JOTI JOURNAL

Vol. XV
JUNE 2009 (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

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HIGH COURT OF MADHYA PRADESH

JABALPUR - 482 007

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(i) क्या धारा 125 द.प्र.सं. के प्रावधानों के अंतर्गत आवेदन दिनांक से भरण–पोषण दिलाए जाने के लिये मजिस्ट्रेट को विशेष कारण लेखबद्ध करना आवश्यक है ?

(ii) यदि भवन स्वामी सहस्वामी हो तथा उनमें से एक या अधिक मध्यप्रदेश स्थान नियत्रंण अधिनियम 1961 की धारा 23 जे में वर्णित श्रेणी में आते हो जबकि शेष उक्त श्रेणी में नहीं आते हो एवं अभिवचनित आवश्यकता से सभी भूमिस्वामियों को संयुक्ततः वाद कारण उत्पन्न हुआ हो, तब वास्तविक आवश्यकता के आधार पर निष्कासन हेतु प्रस्तुत वाद/आवेदन पत्र की सुनवाई का क्षेत्राधिकार सिविल न्यायालय को प्राप्त होगा अथवा भाड़ा नियंत्रण प्राधिकारी को प्राप्त होगा ?

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FROM THE PEN OF THE EDITOR

J.P. Gupta
Director, JOTRI

Esteemed Readers

With this issue of June 2009, we have reached the midst of this year. The Institute was continuously engaged in imparting Induction Training to the newly appointed Civil Judges and other training programmes. Therefore, the work of JOTI Journal took a back seat. It became a mountainous task for the Institute to bring this Journal back to the track. Through this issue, we have been able to accomplish this to a certain extent. We hope that the next issue of JOTI Journal will be out with a little more promptitude.

In the past five months, the Institute had completed the training process by imparting Induction Training to the last batch of newly appointed Civil Judges of 2008 batch, Foundation Training Course to the directly appointed Additional District & Sessions Judges and Refresher Course training to the last batch of Civil Judges Class II of 2007 batch. With these training programmes, the Induction training to the newly appointed Civil Judges of 2008 batch and the Refresher Course training to the Civil Judges of 2007 batch have been completed,

After completion of Induction Training, in two Phases, most of Judicial Officers of 2008 batch have been given independent Boards. The real test for them starts now. They have to put to use whatever they have learnt in the Institute. The Institute in the Induction Training Programme laid emphasis in widening their knowledge on substantial and procedural laws. Now, as these Civil Judges, are in the infant stage of their working, they may come across varied problems in their day to day affairs and there is a possibility that they may commit mistakes. Thus, they need constant guidance and watch. With this view in mind, their work needs to be scrutinized and examined minutely. Simultaneously, it becomes the foremost duty of these judicial officers to take the help of their senior judges to [illegible] out their problems. By doing so, they can learn many new things. This process of interactive learning applies to the directly recruited Additional District Judges also.

The responsibility to make them good judges does not entirely lie with the Institute alone but with every senior member of the judicial fraternity. The Institutional Training was only for a limited period. The major part of their training lies in field training. Therefore, as senior judges, it becomes our bounden duty to help them in their time of need. Senior Judges, with their vast experience, must be ever-zealous to hear the problems of their younger brothers and suggest ways and means to solve them. Therefore, it is my earnest request to each and every District Judge to direct a senior judicial officer of their district to examine the judgments, orders, etc. of these new Judges from time to time and, if they find it necessary, guidance may be provided to them for improving their work. They should be apprised of their mistakes and if they commit the

same mistake again and again, even after suggestions/guidance, then the matter should be brought before the Hon'ble High Court. These judicial officers should also be encouraged to take part in discussions and deliberations along with other senior judicial officers so as to develop their understanding regarding the concept of law.

To acquire good knowledge in the field of law and better practical knowledge and reasoning, regular reading habit of different case laws, law books and other literature should be cultivated. On the other hand, management skills should also be developed to arrange the work of Court in such a way so as to provide timely justice to the people and also to have control over the Court staff.

Dispensation of justice is a divine duty. The qualities of moral uprightness, sincerity, humility, patience, punctuality, discipline and industriousness are the virtues that a Judge should have to become a good Judge. Therefore, these qualities should be imbibed in them from the very beginning as the future of District Judiciary depends upon them. If these qualities are retained in a Judicial Officer, then definitely the flag of the Madhya Pradesh Judicary will always fly high.

In this issue we are fortunate enough to include the text of the 10th D.P. Kohli Memorial Lecture delivered by Hon'ble the Chief Justice of India Shri K.G. Balakrishnan on 2nd April, 2009 at New Delhi on *Criminal Justice System – Growing Responsibility in Light of Contemporary Challenges* in Part I of this issue. It would be profitable if all the Judicial Officers go through this. Two other bi-monthly articles also find place in this Part.

In Part II, as usual, we are including important judgments of the Apex Court and our own High Court.

In Part III, a notification regarding the amendments carried out in *Madhya Pradesh G.P.F. Rules* is being published.

For prohibition of assault, criminal force, intimidation and threat against medical and health service persons, the Government of Madhya Pradesh has brought in a legislation – *The Madhya Pradesh Chikitsak Tatha Chikitsa Seva Se Sambaddha Vyaktiyon Ki Suraksha Adhiniyam, 2008* which finds place in Part IV of the Journal.

Thank you

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The more men dig, the more water flows from sandy springs, the more men learn, the more indeed their wisdom flows.

A learning is revered all over the earth, should we not learn until the hour of death.

– THIRUKKURAL

PART - I

CRIMINAL JUSTICE SYSTEM – GROWING RESPONSIBILITY IN LIGHT OF CONTEMPORARY CHALLENGES

(Text of the 10th D.P. Kohli Memorial lecture delivered by Hon'ble Shri Justice K.G. Balakrishnan, Chief Justice of India at New Delhi on 2nd April, 2009)

Ladies and Gentlemen,

I consider it my privilege to be delivering this lecture - which is organised every year in memory of Shri D.P. Kohli, the esteemed founder of the Central Bureau of Investigation (CBI). I am grateful for this opportunity to speak about some of the contemporary challenges faced by our criminal justice system.

The Central Bureau of Investigation traces its origins to the creation of the Delhi Special Police Establishment in the 1940's during World War II. The parent organisation was created for the purpose of investigating instances of corruption amongst government employees, which were perceived to be on the rise on account of increased governmental production and procurement activities. It was felt that police personnel faced undue obstructions while investigating such cases and hence there was a need for a specialised body at the central level to look into the same. A few years after independence, the Central Bureau of Investigation (CBI) came into being on account of the untiring efforts of people such as Sh. D.P. Kohli. From its original mandate of looking into corruption cases, the CBI has now taken on the responsibility of investigating serious crimes and economic offences, usually on the request of State Governments and in some instances on the directions from the Supreme Court of India and the various High Courts.

The lower judiciary has also been expanded with the creation of Special CBI Courts in many districts. Even though the CBI Courts have been functioning more efficiently than the ordinary criminal courts, their existing number is inadequate to handle the case-load. Recently gathered statistics indicate that approximately 9,000 cases involving the CBI are pending before the various courts. There is obviously an urgent need for creating more CBI Courts which should be manned by judicial officers who have expertise in criminal law. A resolution demanding the same was passed at last year's conference of High Court Chief Justices, following which I personally wrote a letter to the Prime Minister in order to highlight this issue.

Coming to the theme of this lecture – I have been asked to speak about some of the contemporary challenges faced by our criminal justice system. It would be impossible to speak about all the aspects of criminal justice in the allotted time, so I would like to confine my comments to three broad themes:-

- Firstly – the debate over the recent amendments to the Code of Criminal Procedure (CrPC), particularly with respect to the law of arrest
- Secondly, the suggestions for re-classifying the offences enumerated in the IPC and the various Special Laws so as to streamline the legal responses to them
- Thirdly, some thoughts on the need for better treatment of victims and their interests under our criminal laws.

The subject of criminal justice reforms in our country has received considerable attention in recent years. While it was perceived that the 8 volume report of the National Police Commission (1977-1981) was not given due attention for many years, it was the recommendations of the Justice Malimath Committee on Criminal Justice Reforms (in 2003) which triggered a lively debate between police officials, the judiciary, practicing lawyers, academics and civil society activists. The Law Commission has also periodically given suggestions for reforms and the theme has also been touched upon by the National Commission to Review the Working of the Constitution (NCRWC) in 2002. Amongst the most recently published studies, one can refer to the 'Draft National Policy on Criminal Justice' which was released in July 2007 and some of the observations made by the Second Administrative Reforms Commission.

Amongst the many concerns that have been raised by these studies, a consistent strand has been the negative image of the police in the mind of the ordinary citizen. The main reason for this is the high incidence of arbitrary arrests and custodial abuse – even for minor offences. More often than not, it is poorer people who are more likely to be arrested, detained and mistreated – even in the course of routine investigations. Independent studies indicate that upto 60% of arrests made in our country are needless since the detained persons do not prove to be useful for the purpose of investigation or trial. Such a state of affairs exists even though the D.K. Basu judgment laid down clear guidelines to regulate powers of arrest and detention.[1] However, undue delays in investigations, framing of charges and the conduct of trials is another problem where the blame is to be shared by the judiciary. These delays of course contribute to an increase in the population of 'under-trials' who face additional risks arising out of contact with hardened criminals, while in custody.[2]

Another problem is that even law-abiding citizens hesitate to approach the police with genuine complaints since there is a reluctance to register a First Information Report (FIR) unless the alleged offence is very serious or the

1 Refer *D.K. Basu v. State of West Bengal,* AIR 1997 SC 610

2 See N.R. Madhava Menon, 'Towards Making Criminal Justice Human Rights- Friendly – Policy Choices and Institutional Strategies' in C. Raj Kumar & K. Chockalingam (eds.), Human rights, Justice and Constitutional empowerment (New Delhi: Oxford University Press, 2007) at p. 420-436

complainant wields some influence. This chronic problem of 'under-reporting' of crimes is not merely a result of corruption at the grassroots level. It has been reasoned that at the level of a police-station, the personnel have an interest in recording low-crime rates in their respective area, since that is the basis of their evaluation by superiors. Hence the refusal to file FIR's is a deliberate measure to artificially keep the crime-rates low. This tendency indicates that the crime statistics collected at the state and national level are mostly unreliable and do not paint a true picture about the actual incidence of various kinds of crime. In this regard, the Supreme Court has also passed some orders laying down the conditions under which a Station House Officer (S.H.O.) has an obligation to file a FIR and conduct a prompt investigation.[3]

THE PROPOSED CHANGES TO THE LAW OF ARREST

There are many reasons behind these systemic problems and the recent amendments to the Code of Criminal Procedure (CrPC) have tried to tackle a few of them. The amendments are yet to be notified and have actually been the subject of controversy on account of criticisms made by some bar associations. There has also been considerable misunderstanding about the proposed changes to the law of arrest. The amendment bill seeks to give Investigating Officers (I.O.) a certain degree of discretion in the matter of arresting persons while investigating offences that are punishable with imprisonment of less than seven years. The legislative intent behind giving this discretionary power to the police is to reduce the high incidence of arbitrary and unnecessary arrests that take place in our criminal justice system. Some critics of this proposed change have argued that the deterrent value of penal provisions will be weakened since arrests will not be made in cases where the suspected persons use their money or muscle-power.

This criticism is unfounded because the proposed change does not take away the power to arrest in its entirety. Instead it requires arrests to be made in a reasonable and proportionate manner. The Investigating Officer (I.O.) is required to record reasons in writing for making an arrest, thereby creating a reliable basis for subsequent judicial scrutiny. In instances of exigency, such reasons can of course be recorded after the actual act of arrest. Such a requirement is in conformity with 'due process' norms and it will create a measure of accountability in police behaviour apart from providing material for consideration during bail proceedings. Furthermore an Investigating Officer is also to be given the power to issue a 'notice of arrest' to the person sought to be apprehended.

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3 See orders passed in *Prakash Singh v. Union of India, WP No. 310 of 1996* decided on September 22, 2006

To my mind, these changes proposed to the law of arrest are well-intentioned and are being unfairly criticised by some.

NEED FOR RE-CLASSIFICATION OF OFFENCES

It must be kept in mind that another cause for the high incidence of unnecessary arrests in our country is the outdated scheme for the classification of offences in our criminal laws. The division between cognizable and non-cognizable offences, between bailable and non-bailable offences as well as the nature and quantum of punishments for the respective offences needs to be thoroughly re-evaluated. The triggers for the various responses of the criminal law machinery were originally designed in the colonial-era and despite some piecemeal changes from time to time there is a need to re-classify the offences. For instance many minor offences against property are still classified as non-bailable, whereas it is evident that classifying them as compoundable offences and relying on methods such as 'plea-bargaining' may be more effective and agreeable to address the injury caused by the same. It is also obvious that the number of offences wherein arrests can be made without warrants need to be streamlined in a systematic manner.

I must also draw your attention to the fact that a considerable proportion of the criminal cases pending before our courts actually involve regulatory offences such as traffic violations, dishonour of cheques and failure to pay maintenance.

These regulatory offences have of course been created by the various special laws, wherein the legislature identified an overarching public interest in prescribing punitive remedies for certain kinds of acts that are otherwise more akin to civil wrongs. Hence an informed analysis of criminal laws must also differentiate between the nature of the acts and the subsequent degree of harm while deciding on the appropriate response from the criminal law machinery. This line of thinking is clear in the 'Draft National Policy on Criminal Justice' (published in 2007) wherein it has been suggested that all the offences presently identified under the Indian Penal Code (IPC) and the numerous special and local laws should be streamlined into four legislations.[4] This re-classification is proposed to be done on the basis of the gravity of the offences, appropriate procedures for investigation and dispute resolution as well as the proportionate nature and quantum of fines and punishments.

The proposed categories are those of a Social Welfare Offences Code, a Correctional Offences Code, the Penal Code and the Economic Offences Code. Such a re-classification is important since a 'one-size-fits-all' approach does not work and we need to adopt innovative procedures which will be responsive

4 See Report of the Committee on Draft National Policy on Criminal Justice (Ministry of Home Affairs, Government of India, July 2007) at p. 15-16

to social realities rather than legal niceties. The concept of 'compoundable' offences corresponds to the idea of arriving at a settlement without trial. Furthermore, with the introduction of 'plea-bargaining' in our system, there is a possibility for the accused to admit to his or her guilt in return for a lower penalty. This method will prevent the delays associated with the presentation and contestation of evidence in the usual trial procedure. Magistrates are already empowered to adapt their procedure for trying 'petty offences' and increasing reliance can be placed on 'summary trials' for handling offences which carry lower punishments.

ADVANCING THE INTERESTS OF VICTIMS

While such whole-scale legislative changes in our criminal laws may be several years away, there are some other important aspects in the recent CrPC amendment bill, which merit a discussion. I would like to highlight the proposed changes that seek to advance the rights and interests of the victims in the criminal justice process.

It has been frequently urged that most of the safeguards in the law of criminal procedure emphasise the rights of the accused. Aspects such as the presumption of innocence, the right against self-incrimination, the right to legal assistance and the other dimensions of the 'right to fair trial' such as the standard of 'proof beyond reasonable doubt', right of the accused to be informed of charges before trial and the right to present a defence among others - have all been developed through common-law principles that have been codified in our Constitution and subsequently re-inforced by the higher judiciary. This continuing emphasis on the rights of the accused is a natural feature of any liberal democracy where the individual is given protections against the criminal law machinery controlled by the state.

However, in an era of widespread organised crime, terrorist attacks and ethnic conflicts there are often calls made for diluting these protections. This is indeed a dangerous trend, since a partial concession of the components of the 'right to fair trial' could be the precursor for more concessions later. It is often argued that departing from these norms is necessary to ensure justice for the victims of heinous crimes. These arguments are unfounded and absolutely miss the real concerns of victims in most cases. While punishments for various offences are indeed oriented around objectives such as retribution, incapacitation, deterrence and rehabilitation in different measures – the interests of victims are often left in the lurch under our existing criminal laws. It is amply clear that in many instances compensatory remedies are more appropriate than punitive remedies. While the state has an interest in imposing monetary penalties or imprisonment for the purpose of deterrence – the victim's needs are not addressed by the same. It is important to understand that we can indeed engineer a shift towards restorative justice without departing from the safeguards

that have been given to the accused persons in our constitutional and criminal jurisprudence.[5]

In order to respond to the interests of victims more effectively, it is important to ensure that they play an active role during investigation and trial. The problem with the existing statutory scheme is that once an investigation starts, the role of the victim is minimal. In many instances the police personnel proceed very slowly on investigations, thereby losing out on the opportunity to gather relevant evidence and opening up the possibility of corruption. Conversely, investigations involving well-connected and influential persons as victims tend to be taken up in a relatively expeditious manner. Even during the course of trial, the victim's role is confined to that of acting as a 'prosecution witness' since the prosecution is entirely conducted by the State. The lawyers working as Public Prosecutors at the district level often lack the necessary competence and function in a manner that is not accountable to the victim in any way. As a result trials are unduly delayed either on account of the disinterest or conversely the heavy workload faced by the Public Prosecutors. Furthermore, victims as well as witnesses tend to face considerable inconvenience when they are required to repeatedly attend court hearings or face aggressive cross-examination from defence counsels. The situation is even more complicated for victims of sexual offences. This phenomenon of the victims of crimes facing even more harassment during the course of investigation and trial – is called 'secondary victimisation'.[6] The least that the law can do is to check and prevent such callousness.

The Justice Malimath Committee on Criminal Justice Reforms (2003)[7] outlined several measures that could be taken to protect the interests of victims and some of those suggestions have found their way into the recent CrPC amendment bill. One such step it to allow the victim (or in the event of the victim's death, the nearest relative of the victim) to engage a lawyer in addition to the Public Prosecutor.[8] This lawyer will also be authorised to present separate arguments, examine witnesses and produce evidence if permitted by the Court. Furthermore, another change that has been proposed is to allow the victim to file an appeal against an acquittal of the accused, conviction for a lesser offence or the award of an inadequate sentence.[9] These are indeed progressive measures which will greatly boost the public confidence in the criminal justice system.

5 Refer 'Criminal Justice Reform in India: ICJ Position Paper – Review of the recommendations made by the Justice Malimath Committee from an international human rights perspective' (International Commission of Jurists, Geneva – August 2003)

6 See: K. Chockalingam, 'Victimology and Victim Justice – Human Rights perspectives' in C. Raj Kumar & K. Chockalingam, Human Rights, Justice and Constitutional empowerment (New Delhi: Oxford University Press, 2007) at p. 437-461

7 See Recommendation No. 14 in Recommendations of the Malimath Committee on reforms of Criminal Justice System (*Ministry of Home Affairs, Government of India, 2003*)

8 Proposed change in Section 24 of the Code of Criminal Procedure (CrPC)

9 Proposed change in Section 372 of the Code of Criminal Procedure (CrPC)

The most far-reaching change has been the introduction of a victim's compensation scheme – that will enable trial courts to grant monetary remedies on a more consistent basis.[10] Suggestions for the same were made many years ago and many experts pointed to the Criminal Injuries Compensation Scheme implemented in the United Kingdom as an example to learn from.[11] However, based on their experience as well as common sense, there are several practical questions which we will face in the coming years:-

- First and foremost, criminal law provisions need to be examined in a fresh light so as to accommodate the logic of punishment as well as compensation. A majority of the punitive remedies enumerated in the statutes such as fines, penalties and imprisonment are not proportionate to the degree of harm suffered by the victim. Even though the Supreme Court has crafted discretionary remedies under its writ jurisdiction to direct the payment of compensation to victims of abuses by state actors – such as custodial deaths, fake encounters and arbitrary arrests[12] – there has been no statutory basis for the same. In some cases the Supreme Court has also directed offenders to pay compensation to victims in addition to the stipulated punishments.[13] However, in the absence of a clear legislative framework, even the higher judiciary has been inconsistent in awarding compensation to victims. Even though the principles from tort law such as 'strict liability' and 'negligence' can be used in awarding such remedies, they need to be interpreted afresh for every fact situation.
- Secondly, if the extent of compensation has to bear a rational correlation to the actual harm suffered, the trial judge will need to make a thorough inquiry into the nature and degree of such harm. While it may be relatively easy to ascertain external physical injuries, it will be far more difficult to ascertain harm suffered in the nature of mental trauma and psychological stresses that emerge much after the commission of the crime. Complications may also arise if the aim is to ensure compensation for loss of potential earnings, loss of livelihood on account of the death of an earning member of a family and other kinds of indirect costs linked to the crime.

