JOTI JOURNAL

Vol. XIV
JUNE 2008 (BI-MONTHLY)

न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान

मध्य प्रदेश उच्च न्यायालय, जबलपुर – 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

JOTI JOURNAL JUNE - 2008

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FROM THE PEN OF THE EDITOR

J.P. Gupta
Director, JOTRI

With this issue of JOTI Journal, we have travelled through half the journey of the year 2008. The past six months have been a period of hectic activities of imparting training to the newly appointed Judicial Officers so as to bring them into our fold. These Judicial Officers who are fresh to the Court working, were acquainted with the basic concept of court working. A lot of hard work goes into the preparation of specialized course module for the training. In-depth training on the subject, by covering areas of confusion and correct interpretations of law with latest rulings, was imparted to help the Judicial Officers so as to render quick and qualitative justice to the masses.

The challenge before the Indian Judiciary is mounting arrears of cases. To cope up with this problem, these judicial offcers will have to play a vital role. The expectation of the common man is writ large when he walks down the corridors of the Court and his desire for inexpensive and quick justice is also not unjustified. We, as Judicial Officers, should stand to their expectations by delivering quick but nevertheless, qualitative justice, which is also a Constitutional mandate.

A judge is always under the watchful eyes of the general public. Therefore, it becomes all the more important for a judge to be in the best of everything – be it in action, conduct or whatever he is doing. He should be an example to others. He should be the leader in terms of ethics. He should set precedent so that no one dares to point a finger at him. If these qualities are inculcated in the judicial officers from the very beginning, then they will come true to the expectations of the common man.

To get the best out of any Judicial Officer, one has to create an atmosphere that is congenial and tension free. In this way he will be in a position to deliver his best. We should take the example of the sun. As the sun is duty bound to rise and set at equal intervals and not a single day passes when the sun does not appear on the horizon, similarly one should be duty bound towards the task in hand. We must concentrate all our thought upon the work that has been assigned to us. It should be our constant and ceaseless endeavour to make steady progress in the process of learning and attaining perfection in our work and skills as a judicial officer.

The law is being shaped everyday for facing the challenges of time and to fulfill the hopes and aspirations of the litigants. The constant changes and developments in the field of law can be meaningful only if they reach the poorest of the poor. This can be achieved only through the Courts which are working at the grass root level i.e. the hundreds of trial courts and lower courts which are being established in the farthest and remotest areas and all those persons manning them.

Therefore, each and every judicial officer should be well aware of the latest developments in the field of law by cultivating the habit of reading books, developing working skills on the software provided to them as well as by using the resources at their disposal to the optimum level. At the same time one should maintain the quality of self-discipline. The Institute through this Journal is making each and every effort to provide the judicial officers with the latest case law on various subjects of common use. The Institute is ever enthusiastic to help the judicial officers in solving their problems. A column named *Samasya Samadhan* in JOTI Journal is totally dedicated to this and the judicial officers are free to send their queries to the Institute for resolving their doubts.

In Part I of the Journal, an address delivered by Hon'ble Shri Justice C.K. Thakkar, Judge Supreme Court of India in the Regional Progamme of NJA at Ahmedabad titled – ***Duty of District Judiciary to Protect Constitutional Rights of Citizens*** finds place along with other bi-monthly articles. As usual, Part II contains important legal pronouncements of our own High Court as well as of the Apex Court, which will help the Judicial Officers a lot.

Due to paucity of space, Part III and Part IV do not find place in this Journal.

To conclude with, let me assure you that this Institute will strive hard to bring out the best in a Judicial Officer so that the State of Madhya Pradesh sets an example for other States to follow.

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Hon'ble Shri Justice R.S. Garg, Administrative Judge, High Court of M.P. and Chairman, High Court Training Committee delivering inaugural address on the opening day (23.06.2008) of the Refresher Course Training to the Civil Judges Class II. Flanked by His Lordship are the Director and Additional Director, JOTRI

HON'BLE SHRI JUSTICE SUBHASH CHANDRA VYAS DEMITS OFFICE

Hon'ble Shri Justice Subhash Chandra Vyas demitted office on 18th April, 2008 on His Lordship's attaining superannuation. Born on 18th April 1946. Joined as Civil Judge Class II on 16.07.1970. Promoted as Civil Judge Class I on 05.07.1982. As C.J.M. on 27.09.1984 and promoted as officiating District Judge on 19.10.1987. Granted Selection Grade on 23.11.1994 and Supertime Scale on 01.06.1999. Worked as Registrar, High Court of Madhya Pradesh, Indore Bench from 12.05.1997 till September 2003. Worked as District and Sessions Judge, Gwalior from 30.09.2003 till His Lordship's elevation. Elevated as Additional Judge of High Court of Madhya Pradesh on 18.10.2005 and was confirmed as permanent Judge of High Court of Madhya Pradesh in the month of March 2008.

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

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PART - I

DUTY OF DISTRICT JUDICIARY TO PROTECT CONSTITUTIONAL RIGHTS OF CITIZENS

[Lecture delivered by Hon'ble Mr. Justice C.K. Thakker, Judge, Supreme Court of India in NJA Regional Programme on Techniques and Tools for Enhancing Timely Justice, West Zone (Ahmedabad) from 7th to 9th September, 2007]

District Judiciary is concerned, at the grassroot level, from the day one till the final relief is received by the litigant, the subordinate judge is incharge of the proceedings. Say, for example in a celing suit, the day the suit is instituted by presentation of plea under Section 26-A, you are incharge of the matter - issue of summons, filing of written statement, issues, recording of evidences, judgment- you are incharge of the proceedings. No doubt about it that the court has made several provisions and several provisions have even been amended but you must implement them in letter and spirit so that there is expeditious disposal of cases. Sometimes there is some misunderstanding that lower judiciary is not concerned with constitutional matters or constitutional issues for interpretation of statute. This is not correct, as some part may not be within your domain. For example, deciding whether a particular statute is constitutional or not. But barring these few limitations, you are incharge of your Court dealing with all matters including constitutional issues. For instance, take Part III and IV of the Constitution, can you say that I will ignore Articles 14, 19, 21? You cannot even ignore Directive Principles of the State Policy.

Suppose, you have jurisdiction and service matter comes to you. If you are not expressly or impliedly barred, can you say that you will not look at Article 311? You cannot; you are here to interpret these provisions of law also. Sometimes you will come across a case where there are two non-obstante clauses or even one *non-obstante* clause; something which may not be reconciled. For example, in one leading judgement of the Supreme Court, concerning a matter from Surat, notwithstanding anything contained herein, a person is entitled to decree and other provision. Section 25 says that a residential quarter cannot be converted into non-residential and Trustee had said that alright we are committing breach, we will be sent to jail but decree will be granted in our favour. It was granted by Civil Court, it was granted by District Court, it was granted by High Court also. Infact, in the High Court this was referred to a Division Bench considering the importance of the matter and Division Bench said that this non-obstante clause is there.

Infact, it was referred and ultimately the Supreme Court said 'No, we are here to harmonize these two interpretations, these two provisions. If you say, yes, on the one hand we will grant relief in your favour, but as soon as you execute it, we will send you to jail'. Now this is something that cannot be tolerated. This cannot be said looking to the intention of the legislature. Several pressures will come to you. Infact, when I was the President of Judicial Academy, I was told at three conferences which I had attended, that sometimes there are

contradictory decisions also. At least two decisions were pointed out to me. One was regarding Section 156 (3). You are aware that before taking cognizance of the case, sometimes the order is passed that 'let it be enquired into by police authority'. One judgment of Gujarat High Court was that reasons are required to be recorded, another judgement was no, it cannot be recorded. The reason is that you are not taking cognizance of the matter. They asked me what shall we do. Take another instance. In SC & ST (Prevention of Atrocities) Act there is a provision that no anticipatory bail will be granted. A Single Judge took the decision that it cannot be granted. Of course, finally it was concluded by the Supreme Court also. However, at that time this judgment was not there. The second judgment was that it is inherently improbable (or something like correlating to proceeding) that you can grant anticipatory bail also. They asked that what we have to do? I said, 'it is not only your difficulty sometimes it is a difficulty on our part also'. Generally, two decisions of the Supreme Court or of the High Courts are called upon. Infact before me, at a Division Bench, I was a member of the Division Bench, *Mohd. Ramzan Khan* was cited before us, wherein it was stated that there was no contrary decision. Infact there was a decision and before the Division Bench we were told there are two decisions. Earlier it was not pointed out and nothing was stated. Now what is to be done? Therefore, we have to consider all these provisions.

Even with regard to PIL, it was stated that though strictly PIL will not come to you, but what is Section 133? Yesterday, we have considered *Ratlam Municipality.* What is Order I Rule 1-A? What provisions are Section 91 & 92? All these provisions are virtually PIL, atleast it is one instance which I am aware of. In Order 21 Rule 72 there is a provision that if the decree holder himself wants to purchase the property, he will have to take leave of the court because without taking leave of the court, he cannot participate in the bidding process. In 1976 Amendment there is addition of Rule 72 (A). Rule 72 (A) deals with sale of property, but by mortgagee. Now it is seen that the provision states that if mortgagee is also a decree holder and wants to bid, then he will have to take leave. And then the provision also says that ordinarily, except where the Court otherwise directs the upset price should be less than the amount of the mortgage alongwith cost, interest, and expenses. Now that provision if you go to legislative history and Law Commission's Report it was said that that provision was a result of a letter written by a subordinate Judge of Maharashtra. A lower judicial officer written a letter to administrative side of the High Court those days before more than 50 years that "Sir this is the practice here that the mortgagee in possession is a decree holder and he wants to purchase the property" then ordinarily upset price should not be less than everything so that suppose the property is sold and he is not able to pay anything. So it is not that you cannot do anything. Infact Section 133 - *Ratlam Municipality* - itself is an order passed by at the grassroot level.

So in my opinion, you are really the foundation stone and you can certainly do your best.

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BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent by this Institute for discussion in the bi-monthly district level meeting of December, 2007. The Institute has received articles from various districts. Articles regarding topic no. 2, 3, 4 and 5 received from Betul, Indore, Damoh and Neemuch respectively, are being included in this issue. As we have not received worth publishing articles regarding remaining topics, i.e. topic no. 1 it shall be sent to other group of districts for discussion in future:

1. State the law relating to relinquishment of title. Whether relinquishment can be oral?

   स्वत्व के परित्याग संबधी विधि बताईये। क्या परित्याग मौखिक हो सकता है?

2. Explain the law relating to right of private defence of body when injuries on the person of accused have not been explained?

   शरीर की निजी प्रतिरक्षा के अधिकार संबंधी विधि समझाइये, जबकि अभियुक्त के शरीर की चोटों का स्पष्टीकरण नहीं दिया गया हो ?

3. Under what circumstances any accused would not be jointly or vicariously liable for the action of other accused on account of free fight and sudden fight?

   किन परिस्थितियों में कोई अभियुक्त मुक्त लड़ाई और अचानक लड़ाई के कारणअन्य अभियुक्तों के कृत्यों के लिये संयुक्ततः या प्रतिनिधिक रूप से उत्तरदायी नहीं होगा?

4. Whether a legal representative of the deceased can claim compensation u/s 166 of the Motor Vehicles Act, 1988 though he is not a dependent?

   क्या मृतक का विधिक प्रतिनिधि मोटर यान अधिनियम, 1988 की धारा 166 के अन्तर्गत क्षतिपूर्ति की मांग कर सकता है जबकि वह आश्रित नहीं हैं ?

5. Whether in a complaint u/s 138 of the N.I. Act, 1881 an amendment can be allowed with respect to facts relating to notice and amount or date of cheque etc.?

   क्या धारा 138 पराक्राम्य लिखित अधिनियम, 1881 के अन्तर्गत परिवाद में सूचना पत्र एवं चैक की तिथि या राशि आदि के संबंध में संशोधन की अनुमति दी जा सकती है ?

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LAW RELATING TO RIGHT OF PRIVATE DEFENCE OF BODY WHEN THE INJURIES ON THE PERSON OF ACCUSED HAVE NOT BEEN EXPLAINED

Judicial Officers
District Betul

Section 96 of the Indian Penal Code, 1860 provides that nothing is an offence which is done in the exercise of the right of private defence. Section 97 of the Indian Penal Code of self defence deals with the subject matter of right of private defence. The plea of right comprises the body or property (i) of the person exercising the right or (ii) of any other person; and the right may be exercised in the case of any offence against the body and in the case of offence of theft, robbery, mischief or criminal trespass and attempts of such offences in relation to property. Section 99 lays down the limits of the right of private defence Section 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to cousing of death. The right of Private defence is essentially a defensive right circumscribed by the governing statutes i.e. the IPC available only when the circumstances clearly justified it. It should not be allowed to be pleading or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defence, not of retribution, expected to repel unlawful aggression and not as retaliatory measure. While providing for exercise of the right, care has been taken in IPC not to provide and has not devised a mechanism where by an attack may be a pretence for killing. A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived.

A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting.

The number of injuries is not always safe criterion for determining who the aggressor was: it cannot be stated as a universal rule that whenever the injuries are on the body of accused persons a presumption must necessarily be raised that the accused person had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilities the version of the right of private defence.

The question which arises for consideration is what is the effect of non-explanation of injuries sustained by the accused persons ?

In *Mohar Rai and Bharath Rai vs. State of Bihar, 1968 (3) SCR 525* it was observed :-

> "The failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries parabolise the plea taken by the accused."

In another important case *Laxmi Singh and others vs. State of Bihar, AIR 1976 SC 2263* after referring to the ratio laid down in *Mohar Rai's case* (supra), Apex Court observed:

> "Where the prosecution fails to explain the injuries on the accused, two results follow-
>
> (i) That the evidence of the prosecution witnesses is untrue, and
>
> (ii) That the injuries probabilise the plea taken by the appellants."

It was further observed that :

> In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:-
>
> (i) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version.
>
> (ii) That the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and, therefore their evidence is unreliable.
>
> (iii) That in case there is a defence version which explains the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one"

In *Mohar Rai's case* (supra) it was made clear that the failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related to the incident is not true or at any rate not wholly true, likewise in *Lakshmi Singh's case* (supra) it was observed that any non-explanation of the injuries on the accused by the prosecution may affect the prosecution case, but such a non-explanation may assume greater importance where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood, the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence and consequently the whole case much depends on the facts and circumstances of each case. These aspects were highlighted by the Apex Court in ***Vijayee Singh and others vs. State of U.P., AIR 1990 SC 1459.***

In ***Babulal Bhagwan Khandare and another vs. State of Maharashtra, AIR 2005 SC 1460*** Apex Court expressed that non-explanation of the injuries sustained by accused at about the time of occurrence or in the same course of altercation is a very important circumstance. But mere non-explanation of the injuries by prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far out weights the effect of the omissions on the part of the prosecution to explain the injuries.

In ***Munna @ Ram Narayan and others vs. State of M.P., 2006 (4) MPLJ 248*** it was held:-

> The total outcome of the Supreme Court Judgment in case of ***Laxmi Singh's*** case (supra) is that if accused persons have suffered serious injuries and defence version also explained it, under that circumstance the non explanation of injury by the prosecution would be fatal and not in every case where the accused suffered minor and superficial injuries.

If the prosecution is not explaining the injuries on the accused person sustained in the same incident, the only irrefutable presumption against the prosecution would be that accused person acted in the right of private defence of their person. The Supreme Court has pointed out three inferences which can be drawn if the injuries were not explained by the prosecution:

(i) The prosecution has suppressed the genesis and the origin of the occurrence;

(ii) Denial of the witnesses about presence of injuries on the person of accused would be considered that they are not giving the true story of the incident, therefore unreliable; and

(iii) Is that if defence gives a version which competes in probability with that of the prosecution then the benefit should be given to the accused.

The Supreme Court has also considered and held that where the injuries sustained by the accused are minor and superficial or where the evidence is so clear or cogent, under such circumstance, mere non-explanation of injuries by the prosecution would not affect its case.

In *Kallu Singh vs. State of M.P., ILR (2007) MP 1434.* as our High Court has referred *to Takahaji Hiraji vs. Thakore Kubersing Chamanshing and others, AIR 2001 SC 2328* in which the Apex Court has held that when three accused persons suffered injuries of very minor nature, their non-explanation did not cause any infirmity in the prosecution case. The Apex Court had held it cannot be held as a matter of law or invariably a rule that whenever accused sustained an injury in the same occurrence the prosecution is obliged to explain the injury and on the failure of prosecution to do so, the prosecution case should be disbelieved.

In *Bhaba Nanda Sarma vs. State of Assam, (1977) 4 SCC 396* a three-Judge Bench made the following pertinent observations :-

> The prosecution is not obliged to explain the injuries on the person of an accused in all cases and in all circumstances. This is not the law. It all depends upon the facts and circumstances of each case where the prosecution case becomes reasonably doubtful for its failure to explain the injuries on the accused.

The law on the subject has been succinctly clarified by R.C. Lahoti, J. (as he then was) speaking for a three-Judge Bench in *Takhaji Hiraji* case (supra) it was observed.

> "..... the view taken consistently is that it cannot be held as a matter of law or invariably a rule that whenever accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved. Before non-explanation of the injuries on the persons of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions : (i) that injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question. Non-explanation of

injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the defence gives a version which competes in probability with that of the prosecution. Where the evidence is clear, cogent and creditworthy and where the court can distinguish the truth from falsehood, the mere fact that the injuries on the side of the accused persons are not explained by the prosecution cannot by itself be a sole basis to reject the testimony of the prosecution witnesses and consequently the whole of the prosecution case."

The injuries of serious nature received by the accused in the course of the same occurrence would indicate that there was a fight between both the parties. In such a situation, the question as to the genesis of the fight that is to say the events leading to the fight and which party initiated the first attack assumes great importance in reaching the ultimate decision. It is true that the need to explain the injuries of serious nature received by the accused in the course of same occurrence arises, when explanation is given the correctness of the explanation is liable to be tested. If there is an omission to explain it may lead to the inference that the prosecution has suppressed some of the relevant details concerning the incident. The Court has then to consider whether such omission casts a reasonable doubt on the entire prosecution story or will it have any effect on other reliable evidence available having bearing on the origin of the incident. Ultimately, the factum of non-explanation of injuries is one circumstance which has to be kept in view while appreciating the evidence of prosecution witnesses. In case the prosecution version is sought to be proved by partisan or interested witnesses, the non-explanation of serious injuries may *prima facie* make a dent on the credibility of their evidence. So also where the defence version accords with probabilities to such an extent that it is difficult to predict which version is true then the factum of non-explanation of the injuries assumes greater importance.

In view of above discussion, it is clear that there cannot be a mechanical or isolated approach in examining the question where the prosecution case is vitiated by reason of non-explanation of injuries. In other words, the non-explanation of injuries of the accused is one of the factors that could be taken into account in evaluating the prosecution evidence and the intrinsic worth of the defence version. Now the settled legal position is that when accused suffers minor, superficial and simple injuries and same is not explained by the prosecution, it would not cause any damage to the prosecution case. If accused persons have suffered serious injuries and defence version also explained it under that circumstances, the non-explanation of injuries by the prosecution would be fatal.

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CIRCUMSTANCES UNDER WHICH AN ACCUSED WOULD NOT BE JOINTLY OR VICARIOUSLY LIABLE FOR THE ACTION OF OTHER ACCUSED ON ACCOUNT OF FREE & SUDDEN FIGHT

Judicial Officers
District Indore

Basic principles of Constructive Liability in Criminal Justice System

It is a basic principle of the criminal justice system that every crime is composed of two elements, a criminal act & criminal intent. Neither an act alone nor intent alone is sufficient to constitute a crime.

When a criminal act is committed by several persons then question arises about their criminal liability. There are two basic rules of evidence in Indian Penal Code. These are u/s 34 & 149.

As per Section 34 of IPC 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. It means that if two or more persons intentionally do a thing jointly, it is just the same as if each of them has done it individually. Common intention should be anterior in time to commission of the crime showing a pre-assigned plan and prior concert. The common intention of all must be the commission of a criminal act which is done. That is to say, the act done must be the act contemplated by all; otherwise all the co-conspirators are not guilty of the offence committed.

It is well established that a common intention pre-supposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all. Accordingly, there must have been a prior meeting of minds. Several persons can simultaneously attack a man, and each can have the same intention, namely the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case. Same or similar intention should not be confused with common intention. The line of the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice.

The distinction between common intention and same or similar intention becomes important especially in cases of sudden occurrences. A person would not be guilty of crime merely because he was present unless his complicity in

the crime can be inferred by some act or the other or by the way of constructive liability.

As per Section 149 of IPC if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of committing of that offence, is a member of the same assembly, is guilty of that offence.

Every member of an unlawful assembly is by that action rendered liable for the offence committed by any member of the assembly in prosecution of its common object. That fixes vicarious liability of the members of an unlawful assembly. But such liability is not limited to the acts done in prosecution of the common object of the assembly. It extends even to acts which the members of the assembly "knew to be likely to be committed in prosecution of that object."

The liability of other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object.

The section applies equally in cases where offences are committed by single member of the assembly and in cases where offences are committed by two or more members of the assembly acting in prosecution of a common object. If an offence is committed, whether by a single member of the assembly or by a group of members, the other members of the assembly may be liable under this section.

Section 149 creates a specific offence. A member of the assembly would be guilty of an offence committed by another member, although he had no intention to commit that offence and had done no other act except his presence in the assembly and sharing its common object. If offence committed by a member be in prosecution of the common object of that assembly or such as that member of that assembly knew to be likely to be committed in prosecution of the common object, every member would be guilty of the offence.

A common object is different from a common intention in that it does not require prior concert and a common meeting of minds before the attack, and an unlawful object can develop after the people get there. The distinction between the common intention required by Section 34 and the common object set out in Section 149 lies just there. In a case under Section 149 there need not be a prior meeting of minds. It is enough that each has the same object in view and that their number is five or more and that they act as an assembly to achieve that object. The crucial question to determine in such a case 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 by Section 141.

Fight

"Fight" is not defined in the Code. It means a combat or an engagement between two persons or parties. It implies an exchange of blows, it is a bilateral act. The simplest form of fighting by two or more person in a public place and disturbing the public place is **"affray"**. In such an incident all the persons involved shall be liable for the act under Section 160 IPC.

Free Fight

A free fight is one when both sides mean to fight from the start, go out to fight and there is a pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival commanders. ***(Gajanand v. State of U.P., AIR 1954 SC 695)***. In a free fight there is movement of body of the victims and the assailants who are themselves participants or expected participants in the cross assault on the other side. ***(Balaur Singh v. State of Punjab, AIR 1995 SC 1956).*** Once the conclusion is drawn that the injuries sustained by the persons were in the course of a free fight, then only those persons who are proved to have caused injuries can be held guilty for the injuries caused by them. ***(Kanbi Nanji Virji v. State of Gujrat, AIR 1970 SC 219).***

In ***Dattu Shamrao Valake v. State of Rajasthan, AIR 2005 SC 2331*** it was observed that where injuries received by the accused persons remained unexplained in fact incident as such was not denied by either of the parties. It is not possible to say with reasonable certainty as to which party provoked the other and how the fight was initiated. There was no pre-concert amongst the accused to attack the members of the prosecution party. In the circumstances, a reasonable inference based on a high degree of probability could be drawn that there was a sudden quarrel and free fight between the parties.

In a free fight, no right of private defence is available to either party and each individual is responsible for his own acts. In ***Kewal Singh v. State of Punjab, AIR 2004 SC 72*** it was observed that both parties came armed and indulged in a free fight which resulted in injuries on both sides. Since both parties had come prepared to fight, it is unnecessary to go into the question as to whether any of them exercised their right of private defence and therefore, the culpability of the accused must be determined by reference to their individual acts. In a free fight neither side has a right of private defence. (Please see - ***Munir Ahmed v. State of Rajasthan, AIR 1989 SC 705*** **and** ***Vishvas Aba Kurane v. State of Maharashtra, AIR 1978 SC 414***)

Where there is a free fight and it is not possible to say that the accused persons were aggressors, then no case under Section 147 or Section 148 of IPC can be said to have been made out and Section 149 of IPC also cannot be invoked.

It is also settled law that if a sudden unpremeditated free fight takes place between two groups, the members thereof cannot be said to have formed an unlawful assembly within the meaning of Section 141 IPC. In such a case each of them would be liable for their individual acts and not for the acts of others. (Please see - ***Lalji and others v. State of U.P., AIR 1973 SC 2505, Puran v. State of Rajasthan, AIR 1976 SC 912*** and ***Ishwar Singh v. State of U.P., AIR 1976 SC 2423)***

Section 34 is not applicable to act committed in the course of a sudden quarrel without any common intention amongst the accused and every person taking part in the fight would be responsible for his individual acts. (Please see - ***Balkar Singh v. State of Punjab, AIR 1994 SC 1133)***

Where the occurrence was a chance encounter, and the fatal assault was sudden, unanticipated and individual act of the unascertained assailant, their assembly did not become unlawful at any stage. There must be a mutual combat on exchanging blows on each other. And, however, slight the first blow, or provocation, every fresh blow becomes a fresh provocation. The blood already heated or warms up every subsequent stroke. The voice of reason is heard on neither side in the heat of passion. Therefore, it is difficult to apportion between them respective degrees of blame with reference to the state of things at the commencement of the fray but it must occur as a consequence of a sudden fight, i.e. mutual combat and not one side track, it matters no what the cause of quarrel is whether real or imaginary, or who draws strikes first the strike of the blow must be without any intention to kill or seriously injure the other. (Please see ***State of U.P. v. Jashoda Nandan Gupta and others, AIR1974 SC 753 and Kikar Singh v. State of Rajasthan, AIR 1993 SC 2426).***

Sudden Fight

For a "sudden fight" implies mutual provocation and blows on each side and in such case the whole blame could not be placed on one side. A fight suddenly takes place for which both the parties are more or less to blame. It may be that one of them starts it but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation and it is difficult to apportion the share of blame which attaches to each fighter. Heat of passion requires that there must be time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case.

So far the application of Exception 4 of Section 300 IPC is concerned. it is not sufficient to show that there was a sudden quarrel and that there was no premeditation. It must further be shown that the offender has not taken undue

advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'. The fight must not only be unpremeditated, but it must also be sudden that is to say, it must have been brought about unexpectedly and without prearrangement. (Please See - ***D. Salim v. State of A.P., 2007 (13) JT 57, Thankchan and another v. State of Kerala, 2007 (4) Crimes (SC) 263, Sukhdev v. State of Punjab, 2007 (9) JT 257*** and ***Sandhya Jadhav v. State of Maharashtra, (2006) 4 SCC 653).***

In ***Gali Venkataiah v. State of Andhra Pradesh, 2007 (4) Crimes (SC) 271,*** the Apex Court observed that where it appears from the evidence of the witnesses that the relationship between the appellant and the deceased was strained and much before the assault was made, there was exchange of hot words between the accused and the deceased and they were quarreling with each other and it is also be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner. The case can be covered in the Exception 4 to Section 300 IPC.

In ***Muthu v. State by Inspector of Police, Tamil Nadu, 2007 AIR SCW 6982,*** the Apex Court observed that no doubt, even in the heat of the moment or fit of anger one should not attack somebody since human beings are different from animals inasmuch as they have the power of self-control. Nevertheless, the fact remains that in the heat of the moment and in a fit of anger people some times do acts which may not have been done after premeditation. Hence, the law provides that while those who commit acts in the heat of the moment or fit of anger should also be punished, their punishment should be lesser than that of premeditated offences. Similarly, in ***Kulesh Mondal v. State of West Bengal, AIR 2007 SC 3228,*** the Apex Court has held that in sudden fight notwithstanding that a blow may have been struck or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. But where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstances must be taken into consideration to decide whether undue advantage has been taken. In ***Kikar Singh v. State of Rajasthan, AIR 1993 SC 2426*** it was held that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that giving the blow with the knowledge that they were likely to cause death, he had taken undue advantage.

The Supreme Court has settled the legal position about the constructive liability of a co-accused person in an incident of sudden fight in ***Afrahim Shiekh and others v. State of West Bengal, AIR 1964 SC 1263.*** It was observed that, the question is whether the second part of Section 304 can be made applicable? The second part no doubt speaks of knowledge and does not refer to intention

which has been segregated in the first part. But knowledge is the knowledge of the likelihood of death. Can it be said that when three or four persons start beating a man with heavy lathis, each hitting his blow with the common intention of severely beating him and each possessing the knowledge that death was the likely result of the beating that the requirements of Section 304, Part II are not satisfied in the case of each of them? If it could be said that knowledge of this type was possible in the case of each one of the appellants, there is no reason why Section 304, Part II cannot be read with Section 34. The common intention is with regard to the criminal act, i.e. the act of beating. If the result of the beating is the death of the victim, and if each of the assailants possesses the knowledge the death is the likely consequence of the criminal act i.e. beating, ***there is no reason why Section 34 or Section 35 should not be read with the second part of Section 304 to make each liable individually.***

Conclusion

Thus on the basis of aforesaid analysis based on various authorities, we may conclude the issue as under:-

(a) Where, it is not possible to say that, which party was aggressor and there was no preconcert amongst the accused persons to attack the other party and the occurrence was a chance encounter and unanticipated, then a reasonable inference of sudden quarrel and free fight between the parties could be drawn & in such a case the culpability of all the accused persons, would not be jointly or vicariously, but must be determined by reference to their individual acts.

(b) In case of 'Free-Fight' - (i) Sections 34 and 149 IPC are not applicable, (ii) no need to explain injury to any accused (iii) no right of private defence is available to either party.

(c) Similarly, in a case of sudden fight liability is to be determined by reference to individual acts of a particular accused person but for the application of Exception 4 of Section 300 IPC, it is not sufficient to show that there was a sudden quarrel and that there was no premeditation. It must further be shown that the offender has not taken undue advantage (unfair advantage) or acted in cruel or unusual manner.

(d) There is also an exception of the above rule i.e. in a case of sudden fight where more than one assailants have participated in the occurrence with the knowledge of the likely consequence of their criminal act, then all such assailants may be jointly or vicariously liable under Section 34 or 35 or 149 as the case may be. The partition which divides their bounds is often very thin; nevertheless, the distinction is real and substantial and if overlooked will result in miscarriage of justice.

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MAINTAINABILITY OF CLAIM U/S 166 OF THE MOTOR VEHICLES ACT BY LEGAL REPRESENTATIVE OF THE DECEASED WHO IS NOT A DEPENDENT

- Judicial Officers
District Damoh

Every legal representative who suffers on account of the death of a person due to a motor vehicle accident should have a remedy for realization of compensation and that is provided by Sections 166 to 175 of the Motor vehicles Act, 1988. These provisions are in consonance with the principle of law of tort that every injury must have a remedy. Section 166 provides that where death has resulted in an accident arising out of use of motor vehicle application may be made by all or any of the legal representative of the deceased or by any agent duly authorized by all or any of the legal representative of the deceased. The Act, however does not specify as to who is to be treated as legal representation. The term is defined in Section 2 (11) of Civil Procedure Code. "Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

Section 166 also provide representative that where all the legal representatives have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives who have not so joined, shall be impleaded as respondents in the application. Section 166 (1) corresponds to Section 110-A of the Motor Vehicles Act 1939. This proviso of Section 166 appears to be of great significance. This section is a substitute for the provisions of Sec. 1-A of the Fatal Accidents Act, 1855 which provides that "every such action or suit shall be for the benefit of the wife, husband, parent and child if any,..... of the person deceased."

Previously-there has beens sharp difference of opinion amongst the different High Courts as to who are legal representatives i.e. person competent to claim compensation. The first group of cases take the view that a case of fatal accident would be governed by the provisions of Fatal Accident Act, 1855 and no representative of deceased other than wife, husband, parent or child would be entitled to commence an action for compensation. Previously this view was also taken by our M.P. High Court in *Shanker Rao vs. M/s Babulal Fauzdar, AIR 1980 M.P. 154* and in *Buddha vs. Union of India AIR 1981 M.P. 151.* It was held that claim for recovery of compensation as a result of fatal accident by bus-would be governed by Section 1-A and 2 of the Fatal Accidents Act and claim of brother of deceased was held not maintainable as he is not legal representative in view of Section. 1-A of Fatal Accidents Act. But the decision *rendered in AIR 1981 Madhya Pradesh 151* was overruled by the Supreme Court in *Gujarat State Road Transport Corporation v. Ramanbhai Prabhatbhai and others, AIR 1987 SC 1690.* It was held that legal representative ordinarily means a person who in law represents the estate of deceased person or a person on whom the

estate devolves on the death of an individual. Legal representative need not necessarily be a wife, husband, parent and child. Provisions of the Act do supersede the provisions of the Fatal Accidents Act in so far as motor vehicle accidents are concerned. The brother of a person who dies in a motor vehicle accident is entitled to maintain a petition under Section110-A if he is a legal representative of the deceased.

Supreme Court in the latest decision in *Smt. Manjuri Bera vs. Oriental Insurance Co. Ltd. AIR 2007 SC 1474* laid down that in terms of Section 166 (1) (c) in case of death, all or any of the legal representative of the deceased become entitled to compensation and file a claim petition. Claim of married daughter u/s 140 was accepted though she was not dependent on her father and was living with her husband. It was held that even if there is no loss of dependency the claimant if he/she is a legal representative will be entitled to compensation, the quantum of which shall not less than the liability flowing from S.140. The same view was affirmed in *Mrs. Hafizun Begam v. Md. Ikram Haque and others AIR 2007 SC 2680* and it was held that liability in terms of Section 140 of the Act does not cease because of absence of dependency. Therefore, it is clear from the above decisions of the Supreme Court that a person who is not a dependent on deceased can claim compensation under Section 166 of the Act and the controversy is set on rest.

In case of death of children, parents are not dependent on them and in case of death of parents adult and earning son and married daughter are not dependent but they are legal representatives. In cases of motor accidents, the endeavour is to put the claimant in the pre-accidental position. Pecuniary damages cannot replace a human life, therefore law recognizes that in addition to the pecuniary losses, payment should be made for non pecuniary losses on account of loss of happiness, pain and suffering and expectancy of life etc. Supreme Court in the case of *Lata Wadhwa vs. State of Bihar, (2001) 8 SCC 197;* and in *M.S. Grewal vs. Deep Chand Sood, (2001) 8 SCC 151* awarded substantial amount as compensation on death of children who were only students and not earning members of the family with the reasoning that there was loss of expectancy of life, pain and suffering, although parents were not dependent on them.

Therefore, we are of the considered view that a legal representative of the deceased who is not a dependent can claim and get compensation under section 166 of the Motor Vehicles Act 1988.

