSION ACT, 1925 – Section 63

EVIDENCE ACT, 1872 – Section 68

Mode of proving Will – Statutory requirement for due execution of Will to be proved – Attestation of Will is not a mere formality – A valid

Will should be decided by two or more witnesses and propounder should examine at least one attesting witness to prove the Will who should speak not only about testator's signature or affixing his mark to the Will but also that each of the witnesses had signed the will in presence of testator.

When attesting witness said that he neither signed in presence of testator, nor did he know the nature of the document nor other witness had signed in his presence – Execution of 'Will' not proved.

Yumnam OngbiTampha Ibema Devi v.Yumnam Joykumar Singh and others

Judgment dated 06.03.2009 passed by the Supreme Court in Civil Appeal No. 1600 of 2009, reported in (2009) 4 SCC 780 (3-Judge Bench)

Held:

As per provisions of Section 63 of the Succession Act, for the due execution of a Will:

(1) the testator should sign or affix his mark to the Will;

(2) the signature or the mark of the testator should be so placed that it should appear that it was intended thereby to give effect to the writing as a Will;

(3) the Will should be attested by two or more witnesses, and

(4) each of the said witnesses must have seen the testator signing or affixing his mark to the Will and each of them should sign the Will in presence of the testator.

The attestation of the Will in the manner stated above is not an empty formality. It means signing a document for the purpose of testifying of the signatures of the executant. The attested witness should put his signature on the Will animo attestandi. It is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary. Since a Will is required by law to be attested, execution has to be proved in the manner laid down in section and the Evidence Act which requires that at least one attesting witness has to be examined for the purpose of proving the execution of such a document.

Therefore, having regards to the provisions of Section 68 of the Evidence Act and Section 63 of the Succession Act, a Will to be valid should be attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the will. The attesting witness should speak not only about the testator's signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator.

[See also *Girja Datt Singh v. Gangotri Datt Singh, AIR 1955 SC 346, B. Venkatamuni v. C.J. Ayodhya Ram Singh, (2006) 13 SCC 449, Benga Behera v. Braja Kishore Nanda, (2007) 9 SCC 728 and Anil Kak v. Sharada Raje, (2008) 7 SCC 695*]

In the instant case execution of alleged Will dated 13.08.1986 was under consideration. It was observed by the Apex Court that no issue was framed regarding the validity of the will. The evidence of PW2 does not in any way support the claim of due execution and attestation of the will. On the contrary, it clearly establishes that he did not sign in his presence, he did not know what was the nature of the document. There was no attesting witness who has signed in his presence and, therefore, the requirements of Section 68 of the Evidence Act have to be complied with in order to show that the two persons who claimed to have signed as attesting witness can be really treated as attesting witnesses.

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***307. TORTS:**

Medical negligence – Duty to take care, breach of – Sudden death by anaesthesia – At the relevant time no competent person was available in the hospital to administer anaesthesia – Anaesthesia administered by a dresser – There was no emergency as operation was not necessary for saving life of the patient – The deceased was 30 years old lady – Just before two days prior to her death, she delivered a healthy baby and both mother and child were enjoying good health – Date of operation was not mentioned in the bed head ticket – No information was given to police – Dead body was also not sent for post-mortem – Held, no more proof of negligence is necessary – Lady doctor concerned alongwith other doctors who were incharge of the hospital were owing a duty not to allow the administration of anaesthesia by a person who was incompetent to administer anaesthesia and they were negligent in discharging their aforesaid duty – The State directed to pay compensation of Rs. 1,50,000/- with interest @ 6% per annum from the date of suit till realization and the State was put at liberty to recover the amount of compensation from the negligent persons.

Bharti (Ku.) and others v. State of M.P. and others

Judgment dated 11.03.2009 passed by the High Court in First Appeal No. 97 of 1995, reported in 2009 (2) MPHT 472

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308. TRANSFER OF PROPERTY ACT, 1882 – Sections 8, 54 and 58 (c)
EVIDENCE ACT, 1872 – Sections 91, 92, 103 & 114 Ill. (g)
CIVIL PROCEDURE CODE, 1908 – Order 6 Rules 1 & 17, Order 8 Rule 1, Order 12 Rule 6, Order 14 Rule 2 & Order 18 Rule 2

(i) Sale of immovable property – Nature of transaction – Whether it was a sale or a deed executed by way of security? Held, such deed was a registered one, it therefore, carries a presumption that the transaction was a genuine one – Legal character explained.