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10 Proposed change in Section 357 of the Code of Criminal Procedure (CrPC)

11 See: David Miers, 'Rebuilding Lives: Operational and Policy Issues in the Compensation of victims of violent and terrorist crimes', Criminal Law Review, August 2006, p. 695-721

12 Illustrative examples are decisions in *Rudul Shah v. State of Bihar, AIR 1983 SC 1086; Saheli v. Comm. Of Police, Delhi Police, AIR 1990 SC 513; Nilabati Behera v. State of Orissa, (1993) 2 SCC 746*

13 For example in *Bodhisattwa Gautam v. Subhra Chakraborty (AIR 1996 SC 922)* the Court issued a set of guidelines for victim assistance in rape cases and relied on the Principles enumerated in the United Nations Declaration on Justice for victims of Crime and Abuse of Power, 1985 (GA Res. 40/34)

- Thirdly, there is the obvious question about the source of funds for granting compensation to the victims. In the case of 'petty offences' and 'offences against property' it may be possible to direct the offender to pay a compensation amount which is proportionate to the harm suffered. In acts involving abuses by government employees, compensation amounts can of course be drawn from public revenues. However, in many instances the offender may be indigent and hence unable to raise the resources necessary for paying compensation. Furthermore, in some instances the offender may never be identified or apprehended – which is quite conceivable in terrorist attacks or acts of criminal negligence which involve several intermediaries. Yet another possibility is that even the offender is identified and apprehended, he or she may not be convicted. Under these scenarios, there has to be some reliable source of funds for awarding compensation to victims. The suggestions in this regard have been that funds can be drawn from sources within the legal system such as collections of fines, forfeiture of bail amounts or money raised from the sale of attached or forfeiture properties. While there have been no empirical estimates on how much money will be needed to operate a meaningful victim's compensation scheme, there is clearly a need for an informed debate on this aspect.

CONCLUDING REMARKS

Having made these observations, I must say that I am quite optimistic that the proposed changes will definitely improve the role and status of victims in the criminal justice system. The larger agenda of criminal justice reforms touches on many more issues – such as better training for police personnel, a clear separation between the investigation and prosecution functions and continuous education for lawyers and judges. It is a big task and it can only be performed if the necessary political will exists for the same. If the failures of our criminal justice system are allowed to continue they will only encourage offenders to commit more crimes and correspondingly prompt acts of vigilante justice. The emerging crime scenario seriously threatens national security and economic development, warranting joint strategy between union and states on the basis of clear principles, priorities and objectives. An efficient yet fair criminal justice system is an essential requirement for a liberal democracy and these issues should be at the forefront of the agenda of all political parties.

I would like to once again thank all of you for inviting me here and being such a patient audience.

●

SCOPE OF FILING OF OBJECTIONS BY RESPONDENT UNDER ORDER 41 RULE 22 OF CPC, 1908

Judicial Officers
District Jabalpur

Order 41 Rule 22 is not a new provision for us. Before the commencement of the new Code of 1908, it was already there in the old Code of 1882. But from time to time when the need was felt, some amendments took place and some new words were inserted in the main part of the Order 41. The Code of Civil Procedure was extensively amended vide Act No. 104 of 1976. It also introduced changes in Rule 22 of Order 41 which created new area of debate in the legal field pertaining to the scope of "cross-objections" regarding the manner and form of the objections in which it can be taken. After a passage of 32 years of the amendment, it seems to us that more or less some dust has been cleared and scope of Rule 22 of Order 41 is clearly visible, though logic has no bounds and it never ends. Before we delve into the matter, it would be apposite to quote the provision of Rule 22 of Order 41 which runs as under:

> ***22. Upon hearing, respondent may object to decree as if he had preferred separate appeal.-*** (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.
>
> (2) Form of objection and provisions applicable thereto.- Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.
>
> (3) .....
>
> (4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.
>
> (5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule."

Explanation- A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.

SCOPE

If we see the provision of Rule 22(1), it is as clear as noonday that it gives two distinct rights to the respondent in appeal. The first is the right to support the decree of the court on any of the grounds on which that court decided against him; and the second right is that of taking any "cross-objection" to the decree which the respondent might have taken by way of appeal. In the first case, the respondent supports the decree while in the second case, he attacks the decree. In *Ravinder Kumar Sharma v. State of Assam, AIR 1999 SC 3571* it was held that Order 41 Rule 22 gives two distinct rights to the respondent in the appeal. The first is the right to uphold the decree of the Court of first instance on any of the grounds which that Court decided against him. In that case, the finding can be questioned by the respondent without filing cross-objections. The second right is the right to file a cross-objection. In *S. Nazeer Ahmed v. State Bank of Mysore, 2007 (2) Scale 349,* it was laid down that for supporting the decree passed by the trial Court, it is not necessary for a respondent in the appeal to file a memorandum of cross-objections challenging a particular finding that is rendered by the trial Court against him when the ultimate decree itself is in his favour. In case of *Nirvikar Gupta v. Ram Kumar, AIR 1992 MP 115,* his Lordship after comparative reading of the present text of the provision with the repealed one held that the scope of the provision has been widened by making it more liberal. Now the respondent without filing a cross-objection has the liberty of stating that "any finding against him" in the court below "in respect of any issue" ought to have been in his favour. The word "may" used in the explanation to Order 41 Rule 22 suggests that it is permissive and not prohibitive in nature. A respondent may, in the situation mentioned in the Explanation, choose to file cross-objection but that does not mean that his right to support the decree without filing a cross-objection as provided, in the main provision. is taken away.

TEST

Now, the question arises when in a case the finding can be questioned by the respondent without filing cross-objections? A memorandum of cross-objections is needed only if the respondent claims any relief which was negative to him, by the trial Court and in addition to what he has already been given by the decree under challenge. In case of *M/s. Shiv Shankar Prasad v. Union of India, AIR 1984 Pat 348,* it was held, the cross-objection is necessary, where some part of the decree is against the defendant and the defendant is being

desirous of any variation of the decree of lower Court. Where a person could not have appealed against the judgment and decree, he is not required to file a cross-objection in order to assail a finding against him on which the decree is not founded. Under Order 41 Rule 22 (1) Explanation, a cross objection is contemplated only when the respondent could have also appealed independently against the decree.

For example, a suit is filed on the ground of Sections 12 (1) (a) and 12 (1) (e) and suit is decreed only on the ground of Section 12 (1) (e) and rest of the ground held to be not proved. Here plaintiff cannot file an appeal because decree is in his favour. However, if defendant files an appeal then plaintiff without filling "cross-objection" may state that not only decree should be maintained but the ground under Section 12(1)(a) of the Act which was decided against the plaintiff should have been decided in favour. Here ultimately decree under challenge is not going to be changed, so there is no need to file any cross objection. [See *Tej Kumar Jain v. Purshottam, AIR 1981 MP 55* and *Nirvikar Gupta v. Ram Kumar*(supra)]. Take another example. A suit is filed for specific performance of agreement to sale. Defendant attacked the suit on various grounds. Some of the grounds were that the suit property was Joint Hindu family property and it was agreed to sell without legal necessity. The Court, instead of passing the decree of specific performance granted Rs 50000 as damages and ordered to repay the earnest money with interest. However, it was held that it is not Joint Hindu Family Property, so the question of legal necessity does not arise. Plaintiff filed an appeal and prayed for specific performance. Defendant supported the decree to the extent that it was for non-performance of agreement but challenged the findings that he is liable to pay Rs 50,000 as damages and urged the Court that decree should also be passed on the basis that suit property is Joint Hindu Family Property. Here defendant will have to file "cross objection" to avoid payment of Rs 50,000 as he wants to change the decree. Here, if defendant does not file cross objection, he cannot challenge the findings regarding damages. The only way to avoid this part of the decree is either to file an independent appeal or by way of cross objection; if plaintiff files appeal. However, without filing cross objection defendant may challenge the decree pertaining to the Joint Hindu Family Property and legal necessity because so far as this part of the decree is concerned, it is in his favour. [See *Babulal Agrawal v. Jyoti Shrivastava, 2000(1) MPLJ 102* and *Banarsi v. Ram Phal, (2003) 9 SCC 606*]. Therefore, it can safely be said that when a respondent wants to change the decree or avoid some part of the decree or is desirous of any variation in the decree, in that situation, he is required to file "cross objection". In other cases without filing cross objection, while supporting decree, he may contend that finding which has been decided against him should be decided in his favour.

Another question may be raised if in a given case "cross- objection" is not required and respondent files "cross objection" and appeal is dismissed due to non-prosecution or as withdrawn what would be the fate of the cross objection? Pre-amended CPC did not entitle nor permit the respondent to take any cross-

objection as he was not the person aggrieved by the decree. Under the amended CPC, sub-rule (1) of Order 41 Rule 22 read with the Explanation gives the respondent a right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross-objection is spelled out in sub-rule (4) of Order 41 Rule 22. In spite of the original appeal having been withdrawn or dismissed in default, the cross-objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits otherwise as soon as appeal is dismissed, the respondent cannot ask the Court that finding against him should be decided in his favour. [See *Banarsi v. Ram Phal* (supra)]

CONFLICT BETWEEN ORDER 41 RULE 22 & ORDER 41 RULE 33

Sometimes it is argued that though respondent has not filed the "cross objection" still Court can grant relief under Order 41 Rule 33. No doubt it gives the very wide powers to the Appellate Court to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is in as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees.

However, it does not mean that Order 41 Rule 33 gallows the provision of Order 41 Rule .22. Law is well settled that it is an exceptional power and should be used very sparingly and in very conscious manner. In case of *Banarsi v. Ram Phal* (supra) Their Lordships held the power is subject to at least three limitations: firstly, the power cannot be exercised to prejudice or disadvantage of a person not a party before the Court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. In case of *Harihar Prasad Singh and Ors. v. Balmiki Prasad Singh and Ors., (1975) 1 SCC 212* law is propounded in these terms:

> "..... where as a result of interference in favour of the appellant it becomes necessary to readjust the rights of other parties. A second class of cases based on the same principle is where the question is one of settling mutual rights and obligations between the same parties. A third class of cases is when the relief prayed for is single and indivisible but is claimed against a number of defendants. In such cases, if the suit is decreed and there is an appeal only by some of the defendants and if the relief is granted only to the appellants there is the possibility that there might

come into operation at the same time and with reference to the same subject-matter two decrees which are inconsistent and contradictory."

So, if the respondent does not file cross objection, he can pray to Court to exercise the power under Order 41 Rule 33 unless the case is circumscribed by the above contingencies.

MAINTAINABILTY

Order 41 Rule 22 (4) states that even when the appeal is withdrawn or dismissed in default "cross-objection" can still be heard and determined. Sub-rule (4) of Order 22 provides for only two situations in which the cross objection may be heard inspite of the original appeal having not been heard on merits. These situations are : (i) the original appeal being dismissed as withdrawn; (ii) the original appeal being dismissed for default. Cross-objection is nothing but an appeal, a cross-appeal at that. It may be that the respondent wanted to give a quietus to the whole litigation by his accepting the judgment and decree and order even if it was partly against his interest. When, however, the other party challenged the same by filing an appeal the statute gave the respondent a second chance to file an appeal by way of cross-objection if he still felt aggrieved by the judgment and decree or order. Thus, it is clear that cross-objection is like an appeal. It has all the trappings of an appeal. Even when the appeal is withdrawn or is dismissed, cross-objection can still be heard and determined as was observed by the Apex Court in the case of *Superintending Engineer and ors. v. B. Subba Reddy, (1999) 4 SCC 423* and the same view had been reiterated in *Hari Shankar Rastogi v. Shri Shyam Manohar and others, 2005 (3) MPLJ 1 (SC).*

In the case of *Municipal Corporation of Delhi and others v. International Security & Intelligence Agency Ltd., (2004) 3 SCC 250* it was observed that cross-objection would be maintainable if it had been filed within limitation.

CROSS-OBJECTION AGAINST CO-RESPONDENT

In *Shazadi Begum v. Vinod Kumar, 1977 MPLJ 272* it was held that as no relief was sought against appellant, cross-objection is not maintainable, Order 41 Rule 33 could not be invoked when trial Court's decree was not interfered with in appeal. As a general rule, a respondent should prefer an objection directed only against the appellant and it is only in exceptional cases, where the relief sought against the appellant in such an objection is intermixed with the relief granted to the other respondents, so that the relief against the appellant cannot be granted without the question being re-opened between the objecting respondent and other respondents, then objection under Order 41 Rule 22 directed against the other respondents is correct. [See *Panna Lal v. State of Bombay, 1963 MPLJ 648* and *Mahant Dhangir v. Madan Mohan, AIR, 1988 SC 54*]

EFFECT OF RESTORATION OF APPEAL ON CROSS-OBJECTION

Some times question arises if the appeal is dismissed in default and "cross-objection" has been decided on merits and if main appeal is restored, whether the "cross-objection" should be re-heard with the main appeal? In *Nanoo*

Gopinathan v. Neelacantan Balakrishnan, AIR 1990 Kerala 197, it was held when an appeal is dismissed in default or withdrawn, the fate of the cross objection is not sealed thereby. Even when an appeal is withdrawn or dismissed in default, the Court has to hear the cross objection and dispose it of in accordance with law. In other words, cross objection will have to be heard despite the dismissal of the appeal in default. Once an appeal is withdrawn or dismissed in default and the cross objection has been heard and decided on merits, restoration of the appeal and re-hearing of the appeal would not automatically warrant a re-hearing of the cross objection.

LIMITATION

The cross-objector should file an appeal within the prescribed period of limitation calculated from the date of the order, if he wishes to do so. Having allowed that opportunity to lapse, he gets another extended period of limitation commencing from the date of service of the notice of the appeal enabling him to put in issue for consideration of the Appellate Court on the same grounds for which he could have otherwise done by way of filing an appeal. This extended period of limitation commences from the date of service of the notice of appeal and such notice ought to be in the form of a valid or competent appeal. In case of *Vishwa Nath v. Smt. Maharaji, AIR 1977 Allahabad 459* it was held that the discretion of the appellate Court to grant further time for filing cross-objection is very wide and is not hedged in by such considerations as provided in Order 9 Rules 9 and 13 or in Section 5 of the Limitation Act.

COURT FEES

"Cross objection" have all the trappings of an appeal. [See *Hari Shankar v Shri Shyam Manohar, 2005 (3) MPLJ 1.*] Provisions of Order 41 Rule 22 only permits filing of a cross-objection in lieu of a cross-appeal when the other party against the same decree is in appeal. Though, there is no specific mention of the words "cross-objection" in Article I-A of Schedule I of Court Fees Act as there is only mention of "memorandum of appeal". Cross-objection, in substance is a memorandum of appeal and will attract court fee as required under Schedule 1. [See *Babulal Agrawal v. Jyoti Shrivastava* (supra).]

APPLICABILITY TO OTHER PROVISIONS

In case of *Sri Saibaba Cloth Emporium, Adoni v. Kolli Sanjeevamma, AIR 1991 A.P. 106,* it was laid down that though the scope of Order 41 Rule 22 of Civil Procedure Code does not extend to revisions, still the High Court has sufficient powers to entertain questions that may be raised by the respondent, of course, subject to the limitation that such questions should be within the purview of Section 115 CPC. In case of *T. Shivlal v. Balaram AIR 1976 A.P. 78* it was held that provisions of Order 41 also apply to appeals filed under Order 43. However High Court of Madhya Pradesh in the case of *Ramniwas v. Mandata Prasad, 1996 (2) MPWN 127* held that cross objection in miscellaneous appeal is not maintainable.

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PROCEDURE AND LIMITATIONS FOR DECIDING AN APPLICATION UNDER SECTION 34 OF ARBITRATION AND CONCILIATION ACT, 1996

Judicial Officers
District Sheopur*

INTRODUCTION

The Arbitration and Conciliation Act, 1996 aimed at consolidating the law of arbitration and to cut short the procedural aspects for providing speedy and efficacious remedy by giving opportunity to question the final award under Section 34 and not providing appeal against ruling of arbitrator at the threshold. However, Section 34 (1) of the Act of 1996 provides a remedy to an aggrieved party to take recourse to a Court against an arbitral award. Under this provision such party can make an application for setting aside such award in accordance with sub-section (2) and sub-section (3) thereof. Sub-section (2) provides for the grounds on which the court can set aside an arbitral award, whereas sub-section (3) provides for limitation within which such application could be filed.

An application can be made under this Section before the Court for setting aside the award. The grounds on which the award can be set aside u/s 34 (2) (a) by the Court are: (i) a party was under some incapacity (ii) the arbitration agreement is not valid under the law (iii) the party making the application was not given proper notice of the appointment of arbitrator or of the arbitral proceedings or was otherwise unable to present his case (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. The award can also be set aside u/s 34(2) (b) if the Court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law or the arbitral award is in conflict with the public policy of India which includes any award induced or affected by fraud or corruption or was in violation of Section 75 (Breach of confidentiality by the conciliator and the party) or 81 (Admissibility of evidence in other proceedings) of the Act.

The use of expression **"only by an application"** in sub-section (1) and (2) makes it clear that arbitral award could be set aside only on the specific grounds as mentioned in sub-section (2). Sub-section 2 (a) mandates filing of an application whereas under clause (b) the Court may also act *suo motu* if any of the clauses thereof is attracted.

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*The original article received from District Sheopur has been substantially edited by the Institute.

Only a party to the arbitration agreement and a party to the arbitration award can file an application to set aside the arbitration award and that too only on conditions enumerated u/s 34 of the Act.

Under Section 34 of the Act, right is given for filing an application for setting aside the arbitral award to a party which means party to an agreement. Section 34 nowhere provides the procedure for dealing with such an application. In this regard under Section 82 of the Act, the High Court has been empowered to frame Rules. By exercising this power M.P. High Court framed Madhya Pradesh Arbitration Rules, 1997 vide Notification No. C-966-III-15-28-41, dated 25th February, 1997 published in M.P. Rajpatra Part IV (49) dated 7.3.97 (Pages 10-12)., which govern *inter alia* proceedings under Section 34 of the Act. Under Rule 4 (1) (d) of the Rules, 1997 it is necessary that the names and addresses of the persons liable to be affected by the application be mentioned. As per Rule 8 of the Rules, 1997, thereafter, notice be given to opposite party and such other persons as are likely to be affected by the proceedings. Notice shall be accompanied by a copy of the application and documents filed by the applicant. These provisions make it clear that interested person can be impleaded as party to the proceeding u/s 34 of 1996 Act because the Arbitration Award cannot adversely affect the interest of other party without opportunity of hearing, in such a situation impleadment of such party is necessary as observed in *Nahar Allied Agencies v. Hindusthan Petroleum Corporation Limited and others, 2005 (3) MPHT 139.*

Whether Additional District Judge is competent to hear and decide the application u/s 34 of the Act of 1996?

An application u/s 34 for setting aside award is required to be made to the Court as defined in Section 2 (1) (e) of the Act which reads thus:

> "2 (1) (e) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil Court to a grade inferior to such principal Civil Court, or any Court of Small Causes".

The definition of "Court" under Section 2 (1) (e) could be divided in the following manner: (i) The principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction; (ii) having jurisdiction to decide the questions forming the subject-matter of the Arbitration if the same had been subject-matter of a suit; and (iii) it does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes. The term "Court" has been used in sections 9, 14 (2), 34, 36, 37, 39, 42 and 43 of part one of the Act of 1996.

In this regard recently in *Madhya Pradesh State Electricity Board & Anr. v. ANSALDO Energia, S.P.A. & Anr., AIR 2008 MP 328* Division Bench of our High Court after referring the provisions of Section 7 (2) of the M.P. Civil Courts Act, 1958 and previous pronouncements of *Babulal v. Dattatraya, 1971 MPLJ 765, M/s Badrilal Jodhraj and Sons, Indore v. Giridharilal and another, AIR 1988 MP 24, Rasheed Khan and another v. Peer Mohammad, 1992 MPLJ 607, Malik Singh Chawla v. Surendra Kumar Lakhers and others, AIR 1998 MP 312 and N.K. Saxena and Anr. v. State of M.P. and Anr., 2008 (2) MPHT 365* has held that as far as Madhya Pradesh is concerned, the Additional District Judge is equated with the Principal Civil Court of original jurisdiction. Section 2(1)(e) of the Act does not include any civil Court of grade inferior to such Principal Civil Court or any Court of Small Causes. As is evincible from the enunciation of law which we have referred to above, the Additional District Judge is not inferior to the District Judge. The irresistible conclusion is that the Additional District Judge meets the requirements as engrafted under Section 2(1)(e) of the 1996 Act and the objection raised under Section 34 of 1996 Act can be dealt with by the Additional District Judge.