INSTITUTIONAL SUPPLEMENT :

Readers are requested to go through the following decisions rendered by the Division Bench of the Madhya Pradesh High Court :–

(i) *Gafaran and others v. Tilakraj Kapur and others, 2005 ACJ 1711*

(ii) *M.P. State Road Transport Corporation and another v. Sohanlal and others, 1998 (1) MPLJ 175*

(iii) *Chandan Singh and another v. S.E.W. Construction Co., 2003 (1) JLJ 246*

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धारा 138 परक्राम्य लिखत अधिनियम, 1881 के अन्तर्गत प्रस्तुत परिवाद में सूचना पत्र एवं चैक की तिथि या राशि आदि के संबंध में संशोधन संबंधी विधिक स्थिति

– न्यायिक अधिकारीगण
जिला नीमच

इस विधिक विषय पर विचार करते समय हमें यह ध्यान में रखना होगा कि परक्राम्य लिखत अधिनियम,1881 यथासंशोधित 2002 (संक्षेप में 'अधिनियम') के प्रावधान दण्ड प्रक्रिया संहिता एवं भारतीय साक्ष्य अधिनियम के प्रावधानों से परे हैं । इस अधिनियम में संशोधन द्वारा दण्डात्मक प्रावधानों का समावेश करने का उद्देश्य चैकों के अनावरण से बैंकों की गिरती साख को रोकना, व्यवसाय जगत में चैकों की साख बनाये रखना, ऐसे आदेशक (Drawer/Payer) को दण्डित करना जो उसके बैंक खाते में पर्याप्त धनराशि न होने पर भी या अन्य दुराशय से चैक जारी करते हैं तथा ईमानदार आदाता (Payee) की रक्षा करना।

अधिनियम में या दण्ड प्रक्रिया संहिता में ऐसा कोई प्रावधान नहीं है, जिसके तहत परिवाद में संशोधन किया जा सके जैसा कि दीवानी मामलों के लिये व्यवहार प्रक्रिया संहिता के आदेश 6 नियम 17 में प्रावधान किये गये हैं । परन्तु, इसका यह अर्थ नहीं है कि परिवाद की ऐसी त्रुटियाँ जो कि प्रकरण की जड़ तक नहीं जाती है को दुरूस्त नहीं किया जा सकता है। कभी–कभी दृष्टिचूक से या टाइप कराते समय परिवाद में पक्षकारों के नाम, उनके पिता के नाम, सूचनापत्र के दिनांक, चैक जारी करने के दिनांक, चैक राशि, चैक अनादरण होने की दिनांक, बैंक से चैक अनादरण होने की सूचना प्राप्त होने की दिनांक तथा बैंक खाता नम्बर में त्रुटि हो जाती है या उनका उल्लेख होने से रह जाता है। ऐसी दशा में यदि परिवादी उल्लेखित त्रुटि को दुरूस्त करने हेतु न्यायालय को आवेदनपत्र देता है तो ऐसे आवेदन पत्र को न्यायालय को स्वीकार कर लेना चाहिये, क्योंकि ऐसा करने से आरोपी पूर्वाग्रहित नहीं होता और उक्त तथ्य ऐसे हैं, जिनकी कूटरचना पश्चात् सोच (afterthought) के आधार पर नहीं हो सकती है। कारण यह है कि उक्त त्रुटियाँ दुरूस्त करने से संबंधित असल दस्तावेज अभिलेख पर होते हैं। उल्लेखनीय है कि उपरोक्त प्रकार की त्रुटियों को दुरूस्त करने के संबंध में *उत्तरप्रदेश प्रदूषण नियंत्रण बोर्ड बनाम* ***मैसर्स मोदी डिस्टलरी, ए.आई.आर. 1988 सुप्रीम कोर्ट 1128, भीमसिंह बनाम कानसिंह, 2004 (2) डी.सी.आर. 158 (राजस्थान), बाला साहेब बनाम अब्दुल्लाह, 2006 (2) डी.सी.आर. 681 बाम्बे, मान एग्रोसेन्टर बनाम एईड पेरि (इंडिया) लिमिटेड आदि 2005 (2) क्रिमीनल कोर्ट केसस 392 (बाम्बे), एस. सेम्सेन पपली बनाम श्रीदेव, 2006 (2) एन. आई.जे. 130 (मद्रास),*** तथा ***निनान बनाम रूफूस ओलिवेरो, 1994 (2) सिविल कोर्ट केसेस 295 (केरल),*** के मामलों में विचार हुआ और इन त्रुटियों को दुरूस्त करने की अनुमति दी गई।

यह सत्य है कि अधीनस्थ न्यायालय को अन्तर्निहित शक्तियाँ (inherent power) नहीं है, जैसा कि उच्च न्यायालयों को दण्ड प्रक्रिया संहिता की धारा 482 द्वारा प्रदत्त की गई है । परन्तु, जहाँ न्यायदान के लिये आवश्यक हो, वहां पर परिवाद में दृष्टिचूक या टाइपिंग से उत्पन्न त्रुटियों को दूर करने की अनुमति

अधीनस्थ न्यायालय देते हैं, तो उससे यह अर्थ नहीं निकाला जा सकता कि इन न्यायालयों ने अपनी अधिकारिता से परे जाकर कार्य किया है। राजस्थान उच्च न्यायालय ने ***भीमसिंह बनाम कानसिंह (पूर्वोक्त)*** के मामले में इस विषय पर गहनता से विचार किया और यह ठहराया कि :–

> Before parting with this order, a question arises whether such type of mistakes can be rectified by the susbordinate courts or not?
>
> It is an established proposition of law that court of justice must possess inherent powers apart from the express provisions of law, which are necessary to their existence and the proper discharge of duties imposed upon them by law. The Criminal Procedure Code or for the matter of that no procedural law is ever exhaustive and in cases where circumstances required it, the courts have acted on the assumption that they possess inherent powers (as of right) to do justice for which they really exist. At the same time it must be remembered that a court has no inherent power to do that which is prohibited by the Code.
>
> In this view of the matter, every court whether civil or criminal in the absence of any express provision to the contrary, shall be deemed to possess an inherent in its very constitution, all such powers as are necessary in the course of the administration of justice. The rule of inherent powers has its source in a Latin maxim *'Guado lex aliquid alicuiconcedit, concodere videtur id sine quo ipsa esse non-potest'*, which means that when law gives any thing to any one, it gives also all those things without which the thing itself could not exist.
>
> The Court exists for dispensation of justice and not for its denial for technical reasons when law and justice otherwise demand. Even though inherent power saved under section 482 Cr.P.C. is only in favour of High Court, the subordinate criminal courts are also not powerless to do what is absolutely necessary for dispensation of justice in the absence of a specific enabling provision provided there is no prohibition and no illegality or miscarriage of justice is involved.
>
> Thus, this Court is of the view that all the criminal courts are having such an auxiliary power subject to restrictions which justice, equity, good conscience and legal provisions demand provided it will not unnecessarily prejudice somebody else.

उपरोक्त पंक्तियों से भी यह निष्कर्ष निकलता है कि अधीनस्थ न्यायालयों की शक्तियाँ सीमित नहीं हैं और यदि न्यायदान के लिये परिवाद में संशोधन करना आवश्यक है और ऐसे संशोधन से आरोपी के बचाव पर प्रतिकूल प्रभाव नहीं पड़ता और पह पूर्वाग्रहित नहीं होता तो ऐसे संशोधन आवेदन पत्र को स्वीकार कर परिवाद में संशोधन करने की अनुमति दी जा सकती है। यदि संकुचित विचारधारा को लेकर वास्तविकता प्रकट करने वाले संशोधन को अस्वीकार कर दिया जाता है तो ऐसा करना ईमानदार आदाता के साथ अन्याय व बेईमान दाता के साथ न्यायालय द्वारा न्याय करने जैसा होगा, जो निसंदेह अधिनियम की भावना के विपरीत होगा।

एक विधि वेत्ता ने कहा है कि "Counsel seek only for their client's success, but the judge must watch that justice triumphs." जब हम इस सूत्र पर विचार करें तो भी यह कहा जा सकता है कि परिवाद में संशोधन किसी पश्चात् सोच या दुर्भावना से प्रेरित नहीं है वरन् सद्भावना से हुई त्रुटियों को दूर करने के लिये है तो अधीनस्थ न्यायालयों को न्यायहित में परिवाद में संशोधन करने की अनुमति देना चाहिये।

INSTITUTIONAL SUPPLEMENT :

Readers are requested to go through the following decisions :–

1. *S. Samsen Papli v. Shri Dev, 2006 (2) NIJ 130 (Madras)*

   Non-signing of complaint by the complainant is a curable defect and the complainant can later on sign the complaint.

2. *Balasahan v. Abdullah, 2006 (2) Criminal Court Cases 365 (Bombay)*

   Dishonour of cheque – Complaint – Amendment – Correction of cheque number – Comfusion in number of cheque occurred due to rubber stamp over-lapping on the cheque number – If correction of cheque number is permitted, it will not ipso facto prejudice the defence of accused – Amendment allowed.

3. *Maan-Agro Centre v. Eid Parry (India) Ltd. and others, 2005 (2) Criminal Court cases 392 (Bombay)*

   Complaint filed against proprietorship concern through its proprietor but name of its proprietor not mentioned – Name of proprietor sought to be inserted by way of amendment – Amendment allowed.

4. *Ninan v. Rufus Olivero, 1994 (2) Civil Court Cases 295 (Kerala)*

   Correction in the name of accused – Complaint filed against 'A' son of 'B' and cognizance taken – Name of accused allowed to be corrected as 'B' son of 'A' – Order allowing correction in the name of accused upheld.

5. *Bhimsingh v. Kansingh, 2004 (2) DCR 158 (Rajasthan)*

   NI Act, 1881 – S.138 – Criminal Procedure Code, 1973 – S.482 – Application for amendment of cheque number and date of information by bank on ground of typographical mistake – Rejected by ACJM –

Typographical mistake pointed by complainant should have been rectified by Trial Court – As Trial Court has inherent power to rectify such typographical mistakes to do justice.

6. *Kumar Rubber Industries, Kapurthala v. Sohanlal, II (2002) BC 467 (P&H)*

NI Act, 1881 – S.138 – Dishonour of cheque – Incorrect cheque number mentioned in complaint – Defect goes to root of matter – Complaint not maintainable.

7. *V. Rajkumari v.P. Subramha Naidu, 2005 (1) MPHT 203=2005 CrLJ 127 (SC)*

धारा–138 एन.आई.एक्ट– न्यायालय को ऐसा निर्वचन नहीं करना चाहिये, जो बेईमान व्यक्ति की सहायता करें और ईमानदार आदाता की सहायता न करें ।

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A sincere, balanced and kind attitude towards ourselves as well as others is the key to happiness and success in life's all avenues.

– JANOS SELYE

The fragrance of flowers spreads only in the direction of the wind. But the goodness of a person spreads in all directions.

– CHANAKYA

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 रहेंगे। प्रयास यह होगा कि समस्या के सम्यक समाधान के विषय में विश्लेषणात्मक दृष्टिकोण अपनाया जावे)

क्या किसी अभियुक्त को न्यायिक अभिरक्षा में भेजे जाने के उपरांत उसी अपराध में पुलिस अभिरक्षा में सौंपा जा सकता हैं ?

इस संबध में सामान्यतः यह भ्रान्ति पायी जाती है कि यदि किसी अभियुक्त को न्यायिक अभिरक्षा में भेजा जा चुका हो तो उसी अपराध के संबंध में उसकी पुलिस अभिरक्षा स्वीकृत नहीं की जा सकती है।

दण्ड प्रक्रिया संहिता (एतत्मिन पश्चात् मात्र संहिता) की धारा 167 (1) एवं (2) से यह स्पष्ट है कि यदि न्यायिक मजिस्ट्रेट प्रथम श्रेणी एवं उच्च न्यायालय द्वारा विशेषतः सशक्त किये गये न्यायिक मजिस्ट्रेट द्वितीय श्रेणी के लिये यह विश्वास करने के लिये आधार है कि अभियोग या सूचना दृढ़ आधार पर है तब वह उसके समक्ष लाये गये किसी अभियुक्त की, जैसा उचित प्रतीत हो, पुलिस अभिरक्षा या न्यायिक अभिरक्षा कुल मिलाकर 15 दिन से अनधिक अवधि के लिये प्राधिकृत कर सकता है।

संहिता के उक्त प्रावधानों से कोई निर्बन्धन आरोपित होना प्रकट नहीं होता है कि किसी अभियुक्त की एक बार न्यायिक अभिरक्षा प्राधिकृत कर दिये जाने पर उसी अपराध के लिये उसकी पुलिस अभिरक्षा प्राधिकृत नहीं की जा सकती।

इस संबंध में न्याय दृष्टांत ***कोसानपु रामरेड्डी विरूद्ध आंध्रप्रदेश राज्य, ए.आई.आर. 1994 सु.को. 1447 = 1994 सी.आर.एल.जे. 2121*** में सर्वोच्च न्यायालय द्वारा यह अभिनिर्धारित किया गया है कि न्यायिक अभिरक्षा में निरूद्ध किसी व्यक्ति को संहिता की धारा 167 (2) में वर्णित 15 दिन की अवधि के अन्दर पुलिस अभिरक्षा में सौंपा जा सकता है।

सर्वोच्च न्यायालय द्वारा ***मौलवी हुसैन हाजी अब्राहम उमरजी विरूद्ध गुजरात राज्य एवं अन्य, ए.आई.आर. 2004 सु.को. 3946*** में आतंकवाद निवारण अधिनियम से संबंधित प्रकरण में यह स्पष्ट किया गया है कि किसी आरोपी को न्यायिक अभिरक्षा से पुलिस अभिरक्षा में सौंपे जाने संबधी आवेदन पत्र स्वीकार किया जाना सामान्य प्रक्रिया नहीं हैं बल्कि इसके पूर्व सभी पहलुओं एवं अधिनियम विशेष के पारित किये जाने के उद्देश्यों पर विचार करना चाहिये।

इस प्रकार यह स्पष्ट होता है कि प्रकरण विशेष की परिस्थितियों के समग्र परिशीलन से उचित एवं आवश्यक प्रतीत होने पर किसी अपराध के लिये न्यायिक अभिरक्षा में निरूद्ध किसी अभियुक्त को उसी

अपराध के संबंध में संहिता की धारा 167 (2) में वर्णित 15 दिवस की कालावधि में पुलिस अभिरक्षा में सौंपा जा सकता है और ऐसी कोई विधि नहीं है कि एक बार न्यायिक अभिरक्षा प्राधिकृत हो जाने पर उसी अपराध के संबंध में आरोपी की पुलिस अभिरक्षा प्राधिकृत नहीं हो सकती है।

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किसी अभियुक्त की पुलिस अभिरक्षा किस अवधि में एवं अधिकतम कितनी अवधि के लिये प्राधिकृत की जा सकती हैं ?

दण्ड प्रक्रिया संहिता (एतत्मिन पश्चात् मात्र संहिता) की धारा 167 (1) एवं (2) तथा उसके परन्तुक (क) की भाषा से यह स्पष्ट होता है कि किसी अभियुक्त की कुल मिलाकर अधिकतम 15 दिवस की अवधि के लिये ही पुलिस अभिरक्षा प्राधिकृत की जा सकती हैं।

धारा 167 (2) में प्रयुक्त शब्दावली ''जो कुल मिलाकर पन्द्रह दिन से अधिक न होगी'' एवं उसके परन्तुक (क) की शब्दावली ''पुलिस अभिरक्षा से अन्यथा निरोध पन्द्रह दिन की अवधि से आगे के लिये'' के सूक्ष्म अध्ययन एवं उनके संविद प्रभाव से यह प्रकट होता है कि किसी अभियुक्त की पुलिस अभिरक्षा मात्र अभिरक्षा के प्रथम 15 दिवसों की अवधि के अन्दर ही प्राधिकृत हो सकती है एवं अपराध के लिये प्रावधानित कारावास की अवधि के अनुसार विहित 60 या 90 दिन की अवधि को दृष्टिगत रखते हुए आगे की शेष अवधि के लिये मात्र न्यायिक अभिरक्षा ही प्राधिकृत की जा सकती है।

सर्वोच्च न्यायालय द्वारा ***सी.बी.आई. स्पेशल इन्वेस्टिगेशन सेल–1, नई दिल्ली विरूद्ध अनुपम जे. कुलकर्णी ए.आई.आर. 1992 सु.को. 1768*** के प्रकरण में संहिता की धारा 167 (2) के प्रावधान के सभी पहलुओं पर विचारोपरांत पद क्रमांक 13 में उक्त प्रावधान के अन्तर्गत मजिस्ट्रेट से अपेक्षित कार्यवाही का सुस्पष्ट क्रमवार विश्लेषण दिया गया है एवं पद क्रमांक 8 तथा 13 में यह अभिनिर्धारित किया गया है कि आवश्यक प्रतीत होने पर पुलिस अभिरक्षा मात्र प्रथम पन्द्रह दिवस की अवधि में ही प्राधिकृत की जा सकती है एवं प्रथम पन्द्रह दिवस की अभिरक्षा की अवधि के अवसान उपरांत 60 या 90 दिन की अवधि के शेष दिवस के लिये किसी अभियुक्त की मात्र न्यायिक अभिरक्षा ही प्राधिकृत हो सकती है।

यद्यपि न्याय दृष्टान्त ***मौलवी हुसैन हाजी अब्राहम उमरजी, ए.आई.आर. 2004 सु.को. 3946*** में सर्वोच्च न्यायालय ने आतंकवाद निवारण अधिनियम की धारा 49 (2) (ख) में जोड़े गए परन्तुक की विवेचना करते हुए यह विनिश्चित किया है कि उक्त अधिनियम की धारा 49 (2) (ख) का पुलिस अभिरक्षा के लिये प्रयोग मात्र 30 दिवस की अवधि तक सीमित नहीं होगा। किन्तु उक्त न्याय दृष्टान्त में सर्वोच्च न्यायालय द्वारा उक्त अधिनियम की धारा 49 (2) (ख) में जोड़े गये परन्तुक के प्रभाव की व्याख्या की गई है न कि संहिता की धारा 167 (2) और उसके परन्तुक की।

अतः विचारणीय प्रश्न के संबंध में विधिक स्थिति वही रहेगी जो न्याय दृष्टांत **सी.बी.आई. स्पेशल इन्वेस्टिगेशन सेल–1, नई दिल्ली (उपरोक्त)** में प्रतिपादित की गई हैं कि प्रकरण विशेष की परिस्थितियों में

आवश्यकता होने पर यद्यपि पुलिस अभिरक्षा प्राधिकृत की जा सकती हैं किन्तु पुलिस अभिरक्षा कुल मिलाकर अधिकतम 15 दिवस की अवधि के लिये और अभिरक्षा की मात्र प्रथम पद्रंह दिवस की अवधि में ही प्राधिकृत हो सकती है।

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धारा 325, दण्ड प्रक्रिया संहिता के अंतर्गत किसी मजिस्ट्रेट द्वारा कार्यवाही मुख्य न्यायिक मजिस्ट्रेट को भेजे जाने हेतु अपेक्षित प्रक्रिया क्या होगी?

दण्ड प्रक्रिया संहिता (एतत्मिन पश्चात् मात्र संहिता) की धारा 325 के प्रावधानों का उपयोग कब किया जा सकता है, इस संबंध में कोई भ्रम नहीं है किन्तु उक्त प्रावधानों का उपयोग किस प्रक्रिया अनुसार एवं किस प्रक्रम पर किया जाना है इस संबंध में अवश्य कुछ भ्रम प्रकट होता है।

संहिता की धारा 325 की शब्दावली से यह स्पष्ट होता है कि अभियोजन साक्ष्य एवं प्रतिरक्षा साक्ष्य, यदि कोई हो, लिपिबद्व करने के उपरांत साक्ष्य के परिशीलन पर यदि किसी न्यायिक मजिस्ट्रेट प्रथम श्रेणी या द्वितीय श्रेणी का यह मत हो कि अभियुक्त दोषी है, तब उसे आगे यह विचार करना होगा कि क्या अभियुक्त को ऐसा दण्ड दिया जाना चाहिये जो उसकी दण्डाज्ञा पारित करने की शक्ति से अधिक कठोर या भिन्न प्रकार का हो?

संहिता की धारा 325 का प्रयोग किसी न्यायिक मजिस्ट्रेट द्वितीय श्रेणी द्वारा उस दशा में भी किया जा सकता है जब कि उसका यह मत हो कि अभियुक्त दोषी है एवं उससे धारा 106 के अधीन बंधपत्र प्राप्त करना समीचीन हैं।

तत्पश्चात् मजिस्ट्रेट को उक्त आशय का अपना मत (Opinion) अभिलिखित करना होगा। किन्तु मजिस्ट्रेट से यह अपेक्षित नहीं हैं कि वह प्रकरण में निर्णय पारित करें और उसमें अभियुक्त को सिद्ध दोष ठहराए। निर्णय पारित कर अभियुक्त को सिद्ध दोष ठहराकर संहिता की धारा 325 का प्रयोग कर प्रकरण मुख्य न्यायिक मजिस्ट्रेट को भेजना उचित प्रक्रिया नहीं हैं। इस संबंध में न्याय दृष्टाँत ***(1909) 9 सी.आर. एल.जे. 72 कलकत्ता, खुदाबख्शमल वि. ओधालीमल, ए.आई.आर. 1949 कलकत्ता 308, द पब्लिक प्रासिक्यूटर वि. कोन्डरू वेकंटा राजु, ए.आई.आर. 1962 आंध्रप्रदेश 9 (खंडपीठ)*** दृष्टव्य हैं।

यद्यपि निर्णय पारित कर अभियुक्त की दोषसिद्धी अभिलिखित करना संहिता की धारा 325 के अधीन अपेक्षित नहीं है तथापि यदि मजिस्ट्रेट द्वारा निर्णय पारित कर दोषसिद्धी अभिलिखित कर भी दी गई है तो वह अनावश्यक एवं विधिक अकृतता (Surplusage and Legal Nullity) होगी एवं उसे औपचारिक रूप से अपास्त करना आवश्यक नहीं होगा। [देखिये ***रतनलाल एवं धीरजलाल की पुस्तक 'द कोड ऑफ क्रिमीनल प्रोसीजर' 18th इनलार्ज्ड एडीशन रीप्रिंट 2007 के पृष्ठ 1204 पर दिया गया न्याय दृष्टांत नारायण धाकू, (1928) 30 बाम्बे एल.आर. 620 : 52 बाम्बे 456***]

संहिता की धारा 325 के अधीन शक्ति का प्रयोग करने पर मजिस्ट्रेट से यह अपेक्षित है कि वह उक्त आशय का अपना मत निर्णय पारित किये बिना आदेश पत्रिका में या प्रकरण की यथा आवश्यकतानुसार पृथक से आदेश पारित कर अभिलिखित करें और उसे संबधित अभियुक्त सहित प्रकरण (सम्पूर्ण नस्ती) संबधित मुख्य न्यायिक मजिस्ट्रेट की ओर प्रेषित करना चाहिए।

यदि अभियुक्त का एक से अधिक अपराधों के लिये विचारण हुआ हो और मजिस्ट्रेट का यह मत हो कि अभियुक्त दो या अधिक अपराधों के लिये दोषी है और उसमें से एक या अधिक अपराध के लिये ऐसे प्रकार का या ऐसा कठोर दण्ड दिया जाना चाहिये जिसे देने के लिये वह सशक्त नहीं है तब उसे सम्पूर्ण कार्यवाही प्रेषित करना होगी एवं वह ऐसा नहीं कर सकता है कि प्रकरण के अपराधों का प्रथक्करण कर ऐसे अपराध के लिये दण्डाज्ञा पारित कर दें जिसे पारित करने के लिए वह सक्षम है एवं उस एक या अधिक अपराधों के लिये प्रकरण मुख्य न्यायिक मजिस्ट्रेट को भेज दे जिसमें उसके अनुसार ऐसे अधिक कठोर या भिन्न प्रकृति का दण्ड दिया जाना चाहिये जिसे देने के लिये वह सशक्त नहीं है। इस संबंध में न्याय दृष्टांत ***नागेश विरूद्ध कर्नाटक राज्य –1990 सी.आर.एल.जे. 2234*** अवलोकनीय हैं।

इसी प्रकार एक से अधिक अभियुक्त होने की दशा में यदि मजिस्ट्रेट की राय में एक या अधिक अभियुक्त अधिक कठोर दण्ड पाने के पात्र है तब भी सभी अभियुक्त सहित संपूर्ण प्रकरण भेजना चाहिए। (देखिये 1945 एम.डब्लु एन. 182)

मुख्य न्यायिक मजिस्ट्रेट, जिसे उक्तानुसार प्रकरण प्राप्त हुआ है, प्रकरण में या तो पूर्व लिपिबद्ध साक्ष्य के आधार पर प्रकरण में निर्णय पारित कर सकता हैं या पुनः पक्षकारों की परीक्षा कर सकता है या किसी साक्षी को पुनः परीक्षित कर सकता है या अतिरिक्त साक्षय ले सकता है और तत्पश्चात् निर्णय पारित कर सकता है। निर्णय पारित करने में मुख्य न्यायिक मजिस्ट्रेट दोष मुक्ति का निर्णय भी पारित कर सकता है और दोष सिद्धी होने पर विधि अनुसार यथोचित दण्डादेश या आदेश दे सकता है।

मुख्य न्यायिक मजिस्ट्रेट पर, जिसकी ओर संहिता की धारा 325 के अंतर्गत प्रकरण भेजा गया है, प्रकरण भेजने वाले मजिस्ट्रेट द्वारा दोषसिद्धी के संबंध में दिया गया मत बंधनकारी नहीं होता है एवं उससे यह अपेक्षित है कि वह अपने मत के आधार पर स्वयं दोषसिद्धी या दोषमुक्ति का जैसा भी विधि अनुसार उचित हो, निर्णय पारित करें। इस संबंध में ***(1958) 2 मद्रास ला जर्नल 175*** (देखिये ए.आई.आर. मेनुअल (पाँचवा संस्करण, 1989 का पृष्ठ क्र. 354) अवलोकनीय हैं।

टीप:– उक्त विषय पर विस्तृत लेख जोति जनरल 2004 (फरवरी 04 अंक) के भाग एक, पृष्ठ 20 पर प्रकाशित हुआ है।

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नोट:– स्तंम्भ **'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

196. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 (1) (a), 12 (3) Proviso, 13 (1), (5) and (6)

Protection of S.13 and benefit of the proviso – S.12 (3) in subsequent proceedings u/s 12 (1) (a) is not available to the tenant – If the rent is not tendered within 2 months of service of notice by landlord for payment of arrears, Court has to pass a decree for ejectment u/s 12 (1) (a).

Sobhagyamal and another v. Gopal Das Nikhra

Judgment dated 22.02.2008 passed by the Supreme Court in Civil Appeal No. 1839 of 2004, reported in (2008) 3 SCC 788

Held:

A landlord can seek ejectment of his tenant from the premises let out to him only on the ground(s) enumerated in Section 12 of the Act. Clause (a) of sub-section (1) of Section 12 of the Act authorises the landlord to seek ejectment of his tenant if he has neither paid nor tendered the whole of the arrears of rent legally recoverable from him within two months of the service of notice demanding the arrears of rent. Sub-section (3) of Section 12 puts a caveat on the right of the landlord to get ejectment on the ground of arrears of rent if the tenant makes payment or deposit as required by Section 13. However, by virtue of the proviso to sub-section (3), the benefit given to the tenant, on compliance of the payment of rent as provided under Section 13, would be available to him only once in respect of that accommodation, but on default in the payment of rent in respect of same accommodation for three consecutive months he would not be entitled for protection by depositing the rent as provided under Section 13 in the subsequent proceedings initiated by the landlord for ejectment of the tenant on the ground of arrears of rent.

Section 13 of the Act requires that the tenant shall within one month of the service of writ of summons or notice of appeal or of any other proceeding deposit the rent when the proceedings are initiated by the landlord on any of the grounds referred to in Section 12 or within one month of institution of appeal or any other proceeding when taken by the tenant against any decree or order for his eviction. The period of one month given to the tenant for depositing the rent from the date of the summons or the notice of appeal or of any other proceeding could be extended by the court on an application made to it. The rent which is required to be deposited under the Section can be in the court or it may be made over to the landlord. The Section further requires that after the deposit of the arrears of rent the tenant shall continue to make deposit or pay month by month by 15th of each succeeding month a sum equivalent to the rent at that rate till the decision of the suit, appeal or proceeding, as the case may be. Sub- section (5) of Section

13 provides that if the tenant makes deposit or payment as required by sub-section (1) or sub-section (2) no decree or order shall be made by the court for recovery of possession on the ground of default in the payment of rent by the tenant. Sub-section (6) gives an option to the landlord if the tenant does not deposit the rent or pay it to the landlord as required under Section 13 to move an application for the defence against eviction to be struck out. Sub- section (5) of Section 13 has no application in a case when the ejectment is not sought by the landlord on the ground of arrears of rent, but the suit is instituted by the landlord on any other ground(s) of Section 12 of the Act. Striking out of the defence of the tenant on an application moved by the landlord, is a provision applicable in the suit for ejectment on any of the grounds mentioned under Section 12 inclusive of under Section 12 (1) (a) of the Act, whereas sub-section (5) of Section 13 would apply only when the suit is instituted for ejectment on the ground of arrears of rent under Section 12 (1) (a) of the Act.

From the aforesaid, it is clear that Section 12 (3) of the Act provides for an exception to the general rule contained in Section 12 (1) (a) that in the event tenant becomes a defaulter, he is liable to be evicted. From the proviso to Section 12(3) of the Act, it is clear that the protection given to the tenant is only one time protection. Proviso appended to Section 12 (3) controls the main provisions. The exemption contained in Section 12 (3), thus, is not extended to the tenant who becomes a defaulter for more than once. In view of the aforesaid, we are of the opinion that once the tenant had availed the benefit of the proviso to Section 12 (3) of the Act, the said benefit was not available to the tenant in committing a further default in payment of rent for three consecutive months.

The tenant can only be protected against ejectment on the ground of arrears of rent in the subsequent proceedings if he deposits the rent in the court or pay it to the landlord during the pendency of the proceedings in the court or pay it to the landlord after the suit is decided by the court. If there is a default for three consecutive months in the payment of rent and the rent has not been tendered within two months of the service of notice by the landlord for payment of arrears, a cause of action accrued in favour of the landlord to initiate proceedings for ejectment of the tenant by filing a suit under Section 12(1)(a) of the Act and thereafter Section 12 (3) or Section 13 (5) would not be attracted.

The High Court has committed an error in applying the provisions of sub-section (6) of Section 13 to the second suit initiated by the landlord under Section 12 (1) (a) on the ground of arrears of rent. That provision is only for the purpose of striking out of the defence of a tenant if the rent is not deposited as required under Section 13 which has nothing to do with the provisions of sub-section (3) of Section 12 or sub-section (5) of Section 13.

In the present case, the trial court gave benefit to the tenant of Section 12(3) of the Act in the previous proceedings. The tenant by not depositing the rent either in the court or paying it to the landlord, has committed a default and there being three consecutive defaults in the payment of rent as referred in

proviso to sub-section (3) of Section 12 of the Act and on non-payment of arrears of rent within two months of the service of notice of demand, the landlord would be entitled to file a second suit for ejectment on the ground of arrears of rent and the court has to pass a decree for ejectment under Section 12 (1) (a) of the Act.

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***197. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (b) Sub-letting – Defendant taking accommodation for carrying business in the name and style 'Mukesh Kumar Rakesh Kumar Garg' – Later on firm was registered but defendant was not a partner in the said firm – No pleading by defendant that he is having legal possession or having control over suit premises – Merely because partners are father and uncle of defendant not a ground to hold that suit premises has not been sub-let – Plaintiff entitled for decree u/s 12 (1) (b).**

Mukesh Kumar Garg v. Ramchandra Motwani

Reported in I.L.R. (2008) M.P. 551

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***198. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 37 & 45 Jurisdiction of Civil Court – Defendant carried out repair works after obtaining order from Rent Controlling Authority – Civil Court has no jurisdiction to direct deduction of repairing expenses from the rent, as it is barred by virtue of S.45 of the Act.**

Banarsi Devi Jain v. M.P. Transport Company

Reported in I.L.R. (2008) M.P. 555

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199. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 39

(i) Object and scope of the Act.

(ii) S. 39 of the Act, applicability of – Right of self occupation must be exercised before allotment – After allotment, if landlord wants the accommodation for any reason then his remedy is either to file a civil suit u/s 12 of the Act or to initiate proceedings u/s 23-A of the Act, as the case may be – The landlord cannot resort to provisions of S.39 of the Act to secure an order of eviction.

Narmada Bai Lambhate v. Shakuntala Idane (Soni)

Reported in 2008 (2) MPHT 222

Held:

It is a common knowledge that after the Second World War, there was acute shortage of housing, therefore, it was felt that the right of landlord to claim eviction under general law should be regulated by rent legislation and the laws of landlord and tenant must be made rationale and benevolent so as to protect the interests of the tenants. The M.P. Accommodation Control Act, 1961

is one of such piece of legislation which controls the unfettered right of the landlord to let out on rent and seek eviction of a tenant from the rented premises. Now a landlord can seek eviction of tenant only on the grounds specified under Section 12 of the Act wherever the Act is applicable. It also controls the right of landlord to let out if an accommodation covered by the Act has fallen vacant or is likely to fall vacant. Provision has been made for this purpose in Section 39 of the Act. From a bare perusal of Section 39 of the Act it would be clear that it enjoins upon a landlord to give information to the Competent Authority if an accommodation has fallen vacant or is likely to fall vacant within the specified time so that any person holding office of profit under the Union or the State Government or any person in the service of Local Authority, i.e. Electricity Board, Board of Secondary Education or such other body corporation, as may be notified from time to time, could be allotted the accommodation. At the same time, the law recognizes the right of self occupation of the landlord provided he discloses sufficient grounds in the information which the landlord is required to give under sub-section (1) of Section 39 of the Act. A bare perusal of the provisions clearly goes to show that the right for self occupation must be exercised before an accommodation is allotted to a person covered under sub-section (2) of Section 39 of the Act. Once the accommodation is allotted and after the allotment, the landlord wants the accommodation for any reason, then his remedy is either to file a civil suit under Section 12 of the Act or to initiate proceedings under Section 23-A of the Act, as the case may be. The landlord cannot resort to provisions of Section 39 of the Act to secure an order of eviction. I am fortified in my view of the observations of the Full Bench in *Durga Prasad v. K.P. Dixit, 1984 JLJ 10,* which reads as under:–

> "6. Under Section 39 of the Act, the authorized officer is entitled to make allotment of the accommodation in case it has fallen vacant or it likely to fall vacant. This is the action which is envisaged under Scion 39 of the Act. *Section 39 of the Act, however, does not permit the authorized officer to direct a tenant or an unlawful sub-tenant to quit the accommodation. That right is with the landlord who may, if he so chooses, seek the ejectment of his tenant and also to obtain possession from such unlawful sub-tenant by instituting a regular suit.* The jurisdiction of the authorized officer is to make the allotment and direct the landlord to put the allottee in possession; and in case the allottee is obstructed to securing possession, to assist him, in obtaining possession."

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200. ARBITRATION AND CONCILIATION ACT, 1996 – Part I, Sections 34 & 48

The provisions of Part I of the Act also apply to 'international commercial arbitrations' and their proceedings.

Foreign award passed outside India can be enforced in India unless by express or implied agreement the application of the provision of Part I of the Act are excluded by the parties.

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

Reported in AIR 2008 SC 1061

Held:

The provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. Where such arbitration is held in India, the provisions of Part-I would compulsorily apply and parties are free to deviate to the extent permitted by the provisions of Part-I. Even in the case of international commercial arbitrations held out of India provisions of Part-I would apply unless the parties by agreement express or implied, exclude all or any of its provisions. Such an interpretation does not lead to any conflict between any of the provisions of the Act and there is no lacuna as such. The matter, therefore, is concluded by the decision in *Bhatia International v. Bulk Trading S.A. & Anr., 2002 AIR SCW 1285,* followed.

Foreign award which was passed outside India cannot be said to be not enforceable in India by invoking the provisions of the Act or the CPC. The very fact that the decision in *Bhaita International* (supra) holds that it would open to the parties to exclude the application of the provisions of Part I by express or implied agreement, would mean that otherwise the whole of Part I would apply. In any event, to apply S.34 to foreign international awards would not be inconsistent with S. 48 of the Act, or any other provision of Part II as a situation may arise, where, even in respect of properties situate in India and where an award would be invalid if opposed to the public policy of India, merely because the judgment-debtor resides abroad, the award can be enforced against properties in India through personal compliance of the judgment-debtor and by holding out the threat of contempt as is being sought to be done in the present case. In such an event, the judgment-debtor cannot be deprived of his right under S. 34 to invoke the public policy of India, to set aside the award. The public policy of India includes – (a) the fundamental policy of India; or (b) the interests of India; or (c) justice or morality; or (d) in addition, if it is patently illegal. This extended definition of public policy can be by-passed by taking the award to a foreign country for enforcement – In company law, the word 'transfer' has a definite connotation which would require the ownership of the shares to be transferred to the transferee, which would involve the steps being taken under the Company Act and the rules and regulations thereunder, as well as the Foreign Exchange Management Act, 1999 (FEMA). Respondent in enforcing the Award passed by arbitration foreign country directing foreign company a

shareholder in joint venture company. Indian company to transfer shares in favour of respondent company in the US District Court instead of Indian Courts can be said to have been motivated by the intention of evading the legal and regulatory scrutiny to which this transaction would have been subjected to had it been enforced in India. Therefore, respondent was not prepared to enforce the Award inspite of intimate and close nexus to India and its laws, the appellant would certainly not be deprived of the right to challenge the award in Indian Courts.

The fact that the appellant having participated and consented in proceedings filed in foreign Court by the respondent for execution of the award, would not be precluded from re-opening the very some issue by filing a suit in a Court. Moreover, when the High Court in India restrained the respondent from effecting transfer of the shares pending further orders by the City Civil Court, the respondent could not have proceeded the issue before the foreign district court, without getting the said interim orders/directions vacated.

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201. ARBITRATION & CONCILIATION ACT, 1996 – Sections 8 & 7

Reference to arbitration by Civil Court, requirement of –

(i) There should be an arbitration agreement between the parties;

(ii) Arbitration agreement claimed to be illegal and void by the other party, reference in such case is not proper – Only Civil Court can grant such relief;

(iii) Application for reference must be filed at the earliest possible opportunity at least before filing written statement;

(iv) Application must be accompanied with original or duly certified copy of agreement, even though document is on the record – Requirement is mandatory in nature.

Atul Singh and others v Sunil Kumar Singh and others

Judgment dated 04.01.2008 passed by the Supreme Court in Civil Appeal No. 10 of 2008, reported in (2008) 2 SCC 602

Held:

In order to appreciate the contention raised by learned Counsel for the parties, it will be convenient to set out Sections 7 and 8 of the 1996 Act:

> *"7. Arbitration agreement.*– (1) In this Part, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (3) An arbitration agreement shall be in writing.
>
> (4) An arbitration agreement is in writing if it is contained in —
>
> (a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

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

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

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

Sub-section (1) of Section 8 of the 1996 Act says that:

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

Therefore, for application of Section 8, it is absolutely essential that there should be an arbitration agreement between the parties.

The first relief claimed by the plaintiffs in the suit is a decree for declaration that the reconstituted partnership deed dated 17.2.1992 was illegal and void and there was no intention or desire of Shri Rajendra Prasad Singh to retire from the partnership and further that the plaintiffs being heirs of Shri Rajendra Prasad Singh will be deemed to be continuing as partners to the extent of his share. It is true that the plaintiffs have also sought rendition of accounts and their share of profits from the partnership as well as interest over the unsecured loan and the principal amount of unsecured loan on rendition of accounts. For getting this relief, the plaintiffs undoubtedly rely upon the partnership deed dated 13.1.1989. However, this deed of 1989 could be relied upon and form the basis of the claim of the plaintiffs only if the partnership deed dated 17.2.1992 was declared as void. If the deed dated 17.2.1992 was not declared as void and remained valid and operative, the plaintiffs could not fall back upon the earlier

partnership deed dated 13.1.1989 to claim rendition of accounts and their share of profits. Therefore, in order to get their share of profits from the partnership business, it was absolutely essential for the appellant plaintiffs to have the partnership deed dated 17.2.1992 declared as illegal, void and inoperative. The relief for such a declaration could only be granted by the civil Court and not by an arbitrator as they or Shri Rajendra Prasad Singh through whom plaintiffs derive title, are not party to the said deed. The trial Court had, therefore, rightly held that the matter could not be referred to arbitration and the view to the contrary taken by the High Court is clearly illegal.