(ii) Burden of proof – The deed of sale being a registered one and apparently containing stipulations of transfer of right, title and interest by the vendee in favour of the vendor, a heavy onus lies on the defendant (son of vendor) to show that the said deed was, in fact, not executed or otherwise did not reflect the true nature of presumption.

(iii) Adverse inference – When should be drawn – The defendant (son of the vendor) was the attesting witness of the sale deed – In his written statement, he categorically denied execution of the said deed of sale – He also denied that he had attested the document – He even did not examine himself before the trial Judge – Adverse inference, thus, should have been drawn against him.

(iv) Amendment to pleading – Effective date – The date from which amendment to pleading takes effect – Held, when a pleading is amended, it takes effect from the date when original pleading was filed.

(v) Pleading and proof – Legal requirement – The pleadings are required to be considered provided any evidence in support there of has been adduced – The determination of the contention without any pleading thereon and framing issue thereof and adduction of evidence thereon is not permissible.

(vi) Registration of sale deed – Effect – held, as soon as a deed of sale is registered, the title passes to the vendee – The vendor, in terms of stipulations made in the deed of sale is made to deliver possession of the property sold – If he fails to do so, he is liable for damages – Further held – Right of possession over the property is a facet of title.

(vii) Mutually destructive pleas – Distinction from alternative and inconsistent pleas – A defendant may raise alternative or inconsistent pleas but cannot be permitted to raise pleas which are mutually destructive to each other.

(viii) Admission in pleadings – An admission made by the party in his pleading is admissible against him *proprio vigore* (by its own force).

(ix) Admissibility of oral evidence – Held, when the true character of a document is questioned, extrinsic evidence by way of oral evidence is admissible.

(x) Additional evidence on amended pleadings – Appreciation – Duty of appellate Court – When the pleading is permitted to be amended, additional evidence pursuant thereto is also permitted to be adduced – The first appellate Court is duty bound to appreciate the additional evidence in the light of the pleadings of the parties as originally pleaded and after amendment.

Vimal Chand Ghevarchand Jain and others v. Ramakant Eknath Jadoo

Judgment dated 23.03.2009 passed by the Supreme Court in Civil Appeal No. 1784 of 2009, reported in (2009) 5 SCC 713

Held:

The deed of sale dated 29.6.1978 was a registered one. It, therefore, carries a presumption that the transaction was a genuine one. Respondent was the son of the vendor. He was an attesting witness. In his written statement, he categorically denied execution of the said deed of sale. He also denied that he had attested the document. He even did not examine himself before the learned Trial Judge. His witnesses merely proved his possession. The fact that the respondent's father was put in possession with effect from 1.7.1978 was in dispute. What was in dispute was the character of his possession. Did he continue to possess the godown as owner thereof or on the basis of lease and licence was the question, which was not considered in its proper perspective by any of the three courts below.

The learned Trial Judge without any pleading in that behalf proceeded to determine the nature of transaction and opined that in effect and substance, the transaction was a money lending one. No such issue was framed as no such contention was raised in the written statement. Respondent realized his mistake. He, therefore, amended his written statement and examined himself as a witness.

It is true that the written statement was permitted to be amended. Additional evidence pursuant thereto was also permitted to be adduced. The First Appellate Court, however, had a duty to properly appreciate the evidence in the light of the pleadings of the parties. While doing so, it was required to pose unto itself the correct questions.

The deed of sale being a registered one and apparently containing stipulations of transfer of right, title and interest by the vendor in favour of the vendee, the onus of proof was upon the defendant to show that the said deed was, in fact, not executed or otherwise does not reflect the true nature of transaction. Evidently, with a view to avoid confrontation in regard to his signature as an attesting witness as also that of his father as vendor in the said sale deed, he did not examine himself. An adverse inference, thus, should have been drawn against him by the learned Trial Court. [See *Kamakshi Builders v. Ambedkar Educational Society, AIR 2007 SC 2191*].