Again in *Pratap Singh Hardia (Dr.) v. Sanjay Chawrekar, 2009 (1) MPLJ 477* another Division Bench of our High Court after referring the provisions of Sections 7, 8 and 15 of M.P. Civil Courts Act, 1958 in context with the provisions of Section 2 (1) (e) and 42 of the Arbitration and Conciliation Act, 1996 has enunciated the same principle and held that in the State of Madhya Pradesh the Additional District Judge shall exercise the jurisdiction of the Court to which he is appointed and powers of the Judge thereof, subject to any general and special orders of the authority by which he is appointed as to the Class or Value of the suit which he may try, hear or determine. As per sub-section (2) of Section 7 of the Civil Courts Act, an Additional District Judge shall discharge any of the functions of the functions of the District Judge, including the functions of Principal Civil Court of original jurisdiction, which the District Judge may, by general or special order assign to him and in the discharge of such functions he shall exercise the same powers as the District Judge. Thus, this sub-section clearly confers powers upon the Additional District Judge to discharge the functions of Principal Civil Court of original jurisdiction. Section 15 of the Civil Courts Act empowers the District Judge to prepare memo to distribute his business. Hence in Madhya Pradesh by virtue of this distribution memo an Additional District Judge is empowered to hear and decide the application u/s 34 of the Act of 1996.

How to present the application before the 'Court'?

An application for setting aside award should be made to the competent Court in writing duly signed and verified in the manner prescribed by Order 6 Rule 14 of CPC and if the Court so directs shall be supported by an affidavit with all other requirements as per Madhya Pradesh Arbitration Rules, 1997.

The court fees (in court fees stamps) payable for this application is Rs. 500/- as per Schedule of the Rules. Where the application made by the party is not in accordance with the provisions of these Rules, the Court may reject the application (Rule 6). While hearing an application u/s 34 (2) of the Act certain other provisions of Civil Procedure Code and Chapter XX of the M.P. Civil Courts Rules, 1961 are also made applicable as per Rules 9 and 10 of Madhya Pradesh Arbitration Rules, 1997.

Some relevant procedural aspects

Sub-section (4) of Section 34 prescribes that on receipt of an application u/s 34 (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceeding for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceeding or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

The object of taking recourse to the cause of action specified in Section 34 (4) is to enable the arbitral tribunal to resume proceedings or to take such steps as in its opinion will eliminate the grounds for setting aside the arbitral award. If the object of adjournment as mentioned above, is not accomplished, the Court shall proceed upon the application.

Party challenging award must satisfy the Court that grounds contemplated u/s 34 (2) do exist. Onus to prove it lies too heavily on that party. The Court, if satisfied with the proof furnished by the party making the application that grounds contemplated u/s 34 (2) do exist, may set aside the arbitral award.

In this context in *Lakme Ltd. v. Plethic Pharmaceutical Ltd. and ors, 2001 (1) JLJ 387* our High Court has held that as a matter of prudence the Court should always limit their (parties) attention to the spectrum by pointing out the points for determination or by settling the issues on controversy. Otherwise, the parties are likely to swing freely to unnecessary points and would be tempted to lead the evidence on these points. That would help the Courts to advert focused attention on the points which are really in controversy and to be adjudicated on.

The Hon'ble High Court has further observed whether parties or party should be permitted to adduce evidence by way of filing affidavits or by examining the witnesses in the Court. When the parties are not contesting the suit or proceeding keenly and when the question to be adjudicated, is not having multiple angles face, the Court may opt for an easy way directing the parties to adduce evidence by way of affidavit. But if the tussle is keen and parties are fighting daggers drawn, as a matter of prudence, the court should examine the witnesses by directing the parties to adduce their evidence by examining them in the Court by way of oral evidence.

Hon'ble the Court has further clarified by this judgment that the subordinate Courts should not harbour any impression in the minds that they should permit the parties to adduce oral evidence at any length. It should not be more than necessary and it should not be less than what is necessary. The permission to adduce the oral evidence to optimum point only and it should never be permitted to be elongated, lengthy and more than the main matter. The parties should be permitted to adduce oral evidence on relevant points only which the trial Court should firstly determine by settling the points for determination. It should not be permitted to have the impression in the mind of the litigants that it is second inning of the arbitration proceedings.

Where an application u/s 34 is made, the enforcement of the award would remain stayed automatically until the application u/s 34 is decided. There is no need for obtaining any stay order from the Court where the application u/s 34 has been made (See: *Vishnu Prasad Gontiya and ors. v. Ashok Leyland Finance Ltd., Jabalpur and ors., 2002 (1) MPLJ 500.*)

In *National Aluminium Co. Ltd. v. Pressteel and Fabrications Pvt. Ltd., AIR 2005 SC 1514* it was also noticed from the mandatory language of Section 34 of the 1996 Act that an award, when challenged under S.34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the Court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from the Court , contrary to that, also becomes impermissible.

Whether provisions of Limitation Act, 1963 are applicable?

Section 34 (3) of the Act of 1996 reads as under –

> An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:
>
> Provided that if the Court is satisfied that the application was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

In *Ramesh Pratap v. Vimla Singh, 2004 (2) MPLJ 135* it was held that limitation period of three months provided by Section 34 (3) of the Arbitration and Conciliation Act has to be counted from the date of delivery of signed copy of the arbitral award to the applicant.

In terms of Section 31 (5) of the arbitration and conciliation Act, it is mandatory on the part of the arbitrator to deliver a "signed copy" to each party. The receipt of signed copy of the arbitral award is an important event in the arbitration proceedings. It is from that date the limitation period given in section 34 (3) of the act has to be counted.

In *Union of India v. Tecco Trichy Engineers and Contractors, AIR 2005 SC 1832* it was observed that the delivery of an arbitral award under sub-section (5) of Section 31 is not a matter of mere formality. It is a matter of substance. It is only after the stage under Section 31 has passed that the stage of termination of arbitral proceedings within the meaning of Section 32 of the Act arises. The delivery of arbitral award to the party, to be effective, has to be "received" by the party. This delivery by the arbitral tribunal and receipt by the party of the award sets in motion several periods of limitation such as an application for correction and interpretation of an award within 30 days under Section 33(1), an application for making an additional award under Section 33(4) and an application for setting aside an award under Section 34(3) and so on. As this delivery of the copy of award has the effect of conferring certain rights on the party as also bringing to an end the right to exercise those rights on expiry of the prescribed period of limitation which would be calculated from that date, the delivery of the copy of award by the Tribunal and the receipt thereof by each party constitutes an important stage in the arbitral proceedings.

While considering the scope of Section 34 (3) in the context of a huge organization like Railways, it was held that "party" as referred to in Section 2(h) read with Section 34(3) of the Act has to be construed to be a person directly connected with and involved in the proceedings and who is in control of the proceedings before the Arbitrator and the copy of the award has to be received by the person who has knowledge of the proceedings and who would be the best person to understand and appreciate the arbitral award and also to take a decision in the matter of moving an application under sub-section (1) or (5) of Section 33 or under sub-section (1) of Section 34.

In *Ramesh Pratap Singh (Dead) and others v. Smt. Vimla Singh and others, 2004 (1) MPHT 197 (201)* our own High Court observed that as the photocopy of award does not bear signatures of the arbitrators, therefore, period of limitation cannot be counted from the date of supply of photocopy.

In case of *Union of India v. Popular Construction Company, (2001) 8 SCC 470,* the Apex Court held that the limitation period given in Section 34 (3) of the Act can be extended by 30 days as per proviso to that sub-section and there can be no extension of limitation beyond that date. It has also been held that Section 5 of Limitation Act, 1963 is not applicable to the application u/s 34 (3) of the Act.

But so far as the provisions of Section 14 of the Limitation Act is concerned it is applicable in this regard and period consumed in presentation of proceedings

in wrong forum or Court can be excluded while computing limitation u/s 34 (3) of the Act as held by the Apex Court in *State of Goa v. M/s. Western Builders, AIR 2006 Supreme Court 2525.* (Also see: M/s Consolidated Engineering Enterprises v. Principal Secretary, *(Irrigation Department)& Ors., 2008 AIR SCW 4182 and Gulbarga University v. Mallikarjun S. Kodgali & Anr., 2008 AIR SCW 6389*).

In *State of Arunachal Pradesh v. M/s. Damani Construction Co., AIR 2007 SC (Supp) 978* the Apex Court has held that application u/s 33 (1) should be strictly within any of the criteria falling thereunder and if the application is totally misconceived and is not in accordance with the law, then after rejection of such application time consumed will not give any fresh cause of action to the applicant for the purpose of calculating the period of limitation u/s 34 (3) of 1996 Act.

Limitations of the Court to set aside the award u/s 34 (2) of the Act of 1996

The jurisdiction of the Court to interfere with an award of an arbitrator is undoubtedly a limited one. It is not open to Court to re-assess the evidence to find whether arbitrator has committed any error or to decide the question of adequacy of evidence. The Court cannot sit on the conclusion of the arbitrator by re-examining and re-appreciating the evidence considered by the arbitrator. The Court will not sit as Court of appeal to consider the correctness of an award on the merits in respect of matters of fact or even of law.

Re-appraisal of evidence by the Court u/s 34 of the Act is not permissible. It is not open to the Court to deduce in the award and proceed to examine whether those reasons are right or erroneous. The arbitrator is the sole Judge of the quality as well as quantity of the evidence and it is not for the Court to take upon itself the task of being a judge of the evidence before the arbitrator.

In the application u/s 34 for setting aside the award the Court cannot probe the mental process of an arbitrator about the sufficiency of evidence. The insufficiency of evidence cannot nullify the award.

Though the arbitrator has a mandatory obligation to record reasons, the reasons which he records cannot be scrutinized by the Court in the exercise of review jurisdiction. The jurisdiction of reviewing Court under 1996 Act is not appellate in nature and since the Act is a comprehensive Code relating to the law of arbitration, the extent of judicial interference must be confined to what is permitted by the Act.

It is not open to the Court to set aside finding of fact arrived at by the arbitrator and the award can be cancelled only on the grounds mentioned in the Act. Where the arbitrator is a qualified technical person and expert, who is competent to make assessment by taking into consideration the technical aspect of the matter, the Court would generally not interfere with the award passed by the arbitrator.

The Apex Court in the case of *National Aluminium Co. Ltd* (supra) held that there is no discretion left with the Court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein.

In *Narayan Prasad Lohia v. Nikunj Kumar Lohia, AIR 2002 SC 1139* a three-Judge Bench of Apex Court has held that it must be remembered that arbitration is a creature of an agreement. There can be no arbitration unless there is an arbitration agreement in writing between the parties. Any agreement which permits the parties to appoint an even number of arbitrators would not be contrary to provision of Section 10. Such an agreement would not be invalid and void as the Arbitral Tribunal would be validly constituted. Under Section 16, a party can challenge the composition of the Arbitral Tribunal before the Arbitral Tribunal itself. A con-joint reading of Sections 10 and 16 shows that an objection to the composition of the Arbitral Tribunal is a matter which is derogable. It is derogable because a party is free not to object within the time prescribed in Section 16 (2). If a party chooses not to so object there will be a deemed waiver u/s 4. Thus, Section 10 which provides that number of arbitrators shall not be an even number is, derogable provision. Section 10 has to be read along with Section 16 and is, therefore, a derogable provision.

So long as the composition of the Arbitral Tribunal or the arbitral procedure are in accordance with the agreement of the parties, Section 34 does not permit challenge to an award merely on the ground that the composition of the Arbitral Tribunal was in conflict with the provisions of Part I of the said Act. This also indicated that Section 10 is derogable provision. Section 34 (2) (a) (v) only applies if "the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties". These opening words make it very clear that if the composition of the Arbitral Tribunal or the arbitral procedure is in accordance with the agreement of the parties, then there can be no challenge under this provision. The words 'filing such agreement' have reference to an agreement providing for the composition of the Arbitral Tribunal or the arbitral procedure.

In the case of *Gas Authority of India Ltd. and another v. Keti Construction (I) Ltd. and others, (2007) 5 SCC 38* it has been held that challenge of jurisdiction of Arbitral Tribunal should be raised at the beginning not later than filing of defence. If plea of jurisdiction is not taken before arbitrator as provided u/s 16 of the Act, such plea cannot be permitted to be raised in proceeding u/s 34 of the Act unless good reason is shown.

In the case of *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd., AIR 2003 SC 2629,* the Apex Court after referring the provisions regarding composition and jurisdiction of Arbitral Tribunal, conduct of arbitral proceedings and making of arbitral award and termination of proceedings in context of Section

34 has held that reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it could not be set aside by the Court. If it is held that such award could not be interfered, it would be contrary to basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34. It was further observed that if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34. However, such failure of procedure should be patent affecting the rights of the parties.

In this case the Apex Court finally cleared the clouds regarding the powers of the Court to set aside the award and held that the Court can set aside the arbitral award on grounds enumerated in Section 34 (2) & (3) of the Act and as provided under Section 13 (5) and 16 (6) of the Act, if party making application furnishes proof. Hon'ble the Apex Court further clarified the term 'Award against the public policy of India' as it is contrary to (a) fundamental policy of Indian Law; (b) the interest of India; or (c) justice or morality; or (d) patently illegal.

Again in *Delhi Development Authority v. M/s R.S. Sharma & Co., New Delhi, 2008 AIR SCW 5375* the Apex Court reiterating the above legal position has observed that the Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court.

In *Narmada Construction v. Western Coalfields Ltd., 2008 (3) MPLJ 356 (DB)* our own High Court has held that if findings recorded by arbitrator were not perverse or illegal then even if two interpretations of the clauses of agreement were possible and the one interpretation has been adopted by the Arbitrator, that would not be ground to make interference in the Awards passed by the Arbitrator as it could not be said to be a misconduct committed by the Arbitrator.

In *Mc Dermott International Inc. v. Burn Standard Inc. Co. Ltd, (2006) 11 SCC 181 = 2006 AIR SCW 3276* the Apex Court held that the Act of 1996 provides only for supervisory role of Courts to review arbitral award in order to ensure fairness. Intervention of Court is expected only under few circumstance like bias of arbitrator, fraud, violation of natural justice etc. Court cannot correct the error of arbitrator but can only quash the award if parties to the agreement so desire.

In *Venture Global Engineering v. Satyam Computer Services Ltd., AIR 2008 SC 1061* the Apex Court held that 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. It is also clear that 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.

In *M. Anasuya Devi and another v. M. Manik Reddy and others, (2003) 8 SCC 565* it has been specifically held that Section 34 of the Act provides for setting aside of the award on the grounds enumerated therein and none other. The question as to whether the award is required to be stamped and registered, would be relevant only when the parties would file the award for its enforcement under Section 36 of the Act. It is at this stage that the parties can raise objections regarding its admissibility on account of non-registration and non-stamping under Section 17 of the registration Act. The questions whether an award requires stamping and registration is within the ambit of Section 47 CPC and not covered by Section 34 of the Act.

CONCLUSION

On the basis of the aforementioned discussion based on various pronouncements of the Apex Court and our own High Court the legal position germinates as under:-

(a) An application u/s 34(2) of the Act of 1996 should be presented before the competent Court as per Madhya Pradesh Arbitration Rules, 1997 framed by the High Court of Madhya Pradesh

(b) So far Madhya Pradesh is concerned, the competent Court for hearing and deciding the application u/s 34, is District Judge and Additional District Judge as both have equal powers and Additional District Judge is not inferior to the District Judge. Both are Principal Civil Court of original jurisdiction for the purpose of Section 2 (1) (e) of the 1996 Act.

(c) An application u/s 34 (2) of the Act should be strictly within the limitations prescribed under sub-section (3) of Section 34 of the Act, subject to the provisions of Section 14 of the Limitation Act, 1963 as and when applicable.

(d) Section 34 (2) of the Act provides for setting aside the award on the grounds enumerated therein and none other, subject to the legal position clarified by the Apex Court in the case of *Oil and Natural Gas Corporation Ltd. v. Sawpipes Ltd.* (supra.)

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विधिक समस्याऐं एवं समाधान

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

- **क्या धारा 125 द.प्र.सं. के प्रावधानों के अन्तर्गत आवेदन दिनांक से भरण–पोषण दिलाये जाने के लिए मजिस्ट्रेट को विशेष कारण लेखबद्ध करना आवश्यक है ?**

मूलतः अधिनियमित संहिता की धारा 125(2) के अन्तर्गत भरण–पोषण आदेश दिनांक से दिलाया जा सकता था या अन्यथा आदेशित किये जाने की दशा में आवेदन दिनांक से भी भरण पोषण दिलाया जा सकता था और उक्त धारा में दण्ड प्रक्रिया संहिता (संशोधन) अधिनियम, 2001 से संशोधन होने के उपरांत भी इसी आशय की व्यवस्था की गयी है कि भरण पोषण आदेश दिनांक से अदा करने के लिए न्यायालय निर्देश दे सकता है या अन्यथा आदेशित कर आवेदन दिनांक से भरण पोषण प्रदान करने हेतु निर्देश दे सकता है।

इस संबंध में यह उल्लेखनीय है कि संहिता की धारा 125 (2) में ऐसा कोई प्रावधान न तो संशोधन से पूर्व रहा है और न वर्तमान में है कि आवेदन दिनांक से भरण–पोषण की राशि अदा करने के लिये मजिस्ट्रेट तभी निर्देश दे सकता है जबकि ऐसा करने के लिये विशेष कारण दिये गये हों, तथापि विभिन्न उच्च न्यायालयों के भिन्न–भिन्न न्याय दृष्टांतों में प्रतिपादित मतों से भ्रम पूर्ण स्थिति उत्पन्न हुई जिसमें से एक मत के अनुसार सामान्य नियम यह है कि मजिस्ट्रेट को भरण–पोषण आदेश दिनांक से दिलाना चाहिए एवं अत्यन्त आपवादिक दशाओं में मजिस्ट्रेट कारण दर्शाते हुए भरण–पोषण आवेदन दिनांक से अदा करने के निर्देश दे सकता है। दूसरे मत के अनुसार मजिस्ट्रेट को भरण–पोषण अदा करने का आदेश आवेदन दिनांक से पारित करना चाहिए और आदेश दिनांक से भरण–पोषण दिलाने की दशा में मजिस्ट्रेट को विशेष कारण लेखबद्ध करना चाहिए।

उक्त प्रश्न और उसके संबंध में उसकी भ्रमपूर्ण स्थिति पर सर्वोच्च न्यायालय द्वारा न्याय दृष्टांत ***शैल कुमारी देवी विरूद्ध कृष्ण भगवान पाठक (2008) 9 एस.सी.सी. 632*** में विचार करते हुए यह विधि प्रतिपादित की है कि संहिता की धारा 125 के अन्तर्गत प्रस्तुत आवेदन पत्र के निराकरण के समय मजिस्ट्रेट से यह अपेक्षित है कि भरण–पोषण अदा करने या न करने संबंधी आदेश पारित करने पर कारण लेखबद्ध करे तथा भरण–पोषण अदा करने संबंधी निर्देश आदेश दिनांक या आवेदन दिनांक से दिया जा सकता है एवं

आवेदन दिनांक से भरण–पोषण दिलाने के लिये अभिव्यक्त आदेश आवश्यक है तथापि ऐसा करने के लिए कोई विशेष कारण लेखबद्ध करना न्यायालय से अपेक्षित नहीं है।

यदि भवन स्वामी सह स्वामी हो तथा उनमें से एक या अधिक म. प्र. स्थान नियंत्रण अधिनियम, 1961 की धारा 23–जे में वर्णित श्रेणी में आते हों, जबकि शेष उक्त श्रेणी में नहीं आते हों एवं अभिवचनित आवश्यकता से सभी भूमिस्वामियों को संयुक्ततः वाद कारण उत्पन्न हुआ हो, तब वास्तविक आवश्यकता के आधार पर निष्कासन हेतु प्रस्तुत वाद/आवेदन पत्र की सुनवाई का क्षेत्राधिकार सिविल न्यायालय को प्राप्त होगा अथवा भाड़ा नियंत्रक प्राधिकारी को प्राप्त होगा ?