There is no whisper in the petition dated 28.2.2005 that the original arbitration agreement or a duly certified copy thereof is being filed along with the application. Therefore, there was a clear non-compliance with Sub-section (2) of Section 8 of 1996 Act which is a mandatory provision and the dispute could not have been referred to arbitration. Learned Counsel for the respondent has submitted that a copy of the partnership deed was on the record of the case. However, in order to satisfy the requirement of Sub-section (2) of Section 8 of the Act, Defendant No. 3 should have filed the original arbitration agreement or a duly certified copy thereof along with the petition filed by him on 28.2.2005, which he did not do. Therefore, no order for referring the dispute to arbitration could have been passed in the suit.

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***202. ARBITRATION & CONCILIATION ACT, 1996 – Section 11 (6)**
Appointment of Arbitrator in contravention of arbitration clause, effect of – Appointment of Arbitrator in a unilateral manner is null and void – Arbitral proceedings assumed by him are equally null and void.
M.P. Housing Board and another v. Sohanlal Chourasia and another
Reported in 2008 (2) MPLJ 103

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203. CIVIL PROCEDURE CODE, 1908 – Section 11
Doctrine of res-judicata, applicability of – Law explained.
Indramani Prasad Shukla and others v. Smt. Shakuntala and another
Reported in 2008 (2) MPLJ 164

Held:

In the case of *Isher Singh v. Shrawan Singh and others, AIR 1965 SC 948* (V 52 C 151), the Apex Court has held that: –

> "The Question whether a mater was directly and substantially in issue in the former suit has to be decided (a) on the pleadings in the former suit, (b) the issues struck therein, and (c) the decision in the suit. Further, it depends

upon whether a decision on such an issue will materially affect the decision of the suit."

In the case of *Pawan Kumar Gupta v. Rochiram Nagdeo, AIR 1999 SC 1823,* the Apex Court has held that :

> "Thus the second legal position is this : If dismissal of the prior suit was on a ground affecting the maintainability of the suit any finding in the judgment adverse to the defendant would not operate as res judicata in a subsequent suit. But if dismissal of the suit was on account of extinguishment of the cause of action or any other similar cause a decision made in the suit on a vital issue involved therein would operate as res judicata in a subsequent suit between the same parties. It is for the defendant in such a suit to choose whether the judgment should be appealed against or not. If he does not choose to file the appeal he cannot thereby avert the bar of res judicata in the subsequent suit."

The doctrine of res judicata also applies in between the co-defendants. The conditions for its application are as follows :

"(1) there must be conflict of interest between the defendant concerned;

(2) it must be necessary to decide the conflict in order to give the plaintiff the relief he claims;

(3) the co-defendants must be necessary or proper parties to the suit;

(4) the question between the defendants must have been finally decided inter se between them."

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204. CIVIL PROCEDURE CODE, 1908 – Section 47
Powers of executing Court – Relief, not in consonance of tenor of decree – Cannot be given to the decree holder.
Gurudev Singh v. Narain Singh
Reported in AIR 2008 SC 630

Held:

The appellant (Judgment Debtor) herein was restrained by a permanent injunction from planting any tree on khasra Nos. 17/2 on the one side and khasra No. 218/1 and 17/1 on the other side. The decree did not speak of removal of any tree which had already been planted. The executing Court, as noticed hereinbefore, while interpreting the said decree proceeded completely on a wrong premise to hold that there should not be any tree within two Karams on either side of the common boundary of the parties. Such an interpretation evidently is not in consonance with the tenor of the decree.

It is well stated that executing Court cannot go behind the decree. As the decree did not clothe the decree holder to pray for execution of the decree by way of removal of the trees, the same could not have been directed by the learned executing Court in the name of construing the spirit of the decree under execution.

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***205. CIVIL PROCEDURE CODE, 1908 – Section 96**
SPECIFIC RELIEF ACT, 1963 – Sections 10, 12 & 16 (c)
CONTRACT ACT, 1872 – Section 55
Appreciation of Evidence – Findings of Trial Court based on proper appreciation of evidence could not be interfered in appeal in routine manner unless the same appears to be contrary to available record.
Agreement to sell –Time when essence of contract – Vendor accepting part payment of consideration amount after stipulated period – It amounts to extension of fresh limitation to perform contract – Appellants by receiving such payment waived the right to say that time was essence of contract – Stipulated time was not the essence of contract between parties.
Readiness and willingness – Oral evidence led by plaintiff regarding his readiness and willingness reliable – Merely in the lack of any documentary evidence it could not be inferred that plaintiff was not ready and willing to perform his part of contract.
Shankar Lal Pandey v. Tarachand Kulparia
Reported in I.L.R. (2008) M.P. 824

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***206. CIVIL PROCEDURE CODE, 1908 – Section 151**
Two suits, consolidation of – Plaintiff filed a suit for declaration and injunction in respect of land on the basis of an agreement to sale pleading that since defendant had failed to abide by the conditions of the said agreement, it had lost its efficacy – The defendant also brought a suit against the plaintiff in the same Court for specific performance of the same agreement – Trial Court ordered consolidation of the two suits – Held, Trial Court had rightly ordered consolidation of suits – Further held, consolidation of two suits may be ordered by a Court in exercise of inherent powers u/s 151 of the Code to save the parties from multiplicity of the proceedings, delay and expenses.
Manakchand Ruthia v. Rajendra Kumar Agrawal and another
Reported in 2008 (2) MPHT 64

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207. CIVIL PROCEDURE CODE, 1908 – Section 151, Order 1 Rule 16 and Order 22 Rule 10

Transferee *pendente lite*, impleadment of – Transferee *pendente lite* can be added as a proper party if his interest in the subject matter of the suit is substantial and not just peripheral – Apart from that, the L.R. of the deceased transferor not taking any interest is to defend.

Prahalad Singh v. Jammna Bai and others

Reported in 2008 (2) MPHT 72

Held:

It is apparent on record that initially the suit was filed against the deceased respondent Jamnabai and other on dismissing the same this appeal is preferred by the appellant. In pendency of this appeal he proposed respondents purchased the disputed property form Jamnabai vide registered sale deeds dated 2.5.1992 and on their strength each of them filed their separate suits seeking declaration and perpetual injunction against the appellants. The same were dismissed by the Trial Court but were decreed by the Appellate Court against which at the instance of the appellants the Second Appeals bearing Nos. 330/07 and 331/07 are pending in this Court against the proposed respondents. In pendency of such second appeals the proposed respondents want to join this appeal to save their acquired rights and interest. As per provision of Section 52 of Transfer of Property Act the decision of this appeal shall be binding against them. Although in view of the aforesaid provision of the Transfer of Property Act the presence of the proposed respondents in this appeal is not necessary to pass the effective decree. But simultaneously it cannot be brushed aside that after transferring the property to proposed respondents perhaps Jamnabai and after her demise her legal representatives are not taking interest to defend this appeal. Besides this in view of the provision of Order 22 Rule 10 read with Order 1 Rule 10 of the CPC after acquiring the rights by assignment they have a right to join this appeal for protecting their rights till the extent of the right of Jamnabai. In such premises, I am of the view that they should be permitted to join this appeal.

My aforesaid view is fully fortified by the decision of the Apex Court in the matter of *Amit Kumar Shaw v. Farida Khatoon, AIR 2005 SC 2209,* in which it was held as under :–

> 16. The doctrine of lis pendens applies only where the lis is pending before a Court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the Court has a discretion to make him a party. But the transferee *pendente lite* can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral. A transferee *pendente lite* to the extent he has acquired interest from the defendant

is vitally interested in the litigation, whether the transfer is of the entire interest of the defendant, the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party; under Order XXII Rule 10 and alienee *pendente lite* may be joined as a party. As already noticed, the Court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The Court has held that a transferee *pendente lite* of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where the transferee *pendente lite* is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case.

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***208. CIVIL PROCEDURE CODE, 1908 – Section 152**

S. 152 of the Code, applicability of – House number wrongly typed in the judgment – Application for correction rejected by the Trial Court – Held, if by accidental slip or by clerical error in the judgment, incorrect number has been typed, it was incumbent upon the Court concerned to correct the said error when it was brought to its notice by filing an application u/s 152 of the Code.

Sarojini Mahule v. Kailash Chandra Vishwakarma

Reported in 2008 (2) MPLJ 51

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209. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17 Proviso

What should be the stage of commencement of the trial ? Yet not made any specific pronouncement – Amendment petition filed after framing of issues – To settle down the real question in controversy between the parties and in the interest of justice, application allowed – At this stage merit of the amendment is irrelevant.

Usha Devi v. Rijwan Ahamad and others

Judgment dated 17.01.2008 passed by the Supreme Court in Civil Appeal No. 481 of 2008, reported in (2008) 3 SCC 717

Held:

Order 6 Rule 17 CPC in its amended form w.e.f. 01.07.2002 carries a proviso that bars any amendment after the commencement of trial unless the court came to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of trial. In this case

amendment application was filed after framing of issues and proceedings of miscellaneous cases for correction of the description of the suit premises in the suit.

In the case of *Ajendraprasadji N. Pandey v.Swami Keshavprakeshdasji N., (2006) 12 SCC 1* in para 57 of the decision, it was observed as follows: (SCC p. 18)

> "57. It is submitted that the date of settlement of issues is the date of commencement of trial. (*Kailash v. Nanhku, (2005) 4 SCC 480*) Either treating the date of settlement of issues as date of commencement of trial or treating the filing of affidavit which is treated as examination-in-chief as date of commencement of trial, the matter will fall under proviso to Order 6 Rule 17 CPC. The defendant has, therefore, to prove that in spite of due diligence, he could not have raised the matter before the commencement of trial. We have already referred to the dates and events very elaborately mentioned in the counter-affidavit which proves lack of due diligence on the part of the defendants 1 and 2 (the appellants).

In *Baldev Singh v. Manohar Singh, (2006) 6 SCC 498* in paragraph 17 of the decision, it was held and observed as follows : (SCC pp. 504-05)

> "17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion on the court to allow an amendment of the written statement at any stage of the proceedings."

In *Sajjan Kumar v. Ram Kishan, (2005) 13 SCC 89* a three-Judge Bench of this Court in a similar circumstance, allowing the prayer for amendment in para 5 of the decision observed as follows: (SCC p. 90)

"Having heard the learned Counsel for the parties, we are satisfied that the appeal deserves to be allowed as the trial court, while rejecting the prayer for amendment has failed to exercise the jurisdiction vested in it by law and by the failure to so exercise it, has occasioned a possible failure of justice. Such an error committed by the trial court was liable to be corrected by the High Court in exercise of its supervisory jurisdiction, even if Section 115 CPC would not have been strictly applicable. It is true that the plaintiff-appellant ought to have been diligent in promptly seeking the amendment in the plaint at an early stage of the suit, more so when the error on the part of the plaintiff was pointed out by the defendant in the written statement itself. Still, we are of the opinion that the proposed amendment was necessary for the purpose of bringing to the fore the real question in controversy between the parties and the refusal to permit the amendment would create needless complications at the stage of the execution in the event of the plaintiff-appellant succeeding in the suit."

In view of the decision in *Sajjan Kumar* (supra) we are of the view that this appeal too deserves to be allowed. We may clarify here that in this order we do not venture to make any pronouncement on the larger issue as to the stage that would mark the commencement of trial of a suit but we simply find that the appeal in hand is closer on facts to the decision in *Sajjan Kumar* (supra) and following that decision the prayer for amendment in the present appeal should also be allowed.

As to the submission made on behalf of the respondents that the amendment will render the suit non-maintainable because it would not only materially change the suit property but also change the cause of action it has only to be pointed out that in order to allow the prayer for amendment the merit of the amendment is hardly a relevant consideration and it will be open to the defendants-respondents to raise their objection in regard to the amended plaint by making any corresponding amendments in their written statement.

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210. CIVIL PROCEDURE CODE, 1908 – Order 20 Rule 18 & Order 6 Rule 17

(i) Family settlement and partition, effect of – Unless family settlement is effected with intention of bringing an end to joint status of family, it cannot be equated to a family partition.

(ii) Suit for partition and perpetual injunction – Plaintiff filed application for amendment at preliminary stage of the suit seeking amendment to delete averments in respect to oral family settlement as it was not legal – Amendment application allowed by the Trial Court – Held, it is not an abstract law that an

admission cannot be withdrawn at all in all cases – Proposed amendment was not necessary for deciding real controversy between the parties – No prejudice caused to defendants – Amendment rightly allowed by the Court.

Jagram Shakya and others v. Gokul Prasad
Reported in 2008 (1) MPLJ 517

Held:

(i) "Family settlement" is not synonymous to partition. A partition causes severance of status of the family as well the joint family property whereas a family settlement is effected for better and convenient user of joint family property. A family settlement, in strict sense, does not cause severance of status whereas a family partition does result into severance of status. A member of H.U.F. in occupation of a particular portion of H.U.F. property under a family settlement may compel another member to approach a Court of law for seeking partition. To this extent, Courts often recognise family settlement which is obviously to allow joint family to maintain the balance amongst its members. By virtue of a valid partition, title of other sharers would come to an end with respect to a specific portion allotted to a particular member. A family settlement is normally effected for peaceful, better and convenient user and enjoyment of the family property. Rights of other members are not extinguished in a specific portion allotted to a particular member in family settlement. Thus, unless a family settlement is effected with an intention of bringing an end to the joint status of the family, it cannot be equated to a family partition.

(ii) Learned counsel appearing for the petitioners contended that the plaint as well as the application for temporary injunction contained admission about the oral family settlement having taken place between the parties. This admission cannot be permitted to be withdrawn in the light of the law laid down by the Apex Court in the case of *M/s Modi Spinning and Weaving Mills Co. Ltd. and another vs. M/s Ladha Ram and Co., AIR 1977 SC 680 and Heeralal vs. Kalyan Mal and others, AIR 1998 SC 618.*

Before adverting to the citations relied upon by the learned counsel for the petitioners, I would like to refer to the decision of Hon'ble Supreme Court of India in the case of Narayan Bhagwantrao Gosavi Balajiwale vs. Gopal Vinayak Gosavi and others, AIR 1960 SC 100 wherein it has been held:-

> "An admission is the best evidence that an opposing party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous."

Aforesaid observation of the Apex Court clearly goes to show that it is not an abstract law that an admission cannot be withdrawn at all in any case. On the contrary, it may successfully be withdrawn or even without such withdrawal may be proved to be erroneous. Similarly, the Apex Court in the case of *Estralla Rubber vs. Dass Estate (P) Ltd., (2001) 8 SCC 97* has held that even if there

were some admissions in the plaint as well as in the written statement it was still open to the parties to explain the same by way of filing an application for amendment of pleadings. Lastly, in the case of *Baldev Singh and others vs. Manoharsingh and another, 2006(4) MPLJ (SC) 1 = (2006) 6 SCC 498* Hon'ble Supreme Court of India has held to the effect that the withdrawal of admission from pleadings is not impermissible.

Now, it is to be examined that did the plaint contain an admission of the kind which could not be withdrawn at all. Earlier averment of the plaint were to the effect that an oral family partition took place between the plaintiff and defendants which was not in accordance with law. It was rather contrary to the law and is not acceptable to the plaintiff/respondent. These averments were permitted to be substituted by way of amendment by the averments that it was decided between the plaintiff and defendants that the portions occupied by respective parties would remain in the user and enjoyment of the particular occupant until a partition amongst them takes place.

Plaintiff/respondent did not accept the alleged family settlement as binding on him even in the earlier pleadings. Secondly, the learned trial judge while allowing the application for amendment has clearly observed that the proposed amendment is necessary for deciding the real controversy involved between the parties. In the case of *Heeralal* (supra) the Apex Court has disallowed an application for amendment for withdrawal of admission on the ground that it would displace the plaintiff from his case. In the present case, it has already been found that no prejudice would be caused to the defendants who shall have a full right to prove their defence. Moreover, there was no admission in unambiguous and unequivocal language, which may be stated to have been withdrawn by the proposed amendment.

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211. CIVIL PROCEDURE CODE, 1908 – Order 23 Rule 1 (3)

Civil suit, withdrawal of – O.23 Rule 1 (3) of the Code gives discretion to the Court to allow the withdrawal of the suit if the conditions laid down therein are satisfied – It is not mandatory on the Court to allow it.

Durga Prasad and others v. Laxminarayan deceased through LRs

Reported in 2008 (2) MPLJ 23

Held:

Order 23, Rule 1 (3), Civil Procedure Code gives discretion to the Court to allow the withdrawal of the suit if the conditions laid down therein are satisfied. From a bare perusal of the provisions, it is clear that it does not cast any mandatory duty on the Court to allow the withdrawal application. In *Shantilal Bardichand Mahajan v. Champalal Radhaji and others, 1962 MPLJ 596,* this Court had held as under:–

"The Court is not merely an umpire watching a battle of wit between the parties from a distance through a telescope. The Court is charged with the responsibility of guiding the procedure and apprising the parties whenever necessary of their duties. But the law is complicated, the individual litigant is most often a layman and legal advice at the bar cannot always be as efficient as can be desired. The Court may have to direct the party on the requirements of law whenever there has been a patent omission. Legal procedure is full of traps; if a litigant happens to stumble, the Courts should give a helping hand, except when this is the result of an attempt to be clever and to over-reach the Court or to do something inequitable to the other side. In the latter, even the party concerned should be dealt with severely. But where it is the slip or inadvertence, the only consideration is whether in the interval the other side had acquired an equity by the operation of limitation or other wise."

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212. CIVIL PROCEDURE CODE, 1908 – Order 23 Rule 1 (3)

Whether non-joinder of party in a suit is a formal defect as contemplated under Order 23 (1) (3) of the Code? Held, No – Further held, on such ground, plaintiff cannot be permitted to withdraw the suit.

Vinod Kumar Gupta v. Ramadevi Shivhare and another

Reported in 2008 (2) MPLJ 151

Held:

The question as to whether non-joinder of party in a suit is a formal defect as contemplated under sub-rule (3) of Rule 1 of Order 23, Civil Procedure Code has been considered in the case of *Khatuna and another v. Ramsewak Kashinath and another, AIR 1986 Orissa 1* by the Orissa High Court. It has been held by the Orissa High Court in the aforesaid case that non-joinder of necessary party in a suit is not a formal defect. It is held that such a defect strikes at the root of the suit and in such case provisions of Order 23 Rule 1 is not attracted. For arriving at such a conclusion and before laying down the aforesaid principle, the Orissa High Court has placed reliance on a Division Bench's judgment of the Calcutta High Court in the case of *Haridas Sadhu Khan v. Giridhari Sadhu Khan, AIR 1934 Cal 59* wherein it has been held by the Calcutta High Court that the defect to the effect in a suit that certain necessary party was not impleaded is not a formal defect. It is seen that similar view was expressed in the case of *Ram Padarth Misir v. Data Din Misir, AIR 1941 Oudh 417* and by the Allahabad High Court in the case of *Muktanath Tiwari v. Vidyashankar Dube, AIR 1943 Allahabad 67. In the case of Asian Assurance Co. Ltd. v. Madholal Sindhu, AIR*

1950 Bombay 378, Chief Justice Chagla who wrote the judgment on behalf of the Division Bench has also held that non-joinder of some of the parties in the suit is not a formal defect as contemplated under Order 23 Rule 1, Civil Procedure Code thereafter again Bombay High Court in the case of *Tarachand Bapuchand v. Gaibihaji Ahamed Bagwan, AIR 1956 Bombay 632* has taken similar view and judgment in this case was rendered by Shri Gajendragadkar J., as he then there was. It is seen that the judgments of the Bombay High Court were followed by the Orissa High Court in the case of *Trinath Parida v. Sobha Bholaini, AIR 1973 Orissa 387* and it was held that non-joinder of necessary party is not a formal defect. The principle laid by the Himachal Pradesh High Court in the case of *Smt. Savitri Devi v. Hiralal, AIR 1977 HP 91* was also taken note of in this case and it was held that principle laid down by the Bombay High Court in the case of *Tarachand Bapuchand* (supra) and the Oudh High Court in the case of *Ram Padarth Misir* (supra) are relied in the Himachal Pradesh High Court and the principles laid in all these judgments are that non-joinder of necessary party is not a formal defect but the defect which strikes at the root of the suit.

It is seen from the judgments of Orissa High Court and Himachal Pradesh High Court that various judgments have been relied upon and it has been the consistent view of most of the Courts that non-joinder of the party is not a formal defect. In the case of *Uma Devi & another v. Nagarpalika Begamgunj & Ors., 1999 (2) MPJR 487,* a Bench of this Court has held that right granted to the plaintiff under Order 23 Rule 1 (3) Civil Procedure Code cannot be claimed as a matter of right. It has been held that plaintiff is required to satisfy the Court and should show good ground for seeking permission to withdraw the suit and grant of liberty. It has been held by this Court in the case of *Uma Devi* (supra) that a trial *de novo* is not to be lightly granted to plaintiff to enable to come prepared to fight a fresh legal battle.

Keeping in view the totality of the facts and circumstances of the case and the principle that emerges from a complete reading of the judgments as indicated hereinabove, it has to be held that in the present case the suit has proceeded to a stage where defendant's evidence under Order 18 Rule 4 Civil Procedure Code has been filed and plaintiffs now want to withdraw the suit and proceed with a trial *de novo.* As the only reason given for invoking the jurisdiction under sub-rule (3) of Rule 1 of Order 23 is non-joinder of party and as non-joinder of necessary party is held not to be a formal defect by various High Courts in the judgments as indicated hereinabove, the application cannot be allowed. Nothing contrary is brought to notice of this Court and this Court also does not see any reason to hold that defect of non-joinder of party is not a formal defect. Accordingly, in the facts and circumstances of the case, it has to be held that the grounds contemplated for withdrawal of a suit under Order 23 Rule 1 (3) Civil Procedure Code is not made out by the plaintiffs in the present case.

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213. CIVIL PROCEDURE CODE, 1908 – Order 34 Rule 1 & Order 1 Rule 9, 10 (2) & (3)

Suit for redemption of mortgage by some of the legal representative after death of mortgagee – Whether in absence of fraud or any collusion and substantial representation of interest of necessary parties, non-joinding of necessary parties have any negative effect? Held, No.

Mohd. Hussain (dead) by LRs. and others v. Gopibai and others

Judgment dated 19.02.2008 passed by the Supreme Court in Civil Appeal No. 912 of 1999, reported in (2008) 3 SCC 233

Held:

In the case of *N.K. Mohd. Sulaiman Sahib Vs. N.C. Mohd. Ismail Saheb and others AIR 1966 SC 792,* this court in paragraph 14 observed as follows:-

> *"14. Ordinarily the Court does not regard a decree binding upon a person who was not impleaded eo nomine in the action. But to that rule there are certain recognized exceptions. Where by the personal law governing the absent heir the heir impleaded represents his interest in the estate of the deceased, there is yet another exception which is evolved in the larger interest of administration of justice. If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the plaintiff has after bona fide enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate. The Court will undoubtedly investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the Court. The Court will also enquire whether there was a real contest in the suit, and may for that purpose ascertain whether there was any special defence which the absent defendant could put forward, but which was not put forward. Where however on account of a bona fide error, the plaintiff seeking relief institutes his suit against a person who is not representing the estate of a deceased person against whom the plaintiff has a claim either at all or even partially, in the absence of fraud or collusion or other ground which taint the decree, a decree passed against the persons impleaded as heirs binds the estate, even though other persons interested in the estate are not brought on the record. This principle applies to all parties irrespective of their religious persuasion."*

From a bare reading of the aforesaid observation of this court in the abovementioned decision, it is clear that ordinarily the court does not regard a decree binding upon a person who was not impleaded in the action. While making this observation, this court culled out some important exceptions: -

(i) Where by the personal law governing the absent heir, the heir impleaded represents his interest in the estate of the deceased, the decree would be binding on all the persons interested in the estate.

(ii) If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the plaintiff has after bona fide enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate.

(iii) The court will also investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the court. Therefore, in the absence of fraud, collusion or other similar grounds, which taint the decree, a decree passed against the heirs impleaded binds the other heirs as well even though the other persons interested are not brought on record.

We find no difficulty in following the principle laid down by this court in the aforesaid decision. The two sons viz., Manaklal and Motilal, who were also the original mortgagees along with Nandram, being the sons of Nandram, duly represented the estate of the deceased. It was not the case of the defendants/ respondents either in the written statement or in evidence that the two married daughters were not made parties collusively or fraudulently. The suit filed by the appellants only against the two sons of Late Nandram and their sons was not out of fraud or collusion between them. It is also clear from the record that the two sons of Nandram seriously contested the suit and also the appeal filed against the judgment of the trial court before the first appellate court and finally the second appeal in the High Court. Therefore, by no stretch of imagination, it can be said that the suit was filed by the plaintiffs/appellants in collusion or fraud with the two sons of Nandram. Therefore, in the absence of such a defence, it must be held that the estate of Late Nandram, one of the mortgagees, was sufficiently and in a bona fide manner represented by Manaklal and Motilal and there was no fraud or collusion between them and the plaintiffs/appellants and accordingly, the decree that would be passed against Manaklal and Motilal as heirs and legal representatives of Late Nandram also binds the estate even though the two married daughters, who may be interested in the estate, were not brought on record. This view is also supported by the decision of this court in *Surayya Begum (Mst) v. Mohd. Usman and others (1991) 3 SCC 114,* in that case, this court in paragraph 9 has observed as follows:-

> "...This of course, is subject to the essential condition that the interest of a person concerned has really been represented by the others; in other words, his interest has been looked after in a bona fide manner. If there be any clash of interests between the person concerned and his assumed representative or if the latter due to collusion or for any other reason, mala fide neglects to defend the case, he cannot be considered to be a representative"

In view of our discussions made hereinabove and following the principles laid down in the aforesaid two decisions of this court, we are, therefore, of the view that the two sons had sufficiently and in a bona fide manner represented the estate of the deceased Nandram and therefore, the suit could not be dismissed on that ground. It is true that in a suit for redemption of mortgage, all the heirs and legal representatives of the deceased mortgagee are necessary parties but, in the facts and circumstances of the present case, we do not find any reason to agree that in the absence of the two married daughters, the suit could not be maintainable in law.

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214. CIVIL PROCEDURE CODE, 1908 – Order 38 Rule 5

Attachment before judgment – Power under Order 38 Rule 5 is extraordinary and should be exercised sparingly in accordance with the rule – The purpose is not to convert an unsecured debt into a secured debt – Plaintiff cannot be compelled to settle their dispute outside the Court on the threat of attachment – Before exercising the power, the Court should satisfy that plaintiff has reasonable chance of a decree being passed, it means that there should be a *prima facie* case – If case is not made out *prima facie,* application should be rejected – If case is made out *prima facie,* then Court should see whether defendant is attempting to remove his assets with the intention of defeating the decree.

Raman Tech. & Process Engg. Co. and another v. Solanki Traders

Judgment dated 20.11.2007 passed by the Supreme Court in Civil Appeal No. 6171 of 2001, reported in (2008) 2 SCC 302

Held:

The object of supplemental proceedings (applications for arrest or attachment before judgment, grant of temporary injunctions and appointment of receivers) is to prevent the ends of justice being defeated. The object of Order 38 Rule 5 CPC in particular, is to prevent any defendant from defeating the realization of the decree that may ultimately be passed in favour of the plaintiff, either by attempting to dispose of, or remove from the jurisdiction of the court, his movables. The Scheme of Order 38 and the use of the words 'to obstruct or delay the execution of any decree that may be passed against him' in Rule 5 make it clear that before exercising the power under the said Rule, the court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant. This would mean that the court should be satisfied that the plaintiff has a prima facie case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 CPC. It is well-settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of

attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing his assets, an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case.

The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs, by obtaining orders of attachment before judgment and forcing the defendants for out of court settlements, under threat of attachment.

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215. CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 & 2, Order 41 & Order 23 Rule 1

Issuance of interim injunction – Withdrawal of appeal – Plaintiff filed a suit for permanent injunction to restraining the defendant from creating any right over the property and interfering with the possession of plaintiff on the ground that agreement to sale is void – Application for interim injunction filed there in – Trial Court dismissed the application that plaintiff has not sought prayer for cancellation of agreement to sale – Plaintiff filed appeal and an application for amendment of plaint is also filed therein – However, appeal had been withdrawn – Appellate Court while allowing to withdraw the appeal passed an order of *status quo* for a period of two weeks – Plaintiff amended the suit and filed again an interim injunction application – Held, after allowing the appeal, appellate court becomes *functus officio*, could not have granted a further relief – Merely, because plaintiff amended the plaint, second interim injunction application could not be granted unless plaintiff has brought out any new circumstances warranting grant of injunction.

Ajay Mohan and others v. H.N. Rai and others

Judgment dated 12.12.2007 passed by the Supreme Court in Civil Appeal No. 5831 of 2007, reported in (2008) 2 SCC 507

Held:

The order of the City Civil Court dated 13.10.2006 may be bad but then it was required to be set aside by the Court of Appeal. An appeal had been preferred by the appellants thereagainst but the same had been withdrawn. The said order dated 13.10.2006, therefore, attained finality. The High Court, while allowing the appellant to withdraw the appeal, no doubt, passed an order of *status quo* for a period of two weeks in terms of its order dated 23.11.2006

but no reason therefor had been assigned. It ex facie had no jurisdiction to pass such an interim order. Once the appeal was permitted to be withdrawn, the Court became *functus officio*. It did not hear the parties on merit. It had not assigned any reason in support thereof. Ordinarily, a court, while allowing a party to withdraw an appeal, could not have granted a further relief. [See *G.E. Power Controls India and Ors. v. S. Lakshmipathy and Ors. (2005) 11 SCC 509*].

The plaintiffs had not brought out any new circumstances warranting grant of any injunction in their favour. Only because a further prayer had been made in the suit upon amending the plaint, the same by itself did not bring about a situational change warranting application of mind afresh by the learned Judge, City Civil Court. The only argument which is available to the appellants was that the suit, by reason of amendment made in the prayer, has become maintainable. Maintainability of the suit itself does not give rise to a triable issue. The issues which arose for consideration in the suit are the ones we would have noticed hereinbefore, namely, inter alia, the validity of the agreement for sale and/or grant of possession in favour of the defendants/respondents. How, by sheer amendment of the plaint, the plaintiff could prove a prima facie case or show existence of a balance of convenience in their favour, has not been demonstrated.

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***216. CONSTITUTION OF INDIA – Article 21**

Protection of life and personal liberty – Construction of Omkareshwar Dam – Rehabilitation – Rehabilitation and resettlement of displaced persons being part of fundamental right of displaced persons guaranteed under Article 21 of the Constitution – They are to be rehabilitated and resettled in such manner that they are better off than what they were before their displacement – Rehabilitation and resettlement is constitutional obligation of State.

Narmada Bachao Andolan v. State of M.P.

Reported in I.L.R (2008) M.P. 509

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217. CONSTITUTION OF INDIA – Articles 32 & 226

Public Interest Litigation – Courts are required to filter out frivolous petitions and dismiss them with costs.

What are relevant considerations of PIL? PIL should not be for publicity or private or political interest litigation – Case law explained.

M/s Holicow Pictures Pvt. Ltd. v. Prem Chandra Mishra & Ors.

Reported in AIR 2008 SC 913

Held:

When there is material to show that a petition styled as a public interest litigation is nothing but a camouflage to foster personal disputes, the said petition is to be thrown out. Before we grapple with the issue involved in the present

case, we feel it necessary to consider the issue regarding public interest aspect. Public Interest Litigation which has now come to occupy an important field in the administration of law should not be "publicity interest litigation" or "private interest litigation" or "politics interest litigation" or the latest trend "paise income litigation". If not properly regulated and abuse averted, it becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well. There must be real and genuine public interest involved in the litigation and not merely an adventure of knight errant borne out of wishful thinking. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. A person acting *bona fide* and having sufficient interest in the proceeding of public interest litigation will alone have a *locus standi* and can approach the Court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration. These aspects were highlighted by this Court in The *Janta Dal v. H.S. Chowdhary, 1993 AIR SCW 248* and *Kazi Lhendup Dorji vs. Central Bureau of Investigation, 1994 AIR SCW 2190.* A writ petitioner who comes to the Court for relief in public interest must come not only with clean hands like any other writ petitioner but also with a clean heart, clean mind and clean objective. (See *Ramjas Foundation vs. Union of India. (AIR 1993 SC 852) and K.R. Srinivas v. R.M. Premchand, (1994 (6) SCC 620*).

In *Janata Dal case* (supra) this Court considered the scope of public interest litigation. In para 52 of the said judgment, after considering what is public interest, has laid down as follows:

> "The expression 'litigation' means a legal action including all proceedings therein initiated in a Court of law for the enforcement of right or seeking a remedy. Therefore, lexically the expression "PIL" means the legal action initiated in a Court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected."

In paras 60, 61 and 62 of the said judgment, it was pointed out as follows:

> "Be that as it may, it is needless to emphasis that the requirement of *locus standi* of a party to a litigation is mandatory, because the legal capacity of the party to any litigation whether in private or public action in relation to any specific remedy sought for has to be primarily ascertained at the threshold."

In para 96 of the said judgment, it has further been pointed out as follows:

> "While this Court has laid down a chain of notable decisions with all emphasis at their command about the importance and significance of this newly developed doctrine of PIL, it has also hastened to sound a red alert and a note of severe warning that Courts should not allow its process to be abused by a mere busy body or a meddlesome interloper or wayfarer or officious intervener without any interest or concern except for personal gain or private profit or other oblique consideration."

In subsequent paras of the said judgment, it was observed as follows:

> "It is thus clear that only a person acting *bona fide* and having sufficient interest in the proceeding of PIL will alone have as *locus standi* and can approach the Court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not a person for personal gain or private profit or political motive or any oblique consideration. Similarly a vexatious petition under the colour of PIL, brought before the Court for vindicating any personal grievance, deserves rejection at the threshold".

It is depressing to note that on account of such trumpery proceedings initiated before the Courts, innumerable days are wasted, the time which otherwise could have been spent for disposal of cases of the genuine litigants. Though we spare no efforts in fostering and developing the laudable concept of PIL and extending our long arm of sympathy to the poor, the ignorant, the oppressed and the needy, whose fundamental rights are infringed and violated and whose grievances go unnoticed, un-represented and unheard; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to death facing gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from undue delay in service matters Government or private, persons awaiting the disposal of cases wherein huge amounts of public revenue or unauthorized collection of tax amounts are locked up, detenu expecting their release from the detention orders etc. etc. are all standing in a long serpentine queue for years with the fond hope of getting into the Courts and having their grievances redressed, the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of publicity break the queue muffing their faces by wearing the mask of public interest litigation and get into the Courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the Courts and as a result of

which the queue standing outside the doors of the Courts never moves, which piquant situation creates frustration in the minds of the genuine litigants and resultantly they loose faith in the administration of our judicial system.

Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and /or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting *bona fide* and not for personal gain or private motive or political motivation or other oblique considerations. The Court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives, and try to bargain for a good deal as well to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

The Council for Public Interest Law set up by the Ford Foundation in USA defined the "public interest litigation" in its report of Public Interest Law, USA, 1976 as follows:

> "Public Interest Law is the name that has recently been given to efforts provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the proper environmentalists, consumers, racial and ethnic minorities and others."

The Court has to be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. The Court has to act ruthlessly while dealing

with imposters and busybodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of *Pro Bono Publico*, though they have no interest of the public or even of their own to protect.

Courts must do justice by promotion of good faith, and prevent law from crafty invasions. Courts must maintain the social balance by interfering where necessary for the sake of justice and refuse to interfere where it is against the social interest and public good. (See *State of Maharashtra vs. Prabhu, [(1994) 2 SCC 481*], and *Andhra Pradesh State Financial Corporation vs. M/s GAR Re-Rolling Mills and Anr., (AIR 1994 SC 2151*). No litigant has a right to unlimited draught on the Court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions. (See *Dr. B.K. Subbarao vs. Mr. K. Parasaran, 1996 AIR SCW 3356.* Today people rush to Courts to file cases in profusion under this attractive name of public interest. They must inspire confidence in Courts and among the public.

As noted supra, a time has come to weed out the petitions, which though titled as public interest litigations are in essence something else. It is shocking to note that Courts are flooded with large number of so called public interest litigations where even a minuscule percentage can legitimately be called as public interest litigations. Though the parameters of public interest litigation have been indicated by this Court in large number of cases, yet unmindful of the real intentions and objectives, Courts are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilized for disposal of genuine cases. It is also noticed that petitions are based on newspaper reports without any attempt to verify their authenticity. As observed by this Court in several cases newspaper reports do not constitute evidence. A petition based on unconfirmed news reports, without verifying their authenticity should not normally be entertained. As noted above, such petitions do not provide any basis for verifying the correctness of statements made and information given in the petition. It would be desirable for the Courts to filter out the frivolous petitions and dismiss them with costs as afore-stated so that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the Courts.

It is true that in certain cases even though the Court comes to the conclusion that the writ petition was not in a public interest, yet if it finds that there is scope for dealing with the matter further in greater public interest, it can be done. This can be done by keeping the writ petitioner out of picture and appointing an amicus curiae. This can only be done in exceptional cases and not in a routine manner.

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218. CONSTITUTION OF INDIA – Article 141

Binding precedent – The essence in a decision is its ratio and not every observation found therein nor what logically flows from various observations made in the judgment – The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent.

The judgments of the Courts are not to be construed as statutes – Judges interpret statutes and not judgments.

Circumstantial flexibilities may change the meaning and applicability.