The First Appellate Court, however, having regard to the amendment carried out in the written statement setting up a totally inconsistent plea from the one taken before the learned Trial Court by the respondent posed a question as to whether the respondent has discharged the burden placed on him. For the said purpose, critical analysis of the prevarication of the stand taken by the respondent from stage to stage also became relevant.

It is true that when a pleading is amended, it, subject to just exceptions, takes effect from the date when original one is filed. It is also true that the Appellate Court, in exercise of its discretionary jurisdiction and subject to fulfillment of the conditions laid down under Order XLI Rule 27 of the Code of Civil Procedure, may allow the parties to adduce additional evidence.

Pleadings of the parties, it is trite, are required to be read as a whole. Defendants, although are entitled to raise alternative and inconsistent plea but should not be permitted to raise pleas which are mutually destructive of each other. It is also a cardinal principle of appreciation of evidence that the court in considering as to whether the deposition of a witness and/or a party is truthful or not may consider his conduct. Equally well settled is the principle of law that an admission made by a party in his pleadings is admissible against him *proprio vigore*. [See *Ranganayakamma v. K.S. Prakash, (2008) 15 SCC 673*]. It is for the aforementioned purpose, the deed of sale was required to be construed in proper perspective.

Indisputably, the deed of sale contained stipulations as regards passing of the consideration, lawful title of the vendor, full description of the vended property, conveyance of the right, title, interest, use, inheritance, property, possession, benefits, claims and demands at law and in equity of the vendor.

A document, as is well known, must be construed in its entirety. Reading the said in its entirety, there cannot be any doubt whatsoever that it was a deed of sale. It satisfies all the requirements of a conveyance of sale as envisaged under Section 54 of the Transfer of Property Act.

Indisputably when a true character of a document is questioned, extrinsic evidence by way of oral evidence is admissible. [See *R. Janakiraman v. State, (2006) 1 SCC 697 SCC para 24; Roop Kumar v. Mohan Thedani, (2003) 6 SCC 595, SCC para 19; and SBI v. Mula Sahakari Sakhar Karkhana Ltd., (2006) 6 SCC 293 paras 23 to 32*]. We would, therefore, proceed on the premise that it was open to the respondent to adduce oral evidence in regard to the nature of the document. But, in our opinion, he did not discharge the burden of proof in respect thereof which was on him. The document in question was not only a registered one but also the title deeds in respect of the properties have also been handed over. Symbolical possession if not actual physical possession, thus, must be held to have been handed over. It was acted upon. Appellants started paying rent in respect of the said property. No objection thereto has been raised by the respondent.

The right of possession over a property is a facet of title. As soon as a deed of sale is registered, the title passes to the vendee. The vendor, in terms of the stipulations made in the deed of sale, is bound to deliver possession of the property sold. If he does not do so, he makes him liable for damages. The indemnity clause should have been construed keeping in view that legal principle in mind.

If the appellant was able to prove that the deed of sale was duly executed and it was neither a sham transaction nor represented a transaction of different character, a suit for recovery of possession was maintainable. A heavy onus lay on the respondent to show that apparent state of affairs was not the real state of affairs. It was for the defendant in a case of this nature to prove his defence. The First Appellant Court, therefore, in our opinion, misdirected itself in passing the impugned judgment insofar as it failed to take into consideration the relevant facts and based its decision on wholly irrelevant consideration.

A heavy burden of proof lay upon the defendant to show that the transaction was a sham one. It was not a case where the parties did not intend to enter into any transaction at all. Admittedly, a transaction had taken place. Only the nature of transaction was in issue. A distinction must be borne in mind in regard to the nominal nature of a transaction which is no transaction in the eye of law at all and the nature and character of a transaction as reflected in a deed of conveyance. The construction of the deed clearly shows that it was a deed of sale. The stipulation with regard to payment of compensation in the event appellants are dispossessed was by way of an indemnity and did not affect the real nature of transaction. In any event, the said stipulation could not have been read in isolation. The judgment of the First appellate Court was, therefore, perverse. The High Court, thus, failed to consider the real dispute between the parties.