उक्त स्वरूप की आपत्ति सिविल न्यायालय के समक्ष निष्कासन हेतु प्रस्तुत वाद में या भाड़ा नियंत्रक प्राधिकार के समक्ष निष्कासन की सहायता प्राप्ति हेतु प्रस्तुत आवेदन पत्र में म.प्र. स्थान नियंत्रण अधिनियम, 1961 (एतत्मिन पश्चात मात्र अधिनियम) की धारा 45 के प्रावधानों के आलोक में प्रतिवादी/अनावेदक द्वारा उठायी जा सकती है कि न्यायालय को ऐसे वादी द्वारा प्रस्तुत वाद की सुनवाई की अधिकारिता प्राप्त नहीं है जो अधिनियम की धारा 23–जे के अन्तर्गत वर्णित श्रेणी का है या भाड़ा नियंत्रक प्राधिकारी को ऐसे आवेदक द्वारा प्रस्तुत आवेदन पत्र के निराकरण की अधिकारिता प्राप्त नहीं है जो अधिनियम की धारा 23–जे में वर्णित श्रेणी का नहीं हो।

उक्त समस्या का समाधान सर्वोच्च न्यायालय द्वारा न्याय दृष्टांत **धन्नालाल विरूद्ध कलावती बाई एवं अन्य, ए.आई.आर. 2002 सु.को. 2572** में दिया जाकर यह विधि प्रतिपादित की है कि ऐसे प्रकरणों में वादीगण/आवेदकगण को फोरम चुनने की स्वतंत्रता होगी और वे या तो अधिनियम के अध्याय III के अधीन भाड़ा नियंत्रक प्राधिकारी के समक्ष आवेदन पत्र प्रस्तुत कर सकेंगे या सिविल न्यायालय के समक्ष अधिनियम की धारा 12 के अन्तर्गत वाद प्रस्तुत कर सकेंगे एवं दोनों में से कोई भी कार्यवाही उचित (योग्य) एवं प्रचलन योग्य होगी।

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नोटः स्तंभ 'समस्या एवं समाधान' के लिए न्यायिक अधिकारी अपनी विधिक समस्याएं संस्थान को भेज सकते हैं। चयनित समस्याओं के समाधान आगामी अंकों में प्रकाशित किए जाएंगे – **संचालक**

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PART - II

NOTES ON IMPORTANT JUDGMENTS

*166. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 (1) (e) & (f)
Eviction suit – Bonafide requirement, pleading and proof of – As per plaint averment, suit house was let out for residential purpose – However, eviction was sought for bonafide requirement for residence as well as for starting business – Defendant pleaded and proved that the suit house was let out for both the purposes – Plaintiff was able to establish bonafide requirement for both the purposes – Held, decree of eviction can be passed for ejectment from suit house on the grounds mentioned under Sections 12 (1) (e) and (f) of the Act.

Babulal v. Anoop

Judgment dated 06.01.2009 passed by the High Court in First Appeal No. 245 of 2004, reported in 2009 (1) MPLJ 559

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*167. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 2 (1) (e), 34 & 42
M.P. CIVIL COURTS ACT, 1958 – Sections 7 & 8
WORDS AND PHRASES:

(i) Challenge to award, maintainability of – Once the awarded amount is accepted by a party, it cannot challenge the award by filing application under Section 34 of the Arbitration and Conciliation Act.

(ii) Application under Section 34 of the Arbitration and Conciliation Act – Power to hear and decide the same – "Court", meaning of – As per definition under Section 2 (1) (e) of the Arbitration and Conciliation Act, the 'Court' means the Principal Civil Court of original jurisdiction in the district – Court of Additional District Judge is also a Court of Principal Civil Court of original jurisdiction by virtue of Sections 7 and 8 of M.P. Civil Courts Act – The District Judge is empowered to prepare memo for distribution of work – Hence, Additional District Judge has jurisdiction to proceed with the application.

Pratap Singh Hardia (Dr.) v. Sanjay Chawrekar

Judgment dated 05.12.2008 passed by the High Court in Writ Petition No. 5787 of 2008, reported in 2009 (1) MPLJ 477 (D.B.)

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168. CIVIL PROCEDURE CODE, 1908 – Sections 2(2), 97 & 152 and Order 20 Rule 18 (2)
Provision of Section 97 of CPC would not be a bar to file an application for amendment of a preliminary decree passed in a partition suit – A property can be added in the list of properties after a preliminary

decree is passed – The Appellate Court has power to consider subsequent events to complete adjudication.

S. Satnam Singh and others v. Surender Kaur and another

Judgment dated 02.12.2008 passed by the Supreme Court in Civil Appeal No. 7008 of 2008, reported in (2009) 2 SCC 562

Held:

In a partition suit where both the parties want partition, a defendant may also be held to be a plaintiff. Ordinarily, a suit for partial partition may not be entertained. When the parties have brought on records by way of pleadings and/or other material that apart from the property mentioned by the plaintiff in his plaint, there are other properties which could be a subject matter of a partition, the court would be entitled to pass a decree even in relation thereto.

In certain situations, for the purpose of complete adjudication of the disputes between the parties an appellate Court may also take into consideration subsequent events after passing of the preliminary decree.

Indisputably, Section 97 of the Code of Civil Procedure provides for an appeal against preliminary decree but the said provision, in our opinion, would not be a bar to file an application for amendment of a decree.

The court may not have a suo motu power to amend a decree but the same would not mean that the court cannot rectify a mistake. If a property was subject matter of pleadings and the court did not frame an issue which it ought to have done, it can, at a later stage, when pointed out, may amend the decree.

The power of amendment, in a case of this nature, as noticed hereinbefore, would not only be dependent upon the power of the court but also the principle that a court shall always be ready and willing to rectify the mistake it has committed.

The trial court felt that it had committed a mistake. In such a situation, the court, in our opinion, committed no infirmity in directing rectification of its mistake.

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

Applicability of *res judicata* in connected suits – In two connected civil suits, which were heard together, the disputes and issues between the parties were common – Decree passed in both the suits – No appeal was preferred in one suit and the said decree attained finality – Held, the principle of *res judicata* would be applicable against the appeal preferred in the other connected case. [Also see : *Premier Tyres Ltd. v. Kerala SRTC, 1993 Supp (2) SCC 146* and Constitution Bench decision in *Badri Narayan Singh v. Kamdeo Prasad Singh, AIR 1962 SC 388*]

Harbans Singh and others v. Sant Hari Singh and others

Judgment dated 13.01.2009 passed by the Supreme Court in Civil Appeal No. 100 of 2009, reported in (2009) 2 SCC 526

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***170. CIVIL PROCEDURE CODE, 1908 – Order 5 Rules 2 & 10**

Non-compliance of provisions of Order 5 Rules 2 and 10 CPC, effect of – Summons cannot be said to be duly served – In such a case, proceeding cannot be proceeded ex parte.

Jamshed Bahadur v. Rashida Bee (Smt.) and another

Judgment dated 04.02.2009 passed by the High Court in Second Appeal No.350 of 1993, reported in 2009 (2) MPHT 280

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171. CIVIL PROCEDURE CODE, 1908 – Order 8 Rule 1 and Proviso

In *Kailash v. Nankhu, (2005) 4 SCC 480,* though the Proviso to Order 8 Rule 1 was held to be directory, but Supreme Court therein categorically also stated that the defendant may be permitted to file written statement after the expiry of period of 90 days; only in exceptional situation and not in a routine manner.

Mohammed Yusuf v. Faij Mohammad and others

Judgment dated 02.12.2008 passed by the Supreme Court in Civil Appeal No. 7209 of 2008, reported in (2009) 3 SCC 513

Held:

Order 8 Rule 1 of the Code of Civil Procedure reads thus:

> *"1. Written statement:* – The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:
>
> Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons."

Although in view of the terminologies used therein, the period of 90 days prescribed for filing written statement appears to be a mandatory provision. This Court in *Kailash v. Nankhu, (2005) 4 SCC 480* upon taking into consideration the fact that in a given case the defendants may face extreme hardship in not being able to defend the suit only because he had not filed written statement within a period of 90 days, opined that the said provision was directory in nature. However, while so holding, this Court in no uncertain terms stated that defendants may be permitted to file written statement after expiry of period of 90 days only in exceptional situation.

The matter was yet again considered by a three-judge Bench of this Court in *R.N. Jadi & Bros. v. Subhashchandra, (2007) 6 SCC 420.* P.K. Balasubramanyan J., who was also a member in *Kailash* (supra), in his concurring judgment stated the law as under:

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

15. A dispensation that makes Order 8 Rule 1 directory, leaving it to the courts to extend the time indiscriminately would tend to defeat the object sought to be achieved by the amendments to the Code. It is, therefore, necessary to emphasise that the grant of extension of time beyond 30 days is not automatic, that it should be exercised with caution and for adequate reasons and that an extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of the justification for granting such extension, the court being conscious of the fact that even the power of the court for extension inhering in Section 148 of the Code, has also been restricted by the legislature. It would be proper to encourage the belief in litigants that the imperative of Order 8 Rule 1 must be adhered to and that only in rare and exceptional case, will the breach thereof will be condoned. Such an approach by courts alone can carry forward the legislative intent of avoiding delays or at least in curtailing the delays in the disposal of suits filed in courts. The lament of Lord Denning in *Allen v. Sir Alfred Mc Alpine & Sons Ltd, (1968) 1 All ER 543 (CA)* that law's delay have been intolerable and last so

long as to turn justice sour, is true of our legal system as well. Should that state of affairs continue for all times?"

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***172. CIVIL PROCEDURE CODE, 1908 – Order 17 Rule 1 Proviso**

Proviso to Order 17 Rule 1 CPC, applicability of – Although the Proviso to Rule 1 of Order 17 of the Code, which provides that no adjournment shall be granted to a party for more than three times, has been held to be directory but has not been rendered totally redundant by judicial interpretation.

Rajkumar Patel v. Shivraj Singh Chouhan

Judgment dated 05.02.2009 passed by the High Court in Election Petition No. 01 of 2006, reported in 2009 (2) MPHT 285

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173. CIVIL PROCEDURE CODE, 1908 – Order 20 Rule 18

Partition suit – Preliminary decree – It is a step in the partition suit which continues until the final decree is passed – No limitation is provided for final decree and final decree proceedings may be initiated at any point of time – Trial Court can pass a final decree or such order as is necessary for giving effect to the preliminary decree and to conclude the proceedings either *suo motu* or on an application by any of the parties.

Kamla Bai Patel (Kuchwaha) v. Vidhyawati Patel and others

Judgment dated 26.06.2008 passed by the High Court in Civil Revision No. 933 of 2002, reported in 2009 (1) MPLJ 657

Held:

The provision under Order 20 Rule 18 CPC specifically provides that where the partition and separation cannot be conveniently made without further inquiry the court shall pass a preliminary decree declaring the rights of the several parties interested in the property and issue such further directions as may be required. The judgment and decree dated 4.9.1987 was under Order 20 Rule 18(2) of the Code. So the aforesaid judgment and decree were preliminary in nature.

For final decree no limitation is provided and final decree proceedings may be initiated at any point of time. The Apex Court in *Hasham Abbas Sayyad v. Usman Abbas Sayyad and ors., (2007) 2 SCC 355* considering this question held thus :-

> "9. A final decree proceeding may be initiated at any point of time. No limitation is provided therefor. However, what can be executed is a final decree, and not a preliminary decree, unless and until final decree is a part of the preliminary decree."

In view of the settled law by the Apex Court, it is found that the trial Court erred in arriving at a finding that the present application was barred by limitation and such application ought to have filed within a period of 3 years as required under Art.137 of the Limitation Act. The aforesaid findings of the trial Court are hereby set aside.

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

MUNICIPAL CORPORATION ACT, 1956 (M.P.) – Sections 66 (1) & 220

Right to Life under Article 21 of the Constitution, scope of – Right to pollution free water is a fundamental right – Such right is included in Right to Life guaranteed under Art. 21 of the Constitution – Under M.P. Municipal Corporation Act, the Corporation is duty bound to provide sufficient supply of suitable water for public and private purposes.

Manoj Rajani and others v. State of M.P. and others

Judgment dated 12.02.2009 passed by the High Court in Writ Petition (PIL) No. 6021 of 2008, reported in 2009 (2) MPHT 292 (DB)

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175. CONSTITUTION OF INDIA – Article 245

INTERPRETATION OF STATUTES:

(i) Judicial review of subordinate legislation – Grounds for – Reiterated.

(ii) Interpretation of Statutes – Rules of Executive construction – Explained.

Mahalakshmi Sugar Mills Co. Ltd. & Anr. v. Union of India & Ors.

Judgment dated 31.03.2008 passed by the Supreme Court in Civil Appeal No. 2258 of 2008, reported in AIR 2009 SC 792

Held:

Judicial review of subordinate legislation has also been dilated upon by the Court recently in *Vasu Dev Singh v. Union of India, 2006 (11) SCALE 108,* Paras 12 to 23. [See also *Life Insurance Corporation of India & Ors. v. Retired L.I.C. Officers Association & Ors. 2008 (2) SCALE 484*].

From these decisions, it may be deduced that validity of subordinate legislation may be questioned on the ground that:

(a) it is ultra vires the Constitution;

(b) it is ultra vires the parent Act;

(c) it is contrary to the statutory provisions other than those contained in the parent Act;

(d) law-making power has been exercised in bad faith;

(e) It is not reasonable; and f) it goes against legislative policy, and does not fulfill the object and purpose of the enabling Act.

Rules of executive construction may also be applied where a representation is made by the maker of legislation at the time of introduction of the Bill or construction thereupon is put by the executive upon its coming into force, the same carries a great weight.

In this regard, we may refer to the decision of the House of Lords in the matter of *R. v. National Asylum Support Service, (2002) 1 W.L.R.2956* and its interpretation of the decision in *Pepper v. Hart, (1993) A.C. 593* on the question of 'executive estoppel'. In the former decision, Lord Steyn stated:-

> "If exceptionally there is found in the Explanatory Notes a clear assurance by the executive to Parliament about the meaning of a clause, or the circumstances in which a power will or will not be used, that assurance may in principle be admitted against the executive in proceedings in which the executive places a contrary contention before a court."

A similar interpretation was rendered by Lord Hope of Craighead in *Wilson v. First County Trust Ltd., (2004) 1 A.C. 816,* wherein it was stated:-

> "As I understand it [Pepper v. Hart], it recognized a limited exception to the general rule that resort to 'Hansard' was inadmissible. Its purpose is to prevent the Executive seeking to place a meaning on words used in legislation which is different from that which ministers attributed to whose words when promoting the legislation in Parliament..."

See for a detailed analysis of the rule of executive estoppel in a writing of Francis Bennion entitled *"Executive Estoppel: Pepper v. Hart revisited"*, published in Public Law, Spring 2007 issue, pg. 1.

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176. CONSUMER PROTECTION ACT, 1986 – Section 2 (1) (d) r/w/s 2 (1) (m)
GENERAL CLAUSES ACT, 1897 – Section 3 (42)
COMPANIES ACT, 1956
A Company incorporated under the Companies Act is a "person" within the meaning of Section 2 (1) (d) r/w/s 2 (1) (m) of the Consumer Protection Act.

Karnataka Power Transmission Corporation and another v. Ashok Iron Works Private Limited

Judgment dated 09.02.2009 passed by the Supreme Court in Civil Appeal No. 1879 of 2003, reported in (2009) 3 SCC 240

Held:

According to Section 2 (1) (m) of Consumer Protection Act "person" includes

(i) a firm whether registered or not;

(ii) a Hindu Undivided Family;

(iii) a cooperative society; and

(iv) every other association of persons whether registered under the Societies Registration Act, 1860 (21 of 1860) or not while defining "person" cannot be held to be restrictive and confined to these four categories as it is not said in terms that "person" shall mean one or other of the things which are enumerated, but that it shall "include" them.

The General Clauses Act, 1897 in Section 3 (42) defines "person":

> "3(42) 'person' shall include any company or association or body of individuals, whether incorporated or not."

Section 3 of the 1986 Act upon which reliance is placed by learned counsel for appellant provides that the provisions of the Act are in addition to and not in derogation of any other law for the time being in force. This provision instead of helping the contention of appllent would rather suggest that the access to the remedy provided to the Act of 1986 is an addition to the provisions of any other law for the time being in force. It does not in any way give any clue to restrict the definition of the 'person'.

Section 2(1)(m), is beyond all questions, an interpretation clause, and must have been intended by the Legislature to be taken into account in construing the expression 'person' as it occurs in Section 2 (1) (d). While defining 'person' in Section 2(1)(m), the Legislature never intended to exclude a juristic person like company. As a matter of fact, the four categories by way of enumeration mentioned therein is indicative, categories (i), (ii) & (iv) being unincorporate and Category (iii) corporate, of its intention to include body corporate as well as body un-incorporate. The definition of 'person' in Section 2(1)(m) is inclusive and not exhaustive. It does not appear to us to admit of any doubt that company is a person within the meaning of Section 2(1)(d) read with Section 2(1)(m) and we hold accordingly.

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177. CONSUMER PROTECTION ACT, 1988 – Sections 21, 22, 17, 18, 11 & 14 TORTS:

(i) Medical Negligence – General principles relating to medical negligence to be followed by Consumer Fora, Criminal Courts and Police (investigating agency) – Rules regarding protection to doctors in criminal cases and precautions which should be taken by the doctors/hospitals/nursing homes – Reiterated.

(ii) The law is a watchdog and not a bloodhound and as long as doctors do their duty with reasonable care, they should not be held liable even if their treatment was unsuccessful – However, every doctor should, for his own interest, carefully read the Code of Medical Ethics which is part of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 issued by the Medical Council of India under Section 20-A r/w/s 3 (m) of the Indian Medical Council Act, 1956.

Martin F. D'Souza v. Mohd. Ishfaq

Judgment dated 17.02.2009 passed by the Supreme Court in Civil Appeal No. 3541 of 2002, reported in (2009) 3 SCC 1

Held:

Cases, both civil and criminal as well as in Consumer Fora, are often filed against medical practitioners and hospitals, complaining of medical negligence against doctors/hospitals/nursing homes and hence the latter naturally would like to know about their liability.

The law, like medicine, is an inexact science. One cannot predict with certainty an outcome of many cases. It depends on the particular facts and circumstances of the case, and also the personal notions of the Judge concerned who is hearing the case. However, the broad and general legal principles relating to medical negligence need to be understood.

Two things have to be kept in mind : (1) Judges are not experts in medical science, rather they are lay men. This itself often makes it somewhat difficult for them to decide cases relating to medical negligence. Moreover, Judges have usually to rely on testimonies of other doctors which may not necessarily in all cases be objective, since like in all professions and services, doctors too sometimes have a tendency to support their own colleagues who are charged with medical negligence. The testimony may also be difficult to understand, particularly in complicated medical matters, for a layman in medical matters like a Judge; and (2) A balance has to be struck in such cases. While doctors who cause death or agony due to medical negligence should certainly be penalized, it must also be remembered that like all professionals doctors too can make errors of judgment but if they are punished for this no doctor can practice his vocation with equanimity. Indiscriminate proceedings and decisions against doctors are counter productive and serve society no good. They inhibit the free exercise of judgment by a professional in a particular situation.

The broad general principles of medical negligence have been lucidly and elaborately explained in the 3-Judge Bench decision of this Court in *Jacob Mathew v. State of Punjab, (2005) 6 SCC 1.* They are Bolam Test, Halesbury's Degree of Skill and Care Rule etc.

A medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. For instance, he would be liable if he leaves a surgical gauze inside the patient after an operation vide *Achutrao Haribhau Khodwa v. State of Maharashtra, AIR 1996 SC 2377* or operates on the wrong part of the body, and he would be also criminally liable if he operates on someone for removing an organ for illegitimate trade.

There is a tendency to confuse a reasonable person with an error free person. An error of judgment may or may not be negligent. It depends on the nature of the error.

It is not enough to show that there is a body of competent professional opinion which considers that the decision of the accused professional was a wrong decision, provided there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances.

The standard of care has to be judged in the light of knowledge available at the time of the incident and not at the date of the trial. Also, where the charge of negligence is of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time.

The higher the acuteness in an emergency and the higher the complication, the more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and has to choose the lesser evil. The doctor is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case but a doctor cannot be penalized if he adopts the former procedure, even if it results in a failure. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in-charge of the patient if the patient is not in a position to give consent before adopting a given procedure.

There may be a few cases where an exceptionally brilliant doctor performs an operation or prescribes a treatment which has never been tried before to save the life of a patient when no known method of treatment is available. If the patient dies or suffers some serious harm, should the doctor be held liable? In our opinion he should not. Science advances by experimentation, but experiments sometime end in failure e.g. the operation on the Iranian twin sisters who were joined at the head since birth, or the first heart transplant by Dr. Barnard in South Africa. However, in such cases it is advisable for the doctor to explain the situation to the patient and take his written consent.

Simply because a patient has not favourably responded to a treatment given by a doctor or a surgery has failed, the doctor cannot be held straightway liable for medical negligence by applying the doctrine of *res ipsa loquitur*. No sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of the professional would be at stake. A single failure may cost him dear in his lapse.

As observed by the Supreme Court in *Jacob Mathew v. State of Punjab, (2005) 6 SCC 1* case: (SCC pp. 22-23, Paras 28-29)

> "28. A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminality. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.
>
> 29. If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason – whether attributable to himself or not, neither can a surgeon successfully wield his life-saving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to society."

When a patient dies or suffers some mishap, there is a tendency to blame the doctor for this. Things have gone wrong and, therefore, somebody must be punished for it. However, it is well known that even the best professionals, what to say of the average professional, sometimes have failures. A lawyer cannot win every case in his professional career but surely he cannot be penalized for losing a case provided he appeared in it and made his submissions.