Govt. of Karnataka & Ors. v. Gowramma & Ors.

Reported in AIR 2008 SC 863

Held:

Reliance on the decision without looking into the factual background of the case before it is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving a judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates – (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent. (See: *State of Orissa v. Sudhansu Sekhar Misra* and *Ors. (AIR 1968 SC 647)* and *Union of India and Ors. v. Dhanwanti Devi and Ors., (1996 (6) SCC 44*). A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in Act of Parliament. In *Quinn v. Leathem, (1901) AC 495* (H.L.), Earl of Halsbury LC observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.

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 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

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219. CONSTITUTION OF INDIA – Article 141

Binding precedent – Dismissal of SLP from *Rama & Co. v. State of Madhya Pradesh and another, 2007 (II) MPJR 229* is not binding precedent as there are earlier judgments in the field and High Court is bound to follow earlier decisions – View taken in *Dr. Jaidev Siddha and others v. Jaiprakash Siddha and others, 2007 (II) MPJR (FB) 361=2007 (3) MPLJ 595* and others cannot be treated to have been impliedly overruled due to dismissal of SLP preferred against order rendered in case of *Rama & Co.* (supra) – Law laid down in case of *Dr. Jaidev Siddha* (supra) holds field and principles laid down therein have full applicability.

Manoj Kumar v. Board of Revenue and others

Reported in I.L.R. (2007) M.P. 1504

Held:

We are of the humble view that dismissal of an appeal from *Rama & Co. v.*

State of Madhya Pradesh and another, 2007 (II) MPJR 229 is not a binding precedent as there are earlier judgments in the field and the High Court is bound to follow the earlier decisions as per the law laid down in *Union of India and another v. Raghubir Singh (dead) by LRs. etc., AIR 1989 SC 1933, Indian Oil Corporation Ltd. v. Municipal Corporation and another, AIR 1995 SC 1480, N.S. Giri v. Corporation of City of Mangalore and others, (1999) 4 SCC 697, Chandra Prakash v. State of U.P. and another, 2002 AIR SCW 1573, Jabalpur Bus Operators Association and others v. State of M.P. and another, 2003 (1) MPJR 158* and *S. Brahmanand and others v. K.R. Muthugopal (dead) and others, (2005) 12 SCC 764.*

We proceed to record our conclusions in seriatim:

(i) A power to issue the writ is original and the jurisdiction exercised is original jurisdiction.

(ii) Proceedings under Article 226 of the Constitution are in exercise of original jurisdiction of the High Court whereas the proceedings initiated under Article 227 of the Constitution are supervisory in nature.

(iii) When a writ is issued under Article 226 of the Constitution, it is issued in exercise of original jurisdiction whether against a Tribunal or an inferior Court or administrative authorities.

(iv) The power exercised under Article 226 of the Constitution is in exercise of original jurisdiction and not supervisory jurisdiction.

(v) Exercise of supervisory power and power of superintendence is not to be equated with the original or supervisory jurisdiction. (Emphasis supplied)

(vi) The order passed in SLP (Civil) No. 9186/2007 is a declaration of law under Article 141 of the Constitution but the High Court is bound to follow the earlier decisions in the field regard being had to the concept of precedents as per law laid down by the Apex Court and the five-Judge Bench decision in *Jabalpur Motor Association* (supra)

(vii) The decision rendered in *Rama and Company* (supra) is binding upon the parties *inter se.*

(viii) The decisions rendered by the Apex Court in the context of appeal under Letters Patent as regards maintainability of an appeal would govern the field pertaining to maintainability of appeal preferred under Section 2 of the 2005 Adhiniyam.

(ix) The view taken by the Full Bench in *Dr. Jaidev Siddha and others* (supra) cannot be treated to have been impliedly overruled due to dismissal of the Special Leave Petition preferred against the order rendered in the case of *Rama and Company* (supra).

(x) The law laid down in the case of *Dr. Jaidev Siddha* (supra) holds the field and the principles laid down therein will have full applicability.

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*220. CONSTITUTION OF INDIA – Articles 309 & 311

Higher pay scale – Petitioner was granted higher pay scale in the year 2000 after completion of 9 years of service – Penalty of censure imposed in the year 2004 – Respondents directed for recovery of Rs. 97,365/- on the ground that penalty of censure was imposed for the period prior to the date when petitioner became entitled to higher pay scale – Held, no disciplinary action/enquiry was pending or contemplated on the date when higher pay scale was granted – Order of punishment was passed on 20.10.2004 – It cannot be said that petitioner was undergoing punishment on due date – No ill effect of censure as no departmental enquiry was pending or contemplated and petitioner was not undergoing any sort of punishment – Order for recovery of surplus amount not sustainable in law.

Mohd. Ayub Khan v. Chairman-cum-Managing Director, M.P. Poorv Kshetra Vidyut Vitran Co. Ltd.

Reported in I.L.R (2008) M.P. 438

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*221. CONSTITUTION OF INDIA – Articles 311 & 14

Violation of principles of natural jastice – "Useless formality theory", application of – Petitioner appointed as Principal in non-government school although he had no requisite qualification – School taken over by State Government – Petitioner absorbed as Principal – Subsequently, order cancelled and was absorbed as Upper Division Teacher – No opportunity of hearing given before cancellation of order – Held, if person lacks basic qualification for the post then observance of principle of natural justice not necessary – Exception termed as "useless formality theory" – Petition dismissed.

Rakesh Kumar Sharma v. State of M.P.

Reported in I.L.R (2008) M.P. 460

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*222. CONTRACT ACT, 1872 – Section 8

Concluded contract – No acceptance of detailed offer sent by plaintiff to the defendant – On the contrary defendant had insisted for certain modifications – Plaintiff failed to communicate acceptance and at no point of time indicated that whether it was ready to accept defendants conditions or not – Plaintiff only insisted on execution of performance bond and agreement – At no point of time it was understood by parties that contract was to be carried out without execution of aforesaid documents – Parties were only negotiating and did not reach *consensus ad idem* necessary for enforceable contract – In absence of concluded contract plaintiff not entitled for extra costs for Rs. 19,35,410/- which was incurred by getting the work

done by some other agency.

M.P. Power Generating Company Ltd., Jabalpur v. Flow More Private Ltd.

Reported in I.L.R (2008) M.P. 810

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223. CRIMINAL PROCEDURE CODE, 1973 – Sections 46 (1) & (2) & 439

What is 'custody' and 'arrest' in context of bail and other proceedings in connection with a criminal case ?

State of Haryana and others v. Dinesh Kumar

Judgment dated 08.01.2008 passed by the Supreme Court in Civil Appeal No. 84 of 2008, reported in (2008) 3 SCC 222

Held:

In order to resolve the controversy that has arisen because of the two divergent views, it will be necessary to examine the concept of 'arrest' and 'custody' in connection with a criminal case. The expression 'arrest' has neither been defined in the Code of Criminal Procedure (hereinafter referred to as the 'Code') nor in the Indian Penal Code or any other enactment dealing with criminal offences. The only indication as to what would constitute 'arrest' may perhaps be found in Section 46 of the Code.

From sub-sections (1) and (2) of Section 46 of the Code this much is clear that in order to make an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be submission to the custody by word or action. Similarly, the expression "custody" has also not been defined in the Code.

In our view, the law relating to the concept of 'arrest' or 'custody' has been correctly stated in *Niranjan Singh v. Prabhakar Rajaram Kharote, (1980) 2 SCC 559* Paragraphs 7, 8 and the relevant portion of paragraph 9 of the decision in the said case states as follows: (SCC pp. 562-63)

> 7. When is a person in custody, within the meaning of Section 439 Cr. P.C.? When he is, in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide- and-seek

> niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubiotics are unfair evasion of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.
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> 8. Custody, in the context of Section 439, (we are not, be noted, dealing with anticipatory bail under Section 438) is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and order of the court.
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> 9. He can be in custody not merely when the police arrest him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before 'he court and submits to its directions."

Unless a person accused of an offence is in custody, he cannot move the Court for bail under Section 439 of the Code, which provides for release on bail of any person accused of an offence and in custody. The pre-condition, therefore, for applying the provisions of Section 439 of the Code is that a person who is an accused must be in custody and his movements must have been restricted before he can move for bail. This aspect of the matter was considered in *Niranjan Singh'a case* where it was held that a person can be stated to be in judicial custody when he surrenders before the Court and submits to its directions.

So far as proceedings in the court are concerned in relation to enquiry into offences under the Indian Penal Code and other criminal enactments. In order to obtain the benefit of bail an accused has to surrender to the custody of the Court or the police authorities before he can be granted the benefit thereunder. In Vol.11 of the 4th Edition of Halsbury's 'Laws of England' the term 'arrest' has been defined in paragraph 99 in the following terms:

> *"99 Meaning of arrest.*– Arrest consists in the seizure or touching of a person's body with a view to his restraint; words may, however, amount to an arrest if, in the circumstances of the case, they are calculated to bring, and do bring, to a person's notice that he is under compulsion and he thereafter submits to the compulsion."

The aforesaid definition is similar in spirit to what is incorporated in Section 46 of the Code of Criminal Procedure. The concept was expanded by this Court in *State of Uttar Pradesh v. Deomen Upadhyaya, AIR 1960 SC 1125* wherein it was interalia observed as follows:

"12. ... Section 46, Cr.P.C. does not contemplate any formality before a person can be said to be taken in custody. Submission to the custody by words of mouth or action by a person is sufficient. A person directly giving a police officer by word of mouth information which may be used as evidence against him may be deemed to have submitted himself to the custody of the Police Officer....."

The sequitur of the above is that when a person, who is not in custody, approaches the police officer and provides information, which leads to the discovery of a fact, which could be used against him, it would be deemed that he had surrendered to the authority of the investigating agency.

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***224. CRIMINAL PROCEDURE CODE, 1973 – Sections 91 & 311**
NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 139
There was business transaction between accused Company and complainant – It was alleged on behalf of the complainant that accused company issued cheque for the payment of price of goods purchased by it – Cheque being dishonoured, complainant filed complaint against accused company in respect of an offence punishable u/s 138 N.I. Act – Accused company specifically made averments that cheque was issued for the purpose of security and guarantee and no goods, as alleged in the complaint, were sent to and received by it – One of the witnesses of the complainant admitted in evidence that the cheque was issued as a security – At the stage of final argument, two applications u/ss 91 and 311 Cr.P.C. were filed by the accused company that the complainant be directed to file all documents, MOUs, bills, account papers, bilties or other documents related to business transaction etc. and that two witnesses of complainant side be recalled for further cross examination in respect of aforesaid documents – Trial Court rejected the applications but they were allowed by the Revisional Court – Held, the onus lies on the part of the accused company with regard to the presumption u/s 139 of the Act appears completely discharged – Now, it is the duty of the complainant to prove his case – Documents in possession of petitioner were to be produced and proved in the Court – If required by accused company, witness would be recalled for further cross-examination – Further held, Revisional Court committed no illegality in allowing such applications.
M/s Map Auto Ltd. v. Anil Kumar Jain and others
Reported in 2008 (2) MPHT 201

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225. CRIMINAL PROCEDURE CODE, 1973 – Section 154
EVIDENCE ACT, 1872 – Section 32
FIR of non-cognizable offence, written and read over to deceased and he puts his thumb impression on the same – The report is admissible as dying declaration.
Loss of original dying declaration as FIR of non-cognizable case proved – Secondary evidence adduced and accepted – No adverse inference could be drawn in regard to non-production of original FIR.
Dharam Pal & Ors. v. State of U.P.
Reported in AIR 2008 SC 920

Held:

The learned Counsel for the appellants further argued before us that the alleged dying declaration which was given the shape of an FIR could not be made the basis of conviction when the original document signed by the deceased was not brought on record. The learned counsel for the appellants tried to prove before us that the deceased was not in a position to speak and which becomes apparent from the testimony of his father. However, it would not be correct to say so. The evidence of PW 7 Dr. R.P. Goel shows that the condition of the deceased was good and that he was in a position to speak. It would not be appropriate for us to read between the lines by giving unnecessary meanings to the testimony of Raghu. It cannot be left out of sight that Raghu also said that the deceased dictated the FIR to the police. In any view of the matter, the report of occurrence was dictated by the deceased himself and the same was read over to him after which he had put his thumb impression on the same. This report is admissible under Section 32 of the Evidence Act as a dying declaration. It is true that the original document signed by the deceased was not brought on record, but in our view, the FIR has rightly been admitted as a dying declaration. There appears no reason for the police to falsely implicate any one of the accused inasmuch as, initially, the report dictated by the deceased was taken down as a non-cognizable report under section 323 of the IPC. If the police were to implicate the accused, they would have not taken down the report as a non-cognizable report in the very first place itself.

That apart, the report dictated by the deceased fully satisfied all the ingredients for being made admissible as a dying declaration. To ascertain this aspect, we may refer to some of the general propositions relating to a dying declaration. Section 32(1) of the Indian Evidence Act deals with dying declaration and lays down that when a statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, such a statement is relevant in every case or proceeding in which the cause of the person's death comes into question. Further, such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death and whatever may be the nature of

the proceedings in which the cause of his death comes into question. The principle on which a dying declaration is admissible in evidence is indicated in the Maxim *"Nemo Moriturus Praesumitur Mentire"*, which means that a man will not meet his maker with a lie in his mouth. Thus it is clear that a dying declaration may be relating to :-

(a) as to the cause of death of the deceased

(b) as to "any of the circumstances of the transaction" which resulted in the death of the deceased.

It is also clear that it is not necessary that the declarant should be under expectation of death at the time of making the statement. If we look at the report dictated by the deceased in the light of the aforesaid propositions, it emerges that the names of the accused and the important features of the case have been clearly mentioned in the report. It contains a narrative by the deceased as to the cause of his death, which finds complete corroboration from the testimony of eye-witnesses and the medical evidence on record. There is nothing on record to show that the deceased was not in a position to speak at the time when he dictated the report of occurrence. On the other hand, the materials and the other evidence on record would conclusively show, as rightly held by the High Court, that the deceased was in a position to speak when he dictated the report of occurrence. Therefore, in our view, the High Court was fully justified in holding that the deceased was in a fit state of mind at the time of making the statement. In the present case, as noted hereinabove, the dying declaration was fully corroborated by the other evidence on record. That apart, in our view, the submission of the learned counsel for the appellants that the dying declaration which was given the shape of an FIR could not be made the basis of conviction when the original document signed by the deceased was not brought on record is not acceptable. It is an admitted position that despite best efforts, the original FIR could not be produced as the registers relating to non-cognizable offences were destroyed after a lapse of two years. For this reason, the Sessions Court had duly considered this aspect of the matter and found that the loss of the original FIR was duly proved by PW 6 and accordingly, the secondary evidence adduced by the prosecution was accepted. We do not find any infirmity in the said finding when, admittedly, the original register was destroyed after a lapse of two years. Therefore, no adverse inference could be drawn against the prosecution for non-production of the original FIR. That being the position and in view of our discussions, we are not inclined to accept the argument of the learned counsel for the appellant that the deceased was not in a position to speak when he dictated the report or that the alleged dying declaration could not be admissible in evidence because of the other infirmities, as noted hereinabove.

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226. CRIMINAL PROCEDURE CODE, 1973 – Sections 154 & 176
INDIAN PENAL CODE, 1860 – Section 302
Death in police encounter – If specific complaint alleging identified individual is made, registration of crime u/s 302 IPC is permissible – In absence of such complaint procedure u/s 176 of Cr.P.C. to be followed.
Registration of case u/s 302 IPC straightway against police officials is not permissible.
Andhra Pradesh Civil Liberties Committee, Rep. by its General Secretary v. State of A.P. & Anr.
Reported in 2008 CrLJ 402 (AP)(FB)

Held:

It is held that:

a. no crime can be registered under Section 307 of IPC, against a person killed in an encounter.

b. whenever a person is found dead, out of bullet injuries in an encounter, with the police.

(i) if a specific complaint is made, alleging that any identified individual had caused the death of such person, an independent FIR shall be registered in it, if it satisfies the law laid down by the Supreme Court in *State of Haryana v. Bhajan Lal, 1992 CriLJ 527.*

(ii) in the absence of any complaint, the proceduire prescribed under Section 176 of the Cr.P.C. shall be followed, without prejudice to any investigation, that may be undertaken by the police itself.

(iii) the judgment in People's Union for *Civil Liberties v. Union of India, AIR 1997 SC 1203,* does not represent the correct legal position.

There is an underlying purpose, in prohibiting the investigation, where sufficient basis does not exist. With the registration of a crime against an individual, he becomes and exposed to several consequences, flowing from it, including the possibility of his being arrested. Facing the social stigma, possibility of being subjected to restrictions on his social life, suspension from service etc. are the consequences that may follow. Undoubtedly, all these are the facets of Article 21, and the rights of a citizen guaranteed thereunder, cannot be curtailed, except in accordance with the procedure prescribed by law.

It is not that the omission to register a case u/s 302 against any police official would draw curtain over the whole episode, in a given case of a calculated and premeditated murder of a citizen, by the police officials, in gross misuse of his power. It is well known that, whenever an offence takes place, it is not

necessary that the investigation and trial must be limited, to those arrayed as accused or with reference to the provisions of law, mentioned in it. Once a case is registered, under whatever provisions, and the investigation is taken up, the situation may warrant inclusion of new names, deletion of existing ones, and invocation of different provisions, than those cited in the FIR. Cr.P.C. does not prohibit inclusion of police officials, in the list of accused, if, during the course of investigation their culpability is suspected. In addition to this, Section 176 of Cr.P.C. prescribes the special procedure and investigation by a different agency, duly conferring magisterial powers upon him. Any one, who us posted with the facts, about the death of an individual, in the encounter, or police firing, can certainly take part in the investigation, and supply necessary material. In the event of death of an individual in an encounter all the members of the police party comprising of several police official some armed, others entrusted with the logistics cannot be shown as accused, as it would negate the very procedure prescribed under Cr.P.C. in relation to registration of crimes, as intercepted by the Supreme Court. Viewed from any angle, registration of a case u/s 302, straightway against the police officials in such cases, does not accord with the procedure prescribed under the Cr.P.C.

Administration of criminal justice is, almost entirely dependent upon the participation of, and assistance by the police. When such is the vast role assigned to police, as an agency of the State, it is too difficult to accept that the police officials are to be treated on par with the ordinary citizens, in the context of testing their acts and omissions, in the course of discharge of their duties. At the same time, it cannot be assumed that, an individual, on account of his being a police official, is free to resort to acts, which otherwise amount to crimes. If, during the course of enquiry, it emerges that there was any lapse on his part, he shall be liable to be proceeded against.

It is the duty of the Government, irrespective of its form, or ideological leanings, to protect its citizens. The citizens cannot be left to the mercy of others, who assert their own power or strength. In a country, guided by its Constitution, the citizens are required to regulate their acts, in such a way that they accord with the laws, enacted by the agency or authority, conferred with such power. Deviations are to be dealt with, in the manner provided in the concerned laws and regulations. It is in this context, that the law enforcing agencies are created and their powers and functions are delineated. If an individual or a group of persons claim that they have every right to effect the similar rights of other citizens, and if there does not exist any agency, to curb such acts, anarchy prevails. The aggrieved parties have naturally, to organize themselves into a similar groups, or to approach a more powerful group. Such tendencies would negate the very concept of an orderly society, or organized form of Government.

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227. CRIMINAL PROCEDURE CODE, 1973 – Sections 154 (3) & 156 (3) No one can insist that an offence be investigated by a particular agency – Grievance against not registering a case and not making investigation properly – Objection u/s 482 Cr.P.C. to be discouraged where alternative remedies have not been exhausted.

Sakiri Vasu v. State of Uttar Pradesh and others

Judgment dated 07.12.2007 passed by the Supreme Court in Criminal Appeal No. 1685 of 2007, reported in (2008) 2 SCC 409

Held:

It has been held by this Court in *CBI and Anr. v. Rajesh Gandhi and Anr., 1997 Cr.L.J 63* that no one can insist that an offence be investigated by a particular agency. We fully agree with the view in the aforesaid decision. An aggrieved person can only claim that the offence he alleges be investigated properly, but he has no right to claim that it be investigated by any particular agency of his choice.

In view of the abovementioned legal position, we are of the view that although Section 156 (3) is very briefly worded, there is an implied power in the Magistrate under Section 156 (3) CrPC to order registration of a criminal offence and/or to direct the officer in charge of the police station concerned to hold a proper investigation and take all such necessary steps that may be necessary for ensuring a proper investigation including monitoring the same. Even though these powers have not been expressly mentioned in Section 156 (3) CrPC, we are of the opinion that they are implied in the above provision.

We have elaborated on the above matter because we often find that when someone has a grievance that his FIR has not been registered at the police station and/or a proper investigation is not being done by the police, he rushes to the High Court to file a writ petition or a petition under Section 482 Cr.P.C. We are of the opinion that the High Court should not encourage this practice and should ordinarily refuse to interfere in such matters, and relegate the petitioner to his alternating remedy, firstly under Section 154 (3) and Section 36 Cr.P.C. before the concerned police officers, and if that is of no avail, by approaching the Magistrate concerned under Section 156(3).

In our opinion Section 156 (3) Cr.P.C. is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an F.I.R. and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156(3) Cr.P.C., though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.

It is well-settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention,

every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary for its execution.

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***228. CRIMINAL PROCEDURE CODE, 1974 – Section 161**

Statement recorded by police during investigation – Cannot be used for any other purpose except provided in S.162 the of Code – Any part of statement duly proved may be used by accused and with permission of Court by prosecution – Contradict such witness in the manner provided by S.145 of Evidence Act.

Dinesh v. State of M.P.

Reported in I.L.R (2008) M.P. 945

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229. CRIMINAL PROCEDURE CODE, 1973 – Sections 173 (2) & 173 (8)

Investigation after filing of charge sheet – Prior permission of Magistrate – Requirement of – Only in matter of reinvestigation not in case of further investigation – Further investigation is a continuation of the earlier investigation – Reinvestigation is a fresh investigation.

State of Andhra Pradesh v. A.S. Peter

Judgment dated 13.12.2007 passed by the Supreme Court in Criminal Appeal No. 1119 of 2004, reported in (2008) 2 SCC 383

Held:

Indisputably, the law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out of a further investigation even after filing of the chargesheet is a statutory right of the police. A distinction also exists between further investigation and re-investigation. Whereas re-investigation without prior permission is necessarily forbidden, further investigation is not.

This aspect of the matter has been dealt by the Apex Court in *State of Bihar v. J.A.C. Saldanha, (1980) 1 SCC 554, Upkar Singh v. Ved Prakash, (2004) 13 SCC 292* and *Ram Lal Narang v. State (Delhi Admn.), (1979) 2 SCC 322.*

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***230. CRIMINAL PROCEDURE CODE, 1973 – Section 188**

PREVENTION OF INSULTS OF NATIONAL HONOUR ACT, 1971 – Section 2

Offences committed outside India – No enquiry or trial of such offence could be initiated in India except with the previous sanction of the Central Government.

In reference v. Prakash Kumar Thakur

Reported in I.L.R (2008) M.P. 591

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231. CRIMINAL PROCEDURE CODE, 1973 – Section 190

Cognizance of offence, meaning of – It merely means "become aware of" – In reference to a Court or a Judge, it means "to take notice of judicially" – It does not involve any formal action of any kind – Issuance of process is not the date of taking cognizance – "Initiation of proceeding" is different from "commencement of proceeding" – Initiation of proceedings must precede commencement of proceedings – The relevant date for counting the period of limitation is the date of Cognizance and not the date of issuance of process.

S.K. Sinha, Chief Enforcement Officer v. Videocon International Ltd. and others

Judgment dated 25.01.2008 passed by the Supreme Court in Criminal Appeal No. 175 of 2008, reported in (2008) 2 SCC 492

Held:

The expression 'cognizance' has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means 'become aware of' and when used with reference to a Court or a Judge, it connotes to take notice of 'judicially'. It indicates the point when a Court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone.

'Taking cognizance' does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a *sine qua non* or condition precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender. Whether or not a Magistrate has taken cognizance of an offence depends on the facts and circumstances of each case and no rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance.

From the above scheme of the Code, in our judgment, it is clear that 'Initiation of Proceedings', dealt with in Chapter XIV, is different from 'Commencement of Proceedings' covered by Chapter XVI. For commencement of proceedings, there must be initiation of proceedings. In other words, initiation of proceedings must precede commencement of proceedings. Without initiation of proceedings under Chapter XIV, there cannot be commencement of proceedings before a Magistrate under Chapter XVI. The High Court, in our considered view, was not right in equating initiation of proceedings under Chapter XIV with commencement of proceedings under Chapter XVI.

Having heard learned counsel for the parties and having perused the relevant provisions of law as also various judicial pronouncements, we are of the view that the High Court was in error in equating issuance of process with

taking cognizance by a criminal court and in quashing the proceedings treating them as time-barred.

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***232. CRIMINAL PROCEDURE CODE, 1973 – Section 195 (1) (b) (ii)**

S.195 (1) (b) (ii) of the Code, applicability of – Bar under this Section could be attracted only when the offence enumerated in this provision has been committed with respect to a document after it has been produced or given in evidence in proceedings in any Court i.e. during the time when the document was *custodia legis* – If such offence is committed prior to its production or giving in evidence in Court, no complaint by the Court is necessary and a private complaint would be maintainable.

Ramnaresh Singh and others v. Mahila Sonawati

Reported in 2008 (1) MPHT 510

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***233. CRIMINAL PROCEDURE CODE, 1973 – Sections 216 & 397 r/w/s 401**

Trial Court postponed consideration of an application filed by prosecution to amend charges framed against accused without assigning reasoning in a cryptic way – Revisional Court directed the Trial Court to decide the application – Against it this revision filed alleging that revision was not maintainable against the interlocutory order of the Trial Court – Held, orders which are matters of moment and same effect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory orders – Further held, by directing to dispose of the application will not prejudice the right of the accused because at the time of disposal of application, the Trial Court hears both the sides.

Sovaran Singh and others v. State of M.P.

Reported in 2008 (2) MPHT 86

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***234. CRIMINAL PROCEDURE CODE, 1973 – Sections 223 & 317 (2)**

Separation of trial – Joint or separate trial is discretion of Trial Judge – Exercise of discretion would depend upon facts and circumstances of case – Splitting of joint trial is permissible if it does not result in prejudice to any one of the affected parties – Order of separate trial not going to prejudice the applicant – Application dismissed.

Manoj v. State of M.P.

Reported in I.L.R (2008) M.P. 404

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235. CRIMINAL PROCEDURE CODE, 1973 – Sections 227, 228, 239, 240 & 245 Framing of charge, requirement of – At this stage Court is not expected to go into the probative value of the material on record – Court can evaluate the material on record with a view to find out the existence of all the ingredients constituting the alleged offence – If on the basis of materials on record, Court comes to the conclusion that commission of the offence is a probable consequence, Court must frame the charge.

Onkar Nath Mishra and others v. State (NCT of Delhi) and another Judgment dated 14.12.2007 passed by the Supreme Court in Criminal Appeal No. 1716 of 2007, reported in (2008) 2 SCC 561

Held:

It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.

In *State of Maharashtra v. Som Nath Thapa, (1996) 4 SCC 659*, a three-Judge Bench of this Court, after noting three pairs of sections *viz.* (i) Sections 227 and 228 insofar as sessions trial is concerned; (ii) Sections 239 and 240 relatable to trial of warrant cases; and (iii) Sections 245(1) and (2) qua trial of summons cases, which dealt with the question of framing of charge or discharge, stated thus:

> "32. .....if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage."

In a later decision in *State of M.P. v. Mohanlal Soni, (2000) 6 SCC 338,* this Court, referring to several previous decisions held that: (SCC p.342, para 7)

"7. The crystallized judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused."

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236. CRIMINAL PROCEDURE CODE, 1973 – Sections 437 & 439
General principle which has to be taken into account particularly in a heinous crime of murder for grant of bail – Accused is in jail and delay in initiation of trial – Not sustainable ground.
Gobarbhai Naranbhai Singala v. State of Gujarat and others
Judgment dated 29.01.2008 passed by the Supreme Court in Criminal Appeal No. 198 of 2008, reported in (2008) 3 SCC 775

Held:

In *State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21* this Court made the following observation: (SCC p. 32, para 19)

> *"19. ...'14. the condition laid down under Section 437(1)(i) is sine qua non for granting bail even under Section 439 of the Code. In the impugned order it is noticed that the High Court has given the period of incarceration already undergone by the accused and the unlikelihood of trial concluding in the near future as grounds sufficient to enlarge the accused on bail, in spite of the fact that the accused stands charged of offences punishable with life imprisonment or even death penalty. In such cases, in our opinion, the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself would not entitle the accused to being enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the appellant on bail when the gravity of the offence alleged is severe and there are allegations of tampering with the witnesses by the accused during the period he was on bail.' "**

(*As observed in *Kalyan Chandra Sarkar v. Rajesh Ranjan, (2004) 7 SCC 528* at pp. 536-37, para 14)

This Court in *Amarmani Tripathi* (supra) had held that while considering the application for bail, what is required to be looked is, (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of accused absconding or fleeing if

released on bail; (v) character, behavior, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail.

In *Panchanan Mishra v. Digambar Mishra, (2005) 3 SCC 143,* this Court while considering the question of cancellation of bail, observed: (SCC pp. 147-48 para 13)

> "13. .... The object underlying the cancellation of bail is to protect the fair trial and secure justice being done to the society by preventing the accused who is set at liberty by the bail order from tampering with the evidence in the heinous crime.... It hardly requires to be stated that once a person is released on bail in serious criminal cases where the punishment is quite stringent and deterrent, the accused in order to get away from the clutches of the same indulge in various activities like tampering with the prosecution witnesses, threatening the family members of the deceased victim and also create problems of law and order situation."

We are of the view that the High Court has completely ignored the general principles for grant of bail in a heinous crime of commission of murder in which the sentence, if convicted, is death or life imprisonment. A detailed examination of the evidence is to be avoided while considering the question of bail, to ensure that there is no prejudging and no prejudice is caused. Only a brief examination is to be done to satisfy about the facts and circumstances or otherwise of a prima facie case.

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***237. CRIMINAL PROCEDURE CODE, 1973 – Section 473**

Powers u/s 473 are discretionary and wider than u/s 5 of the Limitation Act – Whenever a time bar challan is filed, opportunity should be given to both parties to satisfy the Court for purpose of condonation of delay – Delay has to be condoned with exercise of judicial discretion as well as by speaking order – Trial Court took cognizance of offence without satisfying itself about delay – Order contrary to law.

Harishankar v. State of M.P.

Reported in I.L.R (2008) M.P. 977

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

EVIDENCE ACT, 1872 – Section 165

Petitioner, member of the police force, was examined as a prosecution witness – He did not support prosecution case – Trial Court passed strictures against him and reported the matter to higher police official for initiation of necessary action – Held, petitioner/witness was

neither re-examined by the prosecutor nor any question was put by the Court u/s 165 Evidence Act for seeking clarification and providing an opportunity to explain the situation – In absence of this the remark passed by the Magistrate deserves to be expunged – However, it was made clear that the department concerned is free to take departmental action against the petitioner, if warranted, as per the law.

Jekaram Jumnani v. State of Madhya Pradesh

Reported in 2008 (1) MPHT 525

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239. CRIMINAL TRIAL:

CRIMINAL PROCEDURE CODE, 1973 – Sections 353, 161 & 162

(i) Counter (cross) cases – Each case has to be decided on the basis of its own evidence – Cannot be decided on the evidence recorded in the counter case.

(ii) Spot map, use of contents therein – Spot map would be considered to be the statement of the witness recorded u/s 161 of the Code – Contents may be used u/s 162 of the Code for impeaching testimony of the witness.

Narayan and others v. State of Madhya Pradesh

Reported in 2008 (2) MPHT 138

Held:

(i) The learned Trial Court has failed to keep in mind the basic principles of criminal jurisprudence that each case is to be decided on the basis of its own oral and documentary evidence adduced by either party and no extraneous material can be taken into consideration. This Court can usefully refer herein the Supreme Court judgment passed in the case of *Mitthulal and another v. State of M.P. (AIR 1975 SC 149)*, wherein in Para 4, it has been laid down thus: –

> "It is elementary that each case must be decided on the evidence recorded in it and evidence recorded in another case, though it may be a cross-case cannot be taken into account in arriving at the decision. Even in civil cases this cannot be done unless the parties are agreed that the evidence in one case may be treated as evidence in the other. Much more so in criminal cases would this be impermissible. It is doubtful whether the evidence recorded in one criminal case can be treated as evidence in the other even with the consent of the accused. Decision of Madhya Pradesh High Court reversed."

(ii) It is well settled legal position that the contents of the spot map prepared by police at the instance of a witness would be considered as the statement of the witness recorded under Section 161 of the Code of Criminal Procedure and merely by exhibiting the map by the Investigating Officer, its contents would not

become admissible in evidence. The use of the contents of the map can be as per provision under Section 162 of the Code of Criminal Procedure for impeaching the testimony of witness.

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240. CRIMINAL TRIAL:

Appreciation of Evidence – Solitary witness – Conviction on basis of – Permissibility – Law re-stated.

Kunju alias Balachandran v. State of Tamil Nadu

Judgment dated 16.01.2008 passed by the Supreme Court in Criminal Appeal No. 112 of 2008, reported in (2008) 2 SCC 151

Held:

In *Vadivelu Thevar v. State of Madras, AIR 1957 SC 614* this Court had gone into this controversy and divided the nature of witnesses in three categories, namely, wholly reliable, wholly unreliable and lastly, neither wholly reliable nor wholly unreliable. In the case of the first two categories this Court said that they pose little difficulty but in the case of the third category of witnesses, corroboration would be required. The relevant portion is quoted as under: (AIR p. 619, paras 11-12)

Vadivelu Thevar case (supra) was referred to with approval in the case of *Jagdish Prasad v. State of M.P., (1995 SCC (Cri) 160.* This Court held that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Indian Evidence Act, 1872 (in short 'the Evidence Act'). But, if there are doubts about the testimony the courts will insist on corroboration. It is for the court to act upon the testimony of witnesses. It is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise.

The above position was again highlighted in *Sunil Kumar v. State Govt. of NCT of Delhi, (2003) 11 SCC 36.*

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241. CRIMINAL TRIAL:

EVIDENCE ACT, 1872 – Section 27

(i) Requirement for conviction based on circumstantial evidence.

(ii) Recovery of crime articles as a fact disclosed by accused, not proved beyond reasonable doubt – Serious lacuna in the prosecution story – Appellant (accused) acquitted.

Sattatiya alias Satish Rajanna Kartalla v. State of Maharashtra

Judgment dated 16.01.2008 passed by the Supreme Court in Criminal Appeal No. 579 of 2005, reported in (2008) 3 SCC 210

Held:

(i) It is settled law that an offence can be proved not only by direct evidence but also by circumstantial evidence where there is no direct evidence. The Court can draw an inference of guilt when all the incriminating facts and circumstances are found to be totally incompatible with the innocence of the accused. Of course, the circumstances from which an inference as to the guilt is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

In *Hanumant Govind Nargundkar v. State of M.P., AIR 1952 SC 343,* which is one of the earliest decisions on the subject, this Court observed as under: (AIR pp. 345-46, para 10)

> "10. ...It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

In *Ramreddy Rajesh Khanna Reddy and Anr. v. State of A.P. (2006) 10 SCC 172,* this Court while reiterating the settled legal position, observed: (SCC p. 181, para 26)

> "26. It is now well settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well settled that suspicion, however grave it may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence."

(ii) The next thing which is to be seen is whether the evidence relating to the recovery of clothes of the appellant and the half blade, allegedly used for commission of crime, is credible and could be relied on for proving the charge of culpable homicide the appellant. In this context, it is important to note that the prosecution did not produce any document containing the recording of

statement allegedly made by the appellant expressing his desire to facilitate recovery of the clothes and half blade prosecution case that the accused volunteered to give information and took the police for recovery of the clothes, half blade and purchase of handkerchief is highly suspect. It has not been explained as to why the appellant gave information in piecemeal on three dates i.e. 3.10.1994, 5.10.1994 and 6.10.1994. Room No. 45 of 'Ganesh Bhuvan' from which the clothes are said to have been recovered was found to be unlocked premises which could be accessed by any one. The prosecution could not explain as to how the room allegedly belonging to the appellant could be without any lock. The absence of any habitation in the room also cast serious doubt on the genuineness and bonafides of recovery of clothes. The recovery of half blade from the road side beneath the wooden board in front of 'Ganesh Bhuvan' is also not convincing. Undisputedly, the place from which half blade is said to have been recovered is an open place and everybody had access to the site from where the blade is said to have been recovered. It is, therefore, difficult to believe the prosecution theory regarding recovery of the half blade. The credibility of the evidence relating to recovery is substantially dented by the fact that even though as per the Chemical Examiner's Report the blood stains found on the shirt, pant and half blade were those of human blood, the same could not be linked with the blood of the deceased. Unfortunately, the learned Additional Sessions Judge and High Court overlooked this serious lacuna in the prosecution story and concluded that the presence of human blood stains on the cloths of the accused and half blade were sufficient to link him with the murder.

The overzealous efforts made by the prosecution to link the handkerchief allegedly found near the body of the deceased of the appellant lends support to the argument of the learned Counsel for the appellant that the police had fabricated the case to implicate the appellant. In his statement, PW7 Mohd. Farid Abdul Gani, who is said have sold the handkerchief to the appellant, admitted that he was not selling branded handkerchiefs and that there were no particular marks on the goods sold by him. He, however, recognized the handkerchief by saying that the accused made a lot of bargaining and he was amused by the latter's statement that he will soon become an actor.