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309. TRANSFER OF PROPERTY ACT, 1882 – Section 58
LAND REVENUE CODE, 1959 (M.P.) – Sections 114-A & 117
EVIDENCE ACT, 1872 – Sections 91 & 92
Suit for injunction filed by the plaintiff alleging that defendant is trying to take illegal possession of the suit land – Refuting the plaint averment, defendant pleaded that the sale deed was executed in favour of plaintiff's father as a security of loan – No revenue records (except Bhoo-Adhikar Avam Rin Pustika) filed by the plaintiff – Held, the transaction was not of sale but was loan transaction – From Bhoo-Adhikar Avam Rin Pustika plaintiff's possession is not endorsed therein.
Oral evidence to revert the contents of documents – Sale deed go executed as a collateral security for loan – Evidence making the position clear can be adduced – Provisions of Sections 91 and 92 of Evidence Act would not come in the way.
Motilal Pandey v. Kailash Pathak
Judgment dated 10.02.2009 passed by the High Court in S.A No. 211 of 2002, reported in 2009 (I) MPJR 287

Held:

On going through the record of the trial Court, it is revealed that the original sale-deed (Ex. D-1) said to have been executed between defendant and plaintiff's father Pandit Ramsevak was produced by defendant in the trial Court from his

possession and the plaintiff only filed its certified copy (Ex. P-1). If the transaction between the defendant and plaintiff's father was out and out sale and was not a loan transaction, why original sale-deed was returned to the defendant? Hence, the act of returning the original sale-deed by the father of plaintiff to defendant indicates and one could infer that the transaction between the parties was only of loan and it was not intended by them that the transaction is out and out sale. The strong probability that the transaction was out and out sale, becomes more strong on bare perusal of the acknowledgement which was made by plaintiff's father receiving the loan amount. According to me, the note which has been put on the second page of the sale-deed (Ex. D-1) is having much significance and important bearing in the case. It would be relevant to quote the note which has been put on the original sale-deed which reads thus:

मैं रामसेवक वल्द श्री गिरजानंद साकिन हिनोतिया जिला जबलपुर थाना बरेला इस बात का तस्दीक करता हूँ कि इस रजिस्ट्री की जमीन पर 1200 अंकन बारा सौ रू. श्री मोतीलाल बल्द वल्द बालाप्रसाद को दिये थे और जमीन रजिस्ट्री किये थे आज दिनांक 15/5/75 को मैं अपनी पूरी रकम मोतीलाल पान्डे से पा चुका व आपकी जमीन आपको वापस कर दी आज से मेरा उस जमीन पर कोई संबंध नहीं इसलिए यह रजिस्ट्री अमान्य माने जावे इस वास्ते रजिस्ट्री पर लिखकर रजिस्ट्री का कागज आपको वापिस किया जाता है आज से आपकी जमीन पाक साफ है और उसके पूरे अधिकारी आप हैं इसलिए सनद रहे व वक्त पर काम आवे।

The scribe of this note is Prabhakar (DW-2). On the left side of the note Ramsevak, who is the father of the plaintiff has put his signature. The plaintiff Kailash Pathak (PW-1) has expressed his inability about the said note on the sale deed and has stated that he is not aware whether the transaction was loan transaction and for security purpose sale-deed was executed. However, there is specific evidence of defendant Motilal (DW-1) who is the party to the transaction that the transaction between him and plaintiff's father was of loan only and the document of sale-deed (Ex. D-1) was written only for security purpose. The above said note on the original sale deed stands proved from the evidence of scribe Prabhakar (DW-2) as well as from the evidence of defendant/appellant Motilal.