To fasten liability in criminal proceedings e.g. under Section 304-A IPC the degree of negligence has to be higher than the negligence which is enough to fasten liability in civil proceedings. Thus for civil liability it may be enough for the complainant to prove that the doctor did not exercise reasonable care in accordance with the principles mentioned above, but for convicting a doctor in a criminal case, it must also be proved that this negligence was gross amounting to recklessness.

The difference between simple negligence and gross negligence has broadly been explained in *Jacob Mathew's case* (supra), though difficulties may arise in the application of the principle in particular cases. For instance, if a mop is left behind in the stomach of a patient while doing an operation, would it be simple negligence or gross negligence? If a scissors or sharp edged medical instrument is left in the patient's body while doing the operation would that make a difference from merely leaving a mop?

The professional is one who professes to have some special skill. A professional impliedly assures the person dealing with him (i) that he has the skill which he professes to possess, (ii) that skill shall be exercised with reasonable care and caution. Judged by this standard, the professional may be held liable for negligence on the ground that he was not possessed of the requisite skill which he professes to have.

Thus a doctor who has a qualification in Ayurvedic or Homeopathic medicine will be liable if he prescribes Allopathic treatment which causes some harm vide *Poonam Verma v. Ashwin Patel, (1996) 4 SCC 332.* In *Dr. Shiv Kumar Gautam vs. Alima, Revision Petition No.586 of 1999 decided on 10.10.2006 (NC),* the National Consumer Disputes Redressal Commission held a homeopath liable for negligence for prescribing allopathic medicines and administering glucose drip and giving injections.

Protection to Doctors in Criminal Cases

In para 52 of *Jacob Mathew's case* (supra) the Supreme Court realizing that doctors have to be protected from frivolous complaints of medical negligence, has laid down certain rules in this connection : (SCC p. 35)

(i) A private complaint should not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.

(ii) The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion, preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial opinion applying the Bolam test.

(iii) A doctor accused of negligence should not be arrested in a routine manner simply because a charge has been levelled against him. Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest should be withheld.

Precautions which Doctor/Hospitals/Nursing Homes should take:

(a) Current practices, infrastructure, paramedical and other staff, hygiene and sterility should be observed strictly. Thus, in *Sarwat Ali Khan v. Prof. R. Gogi, Original Petition No.181 of 1997, decided on 18.7.2007 (NC)* the facts were that out of 52 cataract operations performed between 26th and 28th

September, 1995 in an eye hospital 14 persons lost their vision in the operated eye. An enquiry revealed that in the Operation Theatre two autoclaves were not working properly. This equipment is absolutely necessary to carry out sterilization of instruments, cotton, pads, linen, etc., and the damage occurred because of its absence in working condition. The doctors were held liable.

(b) No prescription should ordinarily be given without actual examination. The tendency to give prescription over the telephone, except in an acute emergency, should be avoided.

(c) A doctor should not merely go by the version of the patient regarding his symptoms, but should also make his own analysis including tests and investigations where necessary.

(d) A doctor should not experiment unless necessary and even then he should ordinarily get a written consent from the patient.

(e) An expert should be consulted in case of any doubt. Thus, in *Indrani Bhattacharjee, Original Petition No.233 of 1996 decided on 9.8.2007 (NC),* the patient was diagnosed as having "Mild Lateral Wall Eschemia". The doctor prescribed medicine for gastro-entiritis, but he expired. It was held that the doctor was negligent as he should have advised consulting a Cardiologist in writing.

(f) Full record of the diagnosis, treatment, etc. should be maintained.

After referring the various decisions of the Apex Court and National Consumer Forum it was held that it is evident that doctors and nursing homes/ hospitals need not be unduly worried about the performance of their functions. The law is a watchdog, and not a bloodhound, and as long as doctors do their duty with reasonable care they will not be held liable even if their treatment was unsuccessful. However, every doctor should, for his own interest, carefully read the Code of Medical Ethics which is part of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 issued by the Medical Council of India under Section 20A read with Section 3(m) of the Indian Medical Council Act, 1956.

While this Court has no sympathy for doctors who are negligent, it must also be said that frivolous complaints against doctors have increased by leaps and bounds in our country particularly after the medical profession was placed within the purview of the Consumer Protection Act. To give an example, earlier when a patient who had a symptom of having a heart attack would come to a doctor, the doctor would immediately inject him with Morphia or Pethidine injection

before sending him to the Cardiac Care Unit (CCU) because in cases of heart attack time is the essence of the matter. However, in some cases the patient died before he reached the hospital. After the medical profession was brought under the Consumer Protection Act vide *Indian Medical Association v. V.P. Shantha, (1995) 6 SCC 651* doctors who administer the Morphia or Pethidine injection are often blamed and cases of medical negligence are filed against them. The result is that many doctors have stopped giving (even as family physicians) Morphia or Pethidine injection even in emergencies despite the fact that from the symptoms the doctor honestly thought that the patient was having a heart attack. This was out of fear that if the patient died the doctor would have to face legal proceedings.

Similarly in cases of head injuries (which are very common in road side accidents in Delhi and other cities) earlier the doctor who was first approached would started giving first aid and apply stitches to stop the bleeding. However, now what is often seen is that doctors out of fear of facing legal proceedings do not give first aid to the patient, and instead tell him to proceed to the hospital by which time the patient may develop other complications.

Hence Courts/Consumer Fora should keep the above factors in mind when deciding cases related to medical negligence, and not take a view which would be in fact a disservice to the public. The decision of this Court in *V.P. Shantha* (supra) should not be understood to mean that doctors should be harassed merely because their treatment was unsuccessful or caused some mishap which was not necessarily due to negligence. In fact in the aforesaid decision it has been observed (vide para 22):- [*V.P. Shantha* (supra), SCC p. 665]

> "In the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control."

We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the Criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the concerned doctor/hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in *Jacob Mathew's case* (supra), otherwise the policemen will themselves have to face legal action.

The courts and Consumer Fora are not experts in medical science, and must not substitute their own views over that of specialists. It is true that the

medical profession has to an extent become commercialized and there are many doctors who depart from their Hippocratic oath for their selfish ends of making money. However, the entire medical fraternity cannot be blamed or branded as lacking in integrity or competence just because of some bad apples.

It must be remembered that sometimes despite their best efforts the treatment of a doctor fails. For instance, sometimes despite the best effort of a surgeon, the patient dies. That does not mean that the doctor or the surgeon must be held to be guilty of medical negligence, unless there is some strong evidence to suggest that he is.

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178. CONTRACT ACT, 1872 – Section 28
CIVIL PROCEDURE CODE, 1908 – Section 20
Territorial jurisidction – Restriction of by agreement to vest jurisdiction in one competent Court, is valid and binding – These restrictions are also applicable to matters relating to arbitration.
Rajasthan State Electricity Board v. Universal Petrol Chemicals Limited
Judgment dated 12.01.2009 passed by the Supreme Court in Civil Appeal No. 5430 of 2002, reported in (2009) 3 SCC 107

Held:

There are number of decisions of this Court wherein it was held that where there may be two or more competent courts which can entertain a suit consequent upon a part of the cause of action having arisen therein, if the parties to the contract agree to vest jurisdiction in one such court to try the dispute which might arise as between themselves, such agreement would be valid and binding.

In *A.B.C. Laminart (P) Ltd. v. A.P. Agencies, (1989) 2 SCC 163,* this Court stated thus:

> "21. From the foregoing decisions it can be reasonably deduced that where such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of *ad idem* can be shown, the other courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like "alone", "only", "exclusive" and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim *"expressio unius est exclusio alterius"* – expression of one is the exclusion of another – may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may

imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed."

In *Hakam Singh v. Gammon (India) Ltd., (1971) 1 SCC 286* it was held that where two or more courts have jurisdiction to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in one of such courts was not contrary to public policy and that such an agreement did not contravene the provisions of Section 28 of the Contract Act.

In *Hanil Era Textiles Ltd. v. Puromatic Filters (P) Ltd., (2004) 4 SCC 671,* it was held by this Court that where two or more courts have jurisdiction under the Code, it is permissible to have an agreement between the parties restricting the place of suing to any one of them and if such restriction is placed in the agreement, the same cannot be said to be contrary to public policy and does not contravene Section 28 of the Contract Act. It was, however, made clear that such restriction cannot be made and the parties cannot by agreement confer jurisdiction on a court which otherwise it does not possess under the Code. This Court also considered the scope of Section 20 of the Code in the said case and by referring to the said provision it was held that when ouster clause is clear, unambiguous and specific, accepted notions of contract would bind parties and unless absence of *ad idem* can be shown courts should avoid exercising jurisdiction. While arriving at the said finding this Court followed the ratio laid down in *A.B.C. Laminart (P) Ltd.* (supra).

The aforesaid legal proposition settled by this Court in respect of territorial jurisdiction and applicability of Section 20 of the Code to Arbitration Act is clear, unambiguous and explicit.

Section 20 of the Code will apply in respect of deciding the issue with regard to territorial jurisdiction of a court in respect of a matter relating to arbitration also, for in *Hakam Singh* (supra), it was held that the jurisdiction of the court under the Act to entertain the proceeding for filing an Award was governed by the provisions of the Code.

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179. CONTRACT ACT, 1872 – Section 230

The amount paid to the principal through agent for booking a car – On failure to supply, claim for compensation for refund against the agent is not maintainable – Only principal is liable.

Prem Nath Motors Ltd. v. Anurag Mittal

Judgment dated 14.11.2008 passed by the Supreme Court in Civil Appeal No. 6656 of 2008, reported in AIR 2009 SC 567

Held:

It is also necessary to add that the cheque submitted by the individual person, whoever was interested in purchasing the said car was given in the

name of M/s Pal Peugeot Limited and Prem Nath Motors Limited, i.e. the appellant herein had no other role except to send the same to M/s Pal Peugeot Limited.

But the individual i.e. the respondent No. 1 herein who seems to had applied for "Peugeot 309 Car" did not get the delivery and, therefore, asked for the refund of the booking amount of Rs. 25,000/-. As the said amount was not refunded, the respondent No. 1 filed a Claim Petition under Section 12-B of the Monopolies and Restrictive Trade Practices Act, 1969 (in short the 'Act') on the grounds of failures on the part of respondents to refund the said amount.

The appellant's stand before the Commission was that the liability, if any, was of M/s. Pal Peugeot to pay to respondent. According to the appellant it was only the agent/dealer of said party.

Section 230 of the Contract Act categorically makes it clear that an agent is not liable for the acts of a disclosed principal subject to a contract of the contrary. No such contract to the contrary has been pleaded. An identical issue was considered by this Court in the case of *Marine Container Services South Pvt. Ltd. vs. Go Go Garments, AIR 1999 SC 80* where a similar order passed under the Consumer Protection Act was set aside by this Court. It was held that by virtue of Section 230 the agent could not be sued when the principal had been disclosed.

A similar view has been expressed by a three judge Bench of this Court in Civil Appeal 6653/2005 arising out of S.L.P. (C) No. 19562/2004.

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***180. COURT FEES ACT, 1870 (As applicable in Madhya Pradesh) – Schedule 1, Article 11**

Application for probate – Probate of a Will – Court fees payable therein – *Ad valorem* court fee is required to be paid not on the application but is to be affixed on the probate of a Will.

Pishorilal Sethi v. Arvind K. Jauhar

Judgment dated 11.12.2008 passed by the High Court in Writ Petition No. 501 of 2003, reported in 2009 (2) MPHT 62 (DB)

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181. CRIMINAL PROCEDURE CODE, 1973 – Section 145 (4) (6)
LIMITATION ACT, 1963 – Article 137
SPECIFIC RELIEF ACT, 1963 – Section 6

Period of limitation for filing application u/s 145 (6) Cr.P.C. for restoration of possession in compliance of order passed under Section 145 (4) of Cr.P.C. by the Executive Magistrate – Article 137 of Limitation Act would apply – Section 6 of the Specific Relief Act is not applicable.

Shakuntala Devi and others v. Chamru Mahto and another

Judgment dated 10.02.2009 passed by the Supreme Court in Criminal Appeal No. 258 of 2009, reported in (2009) 3 SCC 310

Held:

On the factual aspect, the Magistrate came to a finding that the appellants were entitled to possession of the disputed plot. It is true that while making such declaration under Section 145 (4) of the Code, the Magistrate could have also directed that the appellants be put in possession of the same.

The question which is now required to be considered is whether the High Court was right in quashing the order passed by the Magistrate, which was confirmed by the Sessions Judge, on the ground that the application made by the appellants under Section 145 (6) of the Code was barred firstly by limitation under Article 137 of the Limitation Act and also by virtue of Section 6 of Specific Relief Act, 1963.

We are in agreement with learned counsel for applicant that the provisions of the Specific Relief Act had been misapplied by the High Court in holding that the appellants should have come for an order under Section 145 (6) of the Code within six months from the date of dispossession, as provided in Section 6 of the said Act, as the Specific Relief Act has no application to a proceeding under Section 145 CrPC.

But the High Court has, however, taken a correct view with regard to the application of Article 137 of Limitation Act to the facts of this case. The said Article is residuary provision which provides for a limitation of three years within which an order passed on any application for which no period with regard to limitation is provided elsewhere in the Third Division relating to application, can be challenged.

However, under Section 145 (1) of the Code,

> "Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his court"

for the purpose of settling their respective claims as regards the fact of actual possession of the subject of dispute.

Sub-section (4) of Section 145 provides that the Magistrate shall then, without reference to the merits or the claims of any of the parties, to a right to possess the subject matter of dispute, after perusing the statements and hearing the parties and receiving such evidence as may be produced, take such further evidence, if he thinks necessary, and, if possible, decide whether and which of the parties was, at the date of order made by him under sub-section (1), in possession of the subject-matter of dispute.

The proviso to sub-section (4) provides that if it appears to the Magistrate that any party had been forcibly and wrongfully dispossessed within two months

next before the date on which the report of a police officer or other information was received by him or after that date and before the date of his order under sub-section (1), he may treat the party so dispossessed as if that party had been in possession on the date of his order under sub-section (1).

Sub-section (6) empowers the Magistrate upon arriving at a decision that one of the parties is or should be treated as being, in such possession of the subject of the dispute, to issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and when he proceeds under the proviso to sub-section (4), he may restore to possession the party forcibly and wrongfully dispossessed.

According to the respondents, the provisions of Article 137 of the Limitation Act became applicable when without implementing the provisions of sub-section (4) of Section 145 immediately after it was made, the appellants had filed the application for possession of the disputed plot to be made over to them after a lapse of three years, while the period of limitation under Article 137 of the Limitation Act is three years. The High Court was persuaded by the said submission and accordingly allowed the criminal miscellaneous application filed by the respondents herein upon holding that restoration of possession had been ordered after expiry of three years which was not permissible in view of Article 137 of the Limitation Act.

There is no doubt that the High Court erred in applying the provisions of the Specific Relief Act to a proceeding under Section 145 CrPC, but as far as making an application for implementation of the order passed under Section 145 (4) CrPC is concerned, since no period of limitation is prescribed, the same ought to have been filed within a period of three years from the date of the order. While the final order in the proceedings under Section 145 CrPC was passed on 7.10.1994, the application for implementation of the same was made on 12.11.1997, which was beyond the period of limitation prescribed under the provisions of Article 137 of the Limitation Act.

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182. CRIMINAL PROCEDURE CODE, 1973 – Section 154

Murder case – F.I.R., delay in lodging of – F.I.R. was lodged after eight hours of the incident – On the background of injury sustained by many persons and considering normal human conduct, such delay cannot be said to be unusual.

Shankaraya Naik & Ors. v. State of Karnataka

Judgment dated 02.09.2008 passed by the Supreme Court in Criminal Appeal No. 512 of 2001, reported in AIR 2009 SC 818

Held:

We are also of the opinion that there is absolutely no delay in the lodging of the FIR in the facts of the case. The incident had happened at 6:30 p.m. on 25th August, 1995, the injured had reached the hospital by 8 p.m. and the FIR

had been lodged at the police station by an injured eye witness eight hours later. Taking into account normal human conduct and the fact that many persons had sustained injuries, one of whom had subsequently died, a delay of eight hours can, by no stretch of imagination, be dubbed as inordinate.

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183. CRIMINAL PROCEDURE CODE, 1973 – Section 197

Applicability of Section 197 – Has to be considered on the basis of fact situation of each case – All acts done by public servant cannot, as a matter of course, be brought under the protective umbrella of the section.

Investigating Officer while investigating an offence, allegedly threatened the complainant to withdraw the complaint and wanted her husband to make a tutored statement and tried to obtain his signature on a blank paper – Such an act was not part of his official duty – Fact situation will not bring the case u/s 197 Cr.P.C.

Choudhary Parveen Sultana v. State of West Bengal and another

Judgment dated 07.01.2009 passed by the Supreme Court in Criminal Appeal No. 8 of 2009, reported in (2009) 3 SCC 398

Held:

In the instant case, appellant's husband suffered grievous injury in a shoot-out for which a case was registered and police investigations started. Subsequently, appellant filed a complaint before CJM alleging therein that Respondent 2 (investigating officer) and the co-accused used to come to the house of the appellant on the pretext of conducting investigation in the aforesaid case and on one day they threatened her husband and wanted him to make a tutored statement and under threat even tried to obtain his signature on a blank paper. Therefore, cognizance was taken by the Magistrate and summons were directed to be issued under Sections 384/506 IPC.

Being aggrieved, Respondent 2 moved the High Court under Sections 397/401 read with Section 482 CrPC for quashing the same. Contention of Respondent 2 before the High Court was that the offence was allegedly committed during course of Investigation of the case and, accordingly, such offence, if at all committed, was committed by him while discharging official duties which brought him within protective umbrella of Section 197 Cr.P.C. Accordingly, the High Court quashed the proceedings and the cognizance taken on the basis thereof.

All acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of Section 197 Cr.P.C. Further, there can be cases of misuse and/or abuse of powers vested in a public servant which can never be said to be a part of the official duties required to be performed by him. The underlying object of Section 197 CrPC is to enable the authorities to scrutinize the allegations made against a public servant to shield him/her against frivolous, vexatious or false prosecution initiated with the main object of causing embarrassment and

harassment to the said official. However, as indicated hereinabove, if the authority vested in a public servant is misused for doing things which are not otherwise permitted under the law, such acts cannot claim the protection of Section 197 CrPC and have to be considered *dehors* the duties which a public servant is required to discharge or perform. Hence, in respect of prosecution for such excesses or misuse of authority, no protection can be demanded by the public servant concerned.

In the instant case, in our view, the offences complained of cannot be said to be part of the duties of the investigating officer while investigating an offence alleged to have been committed. It was not part of his duties to threaten the complainant or her husband to withdraw the complaint. In order to apply the bar of Section 197 Cr.P.C. each case has to be considered in its own fact situation in order to arrive at a finding as to whether the protection of Section 197 CrPC could be given to the public servant. The fact situation in the complaint in this case is such that it does not bring the case within the ambit of Section 197 CrPC and the High Court erred in quashing the same as far as Respondent 2 is concerned. The complaint *prima facie* makes out offences alleged to have been committed by Respondent 2 which were not part of his official duties.

We, accordingly, allow the appeal and set aside the judgment and order of the High Court.

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184. CRIMINAL PROCEDURE CODE, 1973 – Section 228
INDIAN PENAL CODE, 1860 – Sections 304 Part II & 330
Custodial death of asthma patient, accused of taking bribe – On account of detaining him in unventilated room, full of dust and cobwebs, triggered asthma attack – Two injuries were also found on the body of the accused – In such circumstances, the charges under Sections 304 Part II and 330 are made out against the police officers of Lokayukta.
Indu Jain v. State of M.P. & Ors.
Judgment dated 23.10.2008 passed by the Supreme Court in Criminal Appeal No. 1683 of 2008, reported in AIR 2009 SC 976

Held:

We have carefully considered the submissions made on behalf of the respective parties, having particular regard to the fact that R.K. Jain had died while in the custody of the Officers of the Special Police Establishment (Lokayakuta), Bhopal, in the office of the Lokayukta, Bhopal.

On completion of investigation, the investigating agency filed a charge-sheet before the trial court on 12th May, 2004, and on 15th July, 2005, the learned Sessions Judge framed charges against the five accused persons, namely, B.P. Singh, Mokham Singh Nain, Badri Nihale, Ramashish and Silvanus Tirki under Section 304 Part-II I.P.C., but dropped the charge under Section 330 I.P.C.