In our opinion it is extremely difficult to believe that a person engaged in the business of hawking would remember what was sold to a customer almost two months after the transaction and that to without identity of the goods sold having been established.

On the basis of above discussion we held that the prosecution failed to establish the chain of circumstances which could link the appellant with the crime. The learned Trial Court and the High Court committed a serious error by relying on the circumstantial evidence of last scene, the recovery of pant and shirt from Room No. 45 of 'Ganesh Bhuvan' building, half blade from under the wooden board and the sale of the handkerchief by PW7 to the appellant.

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***242. DOWRY PROHIBITION ACT, 1961 – Section 3**

Dowry is a demand for property or valuable security having an inextricable nexus with marriage – No dowry was settled at the time of marriage – Question of abatement of giving dowry does not arise – Appellant cannot be convicted u/s 3.

Bhairon Singh v. State of M.P.

Reported in I.L.R (2008) M.P. 893

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243. EASEMENTS ACT, 1882 – Sections 52 & 61

TRANSFER OF PROPERTY ACT, 1882 – Section 106

(i) Non-examination of party, effect of – Adverse inference against such party may be drawn.

(ii) Licensee is bound to hand over vacant possession of the premises on the license in respect of the same being terminated by licensor.

International Electricals and another v. Smt. Sunital Jain

Reported in 2008 (2) MPLJ 118

Held:

(i) Appellant No. 2 Proprietor of appellant No. 1 neither entered in the witness box nor any explanation in this regard was put forth on record, whereas in order to prove the alleged defence of the tenancy she was the only witness who could have proved such fact. Therefore, non-examination of the appellant No. 2 is material circumstance to draw the inference against the appellants that there was no such relationship of landlord and tenant between them. It is settled proposition of law that the party having knowledge of the material fact did not enter in the witness box to state such thing is sufficient circumstance to draw adverse inference against such party. Such proposition is laid by this Court in the matter of *Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat* reported in *1970 MPLJ 586 = AIR 1970 MP 225,* in which it was held as under:

> "4. When a material fact is within the knowledge of a party and he does not go into the witness box without any plausible reason, an adverse inference must be drawn against him. A presumption must be drawn against a party who having knowledge of the fact in dispute does not go into the witness box particularly when a prima facie case has been made out against him."

(ii) The licence is defined under section 52 of Indian Easements Act, 1882. The same is read as under:

> "When one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which

would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence."

In view of the aforesaid definition, if the case at hand is examined then in the lack of any evidence regarding relationship of landlord and tenant their relation appears to be the licensee and licensor, the same is covered by the above mentioned definition. It is undisputed fact that immovable property was given to the appellants by the respondent with a right to use for keeping the business goods. Such question was answered by the Apex Court in the matter of *Sant Lal Jain v. Avatar Singh* reported in *AIR 1985 SC 857* in which it was held as under:

> "8. The respondent was a licensee, and he must be deemed to be always a licensee. It is not open to him, during the subsistence of the license or in the suit for recovery of possession of the property instituted after the revocation of the license to set up title to the property in himself or anyone else. It is his plain duty to surrender possession of the property as a licensee and seek his remedy separately in case he has acquired title to the property subsequently through some other person. He need not do so if he has acquired title to the property from the licensor or from some one else lawfully claiming under him, in which case there would be clear merger. The respondent has not surrendered possession of the property to the appellant even after the termination of the licensee and the institution of the suit. The appellant is, therefore, entitled to recover possession of the property. We accordingly allow the appeal with costs throughout and direct the respondent to deliver possession of the property to the appellant forthwith failing which it will be open to the appellant to execute the decree and obtain possession. In view of the aforesaid discussion, it has been revealed that there was no relationship as landlord and tenant between the parties and the appellants were permitted by the respondent to use the premises for keeping the business goods as licensee and such license was terminated, revoked or cancelled by notice dated 6-10-1994 (Ex.P.3). Subsequent to it, the appellant was bound to hand over the vacant possession of the premises in compliance of such notice. When the notice was not complied with by the appellant, then the respondent filed the suit. In such premises the trial court has not committed any error in decreeing the suit of the respondents."

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*244. ESSENTIAL COMMODITIES ACT, 1955 – Sections 3 & 7
M.P. (KHADYA PADARTH) SARVAJANKI NAGRIK PURTI VITRAN SCHEME, 1991 – Clauses 6 (5) & 12
M.P. (Khadya Padarth) Sarvajanki Nagrik Purti Vitran Scheme, 1991 has been made in exercise of its executive power by the State Government and not in exercise of any power conferred by any order u/s 3 of the Essential Commodities Act – Therefore, person violating provisions contained in Clauses 6 (5) and 12 of such scheme cannot be punished u/s 7 of the Essential Commodities Act – *Madhya Pradesh Ration Vikreta Sangh and others v. State of Madhya Pradesh, AIR 1981 SC 2001* followed.
Arvind Kumar v. State of Madhya Pradesh
Reported in 2008 (2) MPHT 38

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*245. EVIDENCE ACT, 1872 – Section 3
Custodial death – If there is an evidence that a fatal injury was caused during the period when the person was in the police custody, Court may presume that police officer having custody of that person was the author of such an injury.
Ashok Kumar Jain v. State of M.P.
Reported in I.L.R (2008) M.P. 934

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*246. EVIDENCE ACT, 1872 – Section 32
Dying declaration – Deceased suffered 80% 2nd and 3rd degree burn injuries – Looking to serious condition, dying declaration was recorded by doctor immediately when she was admitted to hospital – She survived for five days after incident – No intimation given to police – Dying declaration not recorded by Magistrate though sufficient time was there – No certificate affixed as to fit state of mind or she remained fully conscious – It cannot be held that doctor was satisfied that dying person is making conscious, voluntary and true statement – Dying declaration not reliable.
Kamlesh Jain v. State of M.P.
Reported in I.L.R (2008) M.P. 885

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*247. EVIDENCE ACT, 1872 – Section 32
Dying declaration – Certificate of fitness – Certificate of fitness of deceased by doctor is not necessary if evidence on record is satisfying that deceased was in fit condition to give statement.
Nasir v. State of M.P.
Reported in I.L.R (2008) M.P. 907

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***248. EVIDENCE ACT, 1872 – Sections 33 & 138**

Cross examination of witness – Witness could not be cross-examined solely due to any inaction or lapse on the part of defendants – Subsequently, witness became incapable of giving evidence – Examination-in-chief of witness could not be read in evidence.

Ghastibai v. Ramgopal Singh

Reported in I.L.R (2008) M.P. 872

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249. EVIDENCE ACT, 1872 – Section 45

Offence by use of firearm – Direct evidence, unimpeachable and corroborated by medical evidence – Non-examination of Ballistic Expert – Not fatal to prosecution case.

Vineet Kumar Chauhan v. State of U.P.

Reported in AIR 2008 SC 780

Held:

It cannot be laid down as general proposition that in every case where proposition that in every case where a fire arm is allegedly used by an accused person, the prosecution must lead the evidence of a Ballistic Expert to prove the charge, irrespective of the quality of the direct evidence available on record. It needs little emphasis that where direct evidence is of such an unimpeachable character, and the nature of injuries, disclosed by post-mortem notes is consistent with the direct evidence, the examination of Ballistic Expert may not be regarded as essential. However, where direct evidence is not available or that there is some doubt as to whether the injuries could or could not have been caused by a particular weapon, examination of an expert would be desirable to cure an apparent inconsistency or for the purpose of corroboration of oral evidence. (See: *Gurcharan Singh v. State of Punjab, AIR 1963 SC 340*)

In *Mohinder Singh v. The State, AIR 1953 SC 415* on which strong reliance is placed on behalf of the appellant, this Court has held that, where the prosecution case was that the accused shot the deceased with a gun, but it appeared likely that the injuries on the deceased were inflicted by a rifle and there was no evidence of a duly qualified expert to prove that the injuries were caused by a gun, and the nature of the injuries was also such that the shots must have been fired by more that one person and not by one person only, and the prosecution had no evidence to show that another person also shot, and the oral evidence was of witnesses who were not disinterested, the failure to examine an expert would be a serious infirmity in the prosecution case. It is plain that these observations were made in a case where the prosecution evidence was suffering from serious infirmities. Thus, in determining the effect of these observations, the facts in respect of which these observations came to be made cannot be lost sight of. The said case, therefore, cannot be held to lay down an inflexible rule that in every case where an accused person is charged with murder caused by a lethal weapon, the prosecution case can succeed in

proving the charge only if Ballistic Expert is examined. In what cases, the examination of a Ballistic Expert is essential for the proof of the prosecution case, must depend upon the facts and circumstances of each case.

In the instant case, having regard to the ocular evidence adduced by the prosecution, there is no reason to discard the prosecution theory that the injury as a result whereof Smt. Premwati suffered complete paralysis of both the lower limbs etc. was caused by a bullet fired from a revolver. The nature of the injury as proved by Dr. P.S. Ahlawat (P.W. 5), under whose treatment the deceased remained at Moradabad and Dr. S.P. Singh (P.W. 7), who had conducted the post-mortem examination is wholly consistent with the prosecution version. It is clear that the bullet recovered by P.W.7 at the time of post-mortem of the victim had traversed to thoracic spine through the neck from the face near the angle of the jaw, hitting the fifth thoracic vertebra, badly damaging the underlying spinal cord. We are, therefore, of the view that on the facts of the present case, the absence of Ballistic Expert's evidence is not fatal to the case of the prosecution, notwithstanding the fact that the Forensic Science Laboratory, in its report dated 18.2.1991, had not expressed a definite opinion about the bullet recovered from the place of occurrence.

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250. EVIDENCE ACT, 1872 – Sections 76, 77 & 79
Certified copies of a public document – Proof and presumption as to their genuineness – Need not be proved by calling a witness – Production would be sufficient as its proof – Court is bound to draw the presumption that a certified copy of a document is genuine and also that the officer signed it in the official character, which he claimed in the said document.

Dalso Bai v. Halko Bai and others

Reported in 2008 (2) MPLJ 180

Held:

The text of Section 76 of the Act enacts that custodian of a public document which any person has a right to inspect, shall give certified copy on demand. Section 77 says that such certified copies may be produced in a proof of the contents of the public documents or their parts. The certified copies are by statutes deemed to be originals. (See *Collector of Gorakhpur v. Ram Sunder Mal and others, AIR 1934 PC 157*). By the word "may" used in Section 77 shows that an option has been given to a party to prove the contents by certified copies or by production of the original. The certified copy of a public document in the custody of a public officer need not to be proved by calling a witness but its production would be sufficient of its proof. In order to attract Section 76 of the Act, it should be borne out that public officer was having the custody of public documents which any person has right to inspect.

The Supreme Court in the case of *Bhinka and others v. Charan Singh, AIR 1959 SC 960,* has categorically held that under Section 79 of the Evidence Act a Court is bound to draw the presumption that a certified copy of a document is genuine and also that the officer signed it in the official character which he claimed in the said document. But such a presumption is permissible only if the certified copy is substantially in the form and purported to be executed in the manner provided by law in that behalf. The Supreme Court further held that to put this logic in different way, if a certified copy was executed substantially in the form and in the manner provided by law, the Court raises a rebuttable presumption in regard to its genuineness. The Supreme Court further came to hold that where a Patwari issues a certified copy without complying with the provisions of law governing its issue, the Court is not bound to draw its presumption in regard to its genuineness.

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251. EVIDENCE ACT, 1872 – Section 106
INDIAN PENAL CODE, 1860 – Sections 359, 362 & 364
Purpose and intention of kidnapping, how to be gathered – On whom the onus of proof lies? Law explained.

Badshah and others v. State of Uttar Pradesh

Judgment dated 12.02.2008 passed by the Supreme Court in Criminal Appeal No. 554 of 2005, reported in (2008) 3 SCC 681

Held:

(i) Ingredients of the offence u/s 364 IPC are:

(1) kidnapping by the accused must be proved;

(2) it must also be proved that he was kidnapped in order to;

(a) that such person may be murdered; or (b) that such person might be disposed of as to be put in danger of being murdered.

The intention for which a person is kidnapped must be gathered from the circumstances attending prior to, at the time of and subsequent to the commission of the offence. A kidnapping per se may not lead to any inference as to for what purpose or with what intent he has been kidnapped.

The question as to on whom the onus lies would depend upon the facts of each case. In *Ram Gulam Chaudhary v. State of Bihar, (2001) 8 SCC 311* this Court stated in para 24 that :

> "Even otherwise, in our view, this is a case where Section 106 of the Evidence Act would apply. Krishnanand Chaudhary was brutally assaulted and then a Chhura blow was given on the chest. Thus Chhura blow was given after Bijoy Chaudhary had said "he is still alive and should be killed". The Appellants then carried away the body. What happened thereafter to Krishnanand Chaudhary is

especially within the knowledge of the Appellant. The Appellants have given no explanation as to what they did after they took away the body. Krishnanand Chaudhary had not been since seen live. In the absence of an explanation, and considering the fact that the Appellants were suspecting the boy to have kidnapped and killed the child of the family of the Appellants. It was for the Appellant to have explained what they did with him after they took him away. When the abductors withheld that information from the Court there is every justification for drawing the inference that they had murdered the boy. Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The Appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference. We, therefore, see no substance in this submission of Mr. Mishra."

In *Sucha Singh v. State of Punjab, [(2001) 4 SCC 375],* Section 106 of the Evidence Act was held to be applicable to cases where the prosecution had succeeded in proving facts for which a reasonable inference can be drawn as regards existence of certain other facts unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference.

In the event of murder of an abducted person, either by direct or presumptive evidence, an inference of murder can safely be drawn in resepct whereof, it would not be necessary to prove the corpus delicti. In *Ramjee Rai & Ors. v. State of Bihar [2006 (8) SCALE 440],* this court observed :

> "It is now a trite law that corpus delicti need not be proved. Discovery of the dead body is a rule of caution and not of law. In the event, there exists strong circumstantial evidence, a judgment of conviction can be recorded even in absence of the dead body."

(ii) The fact that the parties were enemically disposed of towards each other is beyond any doubt or dispute. Two criminal cases were instituted against the prosecution witnesses. It has been established that Suraj Pal Singh had been looking after the said criminal cases. The fact that the appellants were present at the place of occurrence also stands established. Appellant, not only picked up Suraj Pal Singh but also bodily lifted him away and when some resistance was put, they also resorted to firing in the air.

Indisputably, Suraj Pal Singh has not been seen thereafter. He has not been heard of. Nobody in his family has heard from Suraj Pal Singh for the last 27 years. In terms of Section 118 of the Indian Evidence Act, he is presumed to be dead. But in absence of any proof of death having been caused to him, a charge under Section 302 of the Indian Penal Code could not be made. Fact remains that he has not been heard or seen from the date of the incident, the law presumes him to be dead.

Although the First Information was lodged on 24.5.1988, the Investigating Officer did not find the appellants in their house. They could not immediately be arrested. Warrant of attachment of sale of their property was issued. Mulaim Singh was arrested only on 28.6.1988. It is also significant that PW-2, in his deposition, categorically stated that the accused No. 1, Badshah, had given out that they were taking Suraj Pal Singh away in order to kill him. Similar are the statements of PW-2 and PW-3. PW-2 categorically stated that appellants had furthermore given out that if they wanted to save their lives, they should run away.

Testimonials of the said prosecution witnesses have been relied upon by the two courts below. We do not see any reason to differ therewith. The fact that there had been a deep-rooted enemity between the accused persons and Suraj Pal Singh, it will bear repetition to state, stands established. They came to the place of occurrence in the night heavily armed, took the deceased away stating that they would kill him and thereafter he has not been seen alive by any person which, in our opinion, is sufficient to arrive at a conclusion that a case under Section 364 of the Indian Penal Code has been made out.

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***252. EXCISE ACT, 1915 – Sections 46 & 47 (Prior to amendment)**

Confiscation – Truck driver convicted u/s 34 of Act for transporting 294 boxes of foreign liquor – Trial Court ordered for confiscation of truck of appellant after due inquiry – Order of confiscation maintained by First Appellant Court as well as High Court – Held, burden is on owner to establish that he had no reason to believe that offence was being or likely to be committed – Appellant failed to establish his lack of knowledge – On the facts of case in lieu of confiscation, vehicle be released to appellant on payment of sum of Rs. 30,000/- as fine – Appeal allowed.

Kailash Chandra v. State of M.P.

Reported in I.L.R (2008) M.P. 421

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***253. FOREST ACT, 1927 – Section 52**

Confiscation of truck – Transit pass not produced at the time of seizure – Transit pass which was produced by petitioner in course of enquiry bore different number – No illegality committed by Departmental Authorities as well as Revisional Court by not accepting transit pass.

Forest produce – Boulders – Findings recorded by appellate authority that vehicle carrying boulders was chased by forest officials and was caught up on the road belonging to P.W.D. – No shadow of doubt that loading of boulders originated in forest land

Hadiya Begum v. State of M.P.

Reported in I.L.R (2008) M.P. 452

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***254. FOREST ACT, 1927 – Section 52-A**

"Person aggrieved" means a person who has suffered legal injury or one who has been deprived of something which he would have entitled to obtain in usual course – Range Officer who initiated proceeding for confiscation u/s 52 of the Act may be a person aggrieved but not entitled to file an appeal u/s 52-A of the Act – As such appeal has not been provided u/s 52-A the of Act.

Provided an appeal against order of confiscation and not provided appeal against order of release of property – Appeal is a creature of statute and until and unless such appeal is provided under the Act, appellate authority has no jurisdiction to entertain appeal.

Umashanker Usrete v. State of M.P. and others

Reported in I.L.R (2008) M.P. 779

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255. HINDU ADOPTIONS AND MAINTENANCE ACT, 1956 – Section 8

Adoption – Capacity of Hindu wife to adopt – She cannot adopt a child to herself even with the consent of her husband.

Wife leading life like a divorcee, cannot legally adopt a child for herself.

Hindu law about adoption – Origin of custom and object – Explained.

Brajendra Singh v. State of M.P. & Anr.

Reported in AIR 2008 SC 1056

Held:

We are concerned in the present case with clause (c) of Section 8. The Section brings about a very important and far reaching change in the law of adoption as used to apply earlier in case of Hindus. It is now permissible for a female Hindu who is of sound mind and has completed the age of 18 years to take a son or daughter in adoption to herself in her own right provided that (a) she is not married; (b) or is a widow; (c) or is a divorcee or after marriage her husband has finally renounced the world or is ceased to be a Hindu or has been declared to be of unsound mind by a court having jurisdiction to pass a declaratory decree to that effect. It follows from Clause (c) of Section 8 that Hindu wife cannot adopt a son or daughter to herself even with the consent of her husband because the Section expressly provides for cases in which she can adopt a son or daughter to herself during the life time of the husband. She can only make an adoption in the cases indicated in clause (c). It is important to note that Section

6 (1) of the Act requires that the person who wants to adopt a son or a daughter must have the capacity and also the right to take in adoption. Section 8 speaks of what is described as "capacity". Section 11 which lays down the condition for a valid adoption requires that in case of adoption of a son, the mother by whom the adoption is made must not have a Hindu son or son's son or grand son by legitimate blood relationship or by adoption living at the time of adoption. It follows from the language of Section 8 read with Clauses (i) & (ii) of Section 11 that the female Hindu has the capacity and right to have both adopted son and adopted daughter provided there is compliance of the requirements and conditions of such adoption laid down in the Act. Any adoption made by a female Hindu who does not have requisite capacity to take in adoption or the right to take in adoption is null and void. It is clear that only a female Hindu who is married and whose marriage has been dissolved i.e. who is a divorcee has the capacity to adopt. Admittedly in the instant case there is no dissolution of the marriage. All that the evidence led points out is that the husband and wife were staying separately for a very long period and Mishri Bai was living a life like a divorced woman. There is conceptual and contextual difference between a divorced woman and one who is leading life like a divorced woman. Both cannot be equated. Therefore in law Mishri Bai was not entitled to the declaration sought for. Here comes the social issue. A lady because of her physical deformity lived separately from her husband and that too for a very long period right from the date of marriage. But in the eye of law they continued to be husband and wife because there was no dissolution of marriage or a divorce in the eye of law. Brajendra Singh was adopted by Mishri Bai so that he can look after her. There is no dispute that Brajendra Singh was in fact doing so. There is no dispute that the property given to him by the Will executed by Mishri Bai is to be retained by him. It is only the other portion of the land originally held by Mishri Bai which is the bone of contention.

Section 5 provides that adoptions are to be regulated in terms of the provisions contained in Chapter II. Section 6 deals with the requisites of a valid adoption. Section 11 prohibits adoption; in case it is of a son, where the adoptive father or mother by whom the adoption is made has a Hindu son, son's son, or son's son's son, whether by legitimate blood relationship or by adoption, living at the time of adoption. Prior to the Act under the old Hindu law, Article 3 provided as follows:

> "3. (1) A male Hindu, who has attained the age of discretion and is of sound mind, may adopt a son to himself provided he has no male issue in existence at the date of the adoption. (2) A Hindu who is competent to adopt may authorize either his (i) wife, or (ii) widow (except in Mithila) to adopt a son to himself."

Therefore, prior to the enactment of the Act also adoption of a son during the lifetime of a male issue was prohibited and the position continues to be so

after the enactment of the Act. Where a son became an outcast or renounced the Hindu religion, his father became entitled to adopt another. The position has not changed after the enactment of the Caste Disabilities Removal Act (21 of 1850), as the outcast son does not retain the religious capacity to perform the obsequial rites. In case parties are governed by Mitakshara law, additionally adoption can be made if the natural son is a congenital lunatic or an idiot.

The origin of custom of adoption is lost in antiquity. The ancient Hindu law recognized twelve kinds of sons of whom five were adopted. The five kinds of adopted sons in early times must have been of very secondary importance, for, on the whole, they were relegated to an inferior rank in the order of sons. Out of the five kinds of adopted sons, only two survive today, namely, the dattaka form prevalent throughout India and the kritrima form confined to Mithila and the adjoining districts. The primary object of adoption was to gratify the means of the ancestors by annual offerings and, therefore, it was considered necessary that the offerer should be as much as possible a reflection of a real descendant and had to look as much like a real son as possible and certainly not be one who would never have been a son. Therefore, the body of rules was evolved out of a phrase of Saunaka that he must be "the reflection of a son". The restrictions flowing from this maxim had the effect of eliminating most of the forms of adoption. (See *Hindu Law by S.V. Gupte,* 3rd Edn., at pp. 899-900.) The whole law of dattaka adoption is evolved from two important texts and a metaphor. The texts are of Manu and Vasistha, and the metaphor that of Saunaka. Manu provided for the identity of an adopted son with the family into which he was adopted. (See Manu, Chapter IX, pp. 141-42, as translated by Sir W. Jones.) The object of an adoption is mixed, being religious and secular. According to Mayne, the recognition of the institution of adoption in the early times had been more due to secular reasons than to any religious necessity, and the religious motive was only secondary; but although the secular motive was dominant, the religious motive was undeniable. The religious motive for adoption never altogether excluded the secular motive. (See Mayne's Hindu Law and Usage, 12th Edn., p. 329.)

As held by this Court in *V.T.S. Chandrasekhara Mudaliar v. Kulandaivelu Mudaliar (AIR 1963 SC 185)* substitution of a son for spiritual reasons is the essence of adoption, and consequent devolution of property is mere accessory to it; the validity of an adoption has to be judged by spiritual rather than temporal considerations and devolution of property is only of secondary importance.

In *Hem Singh v. Harnam Singh (AIR 1954 SC 581)* it was observed by this Court that under the Hindu law adoption is primarily a religious act intended to confer spiritual benefit on the adopter and some of the rituals have, therefore, been held to be mandatory, and compliance with them regarded as a condition of the validity of the adoption. The first important case on the question of adoption was decided by the Privy Council in the case of *Amarendra Man Singh Bhramarbar v. Sanatan Singh (AIR 1933 PC 155).* The Privy Council said:

Among the Hindus, a peculiar religious significance has attached to the son, through Brahminical influence, although in its origin the custom of adoption was perhaps purely secular. The texts of the Hindus are themselves instinct with this doctrine of religious significance. The foundation of the Brahminical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites.

With these observations it decided the question before it viz. that of setting the limits to the exercise of the power of a widow to adopt, having regard to the well-established doctrine as to the religious efficacy of sonship. In fact, the Privy Council in that case regarded the religious motive as dominant and the secular motive as only secondary.

The object is further amplified by certain observations of this Court. It has been held that an adoption results in changing the course of succession, depriving wife and daughters of their rights, and transferring the properties to comparative strangers or more remote relations. [See: *Kishori Lal v. Chaltibai (AIR 1959 SC 504)*]. Though undeniably in most of the cases, motive is religious, the secular motive is also dominantly present. We are not concerned much with this controversy, and as observed by Mayne, it is unsafe to embark upon an enquiry in each case as to whether the motives for a particular adoption were religious or secular and an intermediate view is possible that while an adoption may be a proper act, inspired in many cases by religious motives, courts are concerned with an adoption, only as the exercise of a legal right by certain persons. The Privy Council's decision in *Amarendra Man Singh's case* (supra) has reiterated the well-established doctrine as to the religious efficacy of sonship as the foundation of adoption. The emphasis has been on the absence of a male issue. An adoption may either be made by a man himself or by his widow on his behalf with his authority conveyed therefor. The adoption is to the male and it is obvious that an unmarried woman cannot adopt, for the purpose of adoption is to ensure spiritual benefit for a man after his death and to his ancestors by offering of oblations of rice and libations of water to them periodically. A woman having no spiritual needs to be satisfied, was not allowed to adopt for herself. But in either case it is a condition precedent for a valid adoption that he should be without any male issue living at the time of adoption.

A married woman cannot adopt at all during the subsistence of the marriage except when the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. If the husband is not under such disqualification, the wife cannot adopt even with the consent of the husband whereas the husband can adopt with the consent of the wife. This is clear from Section 7 of the Act. Proviso thereof makes it clear that a male Hindu cannot adopt except with the consent of the wife, unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind. It is relevant to note

that in the case of a male Hindu the consent of the wife is necessary unless the other contingency exists. Though Section 8 is almost identical, the consent of the husband is not provided for. The proviso to Section 7 imposes a restriction on the right of male Hindu to take in adoption. In this respect the Act radically departs from the old law where no such bar was laid down to the exercise of the right of a male Hindu to adopt oneself, unless he dispossess the requisite capacity. As per the proviso to Section 7 the wife's consent must be obtained prior to adoption and cannot be subsequent to the act of adoption. The proviso lays down consent as a condition precedent to an adoption which is mandatory and adoption without wife's consent would be void. Both proviso to Sections 7 and 8(c) refer to certain circumstances which have effect on the capacity to make an adoption.

At this juncture it would be relevant to take note of *Jolly Das (Smt.) alias Moulick v. Tapan Ranjan Das, (1994) 4 SCC 363.* The decision in that case related to an entirely different factual scenario. There was no principle of law enunciated. That decision was rendered on the peculiar factual background. That decision has therefore no relevance to the present case.

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***256. HINDU ADOPTIONS AND MAINTENANCE ACT, 1956 – Sections 10 & 16**

Person who may be adopted – Appellant had already crossed age of 15 years and was married at the time of adoption – No pleading to the effect that there was any custom or usage permitting adoption of married boy or anybody of more than 15 years of age – Appellant failed to prove custom or usage – Necessary requirements of S. 10 for valid adoption not complied with.

Registration of Adoption Deed, presumption – Presumption would arise only when general conditions as laid down in S. 10 of Act are fulfilled.

Madan Lal v. Vinod Kumar

Reported in I.L.R (2008) M.P. 868

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257. HINDU LAW:

Junior member of HUF may act as a Karta in exceptional circumstances – Law discussed – Eviction suit filed by Karta is maintainable.

M/s Nopany Investments (P.) Ltd. v. Santokh Singh (HUF)

Reported in AIR 2008 SC 673

Held:

In *Sunil Kumar and another v. Ram Prakash and others, (1988) 2 SCC 77,* this court held as follows - :-

> "In a Hindu family, the Karta or Manager occupies a unique position. It is not as if anybody could become Manager of a

joint Hindu family. As a general rule, the father of a family, if alive, and in his absence the senior member of the family, is alone entitled to manage the joint family property."

From a reading of the aforesaid observation of this court in *Sunil Kumar and another v. Ram Prakash and others* [supra], we are unable to accept that a younger brother of a joint Hindu family would not at all be entitled to manage the joint family property as the Karta of the family. This decision only lays down a general rule that the father of a family, if alive, and in his absence the senior member of the family would be entitled to manage the joint family property.

In *Tribhovan Das Haribhai Tamboli v. Gujarat Revenue Tribunal and others, (1991) 3 SCC 442,* this Court held as follows.

> "The managership of the joint family property goes to a person by birth and is regulated by seniority and the Karta or the Manager occupies a position superior to that of the other members. A junior member cannot, therefore, deal with the joint family property as manager so long as the Karta is available except where the Karta relinquishes his right expressly or by necessary implication or in the absence of the Manager in exceptional and extraordinary circumstances such as distress or calamity affecting the whole family and for supporting the family or in the absence of the father whose whereabouts were not known or who was away in remote place due to compelling circumstances and that his return within the reasonable time was unlikely or not anticipated."

From a careful reading of the observation of this court in *Tribhovandas's case* [supra], it would be evident that a younger member of the joint Hindu family can deal with the joint family property as Manager in the following circumstances - :-

(i) if the senior member or the Karta is not available;

(ii) where the Karta relinquishes his right expressly or by necessary implication;

(iii) in the absence of the manager in exceptional and extraordinary circumstances such as distress or calamity affecting the whole family and for supporting the family;

(iv) in the absence of the father - :-

  (a) whose whereabouts were not known, or

  (b) who was away in a remote place due to compelling circumstances and his return within a reasonable time was unlikely or not anticipated.

From the above observations of this court in the aforesaid two decisions, we can come to this conclusion that it is usually the Father of the family, if he is alive, and in his absence the senior member of the family, who is entitled to manage the joint family property.

It is true that in view of the decisions of this court in *Sunil Kumar's case* [supra] and *Tribhovandas's case* [supra], it is only in exceptional circumstances, as noted herein earlier, that a junior member can act as the Karta of the family. But we venture to mention here that Dhuman Raj Singh, the senior member of the HUF, admittedly, has been staying permanently in the United Kingdom for a long time. In *Tribhovandas's case* [supra] itself, it was held that if the Karta of the HUF was away in a remote place, (in this case in a foreign country) and his return within a reasonable time was unlikely, a junior member could act as the Karta of the family. In the present case, the elder brother Dhuman Raj Singh, who is permanently staying in United Kingdom was/is not in a position to handle the joint family property for which reason he has himself executed a power of attorney in favour of Jasraj Singh. Furthermore, there has been no protest, either by Dhuman Raj Singh or by any member of the HUF to the filing of the suit by Jasraj Singh. That apart, in our view, it would not be open to the tenant to raise the question of maintainability of the suit at the instance of Jasraj Singh as we find from the record that Jasraj Singh has all along been realizing the rent from the tenant and for this reason, the tenant is now estopped from raising any such question. In view of the discussions made hereinabove, we are, therefore, of the view that the High Court was fully justified in holding that the suit was maintainable at the instance of Jasraj Singh, claiming himself to be the Karta of the HUF.

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***258. HINDU MARRIAGE ACT, 1955 – Section 24**
CRIMINAL PROCEDURE CODE, 1973 – Section 125
Husband filed an application u/s 13 of the Hindu Marriage Act for dissolution of marriage – Wife filed application u/s 24 of the Act praying maintenance *pendente lite* – She also filed application u/s 125 of Cr.P.C. for granting maintenance – Family Court, while deciding both applications on the same day, ordered for payment of maintenance in both the cases – Family Court rejected the application filed by husband for adjustment of interim alimony – Held, remedies available to an aggrieved person under both these Sections are quite independent – Maintenance u/s 125 CrPC and alimony pendente lite u/s 24 of the Hindu Marriage Act can be claimed by resorting to both these provisions and the Court is competent under these provisions to grant relief to the persons concerned and the question of adjustment to be granted has to be decided after taking into consideration the totality of the circumstances, the amount granted and the capacity of the person directed for making the payment –

There is nothing to suggest that as a thumb rule, adjustment to the amount is to be granted in each and every case.

Ashok Singh Pal v. Smt. Manjulata

Reported in 2008 (2) MPHT 275

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***259. HINDU MINORITY AND GUARDIANSHIP ACT, 1956 – Sections 6 (b) & 13**
GUARDIANS AND WARDS ACT, 1890 – Sections 7 & 17
In a case of illegitimate minor child or illegitimate unmarried girl, the mother is the natural guardian and thereafter the father – While in the aforesaid circumstances, guardianship is required to be decided, paramount consideration is welfare of the child.

Saudarabai v. Ram Ratan

Reported in 2008 (2) MPLJ 186

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260. HINDU SUCCESSION ACT, 1956 – Sections 4, 14 & 24
HINDU WIDOWS' REMARRIAGE ACT, 1856 – Section 2
Hindu Widow's Remarriage Act talks about "limited interest in husband's property" – S.14 (1) of the 1956 Act recognizes the absolute ownership by way of inheritance – Under S. 8 of the 1956 Act, widow gets the property as a heir not as estate of husband – S.4 of the 1956 Act has an over riding effect – The provisions of the 1956 Act shall prevail over the text of any Hindu Law or the provisions of Hindu Widow's Remarriage Act, 1856 though it is only repealed by Act 24 of the Hindu Widows' Remarriage (Repeal) Act, 1983.

Cherotte Sugathan (dead) through LRs. and others v. Cherotte Bharathi and others

Judgment dated 15.02.2008 passed by the Supreme Court in Civil Appeal No. 1323 of 2008, reported in (2008) 2 SCC 610

Held:

Succession had not opened in this case when the 1956 Act came into force. Section 2 of the 1856 Act speaks about a limited right but when succession opened on 2-8-1976, the first respondent became an absolute owner of the property by reason of inheritance from her husband in terms of sub-section (1) of Section 14 of the 1956 Act. Section 4 of the 1956 Act has an overriding effect. The provisions of the 1956 Act, thus, shall prevail over the text of any Hindu Law or the provisions of the 1856 Act. Section 2 of the 1856 Act would not prevail over the provisions of the 1956 Act having regard to Sections 4 and 24 thereof.

The question posed before us is no longer res integra. *In Chando Mahtain v. Khublal Mahto, AIR 1983 Pat 33 the Patna High Court opined:* (AIR p. 34, para 6)

> "6. ....The Hindu Widows' Re-marriage Act, 1856 has not been repealed by the Hindu Succession Act, 1956 but Section 4 of the latter Act has an overriding effect and in

effect abrogates the operation of the Hindu Widows' Re-marriage Act, 1856. According to Section 4 of the Hindu Succession Act all existing laws whether in the shape of enactments or otherwise shall cease to apply to Hindus insofar as they are inconsistent with any of the provisions contained in this Act."

Yet again this Court in *Velamuri Venkata Sivaprasad v. Kothuri Venkateswarlu, (2000). 2 SCC 139* held: (SCC p. 165, para 52)

"52. Incidentally, Section 24 of the Succession Act of 1956 placed certain restrictions on certain specified widows in the event of there being a remarriage: while it is true that Section speaks of a pre-deceased son or son of a pre-deceased son but this in our view is a reflection of the Shastric Law on to the statute. The Act of 1956 in terms of Section 8 permits the widow of a male Hindu to inherit simultaneously with the son, daughter and other heirs specified in class I of the Schedule. As a matter of fact she takes her share absolutely and not the widow's estate only in terms of Section 14. Re-marriage of a widow stands legalised by reason of the incorporation of Act of 1956 but on her re-marriage she forfeits the right to obtain any benefit from out of her deceased husband's estate and Section 2 of the Act of 1856 as noticed above is very specific that the estate in that event would pass on the next heir of her deceased husband as if she were dead. Incidentally, the Act of 1856 does not stand abrogated or repealed by the Succession Act of 1956 and it is only by Act 24 of 1983 that the Act stands repealed. As such the Act of 1856 had its fullest application in the contextual facts in 1956 when Section 14 (1) of the Hindu Succession Act was relied upon by Defendant No. 1."

We respectfully agree with the said view.

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261. INDIAN PENAL CODE, 1860 – Section 34

Active participation of A-2 with iron rod in committing an offence in furtherance of common intention with co-accused A-1 who gave fatal injuries with knife – Conviction for murder with the aid of S.34 u/s 302 IPC is proper.

Shaik China Brahamam v. State of A.P.

Reported in AIR 2008 SC 610

Held:

Learned counsel for the appellant has next submitted that the appellant herein viz. Shaik China Brahmam (A-2) cannot be held liable under section 302 read with Section 34, IPC as the main injuries were given by Shaik Khasim Saida (A-1), who was armed with a knife and he was responsible for injuries to trachea and occipital region which proved fatal. He has submitted that the appellant-Shaik China Brahmam (A-2) was armed with an iron pipe and he did not cause any fatal injury. We are unable to accept the submission made. It has come in evidence that the pipe with which A-2 was armed was in the shape of an iron rod and iron rod can also cause fatal injuries. When a criminal act is done by several persons in furtherance of common intention of all, the other offenders are liable for that act in the same manner as the principal offender as if the act was done by such offenders also. In this case, both the accused went jointly to a place where the deceased had gone for attending the call of nature and they jointly assaulted him. The fact that A-2 also received injuries in his palm shows that he took active part in snatching the knife from the hands of the deceased when he had succeeded in snatching it from A-1. This clearly shows that A-2 shared the common intention with A-1 to cause injuries to the deceased. The essential conditions for the application of Section 34, IPC are common intention to commit an offence and participation by all the accused in doing act or acts in furtherance of that common intention. If these two ingredients are established, all the accused shall be liable for the said offence. We have no doubt that in the present case both the ingredients are fully established and, therefore, A-2 is also liable for commission of the offence. We are, therefore, clearly of the opinion that A-2 is guilty of the offence under Section 302 read with Section 34, IPC and the High Court rightly convicted and sentenced him for the said offence.