The Supreme Court in *Chunchun Jha v. Ebabat Ali and another, AIR 1954 SC 345* has categorically held that the question whether a given transaction is a mortgage by conditional sale or a sale out-right with a condition of repurchase is a vexed one and must be decided on its own facts. In such cases the intention of the parties is the determining factor. The rule of law on this subject is one dictated by commonsense; that prima facie an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In every such case the question is, what upon a fair construction, is the meaning of the instruments? The converse also holds good and if, on the face of it, an instrument clearly purports to be a mortgage it cannot be turned into a sale by

reference to a host of extraneous and irrelevant considerations. Difficulty only arises in the border line cases where there is ambiguity.

This Court in *Deokoobai (Smt.) and others v. Keshrichand, 1992 (I) MPJR 451 = 1992 JLJ 106* has held that if the sale deed got executed as a collateral security for loan, evidence making the position clear can be adduced and Sections 91 and 92 of the Evidence Act would not come in the way. This Court in the said decision placed reliance on earlier Division Bench decision of this Court in *Mandas v. Manbai, 1972 JLJ 632.*

In the present case two most important circumstances in order to hold that the transaction was only a loan transaction and not out and out sale are that firstly the above said note mentioned herein above in para-12 of plaintiff's father Ramsevak Pathak, and second the original sale deed Ex. D/1 was produced in the Court by defendant from his possession. The Supreme Court in *P.L. Bapuswami v. N. Pattay Gounder, AIR 1966 SC 902* in para-6 while considering the several circumstances, in which one of the circumstance was that the document of Patta was not transferred to the defendant of that case, came to hold that the transaction between the parties was not out and out sale, but was a loan transaction. The Supreme Court by allowing the appeal of plaintiff decreed his suit for redemption of the mortgage. This decision of Supreme Court is applicable in the present case also because in the instant case also defendant appellant produced the original sale deed Ex. D/1 from his possession.

The plaintiff has come forward with a case that he is having possession on the suit property which is agricultural land. In order to substantiate this pleading he ought to have filed the revenue record in order to demonstrate that after purchasing suit property he is possession of the same. Since no revenue record has been filed by plaintiff, it cannot be said that he is in possession of the suit property. Form document Ex. P-2 Bhoo-Adhikar Avam Rin Pustika it cannot be ascertained that plaintiff is in possession of the suit property because possession of plaintiff is not endorsed in the said document.

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310. TRANSFER OF PROPERTY ACT, 1882 – Sections 60 & 67
CIVIL PROCEDURE CODE, 1908 – Order 34 Rule 5
Mortgage – Order permitting foreclosure – Relevant factors – Nature of mortgage and rights of parties thereunder.
The right of redemption of a mortgager is a statutory right and can be extinguished either by a final decree for foreclosure or redemption or by act of parties.
K. Vilasini & Ors. v. Edwin Periera & Ors.
Judgment dated 29.08.2008 passed by the Supreme Court in Civil Appeal No. 5476 of 2008, reported in AIR 2009 SC 1041

Held:

We may at this stage notice that an order permitting foreclosure in terms of Order XXXIV Rule 8(3) can be passed only upon ascertaining the nature of the mortgage and the rights of the parties thereunder. The deed of mortgage has not been filed before this Court. No foundational fact, therefore, had been laid by the appellants so as to enable the trial court to pass a decree for foreclosure. No step was also taken for enforcement of the said purported right.

This Court in *Achaldas Durgaji Oswal (Dead) through LRs. v. Ramvilas Gangabisan Heda (Dead) through LRs. & ors., (2003) 3 SCC 614* stated the law, thus:

> "22. The right of redemption of a mortgagor being a statutory right, the same can be taken away only in terms of the proviso appended to Section 60 of the Act which is extinguished either by a decree or by act of parties. Admittedly, in the instant case, no decree has been passed extinguishing the right of the mortgagor nor has such right come to an end by act of the parties."