It has been sufficiently established that the deceased was a patient of asthma which could cause asphyxia which was ultimately said to be the cause of R.K. Jain's death. It is also clear that notwithstanding his serious respiratory problem, the deceased was kept in a windowless room which was full of dust and cobwebs which are known allergens for triggering an asthma attack, which can be fatal, as in this case. The injuries found on the body of the deceased may have been caused during attempts at resuscitation, but all the said circumstances can only be considered during a proper trial and not on the basis of surmises at the time of framing charge where on the strength of the charge sheet only a prima facie satisfaction about the commission of an offence has to be arrived at by the trial court. Therefore, while rejecting the submissions made by Mr. Tulsi and Mr. Gambhir that there were no materials on record to frame charge against the accused persons even under Section 323/34 IPC, we cannot but observe that on a prima facie view of the matter, there is ground to proceed against the accused persons even under Section 304 Part II IPC. On that score, we are inclined to agree both with Mr. Patwalia and Ms. Makhija that the High Court had erred in quashing the charge framed against the accused persons under Section 304 Part II and observing that in view the materials on record only a charge under Section 323 could be brought against the accused persons.

Although, Ms. Makhija has strenuously urged that charge under Section 302 IPC should also have been framed against the accused persons, we are not inclined to accept the same as at this stage there is little to establish an intention on the part of the accused to willfully cause the death of R.K. Jain.

As has been observed in *Kewal Krishan v. Suraj Bhan and another, AIR 1980 SC 1780* at the stage of framing of charge, the Court is not required to go into the details of the investigation but to only arrive at a prima facie finding on the materials made available as to whether a charge could' be sustained as recommended in the charge sheet. The same view has been subsequently reiterated in *State of Orissa v. Devendra Padhi, (2005) 1 SCC 568* and in the case of *Bharat Parikh vs. Union of India, 2008 (1)* Scale page 86 wherein the holding of a mini trial at the time of framing of charge has been deprecated.

This brings us to the next question as to whether the Trial court as well as the High Court was justified in dropping the charge under Section 330 IPC since R.K. Jain's death took place while he was in custody. The important question is whether a prima facie case can be said to have been made out for a charge to be framed under Section 330 IPC. Since the cause of death has been shown to be asphyxia on account of detention of the deceased in unhygienic conditions despite his respiratory problems and the injuries to the ribs and mouth of the deceased could possibly have been caused by the attempts made by the doctor at the Hospital to resuscitate the deceased, who had been brought to the Hospital in a comatose condition, with the body showing no signs of pulse, respiration or blood pressure, prima facie a case is made out for framing of charge under Section 330 IPC. The sheet showing the progress and treatment of the deceased

on arrival at the Hospital, also corroborates the same and it also mentions the fact that cardiac pulmonary resuscitation was immediately started and the patient was also put on mechanical ventilator as" part of the attempts at resuscitation. Apart from indicating that the 'patient had died of asphyxia, the medical opinion does not give any reason for such asphyxia and even in reply to the queries made on behalf of the investigating authorities the reply received from Dr. Satpathi, as to the cause of death, was that it had occurred due to asphyxia, but as to how it had occurred was under investigation.

In this regard, the materials submitted by the Investigating Authority in its Final Report under Section 173 Cr.P.C. does establish the fact that the deceased had been kept in a room which was highly unsuitable for a person suffering from respiratory problems. In fact, as was indicated by Shri O.P. Dixit, the Senior Scientist of the Mobile Unit of the District Police Force the condition of the room where the deceased had been detained was completely unsuitable for a patient of asthma as it was filled with dust and cobwebs which was sufficient to trigger an asthmatic attack which could have caused asphyxia which ultimately led to R.K. Jain's death.

We are, therefore, convinced that the appeals filed by Indu Jain and that filed by the State of Madhya Pradesh must be allowed in part. We, accordingly, allow the same and set aside the order of the High Court impugned in these appeals. While restoring the order of the learned Sessions Judge framing charge against the accused persons under Section 304 Part II IPC, we also direct that charges also be framed against the accused persons under Section 330 Indian Penal Code.

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***185. CRIMINAL PROCEDURE CODE, 1973 – Section 233**
INDIAN PENAL CODE, 1860 – Section 71
CONSTITUTION OF INDIA – Article 20 (2)

(i) Witness, status of – It cannot be changed during trial – During trial, medical officer was examined as prosecution witness – Thereafter the same witness was permitted by Trial Court to be examined again as defence witness – Held, such a juxtaposition is not contemplated under Section 233 of the Code of Criminal Procedure.

(ii) Double punishment for the same criminal act (offence) – Is impermissible – Accused 1 assaulted victim B with an axe – At this point of time, the accused 2 arrived on the spot – He also inflicted injuries to the victim B with *lathi* – After trial, accused 1 was adjudged guilty and punished for causing injuries to B with an axe while accused 2 was held guilty and punished not only for causing injuries to B with *lathi* but also for having a common intention with A1 to inflict injuries to B with an axe – Held, while passing sentences, the Trial Court completely overlooked that both

the offences for which A2 was found guilty related to assault upon a single person and further, by virtue of the principle of joint liability, embodied in Section 34 of the Code, A2 was liable for the criminal act done by A1 in the same manner as if it were done by him alone – This had led to a ridiculous result inasmuch as A1, after being held guilty of causing the head injury to B with an axe, was subjected to single punishment whereas A2, who was found guilty of inflicting injuries by means of a *lathi* received double punishment, that too in contravention of Section 71 of the Code – This Section, which is in consonance with the rule of double jeopardy enshrined in Article 20 (2) of the Constitution of India, prohibits double punishment for the same criminal act.

Beniram and another v. State of Madhya Pradesh

Judgment dated 18.12.2008 passed by the High Court in Criminal Appeal No. 770 of 2001, reported in 2009 (2) MPHT 198

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186. CRIMINAL PROCEDURE CODE, 1973 – Section 438

Anticipatory bail – Background and scope of the provision stated – Power of the Court – Blanket order, directing authority not to arrest accused before issuing prior notice of 10 days, is not within the jurisdiction.

Union of India v. Padam Narain Aggarwal Etc.

Judgment dated 03.10.2008 passed by the Supreme Court in Criminal Appeal No. 1575 of 2008, reported in AIR 2009 SC 254

Held:

Section 438 of the Code makes special provision for granting 'anticipatory bail' which was introduced in the present Code of 1973. The expression ('anticipatory bail') has not been defined in the Code. But as observed in *Balchand Jain v. State of M.P., (1976) 4 SCC 572,* anticipatory bail means a bail in anticipation of arrest. The expression 'anticipatory bail' is a misnomer inasmuch as it is not as if bail presently granted in anticipation of arrest. Where a competent court grants 'anticipatory bail', it makes an order that in the event of arrest, a person shall be released on bail. There is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that the order granting anticipatory bail becomes operative.

It was also observed that the power of granting 'anticipatory bail' is extraordinary in character and only in exceptional cases where it appears that a person is falsely implicated or a frivolous case is launched against him or "there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail" that such power may be exercised. Thus, the power is 'unusual in nature' and is entrusted only to the higher echelons of judicial service, i.e. a Court of Session and a High

Court.

The Code of Criminal Procedure, 1898 (old Code) did not contain specific provision corresponding to Section 438 of the present Code of 1973. Under the old Code, there was a sharp difference of opinion amongst various High Courts on the question whether a Court had inherent power to make an order of bail in anticipation of arrest. The preponderance of view, however, was that it did not have such power. The Law Commission of India considered and question and recommended to introduce express provision by observing as under;

> "The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a Court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to' implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.
>
> We recommend the acceptance of this suggestion. We are further of the view that this special power should be conferred only on the High Court and the Court of Session, and that the order should take effect at the time of arrest or thereafter.
>
> In order to settle the details of this suggestion, the following draft of a, new section is placed for consideration:
>
> **497A.** (1) When any person has a reasonable apprehension that he would be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section. That Court may, in its discretion, direct that in the event of his arrest, he shall be released on bail.
>
> (2) A Magistrate taking cognizance of an offence against that person shall, while taking steps Under Section 204(1), either issue summons or a bailable warrant as indicated in the direction of the Court under Sub-section (1).

(3) if any person in respect of whom such a direction is made is arrested without warrant by an officer in charge of a police station on an accusation of having committed that; offence, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, such person shall be released on bail.

We considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted. But we found that it may not be practicable to exhaustively enumerate those conditions; and moreover, the laying down of such conditions may be construed as prejudging (partially at any rate) the whole case. Hence we would leave it to the discretion, of the; court and prefer not to fetter such discretion in the statutory provision itself. Superior Courts will, undoubtedly, exercise their discretion properly, and not make any observations in the order granting anticipatory bail which will have a tendency to prejudice the fair trial of the accused".

[Law Commission of India, Forty-first Report, Vol. 1, p.32, para 39.9.]

The suggestion of the Law Commission was accepted by the Central Government and in the Draft Bill of the Code of Criminal Procedure, 1970, Clause 447 conferred an express power on the High Court and the Court of Session to grant anticipatory bail.

The Law Commission again considered the issue and stated;

"The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.

It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith"

[Law Commission of India, Forty-eighth Report, para 31]

Keeping in view the reports of the Law Commission, Section 438 was inserted in the present Code. Sub-section (1) of Section 438 enacts that when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or to the Court of Session for a direction that in the event of his arrest he shall be released on bail, and the Court may, if it thinks fit, direct that in the event of such arrest he shall be released on bail.

Sub-section (2) empowers the High Court or the Court of Session to impose conditions enumerated therein.

Sub-section (3) states that if such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, he shall be released on bail.

In the leading case of *Gurbaksh Singh Sibbia & Ors. v. State of Punjab, (1980) 2 SCC 565,* the Constitution Bench of this Court was called upon to consider correctness or otherwise of principles laid down by the Full Bench of High Court of *Punjab & Haryana in Gurbaksh Singh Sibbia v. State of Punjab, AIR 1978 P & H 1 : 1978 Crl LJ 20 (FB).* The Full Bench of the High Court summarized the law relating to anticipatory bail as reflected in Section 438 of the Code and laid down certain principles as to when discretionary power to grant anticipatory bail may be exercised by a Court.

This Court partly disagreeing with the judgment of the High Court held that the Legislature conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail since it felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory bail.

The Court stated;

> "Generalizations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, Courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher Courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by Courts judicially and not according to whim, caprice or fancy. On the other hand,

there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges".

According to this Court, therefore, discretionary power conferred by the Legislature on higher judiciary cannot be put in a straight-jacket formula. Such power must be exercised by the Court keeping in view facts and circumstances of an individual case.

Speaking for the Court, Chandrachud, C.J. stated;

"Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the Courts, by devising a formula which will confine the power to grant anticipatory bail within a strait- jacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a 'Code for the grant of anticipatory bail', which really is the business of the Legislature, it can at best furnish broad guide-lines and cannot compel blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the court, by providing that it may grant bail "if it thinks fit". The concern of the Courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the Courts by law".

We may also refer to at this stage 'Malimath Committee on Reforms of Criminal Justice System'. Considering the exercise of power by Courts under Section 438 and grant of anticipatory bail in favour of applicants, the Committee observed that the provision as to anticipatory bail has often been 'misused by rich and influential people'. The Committee, however, opined to retain the provision subject to two conditions;

(i) Public Prosecutor should be heard by the court before granting an application for anticipatory bail; and

(ii) Petition for anticipatory bail should be heard only by the court of competent jurisdiction.

It may be stated that Section 438 has been amended by the Code of Criminal Procedure (Amendment) Act, 2005 which now provides for hearing of Public Prosecutor before granting an application for anticipatory bail. Sub-sections (1A) and (1B) also provide for notice and presence of applicant in the Court seeking anticipatory bail. The said provisions, however, have not been brought into force so far.

In *Gurbaksh Singh* (supra), this Court also held that before power under sub-section (1) of Section 438 is exercised, the Court must be satisfied that the applicant invoking the provision of anticipatory bail has 'reason to believe' that he is likely to be arrested for a non-cognizable offence.

The Court stated;

> "Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has "reason to believe" that he may be arrested for a non-bailable offence. The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief, for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the Court objectively, because it is then alone that the Court can determine whether the applicant has reason to believe that he may be so arrested. Section 438 (1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely".

The Court proceeded to state that the High Court or the Court of Session must apply its own mind to the question and decide whether a case has been made out for grant of such relief. If condition precedent laid down in sub-section (1) of Section 438 is not satisfied and there is no reason to believe that the

applicant is likely to be arrested for commission of a non-bailable offence, the Court has no power to grant anticipatory bail.

This Court, however, held that the High Court was wholly right so far as proposition (2) was concerned. The High Court in proposition (2) said;

> "Neither Section 438 nor any other provision of the Code authorizes the grant of blanket anticipatory bail for offences not yet committed or with regard to accusations not so far levelled".

Agreeing with the said proposition, this Court stated;

> "We agree that a 'blanket order' of anticipatory bail should not generally be passed. This flows from the very language of the section which, as discussed above, requires the applicant to show that he has "reason to believe" that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. That is why, normally, a direction should not issue under Section 438(1) to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever." That is what is meant by a 'blanket order' of anticipatory bail, an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, in fact any eventuality, likely or unlikely regarding which, no concrete information can possibly be had. The rationale of a direction under Section 438(1) is the belief of the applicant founded on reasonable grounds that he may be arrested for a non-bailable offence. It is unrealistic to expect the applicant to draw up his application with the meticulousness of a pleading in a civil case and such is not requirement of the section. But specific events; and facts must be disclosed by the applicant in order to enable the court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section".

The Court also stated that apart from the language of the statute, there is an important principle involved in the insistence of the fact that the direction under Section 438(1) must be clear and specific and not vague and general.

The Court stated;

> "Apart from the fact that the very language of the statute compels this construction, there is an important principle involved in the insistence that facts, on the basis of which a direction Under Section 438(1) is sought, must be clear and specific, not vague and general. It is only by the

observance of that principle that a possible conflict between the right of an individual to his liberty and the right of the police to investigate into crimes reported to them can be avoided. A blanket order of anticipatory bail is bound to cause serious interference with both the right and the duty of the police in the matter of investigation because, regardless of what kind of offence is alleged to have been committed by the applicant and when, an order of bail which comprehends allegedly unlawful activity of any description whatsoever, will prevent the police from arresting the applicant even if he commits, say, a murder in the presence of the public. Such an order can then become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed. Therefore, the court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective. The power should not be exercised in a vacuum".

Gurbaksh Singh, thus clearly laid down that no blanket order of bail can be passed by a Court while exercising power under Section 438 of the Code.

In *Adri Dharan Das v. State of West Bengal, (2005) 4 SCC 303,* referring to Gurbaksh Singh, this Court observed that normally, no direction should be issued to the effect that the applicant should be released on bail "whenever arrested for whichever offence whatsoever". Such order should not be passed as it would serve as a blanket to cover or protect any and every kind allegedly unlawful activity. An order under Section 438 is a device to secure the individual's liberty, it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely.

The Court proceeded to state;

> "Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance to maintain law and order in the locality. For these or other reasons, arrest may become inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of

the investigator is well-defined and the jurisdictional scope of interference by the Court in the process of investigation is limited. The Court ordinarily will not interfere with the investigation of a crime or with the arrest of accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code

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***187. ELECTRICITY SUPPLY CODE, 2004 – Clause 4.17**

Energy dues of erstwhile consumer – Whether purchaser through intervention of a Government Agency etc., is liable to pay such dues? Held, No – A purchaser of sold property, through intervention of the State Government, Tax Department or other Government Departments and even by the Financial Institutions under the State Act/Central Act is not required to pay energy dues of erstwhile consumer – He is fully protected under Clause 4.17 of the M.P. Electricity Supply Code, 2004 and cannot be burdened for such dues.

M.P. Paschim Kshetra Vidyut Vitran Co. Ltd. v. Electricity Consumer Grievances Redressal Forum and another

Judgment dated 06.02.2009 passed by the High Court in Writ Petition No. 147 of 2009, reported in 2009 (1) MPLJ 565

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188. EVIDENCE ACT, 1872 – Section 3

INDIAN PENAL CODE, 1860 – Sections 302 and 304 Part II

Murder trial – Medical evidence – The doctor who examined the deceased immediately after incident, found two incise injuries – Another doctor conducting autopsy, did not notice the nature of same injuries as the injuries were dressed – Held, there is no inconsistency in medical evidence – The finding of acquittal on the ground that medical evidence is not consistent with the ocular evidence is set aside.

State of Madhya Pradesh v. Sughar Singh & Ors.

Judgment dated 07.11.2008 passed by the Supreme Court in Criminal Appeal No. 1362 of 2004, reported in AIR 2009 SC 586 (Three Judge Bench)

Held:

As far as the contradictions in the deposition of eye witnesses and medical evidence is concerned, in our opinion, the High Court was not right in coming to the conclusion that medical evidence did not support the version of eye-witnesses. It is clearly established from the evidence of injured eye- witness,

PW2-Sarvan Lal and PWs 4 and 8 Ram Niwas and Ram Prasad that the prosecution witnesses were in their fields protecting the crop of Jowar in the early morning of October 20, 1989 and the cattle entered the fields.

Deceased Balkishan and injured PW2-Sarvan Lal wanted to take them to cattle pond. The said act enraged the accused and they attacked Balkishan and Sarvan Lal which resulted in the death of Balkishan and caused serious injuries to PW2-Sarvan Lal. There was no reason to disbelieve the evidence of prosecution witnesses. PW2-Sarvan Lal was injured during the same incident. The prosecution witnesses have supported the case of the prosecution with regard to the incident as also participation of the accused.

Injuries sustained by deceased Balkishan and injured Sarvan Lal-PW2 have been clearly established. The main reason weighed with the High Court was that PW1-Dr. G.D. Agrawal (PW 1) had found seven injuries on the body of the deceased and he had opined that the injuries were caused by hard and blunt substance. PW1-Dr. G.D. Agrawal did not find any incise wound on the head of the deceased. PW5-Dr. Suresh Majeji who had examined the deceased immediately after the incident and advised him to be taken to the District Hospital had stated that there were two incise injuries, one on the middle of the head and the other on the medial aspect of lower 1/3" of the right leg. According to the High Court, therefore, medical evidence was not consistent with the prosecution evidence and the benefit of doubt should be given to the accused.

In our opinion, the High Court was not right in acquitting the accused on the ground that there was inconsistency in the medical evidence and medical evidence is not in accord with ocular evidence of the prosecution witnesses. Dr. Suresh Majeji (PW5), in his sworn testimony stated that he applied stitches on the wounds of the deceased. Since his condition was serious, he was advised to go to District Hospital but before the deceased reached there, he died. In fact, when a question was put to PW1-Dr.G.D. Agrawal in the cross-examination on behalf of the accused regarding injuries sustained by deceased Balkishan, the latter replied that he did not find incise wound either on the forehead or at the right thigh. He, however, stated; "After dressing, it is difficult to tell about the nature of injuries". In view of the above explanation, it was clear that the High Court committed an error in ordering acquittal on the ground of inconsistency in medical evidence and version of eye-witnesses. To that extent, therefore, the decision of the High Court deserves to be interfered with.

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189. EVIDENCE ACT, 1872 – Section 32

Dying declaration – Dying declaration recorded by Magistrate cannot be rejected on the basis that the satisfaction about the fitness of deceased to give statement based on doctor's certification – Magistrate is not required to make independent enquiry from deceased relating to her condition.

State of Tamil Nadu v. Karuppasamy

Judgment dated 20.11.2008 passed by the Supreme Court in Criminal Appeal No. 573 of 2002, reported in AIR 2009 SC 948

Held:

The conclusions of the High Court that PW 11 should not have gone by what the doctor i.e. Dr. Kanchana said and should have made independent enquiries, is to say the least an absurd conclusion. The High Court has recorded as follows:

> "His evidence shows that Doctor Kanchana certified that Kamalam was conscious oriented and was in a fit condition to give the statement. Doctor Kanchana was present by the side of PW 11 throughout. It appears from the evidence of PW 11 that he was totally carried away by the opinion of doctor Kanchana. His evidence in chief does not show that he enquired Kamalam to find out as to whether she was conscious oriented and was in a fit condition to give the statement."

It is not understood as to what the High Court meant by observing that PW 11 should have found out from the deceased as to whether she was conscious, oriented and was in a fit condition to give the statement. The doctor who was attending to the deceased has clearly certified that she was in a fit condition to make the statement. The Doctor has made the following observation:

> "Certified that the patient Smt. Kamalam was conscious at the time of taking the dying declaration and taken in my presence."

The High Court was of the view that the evidence of PW 11 shows that her satisfaction was a subjective satisfaction solely on the basis of the opinion of the Doctor. There is nothing wrong in such a satisfaction being arrived at because the doctor is an appropriate person to certify on that aspect.