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262. INDIAN PENAL CODE, 1860 – Sections 96 to 106

Scope and limitations of the right of private defence – Not available to the accused persons who were aggressor and went to the place of incident with full arrangements and weapons.

Kashi Ram and others v. State of Rajasthan

Judgment dated 28.01.2008 passed by the Supreme Court in Criminal Appeal No. 732 of 2002, reported in (2008) 3 SCC 55

Held:

Sections 96 to 106 of IPC deals with various facets of the right of private defence. All these sections will have to be read together to ascertain whether in the facts and circumstances the accused appellants are entitled to right of private defence or they exceeded the right of private defence. Only when all these sections are read together, we get comprehensive view of the scope and limitation of that right. The position of law is well-settled for over a century both in England and India.

This Court also on several occasions dealt with the cases of exceeding the right of private defence. (See *Munney Khan v. State of M.P., (1970) 2 SCC 480, Balmukund v. State of M.P., (1981) 4 SCC 432, Dharam Pal v. State of U.P., 1994 Supp (3) SCC 668 and Mahabir Choudhary v. State of Bihar, (1996) 5 SCC 107*)

From perusal of the entire evidence on record, it is abundantly clear that the accused appellants were the aggressor and they attacked the complainant party when they were totally unarmed. It is settled legal position that the right of private defence cannot be claimed when the accused are aggressors particularly when the members of the complainant party were totally unarmed. This Court in the recent judgment in *Bishna v. State of West Bengal, (2005) 12 SCC 657* exhaustively dealt with this aspect of the matter. The facts of this case are akin to the facts of the instant cases. In this case, the Court while relying on the earlier judgments of this Court, clearly came to the conclusion that the right of private defence cannot be claimed when the accused is an aggressor. In the instant case, the appellants were the aggressor. They inflicted serious injuries on the unarmed complainant party by a variety of weapons causing the death of Balu Singh and also inflicted serious injuries on other members of the complainant party.

Private defence can be used only to ward off unlawful force, to prevent unlawful force, to avoid unlawful detention and to escape from such detention as held by this Court in *Bishna's case* (supra). In the said judgment the relevant portion of Kenny's Outlines of Criminal Law (by J.W. Cecil Turner) and Criminal Law by J.C. Smith and Brian Hogan have been quoted. We deem it appropriate to reproduce the same: (*Bishna case* (supra), SCC p. 686, paras 89-92)

> "89. ... 'It is natural that a man who is attacked should resist, and his resistance, as such, will not be unlawful. It is not necessary that he should wait to be actually struck, before striking in self-defence. If one party raises up a threatening hand, then the other may strike. Nor is the right of defence limited to the particular person assailed; it includes all who are under any obligation, even though merely social and not legal, to protect him. The old authorities exemplify this by the cases of a husband defending his wife, a child his parent, a master his servant, or a servant his master (and perhaps the courts would now take a still more general view of this duty of the strong to protect the weak)..'
>
> 90. The learned author further stated that self-defence, however, is not extended to unlawful force:
>
> 'But the justification covers only blows struck in sheer self-defence and not in revenge. Accordingly if, when all the danger is over and no more blows are really needed for defence, the defender nevertheless strikes one, he commits an assault and battery. The numerous decisions that have been given as to the kind of weapons that may lawfully be

used to repel an assailant, are merely applications of this simple principle. Thus, as we have already seen, where a person is attacked in such a way that his life is in danger he is justified in even killing his assailant to prevent the felony. But an ordinary assault must not be thus met by the use of firearms or other deadly weapons....'

91. In Browne 1973 NI 96 (NI at p. 107] Lowry, L.C.J. with regard to self-defence stated:

The need to act must not have been created by conduct of the accused in the immediate context of the incident which was likely or intended to give rise to that need.'

92. As regards self-defence and prevention of crime in Criminal Law by J.C. Smith & Brian Hogan, it is stated:

Since self-defence may afford a defence to murder, obviously it may do so to lesser offences against the person and subject to similar conditions. The matter is now regulated by Section 3 of the Criminal Law Act, 1967. An attack which would not justify D in killing might justify him in the use of some less degree of force, and so afford a defence to a charge of wounding, or, a fortiori, common assault. But the use of greater force than is reasonable to repel the attack will result in liability to conviction for common assault, or whatever offence the degree of harm caused and intended warrants. Reasonable force may be used in defence of property so that D was not guilty of an assault when he struck a bailiff who was unlawfully using force to enter D's home. Similar principles apply to force used in the prevention of crime.' "

The right of private defence is purely preventive and not punitive. This right is available only to ward off the danger of being attacked; the danger must be imminent and very real and it cannot be averted by a counter-attack. The acts of the accused appellants of proceeding to a definite destination with lethal weapons and thereafter causing serious injuries including fatal injuries on the unarmed members of the complainant party can never legitimately claim the benefit of the provisions of the right of private defence. Since the accused appellants did not have the right of private defence, therefore, the findings of the courts below regarding their exceeding the right of private defence cannot be sustained and are accordingly set aside.

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***263. INDIAN PENAL CODE, 1860 – Sections 107 & 306**

WORDS & PHRASES :

(i) Suicide, abetment of – Accused persons grabbed the money of deceased – They assaulted him also – Deceased committed suicide – On being prosecuted, the Trial Court framed charges u/s 306 IPC against all the accused – Held, none of the accused can be said to have instigated the deceased to commit suicide – Hence, offence of abetment of suicide not made out.

(ii) **'To instigate', meaning of – A person is said to 'instigate' another to an act, when he actively suggests or stimulates him to the act by means of language, direct or indirect, whether it takes the form of express solicitation, or of hints, insinuation or encouragement: The word 'instigate' means to goad or urge forward or to provoke, incite, urge or encourage to do an act.**

Babbi @ Jitendra and others v. State of Madhya Pradesh

Reported in 2008 (2) MPHT 160

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***264. INDIAN PENAL CODE 1860 – Sections 147, 324/149**

PROBATION OF OFFENDERS ACT, 1958 – Section 4

Incident took place about 20 years back when applicants no. 1 and 3 were 25 and 24 years of age and applicant no. 2 was 60 years of age – Applicants first offenders – Maximum punishment u/s 324 prescribed is 3 years – Benefit of Act can be extended if offence is punishable with imprisonment upto 7 years and accused is first offender – Applicants entitled for benefit of S. 4 of Act.

Jawaharlal v. State of M.P.

Reported in I.L.R (2008) M.P. 960

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

A sudden quarrel between appellant and his wife (deceased) on spur of moment and in heat of passion, without premeditation appellant suddenly dealt one blow of hammer on head of deceased with force – Bones of her skull broken into several pieces and she died – Shows an intention of causing her death or at least causing such bodily injury as was likely to cause her death – Liable to be punished under Part-I of S. 304 IPC.

Vijay Gupta v. State of M.P.

Reported in I.L.R (2008) M.P. 918

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266. INDIAN PENAL CODE, 1860 – Section 300

Infliction of single injury – Intention to commit murder must be gathered after consideration of the entire circumstances – Accused convicted for the offence of murder.

Murugan & Ors. v. State

Reported in AIR 2008 SC 627

Held:

Infliction of a single injury by itself is not a relevant factor to hold that the assailant had no intention to cause murder of the deceased. What is important in a case of this nature is to consider the entire circumstances to arrive at one conclusion or the other. When a group of people come with an intention to assault

particular person(s), with dangerous weapon, the same would attract to principles laid down in *Virsa Singh v. State of Punjab, 1958 AIR SC 465* wherein this Court, upon a detailed analysis of the provisions of Sections 299 and 300 of the Indian Penal Code opined that in order to attract "thirdly" contained in Section 300 of the Indian Penal Code, it must be established :

> "To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 "thirdly";

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

Once the aforementioned factors are established, absence of any knowledge that an act of that kind would likely to cause death become immaterial. The intention to cause the bodily injury, if proved, the rest of the enquiry would be purely objective and the only question is whether as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death.

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***267. INDIAN PENAL CODE, 1860 – Section 302**
EVIDENCE ACT, 1872 – Section 3
Murder – Circumstantial evidence, appreciation of – Law explained. Soon before the incident there had been a quarrel between the deceased and her husband (accused) – Accused and deceased were last seen together inside their house – Thereafter the deceased was found dead due to serious injuries found on her body – Held, the burden was on the accused to offer a reasonable explanation as to how his wife met with homicidal death inside his dwelling house – In the absence of any such explanation, circumstances of the case unerringly point out to the guilt of the accused and of no one else.
Bihari v. State of Madhya Pradesh
Reported in 2008 (2) MPHT 50 (DB)

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*268. INDIAN PENAL CODE, 1860 – Section 302/34
EVIDENCE ACT, 1872 – Section 3
Circumstantial evidence, appreciation of – From the house of the deceased, accused persons were accompanying the deceased – Both accused were last seen together with deceased at village Khamlah – From Khamlah, both accused alongwith deceased were seen proceeding to Amlah – Deceased and accused 'M' took betel from betel shop – On the next day inquiry was made from both accused about the whereabouts of the deceased – Both the accused expressed ignorance – Accused 'M' was injured and was limping – He could not properly explain about his injuries – Six days thereafter dead body of the deceased was found in the well situated near Khamlah Amlah Road – Number of injuries were found on the body of the deceased – Death was not due to drowning but was homicidal – On information and at the instance of the accused persons weapons used for committing the offence were recovered from the possession of accused persons, wrist watch of the deceased seized from accused 'N' and shoes seized from accused 'M' – Accused 'M' had borrowed money from the deceased prior to the incident – Held, the chain of circumstances was complete and there was no escape from the conclusion that within all human probability, the crime was committed by the accused persons and none else.

Manohar and another v. State of Madhya Pradesh
Reported in 2008 (2) MPHT 326 (DB)

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*269. INDIAN PENAL CODE, 1860 – Sections 304/201, 302 & 201
CRIMINAL PROCEDURE CODE, 1973 – Sections 190 & 164
Upon filing of a charge sheet by the police in respect of an offence which is exclusively triable by the Court of Sessions, the Magistrate is obliged to comply with the provisions of S. 207 Cr.P.C. without any delay and to commit the case to the Court of Session – Magistrate is required either to take cognizance u/s 190 (b) Cr.P.C. or to direct the police for further investigation – In such a situation, Magistrate is not empowered to hold an enquiry u/s 319 (2) and/or u/s 190 Cr.P.C. and to record statements of the witnesses u/s 164 Cr.P.C. – Court can take cognizance against the persons who have not been chargesheeted.

Mangilal and another v. State of M.P.
Reported in 2008 (2) MPHT 286

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***270. INDIAN PENAL CODE, 1860 – Section 304, Part I and 324**
CRIMINAL PROCEDURE CODE, 1973 – Section 157
Appellant/Accused 'R' inflicted barchi blow to deceased on account of dispute arose due to grazing cattle in the field – He sustained injury on temple (kanpati) of left side of head and fell down on the ground – Other co-accused inflicted injuries to the deceased by lathi – In the incident other persons also sustained injuries – Ultimately, deceased died in the hospital during course of treatment after 15 days from the date of incident – Trial Court convicted the appellant/ accused 'R' u/ss 304 (I) and 324 IPC, respectively and sentenced to undergo rigorous imprisonment for 10 years with a fine of Rs. 5000/ - and rigorous imprisonment for two years with a fine of Rs. 1000/- with default stipulation respectively and acquitted co-accused persons – Held, prosecution witnesses were present on spot and they saw the incident – Evidence of eye-witnesses is trustworthy and supported by medical evidence – Mere delay in recording FIR and sending the same to Magistrate is not a circumstance to discard prosecution case in its entirety – Further held, in criminal justice system, there should be an equilibrium between the guilt and punishment – Trial Court did not commit any illegality in holding the appellant/accused guilty and has awarded proper and adequate sentence.

Radheshyam v. State of Madhya Pradesh
Reported in 2008 (1) MPHT 512

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271. INDIAN PENAL CODE, 1860 – Section 304-B
EVIDENCE ACT, 1872 – Section 106
Dowry death – Harassment for dowry proved – Death of deceased due to head injury within two years of marriage – The body cremated without informing to police and her parents – Story of suffering from epilepsy was found concocted – In such circumstances no satisfactory explanation of head injury of deceased – Accused liable to be convicted.

State of Rajasthan v. Jaggu Ram
Reported in AIR 2008 SC 982

Held:

If the prosecution evidence is considered in the backdrop of the fact that the defence failed to produce any evidence to controvert the facts relating to the demand of dowry, it must be held that the deceased was subjected to cruelty and harassment in connection with dowry immediately after her marriage and such harassment continued till her death and the learned trial judge rightly held the charge under Section 304-B IPC as proved, against the accused. The learned Single Judge of the High Court gave undue weightage to the minor discrepancies

in the first information report and the statement of PW 1 -Atma Ram and some alleged omission in the first information report and acquitted the accused ignoring the most important factor that the deceased suffered injuries in a dwelling unit belonging to her in-laws and in their presence, that she died due to those injuries and that the defence failed to offer any satisfactory explanation for the injuries on the head of the deceased. The defence did introduce the story of the deceased suffering with epilepsy and her being treated for the same, but no documentary evidence was produced to show that she was ever treated for epilepsy. In their cross-examination, the father and brothers of the deceased and the other prosecution witnesses categorically denied that the deceased was suffering from epilepsy and she used to have bouts of fits. Atma Ram also denied the suggestion that she and the accused had taken Shanti @ Gokul for treatment to a Psychiatrist at Jaipur. Some of the Prosecution witnesses who were declared hostile, did try to support the theory that the deceased used to have fits, but their statements can be of no help to the accused because no documentary evidence in the form of prescriptions of doctors or the bills of the treatment and purchase of medicines were produced to prove that the deceased was suffering from epilepsy and used to have fits. The statement of Dr. Shyam Lal Khuteta is also of no help to the accused because he too did not produce record relating to the treatment allegedly given to the deceased for epilepsy long time ago. The conduct of the accused and his family members in not informing the parents of the deceased about the injuries caused on her head and consequential death and the fact that the cremation of the dead body was conducted in the wee hours of 30.3.1993 without informing the parents or giving an intimation to the Police so as to enable it to get the post-mortem of the dead body conducted go a long way to show that the accused had deliberately concocted the story that Shanti @ Gokul was suffering from epilepsy and she suffered injuries on her head by colliding against the door bar during the bout of fits. The disposal of dead body in a hush-hush manner clearly establish that the accused had done so with the sole object of concealing the real cause of the death of Shanti @ Gokul.

In our considered view, this was a fit case for invoking Section 106 of the Evidence Act, which lays down that when any fact is especially within the knowledge of the any person, the burden of proving that fact is upon him.

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272. INDIAN PENAL CODE, 1860 – Section 364-A

Kidnapping for ransom, requirement of –

(1) accused kidnapped or abducted the person;

(2) kept him under detention after such kidnapping and abduction; and

(3) kidnapping or abduction for ransom.

Vinod v. State of Haryana

Judgment dated 24.01.2008 passed by the Supreme Court in Criminal Appeal No. 165 of 2008, reported in (2008) 2 SCC 246

Held:

Section 364A deals with "Kidnapping for ransom etc." This Section reads as follows:

Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or (any foreign State or international inter-governmental organization or any other person) to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine.

The Section refers to both "Kidnapping" and "Abduction". Section 359 defines Kidnapping. As per the said provision there are two types of kidnapping i.e. (1) kidnapping from India; and (2) kidnapping from lawful guardianship.

Abduction is defined in Section 362. The provision envisages two types of abduction i.e. (1) by force or by compulsion; and/or (2) inducement by deceitful means. The object of such compulsion or inducement must be the going of the victim from any place. The case at hand falls in the second category.

To "Induce" means "to lead into". Deceit according to its plain dictionary meaning signifies anything intended to mislead another. It is a matter of intention and even if promise held out by the accused was fulfilled by him, the question is: whether he was acting in a bonafide manner?

The offence of abduction is a continuing offence. This Section was amended in 1992 by Act XLII of 1993 with effect from 22.5.1993 and it was subsequently amended in 1995 by Act XXIV of 1995 with effect from 26.5.1995. The Section provides punishment for kidnapping, abduction or detaining for ransom.

To attract the provisions of Section 364A what is required to be proved is (1) that the accused kidnapped or abducted the person; and (2) kept him under detention after such kidnapping and abduction; and (3) that the kidnapping or abduction was for ransom. .....

To pay a ransom as per Black's Law Dictionary means "to pay price or demand for ransom". The word "demand" means "to claim as one's due;" "to require"; "to ask relief"; "to summon"; "to call in Court"; "An imperative request preferred by one person to another under claim of right, requiring the latter to do or yield something or to abstain from some act;" "An asking with authority, claiming or challenging as due." The definition as pointed out above would show that the demand has to be communicated. It is an imperative request or a claim made."

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*273. **INDIAN PENAL CODE, 1860 – Section 376 (2) (g)**

Gang rape – Prosecutrix, a blind woman identifying the accused persons from their voices – Prosecutrix not accustomed to the voices of respondents – No identification parade on the ground of voice conducted – She could not identify any person on the basis of their voices in Court – Two parties in village – Prosecutrix brought by one party to implicate the members of other party – False implication of respondents not ruled out – Respondents rightly acquitted by Trial Court.

State of M.P. v. Babloo

Reported in I.L.R (2008) M.P. 879

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274. **INDIAN PENAL CODE, 1860 – Sections 390, 378 & 383**

Meaning of robbery – Violence must be in the course of theft or extortion and not subsequently.

Venu alias Venugopal and others v. State of Karnataka

Judgment dated 30.01.2008 passed by the Supreme Court in Criminal Appeal No. 221 of 2008, reported in (2008) 3 SCC 94

Held:

S. 390 of IPC defines robbery which is theft or extortion when caused with violence of death, hurt or wrongful restraint. Where there is no theft committed, then as a natural corollary there cannot be robbery. Robbery is only an aggravated form of offence of theft or extortion. Aggravation is in the use of violence of death, hurt or restraint. Violence must be in course of theft and not subsequently. It is not necessary that violence actually should be committed but even attempt to commit it is enough.

The essential ingredients to prove the offence of robbery u/s 392 IPC are as follows:

1. Accused committed theft.
2. Accused voluntarily caused or attempted to cause
   (i) death, hurt or wrongful restraint;
   (ii) fear of instant death, hurt or wrongful restraint.
3. He did either act for the end
   (i) to commit theft;
   (ii) while committing theft;
   (iii) in carrying away or in the attempt to carry away property obtained by theft.

The words "for that end" in Section 390 clearly mean that the hurt caused must be with the object of facilitating the committing of the theft or must be

caused while the offender is committing theft or is carrying away or is attempting to carry away property obtained by the theft.

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*275. INDIAN PENAL CODE, 1860 – Sections 395 & 397

Accused cannot be convicted for offence u/s 397 IPC with the aid of S. 34 or 149 IPC – Only those accused persons can be convicted u/s 397 IPC against whom there is specific evidence available about possession of deadly weapons in their hands at the time of the incident and the weapon was visible to the witnesses and victims.

Ranchhod v. State of M.P.

Reported in 2008 (2) MPHT 266

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

Cruelty – Wife died by drowning in well – Appellant used to beat and harass his wife for securing his job through her brothers, to get sale deed of a house and Rs.1 lakh – What happened on the day of incident is within the knowledge of husband and wife – Wife is no more – No woman will end her life without intolerable miseries, troubles, tortures and harassments – Death of wife not reported to authorities or brothers of deceased – Earlier report of harassment was not made to avoid further harassment – Appellant rightly convicted u/s 498-A of IPC.

Bhairon Singh v. State of M.P.

Reported in I.L.R (2008) M.P. 893

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277. LAND ACQUISITION ACT, 1894 – Section 23

Market value – Determination of market value of large tracts on the basis of exemplars of small piece of land – Permissibility – If exemplars of large pieces of land is not available exemplars of small pieces of lands may be taken into consideration – Deduction of compensation for development charge – It is not an absolute rule – It may vary as per the purpose of acquisition – Reasons for deduction – Substantial area of land is used for development of sites, laying out roads, drains, sewers, water and electricity lines and other civic amenities – Money invested in these activities is also blocked up for considerable period – If acquisition is not for housing colony or Government office but for establishing factory where such activities are not to be carried out, 10% deduction is justified.

Atma Singh (dead) through LRs. and others v. State of Haryana and another

Judgment dated 07.12.2007 passed by the Supreme Court in Civil Appeal No. 3148 of 2000, reported in (2008) 2 SCC 568

Held:

The reasons given for the principle that price fetched for small plots cannot form safe basis for valuation of large tracts of land, according to cases referred to above, are that substantial area is used for development of sites like laying out roads, drains, sewers, water and electricity lines and other civic amenities. Expenses are also incurred in providing these basic amenities. That apart it takes considerable period in carving out the roads making sewers and drains and waiting for the purchasers. Meanwhile the invested money is blocked up and the return on the investment flows after a considerable period of time. In order to make up for the area of land which is used in providing civic amenities and the waiting period during which the capital of the entrepreneur gets locked up a deduction from 20% onward, depending upon the facts of each case, is made.

The question to be considered is whether in the present case those factors exist which warrant a deduction by way of allowance from the price exhibited by the exemplars of small plots which have been filed by the parties. The land has not been acquired for a Housing Colony or Government Office or an Institution. The land has been acquired for setting up a sugar factory. The factory would produce goods worth many crores in a year. A sugar factory apart from producing sugar also produces many by-products in the same process. One of the by-products is molasses, which is produced in huge quantity. Earlier, it had no utility and its disposal used to be a big problem. But now molasses is used for production of alcohol and ethanol which yield lot of revenue. Another by-product begasse is now used for generation of power and press mud is utilized in manure. Therefore, the profit from a sugar factory is substantial. Moreover, it is not confined to one year but will accrue every year so long as the factory runs. A housing board does not run on business lines. Once plots are carved out after acquisition of land and are sold to public, there is no scope for earning any money in future. An industry established on acquired land, if run efficiently, earns money or makes profit every year. The return from the land acquired for the purpose of Housing Colony, or Offices, or Institution cannot even remotely be compared with the land which has been acquired for the purpose of setting up a factory or industry. After all the factory cannot be set up without land and if such land is giving substantial return, there is no justification for making any deduction from the price exhibited by the exemplars even if they are of small plots. It is possible that a part of the acquired land might be used for construction of residential colony for the staff working in the factory. Nevertheless, where the remaining part of the acquired land is contributing to production of goods yielding good profit, it would not be proper to make a deduction in the price of land shown by the exemplars of small plots as the reasons for doing so assigned in various decisions of this Court are not applicable in the case under consideration.

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*278. **LAND ACQUISITION ACT, 1956 – Sections 23 & 51-A**

Acquisition of land, relevant factors for determination of market value – Test of a prudent buyer has to be applied – Relevant considerations – Sale deeds relating to closest or nearest piece of land carries more value – Distance of land covered under Sale Deeds from land acquired – Potential value on the date of notification and nature – In case of large piece of land, grant of compensation per sq. ft. after certain deduction for development – Distance from city also relevant factor.

Shakuntala Devi v. Land Acquisition Officer, Satna-Rewa Railway Link Project

Reported in I.L.R (2008) M.P. 564

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279. **LEGAL SERVICES AUTHORITIES ACT, 1987 – Sections 19 & 20**

Nature of jurisdiction and functions of Lok Adalat – Lok Adalat has no adjudicatory or judicial function – Its role is purely conciliatory – It determines a reference on the basis of compromise or settlement – Lok Adalat has no jurisdiction to hear a matter as a regular Court – If it is unable to make compromise or settlement, it should return record to the Court – If matter is decided in terms of settlement, it becomes final and binding on the parties – If any party wants to challenge the award, only remedy available is under Article 226 or 227 of the Constitution of India.

State of Punjab and another v. Jalour Singh and others

Judgment dated 18.01.2008 passed by the Supreme Court in Civil Appeal No. 522 of 2008, reported in (2008) 2 SCC 660

Held:

It is evident from the said provisions that Lok Adalats have no adjudicatory or judicial functions. Their functions relate purely to conciliation. A Lok Adalat determines a reference on the basis of a compromise or settlement between the parties at its instance, and put its seal of confirmation by making an award in terms of the compromise or settlement. When the Lok Adalat is not able to arrive at a settlement or compromise, no award is made and the case record is returned to the court from which the reference was received, for disposal in accordance with law. No Lok Adalat has the power to "hear" parties to adjudicate cases as a court does. It discusses the subject matter with the parties and persuades them to arrive at a just settlement. In their conciliatory role, the Lok Adalats are guided by principles of justice, equity, fair play. When the LSA Act refers to 'determination' by the Lok Adalat and 'award' by the Lok Adalat, the said Act does not contemplate nor require an adjudicatory judicial determination, but a non-adjudicatory determination based on a compromise or settlement, arrived at by the parties, with guidance and assistance from the Lok Adalat. The 'award' of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision making process. The making of the award is merely

an administrative act of incorporating the terms of settlement or compromise agreed by parties in the presence of the Lok Adalat, in the form of an executable order under the signature and seal of the Lok Adalat.

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

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***280. LIMITATION ACT, 1963 – Section 27 & Articles 64 & 65**

ADVERSE POSSESSION:

Adverse possession, proof of – Law explained – Plaintiff filed a suit claiming title to the suit land by exchange of land – Simultaneously, she pleaded adverse possession on the suit land – Plaintiff failed to prove plea of exchange – However, it was proved that in the course of proceedings u/s 145 Cr.P.C. on 11.05.1970 SDM restored possession of the suit land to her – Held, the plaintiff was entitled to retain possession until evicted therefrom in due process of law – Starting point of limitation commenced from 11.05.1970 – Defendants ought to have filed a civil suit based on their title or on previous possession, as the case may be, within a period of twelve years from 11.05.1970 – In absence of this, in view of S. 27 and Articles 64 & 65 of the Limitation Act, the rights of defendants, if any, were extinguished and plaintiff acquired right by way of adverse possession.

Ayodhya Singh and others v. Smt. Kamlesh Singh and another

Reported in 2008 (1) MPHT 489

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281. MOTOR VEHICLES ACT, 1988 – Sections 2 (16), 2 (21), 2 (23) & 149 (2) (a) (ii)

MOTOR VEHICLES RULES, 1989 Central, Form 4 Clauses (d) to (h) (as amended w.e.f. 28.03.2001) – Rules 14 and 16

Light goods vehicle come under the definition of Light Motor Vehicle prior to the amendment dated 28.03.2001.

National Insurance Company Ltd. v. Annappa Irappa Nesaria alias Nesaragi and others

Judgment dated 22.01.2008 passed by the Supreme Court in Civil Appeal No. 574 of 2008, reported in (2008) 3 SCC 464

Held:

The Motor Vehicles Act, 1988, which was enacted to consolidate and amend the law relating to motor vehicles, is a complete code. Section 2 of the Act provides for interpretation of the terms contained herein. It employs the words "unless the context otherwise requires". Section 2 (16) of the Act defines "heavy goods vehicle" to mean "any goods carriage the gross vehicle weight of which, or a tractor or a road roller the unladen weight of either of which, exceeds 12,000 kilograms".

Section 2 (21) defines "light motor vehicle" and Section 2 (23) defines "medium goods vehicle" as under:

> "2. (21) 'light motor vehicle' means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7500 kilograms.
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> ★ ★ ★
>
> (23) 'medium goods vehicle' means any goods carriage other than a light motor vehicle or a heavy goods vehicle.

Section 3 of the Act is in the following terms:

> 3. Necessity for driving licence.- (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle other than a motorcab or motor cycle hired for his own use or rented under any scheme made under Sub-section (2) of Section 75 unless his driving licence specifically entitles him so to do."

The Central Government has framed Rules known as The Central Motor Vehicles Rules, 1989. In Form 4 appended to these Rules prior to amendment on 28.03.2001, the description of vehicles was in clause (d) light motor vehicle, clause (e) medium goods vehicle and clause (g) heavy goods vehicle whereas after amendment, the description of vehicles is in clause (d) light motor vehicle and clause (e) transport vehicle.

"Light motor vehicle" is defined in Section 2 (21) and, therefore, in view of the provision, as then existed (prior to 28.03.2001), included a light transport vehicle. It is evident that "transport vehicle" has now been substituted for "medium goods vehicle" and "heavy goods vehicle". The light motor vehicle continued, at the relevant point of time (i.e. prior to 28.03.2001) to cover both "light passenger carriage vehicle" and "light goods carriage vehicle". A driver

who had a valid licence to drive a light motor vehicle, therefore, was authorized to drive a light goods vehicle as well (prior to 28.03.2001).

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282. MOTOR VEHICLES ACT, 1988 – Section 2 (28)

Motor vehicle, connotation of – JCB machine – Is a motor vehicle within the meaning of the definition of 'motor vehicle' contained in S.2 (28) of the Act.

The New India Assurance Co. Ltd., Indore v. Balu Banjara and others

Reported in 2008 (2) MPHT 252

Held :

Section 2 (28) of the Motor Vehicles Act defines motor vehicle. According to which only those vehicles are not covered under the definition of motor vehicle, which are running upon the fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or vehicle having less than 4 wheels fitted with engine capacity of not exceeding 25 cubic centimeters. In the present case the appellant has examined Ramesh Gagrani, A.O. of the Company, who has categorically admitted that the JCB machine is having 4 wheels. It has also been admitted that it is being driven by the driver and it is being used for the purpose of construction of roads. It is also admitted by him that it moves on the roads. So far as the law laid down by Hon'ble the *Jharkhand High Court in the matter of Central Coalfields Ltd. v. State of Bihar* (now Jharkhand) and others, 2007 ACJ 117 is concerned, it is of no help to the appellant because in this case the Hon'ble Jharkhand High Court has held that the machineries such as shovels, traxcavators, cranes, rappridozers, excavators which are not adapted for use upon roads and are plied exclusively within enclosed premises of mines are not motor vehicles. In the present case the JCB machine is running on the roads and is being used for construction of the roads. Only because it is not being registered by the Regional Transport Authority as motor vehicle and no registration number is being given, it cannot be said that the JCB was not a motor under the provisions of the Motor Vehicles Act. In the facts and circumstances of the case, this Court is of the view that the learned Tribunal has rightly held that the JCB machine is motor for the purpose of Motor Vehicles Act.

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***283. MOTOR VEHICLES ACT, 1988 – Sections 2 (30), 168 & 173**

Tractor trolley financed by a bank – Deceased fell down from trolley – Claims Tribunal fastened liability upon the Bank as financier – Held, financier not in possession of the vehicle – Cannot be said to be the 'owner' of the vehicle u/s 2 (30) of the Act – Hence, cannot be held liable to pay compensation.

Smt. Kapsi Yadav and others v. Pradeep @ Bablu and others

Reported in 2008 (1) MPHT 461

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***284. MOTOR VEHICLES ACT, 1988 – Sections 128, 168 & 173**

The act of allowing two pillion riders to sit while driving a moped vehicle would amount to contravention of S. 128 of the Act and Rules framed thereunder – But on that basis, it cannot be said that driver of the vehicle was rash and negligent or that it was a case of contributory negligence.

Nanhelal Gontiya v. Harischand and others

Reported in 2008 (2) MPHT 46 (DB)

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285. MOTOR VEHICLES ACT, 1988 – Sections 147
INSURANCE ACT, 1938 – Section 64-VB

Cheque issued by insured towards payment for premium was dishonoured – As a result policy of insurance was cancelled and intimated to the insured much before the accident occurred – Insurer not liable to pay compensation.

Deddappa & Ors. v. The Branch Manager, National Insurance Co. Ltd.

Reported in AIR 2008 SC 767

Held:

The provision of Section 64-VB of Insurance Act, 1938 in no unmistakable term provides for issuance of a valid policy only on receipt of payment of the premium. In today's world payment made by cheque is ordinarily accepted as valid tender. Section 64VB of the 1938 Act also provides for such a scheme.

Payment by cheque, however, is subject to its encashment. In *Damadilal and Ors. v. Parashram and Ors., (1976) 4 SCC 855,* this Court observed :

> "On the ground of default, it is not disputed that the defendants tendered the amount in arrears by cheque within the prescribed time. The question is whether this was a lawful tender. It is well-established that a cheque sent in payment of a debt on the request of the creditor, unless dishonoured, operates as valid discharge of the debt and, if the cheque was sent by post and was met on presentation, the date of payment is the date when the cheque was posted..."

A contract is based on reciprocal promise. Reciprocal promises by the parties are condition precedents for a valid contract. A contract furthermore must be for consideration.

In *National Insurance Co. Ltd. v. Seema Malhotra and Ors., (2001) 3 SCC 151,* a Division Bench has held that :

"17. In a contract of insurance when the insured gives a cheque towards payment of premium or part of the premium, such a contract consists of reciprocal promise. The drawer of the cheque promises the insurer that the cheque, on presentation, would yield the amount in cash. It cannot be forgotten that a cheque is a bill of exchange drawn on a specified banker. A bill of exchange is an instrument in writing containing an unconditional order directing a certain person to pay a certain sum of money to a certain person. It involves a promise that such money would be paid.

18. Thus, when the insured fails to pay the premium promised, or when the cheque issued by him towards the premium is returned dishonoured by the bank concerned the insurer need not perform his part of the promise. The corollary is that the insured cannot claim performance from the insurer in such a situation.

19. Under Section 25 of the Contract Act an agreement made without consideration is void. Section 65 of the Contract Act says that when a contract becomes void any person who has received any advantage under such contract is bound to restore it to the person from whom he received it. So, even if the insurer has disbursed the amount covered by the policy to the insured before the cheque was returned dishonoured, the insurer is entitled to get the money back.

20. However, if the insured makes up the premium even after the cheque was dishonoured but before the date of accident it would be a different case as payment of consideration can be treated as paid in the order in which the nature of transaction required it.

We are not oblivious of the distinction between the statutory liability of the Insurance Company vis-a-vis a third party in the context of Sections 147 and 149 of the Act and its liabilities in other cases. But the same liabilities arising under a contract of insurance would have to be met if the contract is valid. If the contract of insurance has been cancelled and all concerned have been intimated thereabout, we are of the opinion, the insurance company would not be liable to satisfy the claim.

A beneficial legislation as is well known should not be construed in such a manner so as to bring within its ambit a benefit which was not contemplated by the legislature to be given to the party.

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286. MOTOR VEHICLES ACT, 1988 – Sections 147 & 149

Principles laid down in *Swaran Singh's case, (2004) 3 SCC 297* are applicable to third party claim and not to other cases – To avoid liability u/s 149 (2) (a) (ii), the insurance company must establish that the breach was on the part of the insured – Mere absence of fake or invalid driving licence or disqualification of the driver for driving at the relevant time itself are not sufficient to prove the defence of Insurance Company against the insured or third party.

Premkumari and others v. Prahlad Dev and others

Judgment dated 18.01.2008 passed by the Supreme Court in Civil Appeal No. 490 of 2008, reported in (2008) 3 SCC 193

Held:

Before considering the relevant decisions of this Court and the issue in question, let us note certain factual details. The first respondent is the owner of the offending vehicle and respondent No. 2 is the driver of the said vehicle, who is none other than the brother of the first respondent. Before the Tribunal, the Insurance Company contended that the driver was not having a valid and effective driving licence. Considering the materials in the form of oral and documentary evidence placed by the Insurance Company the Tribunal found that opposite party No. 2, namely, driver of the offending vehicle did not have a valid and effective licence on the date of the accident. Based on the said conclusion, it exonerated the Insurance Company from its liability. When this specific finding was challenged by way of review application before the High Court, the judgment of this Court in *United India Insurance Co. Ltd. v. Lehru , (2003) 3 SCC 338* was pressed into service. In the said judgment, after considering Section 96(2)(b)(ii) of the old Motor Vehicles Act and similar provision i.e. 149(2)(a)(ii) in the Motor Vehicles Act, 1988, this Court held as under:

> "17. .... Thus under Sub-section (1) the insurance company must pay to the person entitled to the benefit of the decree, notwithstanding that it has become "entitled to avoid or cancel or may have avoided or cancelled the policy". The words "subject to the provisions of this section" mean that the insurance company can get out of the liability only on grounds set out in Section 149. Sub-section (7), which has been relied on, does not state anything more or give any higher right to the insurance company. On the contrary, the wording of Sub-section (7) viz. "no insurer to whom the notice referred to in Sub-section (2) or Sub-section (3) has been given shall be entitled to avoid his liability" indicates that the legislature wanted to clearly indicate that insurance companies must pay unless they are absolved of liability on a ground specified in Sub-section (2). This is further clear from Sub-section (4) which mandates that conditions,

in the insurance policy, which purport to restrict insurance would be of no effect if they are not of the nature specified in Sub-section (2). The proviso to Sub-section (4) is very illustrative. It shows that the insurance company has to pay to third parties but it may recover from the person who was primarily liable to pay. The liability of the insurance company to pay is further emphasised by Sub-section (5). This also shows that the insurance company must first pay, then it can recover. If Section 149 is read as a whole it is clear that Sub-section (7) is not giving any additional right to the insurance company. On the contrary it is emphasising that the insurance company cannot avoid liability except on the limited grounds set out in Sub-section (2).