We may also notice that in *Mhadagonda Ramgonda Patil v. Shripal Balwant Rainade (1988) 3 SCC 298,* this Court held as under:

> "12. It is thus manifestly clear that the right of redemption will be extinguished (1) by the act of the parties or (2) by the decree of a Court. We are not concerned with the question of extinguishment of the right of redemption by the act of the parties. The question is whether by the preliminary decree or final decree passed in the earlier suit, the right of the respondents to redeem the mortgages has been extinguished. The decree that is referred to in the proviso to Section 60 of the Transfer of Property Act is a final decree in a suit for foreclosure, as provided in Sub-rule (2) of Rule 3 of Order XXXIV and a final decree in a redemption suit as provided in Order XXXIV, Rule 8(3)(a) of the CPC. Sub-rule (2) of Rule 3, inter alia, provides that where payment in accordance with Sub-rule (1) has not been made, the court shall, on an application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property. Thus, in a final decree in a suit for foreclosure, on the failure of the defendant to pay all amounts due, the extinguishment of

the right of redemption has to be specifically declared. Again, in a final decree in a suit for redemption of mortgage by conditional sale or for redemption of an anomalous mortgage, the extinguishment of the right of redemption has to be specifically declared, as provided in Clause (a) of Sub-rule (3) of Rule 8 of Order XXXIV of the CPC. These are the two circumstances-(1) a final decree in a suit for foreclosure under Order XXXIV, Rule 3(2); and (2) a final decree in a suit for redemption under Order XXXIV, Rule 8(3)(a) of the CPC-when the right of redemption is extinguished."

The two circumstances in which the right of redemption is extinguished by passing of a decree are: (i) a final decree in a suit for foreclosure under Order XXXIV Rule 3(2), CPC; and (ii) a final decree in a suit for redemption under Order XXXIV Rule 8(3) thereof. [See *Philomina Jose v. Federal Bank Ltd. & ors., (2006) 2 SCC 608*]

As the time for deposit of payment has been extended by the court from time to time in terms of Rule 5 of Order XXXIV of the Code as amended by the State of Kerala, we do not think that the appellants can be permitted to raise their purported claim of right of foreclosure before us. Indisputably, the court has the power to extend the time. Grant of extension of time to deposit the amount, however, is not automatic. The jurisdiction has to be exercised judiciously. However, the fact that the court has the requisite jurisdiction to extend the time is neither denied nor disputed. Once the court exercises its power to postpone the date fixed for deposit of the amount due under the mortgage, the same could have been subject matter of challenge, but as noticed hereinbefore, the appellants have failed to do so.

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Note : Asterisk (*) denotes short notes

PART - III

CIRCULARS/NOTIFICATIONS

NOTIFICATION REGARDING FRAMING OF THE MADHYA PRADESH ARBITRATION RULES, 1997 BY THE HIGH COURT OF MADHYA PRADESH

[Published in M.P. Rajpatra Part IV (Ga) dated 14-3-97 Pages 24-25]

Notification No. C-966-III-15-28-41 dated the 25th February, 1997. – In exercise of the powers conferred by Section 82 of the Arbitration & Conciliation Act, 1996 (26 of 1996), the High Court of Madhya Pradesh makes the following Rules as to the proceedings before the Courts under the Act, namely: –

1. These rules may be called the Madhya Pradesh Arbitration Rules, 1997.

2. They shall come into force from the date of their publication in the "Madhya Pradesh Rajpatra."

3. In these Rules "Act" means the Arbitration and Conciliation Act, 1996. Other expressions not defined herein shall carry the same meaning as they do under Section 2 of the Act.

4. (1) Every application under Section 9, Section 14, Section 17, Section 27, Section 34, Section 39 and Section 43 of the Act shall be made in writing duly signed and verified in the manner prescribed by Order-VI, Rules 14 and 15 of the Code of Civil Procedure, 1908 and if the Court so directs, shall be supported by an affidavit. It shall be divided into paragraphs numbered consecutively and shall contain the name, description and place of residence of the parties. It shall contain statement in concised form–

(a) of the material facts constituting cause of action;

(b) of facts showing that the Court to which the application is presented has jurisdiction;

(c) relief asked for; and,

(d) names and addresses of the persons liable to be affected by the application:

Provided that where a party, by reason of absence or for any other reason, is unable to sign and verify the same, it may be signed and verified by any person duly authorized by him in this behalf and is proved to the satisfaction of the Court to be acquainted with the facts of the case.