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***190. EVIDENCE ACT, 1872 – Section 32**

INDIAN PENAL CODE, 1860 – Sections 302 & 304 Part I

Dying declaration – Certification with respect to physical and mental condition, necessity of – Dying declaration recorded by the doctor himself in question and answer form stating that though the deceased was in painful condition, yet was conscious and was giving answers to the relevant question in a coherent manner – Held, absence of the certificate regarding physical and mental condition of the deceased, in the dying declaration in the above mentioned circumstances, does not affect reliability of the dying declaration.

Vinod Kumar v. State of Madhya Pradesh

Judgment dated 17.02.2009 passed by the High Court in Criminal Appeal No. 128 of 2001, reported in 2009 (2) MPHT 302 (DB)

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***191. EVIDENCE ACT, 1872 – Section 68**
SUCCESSION ACT, 1925 – Section 63 (c)
Will, proof of – Cannot be held to be proved in absence of proof of due attestation.
Ramautar v. Ram Naresh & ors.
Judgment dated 17.02.2009 passed by the High Court in S.A. No. 126 of 1987, reported in 2009 (II) MPJR 92

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192. HINDU MARRIAGE ACT, 1955 – Section 5
Marriage between Hindu and Christian according to Hindu customs – Null and void – Its registration u/s 8 of the Act is meaningless.
Gullipilli Sowria Raj v. Bandaru Pavani alias Gullipilli Pavani
Judgment dated 04.12.2008 passed by the Supreme Court in Civil Appeal No. 2446 of 2005, reported in reported in AIR 2009 SC 1085

Held:

There is no dispute that at the time of the purported marriage between the appellant and the respondent the appellant was a Christian and continues to be so whereas the respondent was a Hindu and continues to be so. There is also no dispute that the marriage was alleged to have been performed under the Hindu Marriage Act, 1955, and was also registered under Section 8 thereof. As against the above, a novel argument has been advanced on behalf of the appellant, the substance whereof is that the Hindu Marriage Act, 1955 does not preclude a Hindu from marrying a person of some other faith.

Although, an attempt has been made to establish that the Hindu Marriage Act, 1955, did not prohibit a valid Hindu marriage of a Hindu and another professing a different faith, we are unable to agree with such submission in view of the definite scheme of the 1955 Act.

In order to appreciate the same, we may first refer to the Preamble to the Hindu Marriage Act, 1955, which reads as follows:

"An Act to amend and codify the law relating to marriage among Hindus". (Emphasis added)

As submitted by Mr. Rao, the Preamble itself indicates that the Act was enacted to codify the law relating to marriage amongst Hindus. Section 2 of the Act which deals with application of the Act, and has been reproduced hereinabove, reinforces the said proposition.

Section 5 of the Act thereafter also makes it clear that a marriage may be solemnized between any two Hindus if the conditions contained in the said Section were fulfilled. The usage of the expression 'may' in the opening line of the Section, in our view, does not make the provision of Section 5 optional. On the other hand, it in positive terms, indicates that a marriage can be solemnized between two Hindus if the conditions indicated were fulfilled. In other words, in the event the conditions

remain unfulfilled, a marriage between two Hindus could not be solemnized. The expression 'may' used in the opening words of Section 5 is not directory, as has been sought to be argued, but mandatory and non-fulfilment thereof would not permit a marriage under the Act between two Hindus. Section 7 of the 1955 Act is to be read along with Section 5 in that a Hindu marriage, as understood under Section 5, could be solemnized according to the ceremonies indicated therein.

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193. HINDU MARRIAGE ACT, 1955 – Section 27
CIVIL PROCEDURE CODE, 1908 – Section 151 & Order 7 Rule 7
Relief, as per the provisions under Section 27 of the Act r/w/ Order 7 Rule 7 and Section 151 of the Code, when may be granted? – Held, Section 27 of the Act is applicable in respect of property received at or about time of marriage, which may belong jointly to both husband and wife – Decree/order in respect of such property may be granted by Court not only in a proceeding relating to matrimonial dispute but also in a subsequent proceeding initiated under Section 27 of the Act and Order 7 Rule 7 r/w/s 151 of the Code.

Manish Nema v. Sandhya Nema

Judgment dated 22.01.2009 passed by the High Court in First Appeal No.865 of 2007, reported in 2009 (2) MPHT 267 (DB)

Held:

Section 27 of the Hindu Marriage Act of 1955 provides for that "In any proceeding under this Act, the Court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which, may belong jointly to both the husband and the wife."

Fair reading of the aforesaid provision reveals that it is applicable in respect of the property received at or about time of marriage, which may belong jointly to both husband and wife. It empowers the Court while deciding the matrimonial dispute to also pass decree in respect of property which may jointly belong to both husband and wife. It provides the civil remedy to an aggrieved wife or husband as the case may be.

The submissions put forth by learned Counsel for the appellant that such powers can be exercised by the Matrimonial Court in a matrimonial dispute and not in a proceeding subsequently initiated under Section 27 under Order 7 Rule 7 of the Code of Civil Procedure read with Section 151 of the CPC.

The submission of the learned Counsel for the appellant loses its hold in wake of judgments rendered by the Division Bench of this Court in *Nirmala Gupta v. Ravendra Kumar, AIR 1996 MP 227* wherein placing reliance of judgments rendered by the Supreme Court in *Prathibha Rani v. Suraj Kumar, AIR 1985 SC 628* and *Manohar Lal Chopra v. Rai Bahadur Rao Raj Seth Hiralal, AIR 1962 SC 527,* and the judgment rendered by the High Court of Allahabad and Bombay in *Kamta Prasad v. Smt. Om Wati, AIR 1972 All 153* and *Sangeeta Balkrishna Kadam*

v. Balkrishna Ramchandra Kadam, AIR 1994 Bombay 1, it was observed that provision under Section 151 read with Order 7 Rule 7 of CPC permits a Court in passing a decree in favour of wife or husband as the case may be for return of the property, which may exclusively belong to either of them.

For the sake of completeness we note with profit paragraph 12 of the judgment referred in *Nirmala Gupta* (supra): –

> "It may be noted that the Act is a special enactment governing the matrimonial proceedings between the parties. Section 4 (1) of the Code of Civil Procedure reads as under: –
>
> **'4. Savings** – (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law not in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.' "

From this provision, it is clear that the procedure prescribed by the special law will not be limited by the Code of Civil Procedure. However, the Act itself adopts the CPC so far as it is applicable in the matrimonial proceedings under the Act and, therefore, all the provisions of the CPC will be applicable to the matrimonial proceedings under the Act. Section 151 read with Order VII Rule 7 of the Code of Civil Procedure will also be made applicable because there is no provision under the Act which bars the application of these provisions of the CPC. Order VII Rule 7 of the Code permits the Court to grant such relief not prayed for as would be just under the circumstances of the case."

Having thus considered we do not find any substance in the submission put forth on behalf of the appellant that Trial Court exceeded its jurisdiction inherent under Section 27 of the Act of 1955 or that it committed any error in allowing the application for return of ornament and furniture.

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194. INDIAN PENAL CODE, 1860 – Sections 149 and 100

Offence committed in prosecution of common object – Scope of right of private defence – Such right neither exercised nor exceeded to commit an offence in furtherance of common object.

Availability of right to private defence – Only where real or apparent danger is present – It is defence right – Not available as a right of aggression or reprisal.

Bhanwar Singh & Ors. v. State of M.P.

Judgment dated 16.05.2008 passed by the Supreme Court in Criminal Appeal No. 300 of 2007, reported in AIR 2009 SC 768

Held:

The evidences of the witnesses clearly establish as to how the offence took place. It is evident that at least six persons, namely, Bhupendra Singh together with Laxman Singh, Mohan Singh, Kripal Singh (A-16), Kuber Singh and Kripal Singh (A-12) formed a common object.

Having resolved the issue of common object, it is to be seen whether such a common object can be reconciled with the existence of any right to private defence.

Sections 96 to 106 of the IPC deal with the right of private defence. Some of the relevant statutory provisions are detailed hereafter. Section 96 of the IPC states that nothing is an offence which is done in the exercise of the right of private defence. Section 97 IPC goes on to define the right of private defence of the body and property. By virtue of Section 97, First, every person has a right to defend his own body and the body of any other person against any offence affecting the human body, subject to the restrictions contained in Section 99 of the IPC. Among the restrictions stated in Section 99, it is pertinent to note that the provision stipulated the extent to which the right of private defence may be exercised, namely that it in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Further, Section 100 details instances in which the right of private defence of the body extends to causing death.

The plea of private defence has been brought up by the appellants. For this plea to succeed in totality, it must be proved that there existed a right to private defence in favour of the accused, and that this right extended to causing death. Hence, if the court were to reject this plea, there are two possible ways in which this may be done. On one hand, it may be held that there existed a right to private defence of the body. However, more harm than necessary was caused or, alternatively, this right did not extend to causing death. Such a ruling may result in the application of Section 300, Exception 2, which states that culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. The other situation is where, on appreciation of facts, the right of private defence is held not to exist at all.

The present case would fall into the latter category as facts clearly establish a common object to orchestrate an armed attack of such a serious nature that, even if the common object itself was not to cause death, the accused can be said to have been possessed of the knowledge that the offence of murder/ culpable homicide would be committed in prosecution of this common object, and such a common object is irreconcilable with the right to private defence.

In this case, the facts demonstrate clearly that the accused were the aggressors, and their object was not that of defending themselves by any stretch

of the imagination. The case of *Sone Lal v. State of U.P., AIR 1981 SC 1379* is relevant in this regard, wherein it is stated that "[a] ggressors, even if they receive injuries from the victims of their aggression cannot have the right of private defence". More recently, a similar ruling was delivered in *Triloki Nath v. State of U.P., AIR 2006 SC 321* and *Bishna @ Bhiswadeb Mahato v. State of West Bengal, (2005) 12 SCC 657.*

It would also be instructive to look at the following observations made in *Gurdatta Mal v. State of UP, AIR 1965 SC 257,* in the context of Sections 34 and 149 IPC:-

> "It is well settled that Section 34 of the Indian Penal Code does not create a distinct offence: it only lays down the principle of joint criminal liability. The necessary conditions for the application of Section 34 of the Code 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 would be liable for the said offence... In that situation Section 96 of the Code says that nothing is an offence which is done in the exercise of the right of private defence. Though all the accused were liable for committing the murder of a person by doing an act or acts in furtherance of the common intention, they would not be liable for the said act or acts done in furtherance of common intention, if they had the right of private defence to voluntarily cause death of that person. Common intention, therefore, has relevance only to the offence and not to the right of private defence. What would be an offence by reason of constructive liability would cease to be one if the act constituting the offence was done in exercise of the right of private defence. To illustrate, if a person was guilty of murder by doing an act in furtherance of a common intention with others to commit murder, he could sustain the plea of the right of private defence only by establishing that he had the right to cause death of that person. It is true that, in ascertaining whether a group of persons had common intention to murder, the evidence adduced by the defence that they had common intention only to cause hurt is relevant. But once it is established that the common intention was to commit murder and/or culpable homicide the question of separate individual liability in the context of private defence would be out of place. Under Section 103 of the Indian Penal Code, the right of private defence of property extends, under the restrictions mentioned in Section 99 thereof, to the voluntary causing of death, if the offence, the committing

of which or attempting to commit which occasions the exercise of the right falls in one of the categories mentioned therein. That is to say, if it was not one of the offences enumerated therein, the person had no right of private defence extending to the voluntary causing of death. If in the instant case the accused were not able to establish that the offence fell in one of the categories enumerated therein, they would be liable for murder, as all of them participated in the offence pursuant to the common intention to commit murder. In most of the cases, the discussion of the evidence in compartments - one relating to the offence and the other to the right of private defence - may not be possible, for almost always the evidence relating to one part will have impact on the other part, and the court in considering whether the accused are liable constructively for murder will have to consider also the evidence of the defence that their common intention was not to commit murder but only to protect their right and to cause hurt, if necessary."

By extension, the above rationale may be applied while trying to reconcile the right to private defence with Section 149 IPC and the common object required thereunder. Section 149 also postulates a principle of constructive liability, attaching liability to members of an unlawful assembly where an offence is committed by a member of an unlawful assembly in prosecution of the common object of such unlawful assembly, or where members of such assembly knew that such offence was likely to be committed in prosecution of that object. However, this provision would quite clearly not apply if the act constituting the offence was done in exercise of the right to private defence. As stated in the aforementioned extract– "What would be an offence by reason of constructive liability would cease to be one if the act constituting the offence was done in exercise of the right of private defence". Moreover, by similar extension of the above judgment, having established the common object, entering into separate individual liability based on private defence would be out of place. Hence, the task of the court would be to ascertain whether, on one hand, there would be constructive liability for culpable homicide or murder on the basis that this was committed in prosecution of the common object of the assembly or was known to be a likelihood in prosecuting such common object, or whether this shared objective of the said group of persons was merely to protect body or property (even if the finding is that such right has been exceeded). The logical deduction from the above line of logic would be that a finding regarding the former would necessarily preclude the existence of the latter situation. In other words, if the object of an assembly is to exercise the right to private defence, and if the alleged offence has been committed in exercise or in excess of such right, it would mean that the `common object' element of Section 149 would be absent.

Similarly, a finding that there exists a common object as described under Section 141, and that an offence was committed in pursuance of such object or was known to be likely to be committed in pursuance of such object, would mean that `private defence' cannot be applied as the common object would no longer be the exercise of the right to private defence.

Applying the above to the facts of the present case, nothing in the facts suggests that the death of Prem Singh was justified on account of the exercise of the right of private defence of the accused. In other words, the right of private defence was neither exercised nor exceeded in the acts which led to the demise of the deceased.

To put it pithily, the right of private defence is a defence right. It is neither a right of aggression or of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of self creation. Necessity must be present, real or apparent.

The basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the state machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question depends upon host of factors like the prevailing circumstances at the spot, his feelings at the relevant time; the confusion and the excitement depending on the nature of assault on him etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence. [See *Dharam v. State of Haryana, 2006 (13) SCALE 280)*].

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195. INDIAN PENAL CODE, 1860 – Section 326

Murder case – Lacerated wounds caused by *lathis* – Knowledge inferred – Intended to cause grievous hurt – Conviction u/s 326 IPC – Held, proper.

Prabhu v. State of Madhya Pradesh

Judgment dated 03.12.2008 passed by the Supreme Court in Criminal Appeal No. 1956 of 2008, reported in AIR 2009 SC 745

Held:

So far as the appellant is concerned, it was submitted that he could not be convicted in terms of Section 302 read with Section 34 IPC as only accused Nanhe, according to the prosecution, caused incised wounds. The appellant was holding only a stick. The High Court relied on the evidence of two eye-witnesses PWs 5 and 9 and held that the appellant cannot be held guilty of offence punishable under Section 302 read with Section 34 IPC. It was held that the prosecution has not proved that each of the participating culprits had the same intention and each one shared the intention of the other. The High Court noticed that the accused Prabhu and Jagdish had caused lacerated wounds and, therefore, the knowledge which can be inferred from the said acts is that they intended to cause grievous hurt. Accordingly, the conviction as noted above was altered.

Learned counsel for the appellant submitted that the appellant cannot be convicted in terms of Section 326 read with Section 34 IPC. It was submitted that none of the injuries were grievous hurts and the sentence in any way is very harsh.

Section 326 provides that whoever, except in the case provided for by Section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any corrosive substance, or by means of any explosive substance, or by means of any substance which is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and also with a liability to pay a fine.

The expression "any instrument which, used as a weapon of offence, is likely to cause death" has to be gauged taking note of the heading of the Section. What would constitute a 'dangerous weapon' would depend upon the facts of each case and no generalization can be made.

The heading of the Section provides some insight into the factors to be considered. The essential ingredients to attract Section 326 are :

(1) voluntarily causing a hurt;

(2) hurt caused must be a grievous hurt; and

(3) the grievous hurt must have been caused by dangerous weapons or means.

As was noted by this Court in *State of U.P. v. Indrajeet alias Sukhatha, (2000) 7 SCC 249* there is no such thing as a regular or earmarked weapon for committing murder or for that matter a hurt. Whether a particular article can per se cause any serious wound or grievous hurt or injury has to be determined factually. At this juncture, it would be relevant to note that in some provisions e.g. Sections 324 and 326 expression "dangerous weapon" is used. In some other more serious offences the expression used is "deadly weapon" (e.g.

Sections 397 and 398). The facts involved in a particular case, depending upon various factors like size, sharpness, would throw light on the question whether the weapon was a dangerous or deadly weapon or not. That would determine whether in the case Section 325 or Section 326 would be applicable.

The above position was highlighted in *Mathai v. State of Kerala, 2005 (2) JT 365.*

Considering the principles set out above, certainly the appellant was guilty of offence punishable under Section 326 read with Section 34 IPC. However, in the peculiar facts of the case, the sentence of 5 years rigorous imprisonment would meet the ends of justice.

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196. INDIAN PENAL CODE, 1860 – Sections 415 & 420

Offence of cheating – Not mere breach of contract – Ingredients of the offence – Explained.

V.Y. Jose and another v. State of Gujarat and another

Judgment dated 16.12.2008 passed by the Supreme Court in Criminal Appeal No. 2048 of 2008, reported in (2009) 3 SCC 78

Held:

An offence of cheating cannot be said to have been made out unless the following ingredients are satisfied:

(i) deception of a person either by making a false or misleading representation or by other action or omission;

(ii) fraudulently or dishonestly inducing any person to deliver any property; or

(iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.

For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Indian Penal Code can be said to have been made out.

There exists a distinction between pure contractual dispute of a civil nature and an offence of cheating. One of the ingredients of cheating as defined in Section 415 of the Penal Code is existence of an (*sic* fraudulent or dishonest) intention of making initial promise or existence thereof from the very beginning of formation of contract.

In *Hira Lal Hari Lal Bhagwati v. CBI, (2003) 5 SCC 257* this Court held: (SCC p. 280 para 40)

> "40. It is settled law, by a catena of decisions, that for establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. From his making failure to keep promise subsequently, such a culpable intention right at the beginning, that is, at the time when the promise was made cannot be presumed...."

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***197. INDIAN PENAL CODE, 1860 – Sections 489-B, 489-C and 120-B**
EVIDENCE ACT, 1872 – Sections 32 (3) & 27

(i) Offence under Section 489-C IPC, ingredients of – If a person has in his possession any forged or counterfeit currency note knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, he can be convicted for the offence – However mere possession of counterfeit currency note does not constitute the offence because only on the basis of mere seizure of one counterfeit currency note, it cannot be concluded that the possessor was having any knowledge that he is in possession of counterfeit currency note or that he had any intention to use the same as genuine or it may be used as genuine – Such accused is entitled to be acquitted.

(ii) Offences under Sections 489-B, 489-C and 120-B of IPC – Accused used the counterfeit currency notes as genuine, knowing and having reason to believe the same to be counterfeit – He was found in possession of counterfeit currency notes with intention to use them as genuine – Several other persons alongwith the accused were the members of the racket who were using/ circulating the counterfeit currency notes intentionally and they were party to a criminal conspiracy – Held, the accused was rightly convicted for offences under Sections 489-B, 489-C and 120-B of IPC.

(iii) Sections 32 (3) and 27 of Evidence Act, scope of – The statement of accused B was recorded under Section 27 of Evidence Act to the effect that another accused C had been involved in the act of circulation of currency notes – Trial Court recorded the finding that the accused C had been having involvement in the business of circulating counterfeit currency notes holding that the statement of accused B recorded under Section 27 of the Evidence Act is admissible under Section 32(3) of the Act – Held, according to sub-section (3) of Section 32, the statement of a

dead person is relevant against the interest of the maker when the statement is against the pecuniary or proprietary interest of the person or it would expose him or would have exposed him to a criminal prosecution or to a suit for damages – It has not been provided in this sub-section that the statement of a dead person can be used against the third person for his criminal prosecution – Further held, Trial Court committed an error in holding that a person who have been named in the memorandum given by another person can be convicted even though there is no evidence against him – Under such circumstances accused C is entitled to be acquitted of the changes.

Laxmi Narayan and others v. State of Madhya Pradesh
Judgment dated 15.07.2008 passed by the High Court in Criminal Appeal No. 961 of 2005, reported in 2009 (1) MPHT 478

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198. INDIAN PENAL CODE, 1860 – Sections 498-A & 304-B
The provisions of Sections 304-B and 498-A IPC deal with two distinct offences – Accused may be convicted u/s 498-A even in the absence of specific charge when acquitted of the charge u/s 304-B.