18. Now let us consider Section 149(2). Reliance has been placed on Section 149(2)(a)(ii). As seen, in order to avoid liability under this provision it must be shown that there is a "breach". As held in *Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan, (1987) 2 SCC 654* and *Sohan Lal Passi v. P. Sesh Reddy, (1996) 5 SCC 21* cases the breach must be on the part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results. Just to take an example, suppose a vehicle is stolen. Whilst it is being driven by the thief there is an accident. The thief is caught and it is ascertained that he had no licence. Can the insurance company disown liability? The answer has to be an emphatic "No". To hold otherwise would be to negate the very purpose of compulsory insurance. The injured or relatives of the person killed in the accident may find that the decree obtained by them is only a paper decree as the owner is a man of straw. The owner himself would be an innocent sufferer. It is for this reason that the legislature, in its wisdom, has made insurance, at least third-party insurance, compulsory. The aim and purpose being that an insurance company would be available to pay. The business of the company is insurance. In all businesses there is an element of risk. All persons carrying on business must take risks associated with that business. Thus it is equitable that the business which is run for making profits also bears the risk associated with it. At the same time innocent parties must not be made to suffer or loss. These provisions meet these requirements. We are thus in agreement with what is laid down in the aforementioned cases viz. that in order to avoid liability it is not sufficient to show that the person driving at the time of accident was

not duly licensed. The insurance company must establish that the breach was on the part of the insured.

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20. When an owner is hiring a driver he will therefore have to check whether the driver has a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take the test of the driver. If he finds that the driver is competent to drive the vehicle, he will hire the driver. We find it rather strange that insurance companies expect owners to make enquiries with RTOs, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). The insurance company would not then be absolved of liability. If it ultimately turns out that the licence was fake, the insurance company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly, even in such a case the insurance company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in *Skandia* (supra), *Sohan Lal Passi* (supra) and *New India Assurance Co. v. Kamla (2001) 4 SCC 342 cases.* We are in full agreement with the views expressed therein and see no reason to take a different view.

It is clear from the above decision when the owner after verification satisfied himself that the driver has a valid licence and driving the vehicle in question competently at the time of the accident there would be no breach of Section 149(2)(a)(ii), in that event, the Insurance Company would not then be absolved of liability. It is also clear that even in the case that the licence was fake, the Insurance Company would continue to remain liable unless they prove that the owner was aware or noticed that the licence was fake and still permitted him to drive.

In *National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297,* this Court summarized its finding in Clauses iii and iv are relevant for this case which are as under: (SCC pp. 341-42, para 110)

"110. xxx

(i) xxx

(ii) xxx

(iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in Sub-section (2) (a) (ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) (iv) Insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

The effect and implication of the principles laid down in Swaran Singh case (supra) has been considered and explained in *National Insurance Co. Ltd. v. Laxmi Narain Dhut, (2007) 3 SCC 700.* The following conclusion in para 38 are relevant: (*Laxmi Narain case (supra),* SCC p. 719)

"38. In view of the above analysis the following situations emerge:

1. The decision in *Swaran Singh case* has no application to cases other than third-party risks.
2. Where originally the licence was a fake one, renewal cannot cure the inherent fatality.
3. In case of third-party risks the insurer has to indemnify the amount, and if so advised, to recover the same from the insured.
4. The concept of purposive interpretation has no application to cases relatable to Section 149 of the Act."

In the case of *National Insurance Co. Ltd. v. Kusum Rai , (2006) 4 SCC 250,* the vehicle was being used as a taxi. It was, therefore, a commercial vehicle. The driver of the said vehicle was required to hold an appropriate licence therefore. Ram Lal, who allegedly was driving the said vehicle at the relevant time, was holder of a licence to drive light motor vehicle only. He did not possess any licence to drive a commercial vehicle. Therefore, there was a breach of condition of the contract of insurance. In such circumstances, the Court observed that the appellant-National Insurance Co. Ltd., therefore, could raise the said defence while considering the stand of the Insurance Company. This Court, pointing out the law laid down in Swaran Singh (supra) concluded that the owner

of the vehicle cannot contend that he has no liability to verify the fact as to whether the driver of the vehicle possessed a valid licence or not.

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287. MOTOR VEHICLES ACT, 1988 – Section 163-A

Claim application – Structure formula – Choice of multiplier – In case of death of a young man leaving behind aged claimant parents. Whether by considering short life expectancy of the claimants, high multiplier provided in the Second Schedule may be lowered down? Held, Yes.

Ramesh Singh and another v. Satbir Singh and another

Reported in 2008 ACJ 814

Held :

Considering the law laid down in *New India Assurance Co. Ltd. v. Charlie [(2005) 10 SCC 720],* it is clear that the choice of multiplier is determined by the age of the deceased or claimants whichever is higher. Admittedly, the age of the father was 55 years. The question of mother's age never cropped up because that was not the contention raised even before the Trial Court or before us. Taking the age to be 55 years, in our opinion, the courts below have not committed any illegality in applying the multiplier of 8 since the father was running 56th year of his life.

The learned counsel relying on the 2nd Schedule of the Act contended that the deceased being about 22 years of age, a multiplier of 16 or 17 should have been granted. It is undoubtedly true that Section 163-A was brought on the Statute book to shorten the period of litigation. The burden to prove the negligence or fault on the part of driver and other allied burdens u/s. 140 or 166 were really cumbersome and time consuming. Therefore as a part of social justice, a system was introduced via Section 163-A wherein such burden was avoided and thereby a speedy remedy was provided. The relief u/s 163-A has been held not to be additional but alternate. The Schedule provided has been threadbare discussed in various pronouncements including *Deepal Girishbhai Soni v. United India Insurance Co. Ltd. [(2004) 5 SCC 385].* 2nd Schedule is to be used not only referring to age of victim but also other factors relevant therefor. Complicated questions of facts and law arising in accident cases cannot be answered all times by relying on mathematical equations. In fact in *U.P. State Road Transport Corporation v. Trilok Chandra [(1996) 4 SCC 362],* Ahmedi, J. (As the Chief Justice then was) has pointed out the shortcomings in the said Schedule and has held that the Schedule can only be used as a guide. It was also held that the selection of multiplier cannot in all cases be solely dependent on the age of the deceased. If a youngman is killed in the accident leaving behind aged parents who may not survive long enough to match with a high multiplier provided by the 2nd Schedule, then the Court has to offset such high multiplier and balance the same with the short life expectancy of the claimants. That precisely has happened in this case. Age of the parents was held as a

relevant factor in case of minor's death in recent decision in *Oriental Insurance Co. Ltd. v. Syed Ibrahim & Ors. [JT 2007(11)SC 113)*. In our considered opinion, the Courts below rightly struck the said balance.

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288. MOTOR VEHICLES ACT, 1988 – Section 166

Contributory and composite negligence are two different phrases – Both have different consideration while determining the liability in a motor accident claim.

T.O. Anthony v. Karvarnan and others

Judgment dated 01.02.2008 passed by the Supreme Court in Civil Appeal No. 1082 of 2008, reported in (2008) 3 SCC 748

Held:

Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is, his contributory negligence. Therefore, where the injured is himself partly liable, the principle of "composite negligence" will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. But where a third party (other than the drivers and/or owners of the vehicles involved) claims damages for loss or injuries, it is said that compensation is payable in respect of the composite negligence of the drivers of those vehicles

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289. MOTOR VEHICLES ACT, 1988 – Section 166

Murder and accidental murder, distinction between – Accidental murder arising out of use of motor vehicle – Claim petition is maintainable.

Khairunisha and others v. Subhash @ Punjabi and others

Reported in 2008 (2) MPHT 259

Held:

It is not in dispute that there was accident between Mini Truck driven by the deceased Mohd. Arif and the truck driven by Subhash Nagle a convict in the murder case relating to death of Mohd. Arif. Subhash Nagle had taken Mohd. Arif in his truck in order to satisfy his demand to make payment of compensation due to damage caused to the Mini Truck which Mohd. Arif was driving. It appears that after Mohd. Arif was taken by Subhash Nagle in his truck an altercation took place between them. Thereafter Mohd. Arif was dashed with the truck. It appears that the truck dashed the deceased rear wheel came over the head resulting into death of Mohd. Arif on the spot. Before giving finding of the causal connection in the instant case, we deem it appropriate to refer to decisions, the

Apex Court in *Rita Devi v. New India Assurance Co. Ltd., AIR 2000 SC 1930 = 2000 ACJ 801,* has laid down that there is no doubt that the 'murder', as it is understood, in the common parlance is a felonious act where death is cause with intent and the perpetrators of that act normally have a motive against the victim of such killing. But there are also instances where murder can be by accident on a given set of facts. The difference between a 'murder' which is not an accident and a 'murder' which is an accident, depends on the proximity of the cause of such murder. If the dominant intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simpliciter, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonius act then such murder is an accidental murder. In the backdrop of the fact that deceased in the said case was driver of auto-rickshaw for carrying passengers on hire was duty bound to have accepted the demand of fare paying passengers to transport them to the place of their destination. During the course of this duty, if the passengers had decided to commit an act of felony of stealing the auto-rickshaw, they had to eliminate the driver of the auto-rickshaw then it cannot but be said that the death so caused to the driver of the auto-rickshaw was an accidental murder. The death of auto-rickshaw driver is an accident in the process of theft of auto-rickshaw.

The right of third party to claim compensation in such situation has been considered by Lord Denning in the case of *Hardy v. Motor Insurer's Bureau, (1964) 2 ALL ER 742,* it was held that: –

> "The policy of insurance, which a motorist is required by statute to take out, must cover any liability which may be incurred by him arising out of the use of the vehicle by him. It must, I think, be wide enough to cover, in general terms, any use by him of the vehicle, be it an innocent use or a criminal use, or be it a murderous use or a playful us. A policy so taken out by him is good altogether according to its terms. Of course, if the motorist intended from the beginning to make a criminal use of the vehicle intended to run don people with it or to drive it recklessly and dangerously and the insurers knew that, that was his intention, the policy would be bad in its inception. No one can stipulate for inequity. But that is never the intention with which such a policy is taken out. At any rate, no insurer is ever party to it. So the policy is good in its inception. The question arises only when the motorist afterwards makes a criminal use of the vehicle, the consequences are then these: if the motorist is guilty of a crime involving a wicked and deliberate intent and he is made to pay damages to an injured person, he is not himself entitled to recover on the

policy. But if he does not pay the damages, then the injured third party can recover against the insures under Section 207 of the Road Traffic Act, 1960 for it is a liability which was attached the motorist, under the statute, was required to cover. The injured third party is not affected by the disability which was attached to the motorist himself. So here, the liability of Philips to the plaintiff was a liability which Philips was required to cover by a policy of insurance, even though it arose out of his willful and culpable criminal act. If Philips had been insured, he himself would be disabled from recovering from the insurers. But the injured third party would not be disabled from recovering from them."

This Court after considering the case laws of *Kaushalya Bai and others v. Ramkishan Kirar and others, 2001 ACJ 1176, Samir Chanda v. M.D., Assam State Trans. Corpn., 1998 ACJ 1351 (SC), Shivaji Dayanu Patil v. Vatschala Uttam More, 1991 ACJ 777 (SC)* and *Oriental Insurance Co. Ltd. v. Sheela Bai and another, 2007 ACJ 1126* and coming to the facts of the instant case found that there was causal connection between the initial accident that took place between the Mini Truck and that of offending vehicle, there was also connection of the subsequent events with the accident and clearly the motor vehicle driven by Subhash Nagle caused death of Mohd. Arif. Thus, it was clearly a case o accidental murder. It was having causal connection with the motor accident, altercation also took place due to accident as the compensation was demanded that was also having causal connection, thereafter Mohd. Arif was run over by the offending truck. Thus, case squarely falls within the category of accidental murder as per principles laid down by the Apex Court in *Rita Devi* (supra). Thus, the claimants would be entitled for compensation, being a case of accidental murder involving use of motor vehicles.

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290. MOTOR VEHICLES ACT, 1988 – Section 166

TORTS:

Accident took place between a jeep and a truck – Drivers of both the vehicles were negligent – Deceased died while travelling in Jeep – He did not contribute to the accident – Held, the question of contributory negligence does not arise – Further held, it is a case of composite negligence – Where the liability is joint and several, it is the choice of the claimant to claim from the owner, driver and the insurer of both the vehicles or any one of them.

Mahesh Matre and others v. Akhlesh Thakur and others

Reported in 2008 (2) MPHT 163 (DB)

Held:

Deceased died the accidental death while travelling in the jeep. He was

not driving the jeep. He had not contributed to the causation of the accident. In the absence of any contribution for causing the accident, the question of contributory negligence does not arise. In the case of *Pramodkumar Rasikbhai Jhaveri v. Karmasey Kunvargi Tak and others, AIR 2002 SC 2864*, the Apex Court dealt with the concept of contributory negligence in the following terms: –

> "The question of contributory negligence arises 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 and another, 2004 ACJ 53,* the Apex Court has explained the concept of contributory negligence thus : –

> "Where an accident is due to negligence of both parties, substantially there would be contributory negligence and both would be blamed. In a case of contributory negligence, the crucial question on which liability depends would be whether either party could, by exercise of reasonable care, have avoided the consequence of other's negligence. Whichever party could have avoided the consequence of other's negligence would be liable for the accident. If a person's negligent act or omission was the proximate and immediate cause of death, the fact that the person suffering injury was himself negligent and also contributed to the accident or other circumstances by which the injury was caused would not afford a defence to the other. Contributory negligence is applicable solely to the conduct of a plaintiff. It means that there has been an act or omission on the part of the plaintiff which has materially contributed to the damage, the act or omission being of such a nature that it may properly be described as negligence, although negligence is not given its usual meaning."

Tested on the touchstone of the aforesaid parameters, there cannot be any shadow of doubt that in the absence of ay role remotely played by the deceased in the causation of accident, it cannot be held that he had contributed to the accident. In fact, as is evincible, he was travelling in the keep and the accident had occurred because of the collision between the truck and the jeep. Thus, he was a third party in respect of both the vehicles. As far as he is

concerned, the accident has been caused by the composite negligence by the feasors. This Court in *Sushila Bhadoriya and others v. M.P. State Road Transport Corporation, 2005 (1) MPLJ 372 (FB),* has held as under : –

> "26. On the same principle, in the case of tort-feasors, where the liability is joint and several, it is the choice of the claimant to claim damages from the owner and driver and insurer of both the vehicles or any one of them. If claim is made against one of them, entire amount of compensation on account of injury or death can be imposed against the owner, driver and insurer of that vehicle as their liability is joint and several and the claimant can recover the amount from any one of them. There cannot be apportionment of claim of each tort-feasors in the absence of proper and cogent evidence on record and it is not necessary to apportion the claim."

From the aforesaid enunciation of law it is quite clear that where the liability is joint and several it is the choice of the claimant to claim from the owner, driver and the insurer of both the vehicles or any one of them. The entire amount of compensation on account of the injuries or death can be imposed on the owner, driver and insurer of that vehicle.

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***291. MOTOR VEHICLES ACT, 1988 – Section 168**

Income of an employee includes not only pay-packet that he carries home but also other perks which are beneficial to the members of the entire family – Private Sector Companies in lieu of pension scheme gives contributory provident fund, gratuity and other perks to their employees – If facilities are being provided whereby the entire family stands to benefit, it must be included in the income of the employee for computation of the total compensation – Superannuation benefits, contribution towards gratuity, insurance of medical policy for self and family and education scholarship are beneficial to the members of the family – Allowances like travelling, newspaper, telephone, servant, car maintenance, etc., which are given for his vocational need should not be included in salary – However, income tax, professional tax which are deducted from salary should not be counted in salary.

National Insurance Co. Ltd. v. Indira Srivastava and others

Judgment dated 12.12.2007 passed by the Supreme Court in Civil Appeal No. 5830 of 2007, reported in (2008) 2 SCC 763

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***292. MOTOR VEHICLES ACT, 1988 – Section 168**

Under the Act, there is no restriction that the Tribunal/Court cannot award compensation amount exceeding the claimed amount – The function of the Tribunal/Court is to award 'just' compensation which is reasonable on the basis of evidence produced on record.

Andhra Pradesh State Road Transport Corporation represented by its General Manager and another v. M. Ramadevi and others

Judgment dated 25.01.2008 passed by the Supreme Court in Civil Appeal No. 682 of 2008, reported in (2008) 3 SCC 379

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293. MOTOR VEHICLES ACT, 1988 – Section 169

EVIDENCE ACT, 1872 – Section 157

First Information Report, evidentiary value of – FIR filed on behalf of claimants – They relied upon it – Held, it is not necessary to examine the lodger of FIR so as to prove it – It can be considered forming part of evidence.

Arun Kumar Patel and another v. Smt. Terasi and others

Reported in 2008 (1) MPHT 457

Held:

The immediate conduct evidence reflected in the shape of FIR indicates that marriage party in fact was being carried. It was not necessary to examine the lodger of the FIR as the document was filed on behalf of claimants and they have relied upon it, once they have relied upon it, the document could have been considered forming part of evidence and its evidentiary value has been found in the instant case. We place reliance on a decision of Apex Court in *Oriental Insurance Co. Ltd. v. Premlata Shukla and others (Civil Appeal No. 2526/2007), decided on 15th May, 2007,* in which it has been considered that FIR can be relied upon, it is not necessary to examine the lodger of FIR so as to prove it. In the facts and circumstances of the case, we are of the opinion that the finding recorded by the Tribunal is proper in the instant case that there was violation of policy inasmuch as marriage party was being carried at the time of accident, case set up by the claimants has been rightly rejected.

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***294. MOTOR VEHICLES ACT, 1988 – Section 170**

Owner (respondent No. 2) was driving offending vehicle, filed his written statement and affidavit bud did not turn up for cross examination – Appellant filed application u/s 170 of the Act seeking permission to contest claim on all grounds – Application dismissed without assigning any cogent reason and award passed by Tribunal – Held, dismissal of application u/s 170 was without justification – As final award was passed within 6 weeks of order of dismissal of application, appellant was well within his right to challenge the order

in appeal – Matter remanded back to Tribunal to allow appellant to contest claim on all grounds which are available to owner and driver.

Motor Insurance Co. Ltd. v. Suresh Chand Sankla

Reported in I.L.R (2008) M.P. 863

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295. N.D.P.S. ACT, 1985 – Sections 42 & 43

Hotel is a public place – Room occupied in a hotel by a person is not a public place – An information was received by an officer of Directorate of Revenue Intelligence that accused is staying in hotel with contraband substances – But information was passed on to PW1 who reduced the same in writing and in turn passed it to Senior Intelligence Officer PW10 – Held, person who received information neither reduced it in writing nor sent it to his senior officer – Requirement of S.42 not complied with – Conviction cannot be upheld.

Directorate of Revenue and another v. Mohammed Nisar Holia

Judgment dated 05.12.2007 passed by the Supreme Court in Criminal Appeal No. 311 of 2002, reported in (2008) 2 SCC 370

Held:

An information was received in the office of the appellant on 23.1.1997 that one person staying in Room No.305 or 306 at Hotel Kalpana Palace, Grant Road, Mumbai was in possession of a fax copy of consignment note under which Mandrex tablets were being transported from Delhi to Mumbai. The said information was passed on to PW-1, Parmar. He reduced the same in writing. He in turn passed it placing same by reducing it to writing before A.D. Patekar, Senior Intelligence Officer (PW- 10) allegedly as advised by Atul Dixit, Assistant Director. PW-1 along with two other officers, namely, Dhani and Patekar visited the said hotel. They came to know that the accused was staying in Room No.306. Two of the employees of the said hotel were asked to be panch witnesses. The door of the said room was knocked; Appellant opened it. He allegedly was given an option to get himself searched in presence of a Gazetted Officer or a Magistrate. He opted for the former. He was searched by the said officers. A sum of Rs.4,25,000/- in cash and a fax copy of a receipt of Green Carriers from Delhi showing the consignment of medicine was found in the said room. A xeroxed copy of the said fax message was retained.

Power under Section 42, NDPS Act to make search and seizure as also to arrest an accused is founded upon and subject to satisfaction of the officer as the term "reason to believe" has been used. Such belief may be founded upon secret information that may be orally conveyed by the informant. Section 43, on a plain reading of the NDPS Act, may not attract the rigours of Section 42 thereof. That means that even subjective satisfaction on the part of the authority, as is required under Section 42 (1), need not be complied with, only because the place whereat search is to be made is a public place. If Section 43 is to be treated as an exception to Section 42, it is required to be strictly complied with.

Although it is possible to contend that where a search is required to be made at a public place which is open to the general public, Section 42 would have no application but it may be another thing to contend that search is being made on prior information and there would be enough time for compliance of reducing the information to writing, informing the same to the superior officer and obtain his permission as also recording the reasons therefor coupled with the fact that the place which is required to be searched is not open to public although situated in a public place as, for example, room of a hotel. Whereas hotel is a public place, a room occupied by a guest may not be. He is entitled to his right of privacy. The very fact that the NDPS Act contemplated different measures to be taken in respect of search to be conducted between sunrise and sunset, between sunset and sunrise as also the private place and public place is of some significance. An authority cannot be given an untrammeled power to infringe the right to privacy of any person.

The provisions contained in the NDPS Act provide for certain checks on exercise of the powers of the authority concerned which otherwise would have been arbitrarily or indiscriminately exercised. The statute mandates that the prosecution must prove compliance with the said provisions. If no evidence is led by the prosecution, the court will be entitled to draw the presumption that the procedure had not been complied with. For the said purpose, there may not be any distinction between a person's place of ordinary residence and a room of a hotel.

In the instant case, the statutory requirements under Section 42 of the NDPS Act had not been complied with as the person who had received the first information did not reduce the same to writing. An officer who received such information was bound to reduce the same to writing and not the person who heard thereabout. In this view, the judgment of the High Court reversing the conviction does not suffer from any legal infirmity.

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***296. N.D.P.S. ACT, 1985 – Sections 50 & 42**

Limits of the applicability of the provisions in search of a house – Search of a house is distinguishable from search of a person – Right of the search being taken only in the presence of a Magistrate or a Gazetted Officer, is restricted, where the search is taken of a 'person' of the accused only u/s 50 – Where as, in search of a house, the investigating officer has to follow the conditions u/s 42 of the NDPS Act r/w/s 100 of CrPC [Please also see *State of Himachal Pradesh v. Pawan Kumar, (2005) 4 SCC 350*]

Ghasita Sahu v. State of Madhya Pradesh

Judgment dated 28.01.2008 passed by the Supreme Court in Criminal Appeal No. 184 of 2008, reported in (2008) 3 SCC 52

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297. N.D.P.S. ACT, 1985 – Section 67

Statement made u/s 67 of the Act is not the same as statement made u/s 161 of Cr.P.C.

The statement u/s 67 of the Act can be used as confession against the accused – The provisions of Sections 24 to 27 of the Evidence Act are not applicable.

Kanhaiyalal v. Union of India

Reported in AIR 2008 SC 1044

Held:

Considering the provisions of Section 67 of the N.D.P.S. Act and the views expressed by this Court in *Raj Kumar Karwal v. Union of India and others, (1990) 2 SCC 409* with which we agree, that an officer vested with the powers of an Officer-in-Charge of a Police Station under Section 53 of the above Act is not a "Police Officer" within the meaning of Section 25 of the Evidence Act, it is clear that a statement made under Section 67 of the N.D.P.S. Act is not the same as a statement made under Section 161 of the Code, unless made under threat or coercion. It is this vital difference, which allows a statement made under Section 67 of the N.D.P.S. Act to be used as a confession against the person making it and excludes it from the operation of Sections 24 to 27 of the Evidence Act.

There is nothing on record to suggest that the appellant was compelled under threat to make the statement after he had been placed under arrest which renders such statement inadmissible and not capable of being relied upon in order to convict him. On the other hand, there is the evidence of PW9 upon which the High Court has relied in convicting the appellant. It may once again be mentioned that no question in cross-examination had been put to PW9 in this regard and the version of the said witness must be accepted as corroborative of the statement made by the accused.

It may also be recalled that though an application was made for retracting the confession made by the appellant, neither was any order passed on the said application nor was the same proved during the trial so as to water down the evidentiary value of the said statement. On the other hand, in the absence of such evidence on record, the High Court had no option but to proceed on the basis of the confession as made by the appellant under Section 67 of the NDPS Act. Since it has been held by this Court that an officer for the purposes of Section 67 of the NDPS Act read with Section 42 thereof, is not a police officer, the bar under Sections 24 and 27 of the Evidence Act cannot be attracted and the statement made by a person directed to appear before the officer concerned may be relied upon as a confessional statement against such person. Since a conviction can be maintained solely on the basis of a confession made under Section 67 of the NDPS Act, we see no reason to interfere with the conclusion of the High Court convicting the appellant.

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298. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
CRIMINAL PROCEDURE CODE, 1973 – Section 256
Complaint case for dishonour of cheque dismissed in default of complainant at the stage of defence – Held, improper – Case should have been disposed of on the merits of the case.

S. Anand v. Vasumathi Chandrasekar

Judgment dated 14.02.2008 passed by the Supreme Court in Criminal Appeal No. 311 of 2008, reported in (2008) 4 SCC 67

Held:

Section 256 of the Code provides for disposal of a complaint in default. It entails in acquittal. But, the question which arises for consideration is as to whether the said provision could have been resorted to in the facts of the case as the witnesses on behalf of complainant have already been examined.

The date was fixed for examining the defence witnesses. Appellant could have examined witnesses, if he wanted to do the same. In that case, the appearance of the complainant was not necessary. It was for her to cross-examine the witnesses examined on behalf of the defence.

The accused was entitled to file an application under Section 311 of the Code of Criminal Procedure. Such an application was required to be considered and disposed of by the learned Magistrate. We have noticed hereinbefore that the complainant did not examine herself as a witness. She was sought to be summoned again for cross-examination. The said prayer has not yet been allowed. But, that would not mean that on that ground the court would exercise its discretionary jurisdiction under Section 256 of the Code of Criminal Procedure at that stage or the defence would not examine his witnesses.

Presence of the complainant or her lawyer would have been necessary, as indicated hereinbefore, only for the purpose of cross-examination of the witnesses examined on behalf of the defence. If she did not intend to do so, she would do so at her peril but it cannot be said that her presence was absolutely necessary. Furthermore, when the prosecution has closed its case and the accused has been examined under Section 311 of the Code of Criminal Procedure, the court was required to pass a judgment on merit of the matter.

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299. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 & 139
Dishonour of cheque – Presumption u/s 139 of the Act and mode of its rebuttal.
Existence of legally recoverable debt is not a matter of presumption u/s 139 of the Act – Presumption is that the cheque has been issued for discharge of any debt or liability.
Rebuttal – Proof – Accused not required to come into the witness box – His burden may be discharged on the basis of materials already brought on record.

Balancing approach required between presumption of innocence as a human right and doctrine of reverse burden introduced by Section 139 of the Act and the same is dependant on factual matrix of each case.

Krishna Janardhan Bhat v. Dattatraya G. Hegde

Reported in 2008 CrLJ 1172 (SC)

Held:

The proviso appended to the said section provides for compliance of legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.

The courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also. The courts below, in our opinion, committed a serious error in proceeding on the basis that for proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the courts, we feel, is not correct.

An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on records. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of the prosecution in a criminal case is different.

In *Bharat Barrel & Drum Manufacturing Company v. Amin Chand Payrelal [(1999) 3 SCC 35]* interpreting Section 118(a) of the Act, this Court opined:

> "Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non- existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In

such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. *The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt...." [Emphasis supplied]*

Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is "preponderance of probabilities". Inference of preponderance of probabilities can be drawn not only from the materials brought on records by the parties but also by reference to the circumstances upon which he relies.

A statutory presumption has an evidentiary value. The question as to whether the presumption whether stood rebutted or not, must, therefore, be determined keeping in view the other evidences on record. For the said purpose, stepping into the witness box by the appellant is not imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration.

The presumption of innocence is a human right. [See *Narender Singh & Anr. v. State of M.P. (2004) 10 SCC 699, Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Anr. (2005) 5 SCC 294 and Rajesh Ranjan Yadav @ Pappu Yadav v. CBI through its Director (2007) 1 SCC 70] Article 6(2)* of he European Convention on Human Rights provides: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". Although India is not bound by the aforementioned Convention and as such it may not be necessary like the countries forming European countries to bring common law into land with the Convention, a balancing of the accused rights and the interest of the society is required to be taken into consideration. In India, however, subject to the statutory interdicts, the said principle forms the basis of criminal jurisprudence. For the aforementioned purpose the nature of the offence, seriousness as also gravity thereof may be taken into consideration. The courts must be on guard to see that merely on the application of presumption as contemplated under Section 139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction. It is for the aforementioned reasons that we have taken into consideration the decisions operating in the field where the difficulty of proving a negative has been emphasized. It is not suggested that a negative can never be proved but there are cases where such difficulties are faced by the accused e,g,. honest and reasonable mistake of fact.

We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This, however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have rebutted. Other important principles of legal jurisprudence, namely presumption of innocence as human rights and the doctrine of reverse burden introduced by Section 139 should be delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same.

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300. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 & 147
Compromise petition filed by Advocate with his signature, on behalf of authority granted by litigant, is binding to the party concerned.
R. Rajeshwari v. H.N. Jagadish
Judgment dated 05.03.2008 passed by the Supreme Court in Criminal Appeal No. 442 of 2008, reported in (2008) 4 SCC 82

Held:

Negotiable Instruments Act is a special Act. Section 147 of the Act provides for a non obstente clause, stating:

> *"Section 147 – Offences to be compoundable:* Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable."

Indisputably, the provisions of the Code of Criminal Procedure, 1973 would be applicable to the proceedings pending before the courts for trial of offences under the said Act. Stricto sensu, however, the table appended to Section 320 of the Code of Criminal Procedure is not attracted as the provisions mentioned therein refer only to provisions of Indian Penal Code and none other.

In such a situation, a settlement could be arrived at by and between the complainant and the accused. While a settlement is arrived at, it is not necessary under the provisions of the Act and/or Code of Criminal Procedure to file any affidavit affirmed by the complainant or the accused. By reason of the authority granted by a litigant in favour of his Advocate which, inter alia, empowers the latter to enter into a settlement, any settlement arrived at, on behalf of a party to a lis would be binding on the parties thereto.

In *Manoharbahal Colliery v. K.N. Mishra, [AIR 1975 SC 1632],* it has been held by this Court:

"The next question is whether the compromise is binding on the petitioner. From what has been stated above it would be clear that the petitioner was not averse to the idea of compromise. He only wanted the amount to be paid to him to be raised above four thousand rupees which was originally suggested. It also appears that in pursuance of a stay order passed in this case the petitioner has been receiving half of his wages throughout. He does not specifically deny the receipt of a cheque for Rs. 4000 sent by Mr. Mukherjee. It cannot therefore be accepted that he was under the impression, as he now tries to make out, that what he was receiving was arrears of past wages deposited in the Court in compliance with the Court's order. The advocate for the appellant had filed the statement of the case on 13.11.69. The petitioner/respondent had to file it by 17.12.69 but that was not filed and the appeal was therefore, set down ex parte against the petitioner/ respondent. In the circumstances and the idea of the compromise not being unacceptable to the petitioner it was the right and indeed the duty of his advocate Mr. Mukherjee to do the best for his client. We are not able to see any lack of authority in the action taken by Mr. Mukherjee. We are of the opinion that there are absolutely no merits in this application and it is dismissed."

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301. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 145
It is only the complainant who can give evidence of his witnesses on affidavit in any enquiry, trial or other proceedings under the Act – Right to examine the witnesses on affidavit cannot be availed of by the accused.

Suresh v. Ashok
Reported in 2008 (2) MPHT 58

Held:

Section 145 of the Negotiable Instruments Act is reproduced hereunder :–

'145. Evidence on affidavit. – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceedings under the said Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine

any person giving evidence on affidavit as to the facts contained therein.'

On a bare perusal of Section 145 (1) of the aforesaid Act, it is apparent that it is only the complainant who can give evidence of his witnesses on affidavit in any enquiry, trial or other proceedings under the Act. Sub-section (2) of the Act provides that the Court shall, on the application of prosecution or accused, may summon and examine any person giving evidence on the affidavit as to the facts contained in the said affidavit. It is apparent that sub-section (2) of Section 145 of the Act permits accused to call for witnesses for the purpose of cross-examination, who have given their evidence on affidavit. This right can also be exercised by the prosecution, if Court thinks fit. In the above provision, it is nowhere provided that right to examine the witnesses on affidavit can be availed by the accused. The words in sub-section (2) of Section1 45 of the Negotiable Instruments Act "summon and examine any person giving evidence on affidavit" pertain to a person whose evidence the prosecution has tendered by the affidavit.

In view of the above position of law, I do not find any error in the impugned order passed by the Trial Court refusing to permit accused to examine his witnesses on affidavit.

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302. PASSPORT ACT, 1967 – Sections 10 (3) (e) & 10-A
CRIMINAL PROCEDURE CODE, 1973 – Sections 102, 104 & 165

(i) Passport Act is a Special Act – It would override the provisions of Criminal Procedure Code for the purpose of impounding of passport.

(ii) Difference between impounding and seizure.

Suresh Nanda v. Central Bureau of Investigation

Judgment dated 24.01.2008 passed by the Supreme Court in Criminal Appeal No. 179 of 2008, reported in (2008) 3 SCC 674

Held :

(i) Sub-section (3) (e) of Section 10 of the Act provides for impounding of a passport if proceedings in respect of an offence alleged to have been committed by the holder of the passport or travel document are pending before a criminal court in India. Thus, the Passport Authority has the power to impound the passport under the Act, Section 102 of Cr.P.C. gives powers to the police officer to seize any property which may be alleged or suspected to have been stolen or which may be found under circumstances which create suspicion of the commission of any offence.

Sub-section (5) of Section 165 of Cr.P.C. provides that the copies of record made under Sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance to the offence Whereas Section 104 of Cr.P.C. authorizes the court to impound any document or thing produced before it under the Code. Section 165 of Cr.P.C. does not speak about the passport which has been searched and seized as in the present case. It

does not speak about the documents found in search, but copies of the records prepared under Sub-section (1) and Sub-section (3).

"Impound" means to keep in custody of the law. There trust be some distinct action which will show that documents or things have been impounded. According to the Oxford Dictionary "impound" means to take legal or formal possession. In the present case, the passport of the appellant is in possession of CBI right from the date it has been seized by the CBI. When we read Section 104 of Cr.P.C. and Section 10 of the Act together, under Cr.P.C., the Court is empowered to impound any document or thing produced before it whereas the Act speaks specifically of impounding of the passport.

Thus, the Act is a special Act relating to a matter of passport, whereas Section 104 of the Cr.P.C. authorizes the Court to impound document or thing produced before it. Where there is a special Act dealing with specific subject, resort should be had to that Act instead of general Act providing for the matter connected with the specific Act. As the Passports Act is a special act, the rule that "general provision should yield to the specific provision" is to be applied. See: *Dam Vaiaji Shah and Anr. v. Life Corporation of India and Ors. AIR 1966 SC 135; Gobind Sugar Mills Ltd. v. State of Bihar, (1999) 7 SCC 76 and Belsund Sugar Co. Ltd. v. State of Bihar, (1999) 9 SCC 620.*

(ii) It may be mentioned that there is a difference between seizing of a document and impounding a document. A seizure is made at a particular moment when a person or authority taxes into his possession some property which was earlier not in his possession. Thus, seizure is done at a particular moment of time. However, if after seizing of a property or document the said property or document is retained for some period of time, then such retention amounts to impounding of the property/or document. In the Law Lexicon by P. Ramanatha Aiyar (2nd Edition), the word "impound" has been defined to mean

> "to take possession of a document or thing for being held in custody in accordance with law".

Thus, the word 'impounding" really means retention of possession of a good or a document which has been seized.

Hence, while the police may have power to seize a passport under Section 102 Cr.P.C. if it is permissible within the authority given under Section 102 of Cr.P.C. it does not have power to retain or impound the same, because that can only be done by the passport authority under Section 10 (3) of the Passports Act. Hence, if the police seizes a passport (which it has power to do under Section 102 Cr.P.C.), thereafter the police must send it along with a letter to the passport authority clearly stating that the seized passport deserves to be impounded for one of the reasons mentioned in Section 10 (3) of the Act. It is thereafter the passport authority to decide whether to impound the passport or not. Since impounding of a passport has civil consequences, the passport authority must give an opportunity of hearing to the person concerned before impounding his passport. It is well settled that any order which has civil

consequences must be passed after giving opportunity of hearing to a party (vide *State of Orissa v. Binapani Dei AIR 1967 SC 1269*)

In our opinion, even the Court cannot impound a passport. Though, no doubt. Section 104 Cr.P.C. states that the Court may, if it thinks fit, ithis provision will only enable the Court to impound any document or thing other than a passport. This is because impounding a "passport" is provided for in Section 10(3) of the Passports Act. The Passports Act is a special law while the Cr.P.C. is a general law. It is well settled that the special law prevails over the general law vide G.P. Singh's Principles of Statutory Interpretation (9th Edition pg, 133). This principle is expressed in the maxim Generalia specialibus non derogant, Hence, impounding of a passport cannot be done by the Court under Section 104 Cr.r.C. though it can impound any other document or thing.

●

***303. PREVENTION OF FOOD ADULTERATION ACT, 1954 – Section 17**

(i) Prosecution in respect of offences by Companies, requirement of – Specific averments must be mentioned in the complaint – Further held, where a person has been nominated u/s 17 (2) of the Act, he along with the Company/Firm can be prosecuted unless it is shown that the offence was committed with the consent/connivance/negligence of any other Director, Manager, Secretary or Officer of the Company, in such case the said person can also be prosecuted and punished for the commission of the said offence – Where no such person has been nominated, every person who at the time the offence was committed, was in charge of, and was responsible to the Company for the conduct of its business can be prosecuted and punished.