(2) An application for enforcement of an arbitral award under Section 36 or a foreign award under Section 47 or Section 56 shall be in writing signed and verified by the applicant or by some other person proved to the satisfaction of

the Court to be acquainted with the facts of the case, and shall contain in a tabular form the particulars prescribed in sub-rule (2) of Rule 11 of Order 21 of the Code of Civil Procedure, 1908.

5. The Court Fees (in Court Fee stamps) on the application/ Vakalatnama/ Appeal made/preferred to the Court/Court of appeal under the Act shall be payable according to the Schedule below: –

Schedule

A-Applications

S.No.	Nature of Application	Amount of Court Fee
(1)	(2)	(3)
1.	Application under Section 9	Rs. 300.00
2.	Application under sub-Section (1) of Section 17	Rs. 50.00
3.	Application under Section 34	Rs. 500.00
4.	Application under Sections 14, 27, 36, 39 and 43	Rs. 200.00
5.	Application under Sections 47 and 56	Rs. 1,000.00
6.	Any other application	Rs. 50.00
7.	Vakalatnama	As prescribed under the Court Fees Act, 1870

B-Appeals

S.No.	Nature of Appeal	Amount of Court Fee
(1)	(2)	(3)
1.	Appeal against an order on an application under Section 9	Rs. 300.00
2.	(a) Appeal against order of the Arbitral Tribunal accepting the plea referred to in Sub-section (2) of sub-section (3) of Section 16.	Rs. 300.00
3.	Appeal against an order on an application under Section 34	Rs. 500.00
4.	Appeal against an order refusing to refer the parties to arbitration under Sections 45 and 54	Rs. 300.00

5.	Appeal against an order refusing to enforce a foreign award under Section 48 and sub-section (2) of Section 57	Rs. 500.00

6. Where the application made by the party is not in accordance with the provisions of these rules, the Court may reject the application.

7. Every application shall, if the Court is satisfied that the same in in order, be numbered and registered as an arbitration case and every appeal shall be registered as an arbitration appeal.

8. The Court to which an application is presented shall direct notice thereof to be given to the opposite party and to such other persons as are likely to be affected by the proceedings requiring to show cause within a time to be specified in the notice why the relief sought in the application be not granted. The notice shall be accompanied by a copy of the application and documents filed by the applicant.

9. (1) Save as otherwise expressly provided in the Act or these Rules the following provisions of the Code of Civil Procedure, 1908 (V of 1908) shall apply to the proceedings before a Court in so far as they may be applicable thereto, namely: –

(i) Sections 28, 31, 35, 35A, 35B, 107 133, 135, 148A, 149, 151 and 152, and,

(ii) Order III, V, VI, IX, XIII, XIV, XVI to XIX, XXIV and XLI

(2) (a) For the purpose of facilitating the application of the provisions referred to under sub-section (1) the Court may construe them with such alterations, not affecting the substance, as may be necessary or proper to adopt to the matters before it; and

(b) The Court may, for sufficient reasons, proceed otherwise than in accordance with the said provisions if it is satisfied that the interests of the parties shall not thereby be prejudiced.

10. The process fee in relation to the proceedings before the court shall be charged as per Chapter XX of the Madhya Pradesh Civil Court Rules, 1961 as if the proceedings were the proceedings in suit.

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A socially sensitized judge is a better armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and complicated provisos.

– *C.K. Thakker, J* in State of M.P. v. Babulal, (2008) 1 SCC 234

Judiciary is the bedrock and handmaid of democracy. If people lose faith in justice parted by a court of law, the entire democratic set-up would crumble down.

– *Dr. Arijit Pasayat, J* in Hari Das v. Usha Rani Banik, (2007) 14 SCC 1

The Courts are guardians of the rights and liberties of the citizens, and they will be failing in their responsibility if they abdicate this solemn duty towards the citizens. For this, they may sometimes have to declare the act of the executive or the legislature as unconstitutional

– *Markandey Katju, J* in Govt. of A.P. v. P. Laxmi Devi, (2008) 4 SCC 720