(ii) Trial Court convicted petitioner for offence u/s 7/11 of the Act – Feeling aggrieved , he filed appeal which is pending – In the appeal petitioner filed an application u/s 391 of Cr.P.C. that one 'A' had been nominated u/s 17 (2) of the Act by the firm of the petitioner and the same had been communicated to and acknowledged by the Local (Health) Authority – He also submitted therein that nomination order was given by him to his Advocate but he could not file it during trial, hence the same ought to be taken on record – The application rejected by the Appellate Court – Held, additional evidence, if the Court thinks necessary, can be taken at the appellate stage – Further held, though information regarding nomination has been given at a very late stage of appeal, yet the complainant (Food Inspector) was also having responsibility to enquire/investigate and prosecute the real person – The petitioner cannot be penalized for facing the trial or for serving the sentence for which he is not liable – Applications were allowed and directed the Court

concerned to take further steps in appeal in accordance with the provisions of S.391 Cr.P.C.

Hindustan Food Products India v. State of M.P. and another
Reported in 2008 (2) MPLJ 63

●

304. PROBATION OF OFFENDERS ACT, 1958 – Section 6

Benefit of probation – Relevant date to determine the age of accused is the date of imposition of punishment by Trial Court and not the date of offence.

Sudesh Kumar v. State of Uttarakhand
Reported in 2008 CrLJ 1604 (SC)

Held:

It can be noticed from *Ramji Missar and Another v. State of Bihar, AIR 1963 SC 1088* and *Pratap Singh v. State of Jharkhand* and *Another, (2005) 3 SCC 551,* that the object and purpose of the Probation of Offenders Act, 1958 for applying the relevant provisions to the accused are different and cannot be said in pari materia with the Juvenile Justice Act, 1986 and the Juvenile Justice (Care and Protection of Children) Act, 2000. The Court would not construe a Section of a statute with reference to that of another statute unless the latter is in pari materia with the former. Therefore, a decision made on a provision of a different statute will be of no relevance unless underlying objects of the two statutes are in pari materia. The decision interpreting various provisions of one statute will not have the binding force while interpreting the provisions of another statute. Section 6 of the Act has been construed by a 4-Judge Bench of this Court in *Ramji Missar case* (supra) and that will have the binding force while interpreting the same Section in same statute and the decision of the Constitution Bench interpreting provisions of the 1986 Act and the 2000 Act would not be held to be a decision on interpretation of Section 6 of the Act. Section 6 of the Act would apply to the accused who is under 21 years of age on the date of imposition of punishment by the trial court and not on the date of commission of the offence. If on the date of the order of conviction and sentence by the trial court the accused is below 21 years of age the provisions of Section 6 of the Act applies in full force.

●

***305. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Section 19 (1) (f)**

Alternate accommodation or to pay rent for the same – The claim for alternate accommodation can only be made against husband – Wife is entitled to a right of residence in a shared house belonging to husband or house which belongs to joint family of which husband is a member.

Razzak Khan v. Shahnaz Khan
Reported in I.L.R (2008) M.P. 963

●

306. RAILWAY PROPERTY (UNLAWFUL POSSESSION) ACT, 1966 – Sections 3 (a) & 2 (d)

Ingredients of S.3, existence of – Truck in question was loaded at scrap yard with Railway property illegally in the presence of accused, who described himself as a contractor – On the direction of authority concerned, he called his labourers to unload those articles – Unlawful possession of Railway property established.

Om Prakash v. State of Uttar Pradesh

Judgment dated 22.01.2008 passed by the Supreme Court in Criminal Appel No. 145 of 2008, reported in (2008) 2 SCC 236

Held:

From the evidence on record, it was found that the presence of cast iron Grade I has not been disputed. The stand presently taken is that somebody else was the auction-purchaser and the appellant had no role to play. But at all stages, it appears that the appellant was present near the truck, he was described as the contractor and in his presence the analysis was done and from the material available on record, it is also clear that he, as the contractor, was asked to unload the articles and he had called his labourers to unload the articles.

Therefore, the finding that he was in unlawful possession of cast iron Grade I is a finding which does not warrant interference. Railway property, as defined in Section 2 Clause (d) of the Act reads as follows:

> "2. (d) 'railway property' includes any goods, money or valuable security or animal, belonging to, or in the charge or possession of, a Railway Administration;"

Section 3 deals with penalty for unlawful possession of railway property. The same reads as follows:

> "3. *Penalty for unlawful possession of railway property.* – Whoever is found, or is proved to have been, in possession of any railway property reasonably suspected of having been stolen or unlawfully obtained shall, unless he proves that the railway property came into his possession lawfully, be punishable–
>
> (a) for the first offence, with the imprisonment for a term which may extend to five years, or with fine, or with both and in the absence of special and adequate reasons to be mentioned in the judgment of the court, such imprisonment shall not be less than one year and such fine shall no be less than one thousand rupees;
>
> (b) for the second or a subsequent offence, with imprisonment for a term which may extend to five years and also with fine and in the absence of special and adequate reasons to be mentioned in the judgment of the court, such imprisonment shall not be less than two years and such fine shall not be less than two thousand rupees."

In *State of Maharashtra v. Vishwanath Tukaram, (1979) 4 SCC 23,* it was observed that the following ingredients are necessary to bring in application of Section 3:

> (i) The property in question should be railway property; (ii) It should be reasonably suspected of having been stolen or unlawfully obtained; and (iii) it should be found or proved that the accused was or had been in possession of that property."

●

***307. RENT CONTROL AND EVICTION:**

Landlord's father is doing his own independent business – Landlord wanted to establish his own business – Other shops are in possession of tenants – Landlord can not be compelled to join his father's business – Bona fide requirement, test for – *Akhileshwar Kumar v. Mustaqim, (2003) 1 SCC 462* and *Ragavendra Kumar v. Prem Machinery & Co., (2000) 1 SCC 679* referred.

Yadvendra Arya and another v. Mukesh Kumar Gupta

Judgment dated 28.11.2007 passed by the Supreme Court in Civil Appeal No. 5483 of 2007, reported in (2008) 2 SCC 144

●

308. SCHEDULED CASTES & SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 3 (1) (v)
INDIAN PENAL CODE, 1860 – Section 427

Accused caused the cattle to enter into the field of a member of Scheduled Caste and grazed his crops with intention to cause damages to his crops – Held, it is a case of mischief simpliciter punishable u/s 427 IPC – Further held, since damage was not caused on account of the complainant being a member of Scheduled Caste, offence u/s 3 (1) (v) of the Act is not made out.

Jagannath v. State of M.P.

Reported in 2008 (2) MPHT 168

Held:

Section 3 (1) (v) of the Act is reproduced as under: –

> "Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, wrongfully dispossesses a member of a Scheduled Caste or a Scheduled Tribe from his land or premises or interferes with the enjoyment of his rights over any land, premises or water, shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 5 years and with fine."

The provisions of this section were considered by this Court in the case of *Janggu alias Shobit and others v. State of M.P.,* reported in *2000 Cr.L.J. 711,* wherein it has been held: –

"For securing a conviction under section 3 (1) (v), the prosecution, for the first clause is required to show that the accused had wrongfully dispossessed a member of Scheduled Caste or Scheduled Tribe from his land or premises. A wrongful dispossession, in the opinion of this Court, presupposes positive and de-facto possession. Unless a man is shown to be in actual physical possession of the property, he cannot be dispossessed. I have already found that the complainant was not in de-facto possession. If a person is not in possession of the property, then he cannot be dispossessed. The second clause of section 3 (1) (v) provides that if somebody interferes with the enjoyment of complainant's rights over any land, premises or water, then he shall be punished. On a fair reading, the words "enjoyment of his rights" must be read in juxta position with the words "any land, premises and water", the first clause refers to the personal lands while the second clause relates to any land, premises or water. In fact the second clause applies to a case where the right to enjoy any land, premises or water has been interfered with. For securing conviction under the second clause, the prosecution is required to prove that the complainant had some rights and he was enjoying the said rights over any land, premises or water. The second clause would cover a contingency relating to right of easements, right of way and fetching of the water etc. Unless it is proved by the prosecution that the complainant had a right and was enjoying the same, the prosecution would not be entitled to say that because accused did not permit the complainant to take possession of the property which he was allegedly entitled he be convicted."

The present case is neither of dispossession nor interference in his rights but simpliciter a case of mischief caused by grazing cattle by the appellant. The damage was not caused on account of his being a member of Scheduled Caste. Thus all the ingredients required to prove the offence under Section 3 (1) (v) of SC & ST Act have not been established by the prosecution.

●

***309. SCHEDULED CASTES & SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Sections 3 (2) (iv) & (v)**

S. 3 (2) (v) provides that a person who commits crime on ground that such person is a member of SC or ST, but these words are missing in S.3 (2) (iv) of the Act – Requirement of knowledge of accused that victim is member of SC or ST is not provided in S.3 (2) (iv) – Court

while recording conviction u/s 3 (2) (iv) of the Act has no discretion but to award sentence of life imprisonment.

Bhupendra v. State of M.P.

Reported in I.L.R (2008) M.P. 950

●

310. SERVICE LAW:

Compulsory retirement, criteria for – Entire service record to be seen – If record of five years preceding has shown improvement, his compulsory retirement on the basis of earlier adverse grading is arbitrary action.

R.D.S. Chauhan v. State of M.P. and others

Reported in 2008 (2) MPHT 237

Held:

When the question of compulsorily retiring an employee is to be decided by the Competent Authority the entire service record is to be evaluated and it has to be assessed as to whether retention of the employee in service is in public interest or not. The criteria to be followed by the Screening Committee is to weed out dead wood from the service, if an employee has shown improvement for more than 5 years preceding the date for which consideration is made, benefit should be given to such an employee and by evaluating his service as bad on the basis of earlier adverse grading earned would amount to arbitrary exercise of power by the Competent Authority.

●

***311. SERVICE LAW:**

Transfer order – Interference by the Court – Limitations.

Transfer of a Government servant who is appointed to a particular cadre of transferable post from one place to another is an ordinary incident of service – No Government servant can claim to remain in a particular place or in a particular post unless his appointment itself is to a specified, non-transferable post – It has further been laid down that if the transfer order has been issued by the Competent Authority which did not violate any mandatory rule, the interference by the Court in such transfer order is not required – Even if a transfer order is passed in violation of executive instruction or order, the Court ordinarily should not interfere with the order, instead, affected party should approach the higher authorities in the department – Who should be transferred to where, is a matter for the Appropriate Authority to decide – Unless the order of transfer is vitiated by malafides or is made in violation of any statutory provisions, the Court cannot interfere with it.

Shishir Raizada v. Union of India and others

Reported in 2008 (1) MPHT 54 (DB)

●

***312. SERVICE LAW :**

CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1966 (M.P.) – Rules 10 (i) to (iv)

Minor Penalty – Natural Justice – Show cause notice issued to petitioner who submitted his reply – Departmental Enquiry ordered – However, no enquiry was conducted on ground that since neglect and dereliction in duties is made out from reply – Minor penalty of censure imposed – Held, fresh opportunity of hearing ought to have been given before inflicting minor penalty.

Ajay Kumar Singh v. State of M.P.

Reported in I.L.R (2008) M.P. 746

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313. SERVICE LAW:

CIVIL SERVICES (CLASSIFICATION, CONTROL & APPEAL) RULES, 1966 (M.P.) – Rule 19 (i)

Peon (Government servant) convicted u/s 323/34 IPC and sentenced to fine of Rs. 500/- – In departmental proceedings proportionate punishment warranted – Removal from service held excessive – Wednesbury principle of unreasonableness has been replaced by doctrine of proportionality in judicial review.

State of Madhya Pradesh and others v. Hazarilal

Judgment dated 20.02.2008 passed by the Supreme Court in Civil Appeal No. 6498 of 2005, reported in (2008) 3 SCC 273

Held:

The case in hand appears to be a gross one. This Court is unable to appreciate the attitude on the part of the appellant herein which ex-facie appears to be wholly unreasonable. Respondent had not committed any misconduct within the meaning of the provisions of the Service Rules. He was involved in a matter for causing simple injury to another person. He was not even sent to prison. Only a sum of Rs. 500/- was imposed upon him as fine.

Rule 19 of M.P. Civil Services (Classification, Control and Appeal) Rules, 1966, which provides for special procedure in certain cases, to which reliance has been placed by the appellants does not appear to be applicable in the instant case. The said Rule reads thus:-

"19. Special procedure in certain cases.

Notwithstanding anything contained in Rule 14 to Rule 18

(i) where any penalty is imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge, or

(ii) where the disciplinary authority is satisfied for reasons to be recorded by it in writing that it is not reasonable practicable to hold an inquiry in the manner provided in these rules, or

(iii) where the Governor is satisfied that in the interest of the security of the State, it is not expedient to hold any inquiry in the manner provided in these rules, the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit.

Provided that the Commission shall be consulted where such consultation is necessary, before any orders are made in any case under this rule."

By reason of the said provision, thus, "the disciplinary authority has been empowered to consider the circumstances of the case where any penalty is imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge", but the same would not mean that irrespective of the nature of the case in which he was involved or the punishment which has been imposed upon him, an order of dismissal must be passed. Such a construction, in our opinion, is not warranted.

An authority which is conferred with a statutory discretionary power is bound to take into consideration all the attending facts and circumstances of the case before imposing an order of punishment. While exercising such power, the disciplinary authority must act reasonably and fairly. Respondent occupied the lowest rank of the cadre. He was merely a contingency peon. Continuation of his service in the department would not bring a bad name to the State. He was not convicted for any act involving moral turpitude. He was not punished for any heinous offence.

The Tribunal, in our opinion, rightly placed reliance upon the decision of this Court in *Shankar Das v. Union of India : (1985) 2 SCC 358* wherein this Court held: (SCC p. 362)

> "7. It is to be lamented that despite these observations of the learned Magistrate, the Government chose to dismiss the appellant in a huff, without applying its mind to the penalty which could appropriately be imposed upon him insofar as his service career was concerned. Clause (a) of the second proviso to Article 311(2) of the Constitution confers on the Government the power to dismiss a person from service "on the ground of conduct which has led to his conviction on a criminal charge". But, that power, like every other power, has to be exercised fairly, justly and reasonably. Surely, the Constitution does not contemplate that a government servant who is convicted for parking his scooter in a no- parking area should be dismissed from service. He may, perhaps, not be entitled to be heard on the question of penalty since clause (a) of the second proviso to Article 311(2) makes the provisions of that article

inapplicable when a penalty is to be imposed on a government servant on the ground of conduct which has led to his conviction on a criminal charge. But the right to impose a penalty carries with it the duty to act justly. Considering the facts of this case, there can be no two opinions that the penalty of dismissal from service imposed upon the appellant is whimsical."

We express similar dis-satisfaction in this case.

Furthermore, the legal parameters of judicial review has undergone a change. Wednesbury principle of unreasonableness has been replaced by the doctrine of proportionality.

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***314. SPECIFIC RELIEF ACT, 1963 – Section 20**

Rights of purchaser against co-owner who is not a party to agreement and no money paid to such co-owner – Agreement to sele entered into by Bapu Singh, one of the co-owners – Another co-owner, Rajkunwarbai not a party to agreement – No money paid to Rajkunwarbai – After death of Bapu Singh, she became owner of the share of Bapu Singh alongwith other LRs. – Held, Rajkunwarbai was not a party to agreement – Therefore, even if Rajkunwarbai became one of the co-owners of the share of Bapu Singh alongwith other LRs, no decree for specific performance of contract can be passed under facts and circumstances of the case.

Rajkunwar Bai v. Murlidhar

Reported in I.L.R (2008) M.P. 855

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315. SPECIFIC RELIEF ACT, 1963 – Section 26

CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17

Single application moved for amendment of plaint as well as agreement for sale regarding a part of description of suit property permissible as per law – Separate suit for rectification of instrument is not necessary – This will not involve either the question of limitation or the change of nature of the suit for specific performance.

Puran Ram v. Bhaguram and another

Judgment dated 29.02.2008 passed by the Supreme Court in Civil Appeal No. 1673 of 2008, reported in (2008) 4 SCC 102

Held:

A reading of these two conditions made under Section 26 of the Act would amply show that either party may institute a suit to have the instrument rectified or a party who has already filed a suit in which any right arising under the instrument is in issue may claim in his pleading that the instrument be rectified. So far as the facts of the present case are concerned, it cannot be doubted that

the main issue in the suit for specific performance of the contract for sale was relating to the agreement for sale in which a part of the description of the suit property was wrongly given by mutual mistake and therefore, needed to be amended. Section 26, of course, says that it would be open to a party to institute a suit for correcting the description of the suit property, but the proviso to Section 26 clearly permits that where a party has not claimed any such relief in his pleading, the court shall at any stage of the proceeding allow him to amend the plaint on such terms as may be just for including such claim. From a plain reading of the provisions under Section 26 of the Act, there is no reason why the prayer for amendment of the agreement to correct a part of the description of the suit property from Chak No. 3 SSM to Chak No. 3 SLM, later on converted to Chak No. 3 SWM could not be granted. In our view, it is only a correction or rectification of a part of the description of the suit property, which cannot involve either the question of limitation or the change of nature of suit. In our view, the suit shall remain a suit for specific performance of the contract for sale and a separate independent suit is not needed to be filed when the proviso to Section 26 itself clearly permits either party to correct or rectify the description of the suit property not only in the plaint but also in the agreement itself. So far as the question of limitation is concerned, the agreement was entered into on 12th of April, 1991 and the suit, admittedly, was filed within the period of limitation. Therefore, even if the amendment of plaint or agreement is allowed, that will relate back to the filing of the suit which was filed within the period of limitation.

So far as the submission of the learned counsel for the respondent that the rectification of the agreement cannot be permitted is concerned, we are of the view that Section 26(4) of the Act only says that no relief for rectification of instrument shall be granted unless it is specifically claimed. However, proviso to Section 26, as noted herein earlier, makes it clear that when such relief has not been claimed specifically, the court shall at any stage of the proceeding allow such party to amend the pleading as may be thought fit and proper to include such claim. Therefore, we are not in agreement with the learned counsel for the respondent that section 26 would stand in the way of allowing the application for amendment of the agreement. The views expressed by us find support in a decision of the Madras High Court in *Raipur Manufacturing Co., Ltd v. Joolaganti Venkatasubba Rao Veerasamy & Co [AIR 1921 Mad 664],* wherein it was held that where in the course of a suit for damages for breach of contract, the plaintiff contends that there is a clerical error in the document embodying the contract, it is not always necessary that a separate suit should have been brought for rectification of the document and it is open to the court in a proper case to allow the plaintiff to amend the plaint and ask for the necessary rectification.

As noted herein earlier, the learned counsel for the respondent contended before us that the appellant could not get specific performance of the contract for sale unless he sued for rectification of the agreement for sale. We are unable

to accept this contention of the learned counsel for the respondent for the simple reason that in this case, by filing the application for amendment in the suit for specific performance of the contract for sale, the appellant had sought the rectification of the agreement also. It is sufficient to observe that it was not necessary for the appellant to file a separate suit for that purpose as contended by the learned counsel for the respondent. It is open to the appellant to claim the relief of rectification of the instrument in the instant suit. The amendment, in our view, in the agreement was a formal one and there was no reason why such amendment could not be allowed. This is only a change in a part of the description of the suit property which was wrongly described by mutual mistake.

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316. SPECIFIC RELIEF ACT, 1963 – Section 38

Permanent injunction in mandatory form passed without deciding title of plaintiff is not proper – Revenue record is not a document of title – It merely raises a presumption with regard to possession and/ or continuity thereof, both forward and backward.

Gurunath Manohar Pavaskar & Ors. v. Nagesh Siddappa Navalgund & Ors.

Reported in AIR 2008 SC 901

Held:

In Narain Prasad Aggarwal (D) by LRs. v. State of M.P. [2007 (8) SCALE 250], this Court opined:

> "22. Record of right is not a document of title. Entries made therein in terms of Section 35 of the Indian Evidence Act although are admissible as a relevant piece of evidence and although the same may also carry a presumption of correctness, but it is beyond any doubt or dispute that such a presumption is rebuttable."

A revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof both forward and backward can also be raised under Section 110 of the Indian Evidence Act. The courts below, were, therefore, required to appreciate the evidence keeping in view the correct legal principles in mind.

The courts below appeared to have taken note of the entries made in the revenue records wherein the name of the Municipal Corporation, Belgaum appeared in respect of CTS No. 4823/A-1. We have, however, noticed that the learned Trial Judge proceeded on the basis that the said property may be belonging to the defendants - appellants. The courts below not only passed a decree for prohibitory injunction but also passed a decree for mandatory injunction. The High Court opined that the Trial Court could exercise discretion

in this behalf. It is again one thing to say that the courts could pass an interlocutory order in the nature of mandatory injunction in exercise of its jurisdiction under Section 151 of the Code of Civil Procedure on the premise that a party against whom an order of injunction was passed, acted in breach thereof; so as to relegate the parties to the same position as if the order of injunction has not been violated, but, it is another thing to say that the courts shall exercise the same power while granting a decree permanent injunction in mandatory form without deciding the question of title and/or leaving the same open. How, in the event the structures are demolished, it would be possible for the appellants to work out their remedies in accordance with law in regard to the title of the property has not been spelt out by the High Court.

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317. STAMP ACT, 1899 – Sections 2 (6), 2 (7), 27 & 47-A
PREVENTION OF UNDERVALUATION OF INSTRUMENTS RULES, 1975 (M.P.) – Rule 3
Instrument of conveyance, stamp duty payable thereon – Stamp duty is payable *ad valorem* on the market value of the property at the time of registration of the instrument concerned and not on the value set forth – Law explained.
State of Madhya Pradesh and another v. Dilip Kumar Sangni
Reported in 2008 (1) MPHT 534

Held:

The sale-deed is covered under the definition of conveyance and stamp duty is chargeable as applicable to such instrument. As per Item No. 23 of Schedule I-A, the stamp duty is chargeable on the market value of the property. The aforesaid provision specifically provides that the proper stamp duty for conveyance shall be 7½% of market value. Section 27 as substituted by M.P. Act No. 8 of 1975 w.e.f. 15-5-1975 specifically provides that consideration, if any, the market value of the property and all other facts and circumstances shall be fully and truly set forth in the document for the purposes of ascertaining stamp duty. An instrument relating to sale of immovable property is chargeable with ad valorem duty on the market value of the property and not on the value set forth. The State Government has framed rules namely M.P. Prevention of Undervaluation of Instruments Rules, 1975 of which Rule 3 provides that all the particulars to be set forth in the instrument as required by sub-section (2) of Section 27 of the Act.

The valuation of the property for the purpose of stamp duty is the market value at the time of its execution. The Indian Stamp Act is a taxing statute and is to be construed strictly. In the case of a decree of the Civil Court, may be on the basis of compromise, for the purpose of payment of stamp duty, provision of Section 3 of the Act shall be applicable which specifically provides that the stamp duty shall be chargeable with duty of the amount indicated in the Schedule.

Section 27 as amended in Madhya Pradesh specifically provides that the fact affecting the duty to be set forth in instrument and as per Schedule I-A, on the conveyance, the stamp duty is payable on the market value. In these circumstances, there is no iota of doubt that on the sale-deed stamp duty was payable as per market value and it had no concern with the consideration shown or paid to the vendor. Section 47-A provides a procedure in respect of instrument undervalued to be dealt with. The Registering Officer while registering any instrument if has reason to believe that the market value of the property which is the subject-matter of such document has not been truly set forth in the instrument, he may after registering such document refer the same to the Collector for determination of the market value of such property and proper duty payable thereon.

In this case, there was a difference between market value and the price as agreed in the agreement or subsequently fixed in the compromise petition. The suit was decided on the basis of compromise arrived at between the parties and as per compromise decree, consideration as settled between parties was to be paid by the vendee to the vendor. For consideration, aforesaid amount is binding between the parties but for payment of stamp duty, market value on the date of execution of the document was a decisive factor and the stamp duty was payable on the market value of the property at the time of registration of the sale deed and not as per the price fixed under agreement to sell or in the decree of the Court.

Recently the Apex Court has considered the law in *State of Rajasthan Vs. M/s. Khandaka Jain Jewellers, 2007 AIR SCW 7378*, and held thus :-

> "10 ..... Therefore, in the present case when the Registering Authority found that valuation of the property was not correct as mentioned in the instrument, it sent the document to the Collector for ascertaining the correct market value of the property. The expression "execution" read with Section 17 leaves no manner of doubt that the current valuation is to be seen when the instrument is sought to be registered. The Stamp Act is in the nature of a taxing statute, and a taxing statute is not dependent on any contingency. Since the word "execution" read with Section 17 clearly says that the instrument has to be seen at the time when it is sought to be registered and in that if it is found that the instrument has been undervalued then it is open for the Registering Authority to enquire into its correct market value. ..."

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***318. SUCCESSION ACT, 1925 – Section 214**

NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 80

(i) Legal representative filed suit for recovery of debt due to the deceased – Succession Certificate not produced as contemplated u/s 214 of the Indian Succession Act – Suit decreed by the Trial Court – Held, S. 214 of the Act does not bar institution of a suit – Further held, decree passed in the suit shall be treated as provisional and will not be given effect till decree holders obtain and produce the Succession Certificate.

(ii) When no rate of interest is specified in Negotiable Instrument, interest on the amount due thereon shall be calculated @ 18% p.a.

Manak Chand Jain v. Smt. Pukhraj Bai and another

Reported in 2008 (2) MPHT 155

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319. SUCCESSION ACT, 1925 – Section 372

'A' married 'S' but deserted her and married 'V' – During wedlock 'V' bore children, she was made nominee in official record to receive retiral benefit – After the death of employee both 'V' and 'S' filed claim for succession certificate – Trial Court rejected the claim of 'S' and granted certificate in favor of 'V' – High Court reversed the order of the Trial Court – Setting aside the order of the High Court, the Apex Court held, 'V' was not only nominee but also claiming certificate on behalf of employee's children, such nominee can file claim on basis of the nomination – Merely 'S' was legally wedded wife that by itself did not entitle her to a succession certificate in comparison to 'V' who all through had stayed as the wife and bore his children – However, looking to the equity of the case, certificate granted subject to the condition that 'S' would get one-fifth share of retiral benefits through 'V' and 'V' will furnish security for the same.

Vidhyadhari and others v. Sukhrana Bai and others

Judgment dated 22.01.2008 passed by the Supreme Court in Civil Appeal No. 575 of 2008, reported in (2008) 2 SCC 238

Held:

The law is clear on this issue that a nominee like Vidhyadhari who was claiming the death benefits arising out of the employment can always file an application under Section 372 of the Indian Succession Act as there is nothing in that Section to prevent such a nominee from claiming the certificate on the basis of nomination. The High Court should have realised that Vidhyadhari was not only a nominee but also was the mother of four children of Sheetaldeen who were the legal heirs of Sheetaldeen and whose names were also found in Form A which was the declaration of Sheetaldeen during his life-time. In her application Vidhyadhari candidly pointed out the names of the four children as the legal heirs of Sheetaldeen. No doubt that she herself has claimed to be a

legal heir which status she could not claim but besides that she had the status of a nominee of Sheetaldeen. She continued to stay with Sheetaldeen as his wife for long time and was a person of confidence for Sheetaldeen who had nominated her for his Provident Fund, Life Cover Scheme, Pension and amount of Life Insurance and amount of other dues. Under such circumstances she was always preferable even to the legally wedded wife like Sukhrana Bai who had never stayed with Sheetaldeen as his wife and who had gone to the extent of claiming the Succession Certificate to the exclusion of legal heirs of Sheetaldeen. In the grant of Succession Certificate the court has to use its discretion where the rival claims, as in this case, are made for the Succession Certificate for the properties of the deceased. The High Court should have taken into consideration these crucial circumstances. Merely because Sukhrana Bai was the legally wedded wife that by itself did not entitle her to a Succession Certificate in comparison to Vidhyadhari who all through had stayed as the wife of Sheetaldeen, had born his four children and had claimed a Succession Certificate on behalf children also. In our opinion, the High Court was not justified in granting the claim of Sukhrana Bai to the exclusion not only of the nominee of Sheetaldeen but also to the exclusion of his legitimate legal heirs.

Therefore, though we agree with the High Court that Sukhrana Bai was the only legitimate wife yet, we would chose to grant the certificate in favour of Vidhyadhari who was his nominee and the mother of his four children. However, we must balance the equities as Sukhrana Bai is also one of the legal heirs and besides the four children she would have the equal share in Sheetaldeen's estate which would be 1/5th. To balance the equities we would, therefore, chose to grant Succession Certificate to Vidhyadhari but with a rider that she would protect the 1/5th share of Sukhrana Bai in Sheetaldeen's properties and would hand over the same to her. As the nominee she would hold the 1/5th share of Sukhrana Bai in trust and would be responsible to pay the same to Sukhrana Bai. We direct that for this purpose she would give a security in the Trial Court to the satisfaction of the Trial Court.

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320. TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1987 – Sections 12, 18, 20-A (as inserted by Act 43 of 1993)
EXPLOSIVE SUBSTANCES ACT, 1908 – Section 5
Designated Court debarred from taking cognizance of the offence under TADA Act for lack of sanction of Competent Authority – It has no jurisdiction to try any other offence under any other Act.

Harpal Singh v. State of Punjab
Reported in AIR 2008 SC 743

Held:

The Designated Court, while trying an offence under TADA, is undoubtedly empowered to try any other offence with which the accused may, under the Code of Criminal Procedure, be charged at the same trial if the offence is

connected with such other offence in view of Section 12 of TADA and may convict such person of such other offence and may pass any sentence authorized by TADA or by such other law for the punishment thereof. But for application of Section 12 it is absolutely essential that the Designated Court should be trying an offence under TADA. If the Designated Court is not trying an offence under TADA it will have no jurisdiction to try any other offence. Section 18 also points out the same situation which says that where, after taking cognizance of any offence, a Designated Court is of opinion that the offence is not triable by it, shall, notwithstanding that it had no jurisdiction to try such offence, transfer the case for the trial of such offence to any court having jurisdiction under the Code of Criminal Procedure. Thus the Designated Court gets the jurisdiction to try any other offence only if it has the jurisdiction and is trying an offence under TADA. In *Niranjan Singh Karam Singh Punjabi vs. Jitendra Bhimraj Bijja and others AIR 1990 SC 1962,* it was observed as under: -

> "Section 12(1) no doubt empowers the Designated Court to try any offence punishable under any other statute along with the offence punishable under the Act if the former is connected with the latter. That, however, does not mean that even when the Designated Court comes to the conclusion that there exists no sufficient ground for framing a charge against the accused under S.3 (1) it must proceed to try the accused for the commission of offences under other statutes. That would tantamount to usurping jurisdiction. Section 18, therefore, in terms provides that where after taking cognizance of any offence the Designated Court is of the opinion that the offence is not triable by it, it shall, notwithstanding that it has no jurisdiction to try such offence, transfer the case for the trial of such offence to any Court having jurisdiction under the Code."

'Jurisdiction,' means the authority or power to entertain, hear and decide a case and to do justice in the case and determine the controversy. In absence of jurisdiction the court has no power to hear and decide the matter and the order passed by it would be a nullity.

In this case the first charge-sheet which was filed on 24.2.1994 there was no mention of TADA at all. It was in the supplementary charge-sheet filed on 29.5.2006 that the prosecution introduced the offence under TADA. But there was no sanction of the Inspector General of Police or of the Commissioner of Police as required under Section 20-A(2) of TADA and, therefore, the Designated Court had no jurisdiction to take cognizance of the offence. Since the Designated Court lacked inherent jurisdiction to try the offence under TADA it could not have tried the appellant even for offences under the Explosive Substances Act,

1908 or the Explosives Act, 1884. So the conviction u/s 5 of the Explosive Substances Act and sentence thereunder are set aside accordingly.

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321. WILD LIFE PROTECTION ACT, 1972 – Sections 39 (1) (d) & 50 (3-A) CRIMINAL PROCEDURE CODE, 1973 – Section 451
Power of Magistrate to make order u/s 451 of Cr.P.C. – Vehicle seized under Wild Life Protection Act – Sections 39 (1) (d) and 50 of the Act do not affect such power to direct release during pendency of trial. (Full Bench judgment of the High Court of Madhya Pradesh Bench at Jabalpur in the case of Madhukar Rao v. State of M.P. in Writ Petition No. 4421 of 1997 reported in 2000 (1) MPLJ 289 affirmed.)
State of M.P. & Ors. v. Madhukar Rao
Reported in 2008 AIR SCW 787

Held:

We are unable to accept the submissions. To contend that the use of a vehicle in the commission of an offence under the Act, without anything else would bar its interim release appears to us to be quite unreasonable. There may be a case where a vehicle was undeniably used for commission of an offence under the Act but the vehicle's owner is in a position to show that it was used for committing the offence only after it was stolen from his possession. In that situation, we are unable to see why the vehicle should not be released in the owner's favour during the pendency of the trial.

We are also unable to accept the submission that Section 50 and the other provisions in Chapter VI of the Wild Life Protection Act exclude the application of any provisions of the Code. It is indeed true that Section 50 of the Act has several provisions especially aimed at prevention and detection of offences under the Act. For example, it confers powers of entry, search, arrest and detention on Wild Life and Forest Officers besides police officers who are normally entrusted with the responsibility of investigation and detection of offences; further Sub-section (4) of Section 51 expressly excludes application of Section 360 of the Code and the provisions of Probation of Offenders Act to persons eighteen years or above in age. But it does not mean that Section 50 in itself or taken along with the other provisions under Chapter VI constitutes a self-contained mechanism so as to exclude every other provision of the Code. This position becomes further clear from Sub-section (4) of Section 50 that requires that any person detained, or things seized should forthwith be taken before a Magistrate. Sub-section (4) of Section 50 reads as follows:

> "50 (4). Any person detained, or things seized under the foregoing power, shall forthwith be taken before a Magistrate to be dealt with according to law [under intimation to the Chief Wild Life Warden or the officer authorized by him in this regard."

It has to be noted here that the expression used in the sub-section is 'according to law' and not 'according to the provisions of the Act'. The expression 'according to law' undoubtedly widens the scope and plainly indicates the application of the provisions of the Code.

We find that the Full Bench of the High Court of Madhya Pradesh has correctly taken the view that the deletion of sub-section (2) and its replacement by sub-section (3-A) in Section 50 of the Act had no effect on the powers of the Magistrate to release the seized vehicle during the pendency of trial under the provisions of the Code. The effect of deletion of Sub-section (2) and its replacement by Sub-section (3-A) may be summed up thus: as long as, Sub-section (2) of Section 50 was on the Statute Book the Magistrate would not entertain a prayer for interim release of a seized vehicle etc. until an application for release was made before the departmental authorities as provided in that sub-section. Further, in case the prayer for interim release was rejected by the departmental authority the findings or observations made in his order would receive due consideration and would carry a lot of weight before the Magistrate while considering the prayer for interim release of the vehicle. But now that Sub-section (2) of Section 50 stands deleted, an aggrieved person has no option but to approach the Magistrate directly for interim release of the seized vehicle.

The decision of this Court closer to the issue under consideration may be found in *Moti Lal v. Central Bureau of Investigation and another, (2002) 4 SCC 713.* In that case after examining in detail the various provisions of the Act particularly the provisions of Section 50 held as follows:

> "The scheme of Section 50 of the Wild Life Act makes it abundantly clear that a police officer is also empowered to investigate the offences and search and seize the offending articles. For trial of offences, the Code of Criminal Procedure is required to be followed and for that there is no other specific provision to the contrary. The special procedure prescribed is limited for taking cognizance of the offence as well as powers are given to other officers mentioned in Section 50 for inspection, arrest, search and seizure as well as of recording statement. The power to compound offences is also conferred under Section 54. Section 51 provides for penalties which would indicate that certain offences are cognizable offences meaning thereby a police officer can arrest without warrant. Sub-section (5) of Section 51 provides that nothing contained in Section 360 of the Code of Criminal Procedure or in the Probation of Offenders Act, 1958 shall apply to a person convicted of an offence with respect to hunting in a sanctuary or a national park or of an offence against any provision of

Chapter 5-A unless such person is under 18 years of age. The aforesaid specific provisions are contrary to the provisions contained in the Code of Criminal Procedure and that would prevail during the trial. However, from this, it cannot be said that operation of rest of the provisions of the Code of Criminal Procedure are excluded.

In this view of the matter, there is no substance in the contention raised by the learned Counsel for the appellant that Section 50 of the Wild Life Act is a complete Code".

We have, therefore, no doubt that the provisions of Section 50 of the Act and the amendments made thereunder do not in any way affect the Magistrate's power to make an order of interim release of the vehicle under Section 451 of the Code.

Learned Counsel submitted that Section 39 (1) (d) of the Act made the articles seized under Section 50(1)(c) of the Act as government property and, therefore, there was no question of their release. The submission was carefully considered by the Full Bench of the High Court and on an examination of the various provisions of the Act it was held that the provision of Section 39(1)(d) would come into play only after a court of competent jurisdiction found the accusation and the allegations made against the accused as true and recorded the finding that the seized article was, as a matter of fact, used in the commission of offence. Any attempt to operationalise Article 39(1)(d) of the Act merely on the basis of seizure and accusations/allegations leveled by the departmental authorities would bring it into conflict with the constitutional provisions and would render it unconstitutional and invalid. In our opinion, the High Court has taken a perfectly correct view and the provisions of Section 39(1)(d) cannot be used against exercise of the Magisterial power to release the vehicle during pendency of the trial.

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NOTE : Asterisk (*) denotes brief notes