Rajendran & Anr. v. State Asstt. Commr. of Police, Law & Order
Judgment dated 02.12.2008 passed by the Supreme Court in Criminal Appeal No. 53 of 2002, reported in AIR 2009 SC 855

Held:

Sections 304B and 498A, IPC cannot be held to be mutually inclusive. These provisions deal with two distinct offences. It is true that cruelty is a common essential to both the sections and that has to be proved. The Explanation to Section 498-A gives the meaning of 'cruelty'. In Section 304-B there is no such explanation about the meaning of 'cruelty'. But having regard to common background to those offences it has to be taken that the meaning of 'cruelty' or 'harassment' is the same as prescribed in the Explanation to Section 498-A under which 'cruelty' by itself amounts to an offence. Under Section 304-B it is 'dowry death' that is punishable and such death should have occurred within seven years of marriage. No such period is mentioned in Section 498-A. A person charged and acquitted u/s 304-B can be convicted u/s 498-A without that charge being there, if such a case is made out.

Where from the evidence of father, brother and neighbour of deceased it was clear that the deceased was tortured by her husband and in-laws not on account of dowry but as she gave birth to a female child which was considered to be inauspicious the case would fall under Clause (a) of Expln. to Section 498-A and as the suicide was committed within seven years of the marriage it can be presumed under Section 113-A of Evidence Act that such suicide had been abetted by her husband or relatives of her husband. As the accused husband and his relatives have failed to rebut the presumption they are liable to be

convicted u/s 498-A. (Also See – *Akula Ravinder and others v. The State of Andhra Pradesh, AIR 1991 SC 1142* and *Balwant Singh & Ors. v. State of H.P., 2008 AIR SCW 6372.)*

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199. INDIAN PENAL CODE, 1860 – Sections 498-A, 306 & 109 r/w/s 34
Cruelty and abetment of suicide – Proof of – The circumstances enumerated in the suicide note and oral evidence show that accused created circumstances which left no option for the wife but to take the extreme step of putting an end to her life – Offence proved – Conviction under aforesaid sections upheld.
Milind Bhagwanrao Godse v. State of Maharashtra and another
Judgment dated 12.02.2009 passed by the Supreme Court in Criminal Appeal No. 891 of 2001, reported in (2009) 3 SCC 699

Held:

Exh. 46 is a letter written by the deceased to her parents on 9.10.1989, just before she had committed suicide. The deceased wrote in the letter that she was an unlucky girl. She thought that she would have some moments of happiness, but it was not possible because of the nature of her husband (the appellant herein). She mentioned that on the last day and night, the appellant had quarrelled with her and in the morning the appellant cursed the father of the deceased. She stated that the appellant had gone to the extent of saying that since she was so proud of the influence of her father, she should live with her father in matrimony and also said many things of that sort. She specifically stated that the appellant had harassed her so much that it would not be possible for her to live with him any more. She further stated in the letter that it is one thing of not earning money and another to frequently dishonour and to give trouble to the deceased and her son Rohit.

She stated in the letter that the appellant deliberately twisted the leg of Rohit (his small son) and broke his bone. She also stated in the letter that the appellant did so because he had a brother Arvind who was physically handicapped and he wanted Rohit to be like Arvind and also because the deceased loved her son Rohit intensely. She stated in the letter that the appellant had unusual attraction towards other girls, particularly towards deceased's sister Asha, Sushma, Sandhya, sister of Charuhas, wife of Anil Pangrikar. The deceased wrote in the letter that the appellant, in order to torture and mentally harass her, used to say that these girls had good physical figures and looked beautiful. The deceased also stated in the letter that the appellant used to say that there would be a row of girls now for marriage with him. These comments led to severe mental torture. She requested her parents to take care of her minor son Rohit and wanted that there should not be a shadow of the appellant on Rohit.

This letter is indeed very emotional and was written in extreme distressing mental condition. This letter clearly demonstrates that the deceased was so much mentally tortured by the appellant that she had decided to put an end to her life.

Exh. 46, the letter written by the deceased to her parents on 9.10.1989 immediately before she had committed suicide, gives graphic description of the number of instances of extreme mental torture, day in and day out. This letter gives the impression that the appellant was deriving sadistic pleasure in causing extreme mental torture to the deceased. He would leave no stone unturned to ensure that the maximum mental torture and agony is caused to the deceased. We do not find the slightest doubt that the circumstances which have been enumerated in Exh. 46 and the testimony of P.Ws. 6, 7 and 8 lead to a situation where the deceased virtually was left with no option except to take an extreme step of putting an end to her life. Therefore, conviction under Sections 498-A and 306 and punishment thereof held proper.

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200. INTERPRETATION OF STATUTES:

Function of proviso – Normally, a proviso does not travel beyond the provision to which it is a proviso – It carves out an exception to the main provision.

Nagar Palika Nigam v. Krishi Upaj Mandi Samiti & Ors.

Judgment dated 14.10.2008 passed by the Supreme Court in Civil Appeal No. 1921 of 2006, reported in AIR 2009 SC 187

Held:

The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in *Mullins v. Treasurer of Survey, 1880 (5) QBD 170, (referred to in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha, AIR 1961 SC 1596 and Calcutta Tramways Co. Ltd. v. Corporation of Calcutta, AIR 1965 SC 1728)* when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso." Said Lord Watson in *West Derby Union v. Metropolitan Life Assurance Co.,1897 AC 647 (HL).* Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. [See *A.N. Sehgal and Ors. v. Raje Ram Sheoram and Ors., AIR 1991 SC 1406, Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal and Ors., AIR 1991 SC 1538 and Kerala State Housing Board and Ors. v. Ramapriya Hotels (P) Ltd. and Ors., (1994) 5 SCC 672*]

"This word (proviso) hath divers operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant" (Coke upon Littleton 18th Edition, 146)

"If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails....But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole" (per Lord Wrenbury *in Forbes v. Git [1922] 1 A.C. 256*).

A statutory proviso "is something engrafted on a preceding enactment" *(R. v. Taunton, St James, 9 B. & C. 836).*

"The ordinary and proper function of a proviso coming after a general enactment is to limit that general enactment in certain instances" (per Lord Esher in *Re Barker, 25 Q.B.D. 285*).

A proviso to a section cannot be used to import into the enacting part something which is not there, but where the enacting part is susceptible to several possible meanings it may be controlled by the proviso (See *Jennings v. Kelly [1940] A.C. 206*).

[Note: Also see *Anil M.K. & ors. V. State of Keral and ors., 2003 AIR SCW 2931.*]

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***201. INTERPRETATION OF STATUTES:**
PREVENTION OF CORRUPTION ACT, 1988 – Sections 7, 11 & 12
INDIAN PENAL CODE, 1860 – Section 116 Illustration (a)

(i) Illustration – Importance in interpretation of statutes – Unlike marginal note, an illustration is to be considered as part of section itself – It is to be accepted as being both relevant and available for construction of section.

(ii) Sections 161, 165 and 165-A of IPC replaced by Sections 7, 11 and 12 of Prevention of Corruption Act – No implied repeal of Illustration (a) to Section 116 IPC – Cases falling under Sections 7, 11 and 12 of Prevention of Corruption Act may be decided by taking aid of Illustration (a) of Section 116 IPC – Case of *Rajaram v. State of M.P., 2001 (1) MPLJ 624* rightly decided – Reference answered accordingly.

Sharad Kumar v. State of M.P.

Judgment dated 01.08.2008 passed by the High Court in Criminal Appeal No. 791 of 1996, reported in I.L.R. (2009) M.P. 229 (D.B.)

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***202. INTERPRETATION OF STATUTES:**

Statutes relating to limitation – Whether prospective or retrospective in effect? Held, Statutes relating to limitation are said to be retrospective in nature in the sense that they apply to all proceedings brought after coming into force, even for enforcing cause of action which had accrued prior to the date when such statute came into force – They are prospective in sense that they do not have the effect of reviewing a right of action which was already barred on the date of its coming into operation.

Rajesh v. State of M.P. and others

Judgment dated 07.08.2008 passed by the High Court in Writ Petition No. 2050 of 2008, reported in 2009 (1) MPLJ 90

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203. JUVENILE JUSTICE ACT, 1986 – Section 2 (e) & (h)
GENERAL CLAUSES ACT, 1897 – Sections 3 (35) & (66)
MAJORITY ACT, 1875 – Section 3
Whether accused/appellant a 'juvenile' on the date of commission of offence? Process for calculating a person's age – Explained.

Eerati Laxman v. State of Andhra Pradesh

Judgment dated 23.01.2009 passed by the Supreme Court in Criminal Appeal No. 139 of 2009, reported in (2009) 3 SCC 337

Held:

The question, which arises for consideration, is as to whether the appellant had completed the age of 16 years on 9.5.1994 where it is indisputable that the date of birth of appellant is 10.5.1978? In other words, whether the appellant comes within the purview of 'juvenile'?

Under Section 3(35) of the General Clauses Act, 1897 (for short 'the Act'), 'month' shall mean a month reckoned according to the British Calendar. 'Year' as defined under section 3(66) of the Act shall mean a 'Year reckoned according to the British Calendar'.

Halsbury's Laws of England in Paragraph 143, Volume No. 37 (Third Edition), described 'Month' as under:-

> *"143. Calendar month running from arbitrary date.* – When the period prescribed is a calendar month running from any arbitrary date the period expires with the day in the succeeding month immediately preceding the day corresponding to the date upon which the period starts; save that, if the period starts as the end of a calendar month which contains more days than the next succeeding month the period expires at the end of the latter month.'

Section 3 of the Indian Majority Act, 1875 provides for age of majority of persons domiciled in India and the criteria for computation of age of majority. It reads as under:

> *"3. Age of majority of persons domiciled in India.* – (1) Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.
>
> (2) In computing the age of any person, the day on which he was born is to be included as a whole day and he shall be deemed to have attained majority at the beginning of the eighteenth anniversary of that day."

In *Prabhu Dayal Sesma v. State of Rajasthan, (1986) 4 SCC 59,* this Court categorically held that: (SCC p. 59)

> "In absence of any express provision, while calculating a person's age, the day of his birth must be counted as a whole day and any specified age in law is to be computed as having been attained on the day preceding the anniversary of the birthday. A legal day commences at 12 o'clock midnight and continues until the same hour the following night.

[See *Salag Ram Sharma v. State of Rajasthan, (2005) 10 SCC 77*]

The appellant, therefore, having been born on 10.5.1978, the said day was to be counted as a whole day and, thus, he had not attained the age of 16 years before 12 o'clock in the midnight of the previous day, i.e. 9.5.1978 (*sic* 9.5.1994). This aspect of the matter has recently been considered in *Achhaibar Maurya v. State of U.P., (2008) 2 SCC 639*], wherein it was held: (SCC p. 642, para 14)

> "14. It is interesting to note, however, that the common law rule stated in *Shurey, Re, Savory v. Shurey,* (1918) 1 Ch 263, in respect of anniversaries has been abrogated by virtue of the Family Law Reform Act, 1969. The effect of the change is that, in respect of anniversaries falling after 1-1-1970, the time at which a person attains a particular age expressed in years is the commencement of relevant anniversary of the date of his birth. (See Halsbury's Laws of England, 4th Edn., Reissue, p. 209) We do not have such statute. We have, therefore, to determine the cases on the touchstone of statute operating in the field and in absence thereof by common law principle."

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204. LAND ACQUISITION ACT, 1894 – Sections 18 & 29
CIVIL PROCEDURE CODE, 1908 – Section 9
Sections 18 and 29 of Land Acquisition Act and Section 9 of CPC, scope of – Suit for recovery of amount of compensation in lieu of the land acquired by Government which is, as alleged by the plaintiff, illegally and unauthorizedly received and swallowed by defendants, maintainability of – Held, jurisdiction of Civil Court is not excluded either by Section 18 or 29 of the Land Acquisition Act.

Lalji v. Sitaram & anr.

Judgment dated 18.11.2008 passed by the High Court in Civil Revision No. 336 of 2007, reported in 2009 (I) MPJR 194

Held:

Section 9 of C.P.C. makes it clear that Civil suits normally of all kind are entertainable unless they are prohibited or barred under law. Needless to say that such bar or prohibition may be express or implied. This being so, the revisionist is required to show that the suit in question is barred under law.

Faced with the aforesaid, learned counsel for the revisionist drew attention of this Court to Section 18 and 29 of the Land Acquisition Act, 1894

Learned counsel for the revisionist for the aforesaid purpose and placed reliance on the Apex Court decisions in the Case of *Laxmi Chand & Ors. v. Gram Panchayat, Kararia & Ors., AIR 1996 SC 523 and S.P. Subramanya Shetty & Ors. v. Karnataka State Road Transport Corporation & Ors., AIR 1997 SC 2076. In the case of Laxmi Chand* (supra), civil suit was filed for challenging the validity of the acquisition and the award on the ground that the land could not be acquired. This suit was held to be not maintainable which was upheld upto the Apex Court. In the case of *S.P. Subramanya* (supra) civil suit was filed for mandatory injunction against the State restraining them from interfering into possession of a property which was subject of acquisition and to denotify the notification of acquisition. It was held that the notification had become final and the proceedings of acquisition having attained finality, civil suit was not maintainable.

In the instant case, the plaintiff has neither challenged the notification nor the acquisition. He has not challenged the award also. His contention is that the compensation on account of acquisition was duly deposited which included compensation in lieu of Survey Nos. 50/1 and 14/1 which belonged to him exclusively. This has been paid to the defendant/revisionist, who did not disclose that the aforesaid two survey numbers did not belong to him. Thus, the amount of compensation in respect of these two survey numbers is received by the defendant/revisionist wrongly or by misrepresentation. Plaintiff has nowhere accused the acquisition officer or the proceedings of acquisition. In civil suit he would be required to establish his title to land comprised in Survey Nos. 50/1 and 14/1. If he succeeds in establishing this fact and further that the defendant/ revisionist has received the amount of compensation in respect of these two servey numbers, I see no reason that why the reliefs claimed in the suit may not be granted. They in no way are in conflict with the purpose and object of section 18 of the Land Acquisition Act.

It is an undisputed position of law that while applying provisions of order 7 rule 11 of C.P.C., averments contained in the plaint alone are be examined. In the present case the plaintiff has categorically averred that he is Bhumiswami of land comprised in Survey Nos. 50/1, 14/1 in respect of which amount of compensation has been paid to the defendant/revisionist. He has not blamed

the Land Acquisition Officer for passing an award in favour of defendant/ revisionist. On the contrary, his contention is that his grand-mother Paniya Bai had acquired the entire land from her parents. Defendant/revisionist is grand son of Paniya Bai like the plaintiff himself. There arose a dispute about inheritance in respect of property held by Paniya Bai which was resolved by way of compromise. The subject land comprised in Survey Nos. 50/1 and 14/1 was allotted to the plaintiff and other land was allotted to the defendant/revisionist. Accordingly, it is averred that the plaintiff was Bhumiswami of inter alia survey Nos. 50/1 and 14/1 in respect of which amount of compensation was paid wrongly to the defendant/revisionist, plaintiff/respondent No. 1 instituted a civil suit (giving rise to the present revision application) for the relief that he be declared entitled to the amount of compensation to the tune of Rs. Two lac being Bhumiswami of Survey Nos. 50/1 and 14/1. It is further averred that defendant/revisionist has unauthorizedly received the said amount which may be directed to be paid by the defendant/revisionist to him.

As regards objection about Section 18 and 29 of the Land Acquisition Act, it may be seen that the plaintiff/respondent has averred exclusive title to Survey Nos. 50/1 and 14/1. He has not asserted joint title with the plaintiff, therefore, there was no question of apportionment of compensation. This being so, section 29 also expressly or by necessary implication does not debar the plaintiff from instituting the suit of present nature.

In *Principles of Statutory Interpretation* by Justice G.P. Singh, 10th edition, page 682, it is stated :

> "As a necessary corollary of this provisions excluding jurisdiction of civil courts and provisions conferring jurisdiction on authorities and tribunals other than civil courts are strictly construed. The existence of jurisdiction in civil courts to decide questions of civil nature being the general rule and exclusion being an exception, the burden of proof to show that jurisdiction is excluded in any particular case is on the party raising such a contention. The rule that the exclusion of jurisdiction of civil courts is not to be readily inferred is based on the theory that civil courts are courts of general jurisdiction and the people have a right, unless expressly or impliedly debarred, to insist for free access to the courts of general jurisdiction of the State. Indeed, the principle is not limited to civil courts alone, but applies to all courts of general jurisdiction including criminal courts."

[See : *Swamy Atamananda and others v. Shri Ramkrishna Tapovanam and others, (2005) 10 SCC 51* and *Dhulabhai v State of M.P., AIR 1969 SC 78*]

As already observed by this Court, if the plaintiff succeed in establishing that the defendant/revisionist is in receipt of the amount of compensation payable in respect of Survey Nos. 50/1 and 14/1 without any authority of law, I see no

legal impediment in the maintainability of the suit. Thus, neither section 18 nor section 29 of the Land Acquisition Act may be invoked by the defendant/ revisionist so as to prevent the plaintiff from prosecuting his suit. There being no allegations against the land acquisition proceedings or land acquisition officer, our system of justice may not allow the defendant/revisionist to swallow the amount of compensation payable in respect of the land not belonging to him. Thus, the case in hand does not fulfill any of the conditions prescribed by the Apex court and the jurisdiction of civil courts is not excluded by sections 18 or 29 of the Land Acquisition Act.

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205. LAND ACQUISITION ACT, 1894 – Sections 23 & 28

Power of executing court to grant interest on solatium amount – It can be granted only if it is not specifically denied by referral or appellate Court in view of the case of *Sunder v. Union of India, 2001 AIR SCW 3692.*

Food Corporation of India, Kakinada, Rep. by District Manager v. Yarlagadda Narayana Apparao & Ors.

Judgment dated 17.09.2008 passed by the Surpeme Court in Civil Appeal No. 5725 of 2008, reported in AIR 2009 SC 521

Held:

That question is whether in the light of the decision in *Sunder (2001) 7 SCC 211*, the awardee/decree-holder would be entitled to claim interest on solatium in execution though it is not specifically granted by the decree. It is well settled that an execution court cannot go behind the decree. If, therefore, the claim for interest on solatium had been made and the same has been negatived either expressly or by necessary implication by the judgment or decree of the Reference Court or of the appellate court, the execution court will have necessarily to reject the claim for interest on solatium based on Sunder on the ground that the execution court cannot go behind the decree. But if the award of the Reference Court or that of the appellate court does not specifically refer to the question of interest on solatium or in cases where claim had not been made and rejected either expressly or impliedly by the Reference Court or the appellate court, and merely interest on compensation is awarded, then it would be open to the execution court to apply the ratio of Sunder and say that the compensation awarded includes solatium and in such an event interest on the amount could be directed to be deposited in execution. Otherwise, not. We also clarify that such interest on solatium can be claimed only in pending executions and not in closed executions and the execution court will be entitled to permit its recovery from the date of the judgment in Sunder (19-9-2001) and not for any prior period. We also clarify that this will not entail any re-appropriation or fresh appropriation by the decree-holder. This we have indicated by way of clarification also in exercise of our power under Articles 141 and 142 of the Constitution of India with a view to avoid multiplicity of litigation on this question.

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206. LAND ACQUISITION ACT, 1894 – Sections 28-A, 18 & 11

(i) Once a claimant has sought and secured reference under Section 18 and an order is passed, he cannot thereafter invoke, under Section 28-A of the Act, for re-determination of compensation – But disposal of an application seeking reference under Section 18 on the ground of delay would not come in the way of the claimant for applying under Section 28-A of the Act.

(ii) Application under Section 28-A kept pending for decision till the finality of the Reference Court's order pending in appeal – Held, not illegal – Object and scope of Section 28-A of the Act reiterated.

Kendriya Karamchari Sehkari Grah Nirman Samiti Limited, Noida and others v. State of Uttar Pradesh and another

Judgment dated 07.11.2008 passed by the Supreme Court in Civil Appeal No. 6850 of 2003, reported in (2009) 1 SCC 754

Held:

The provision of Section 28-A of the Land Acquisition Act, 1894 came up for consideration before this Court in several cases. In the leading case of *Mewa Ram v. State of Haryana, (1986) 4 SCC 151,* this Court held that having regard to the Statement of Objects and Reasons of the Amendment Act, it is clear that Section 28A is intended and meant for the inarticulate and poor people who by reason of their poverty and ignorance have failed to take advantage of the right of Reference to Civil Court under Section 18 of the Act. It was also held that the provision was not intended to reopen an Award which had attained finality and was of binding nature.

Again, in *The Scheduled Caste Co-operative Land Owning Society Ltd. v. Union of India, (1991) 1 SCC 174,* the Court held that once a claimant has sought and secured a Reference under Section 18 of the Act and an order is passed, he cannot thereafter invoke Section 28-A of the Act for re-determination of compensation.

In the well known decision in *Babua Ram & Ors. v. State of U.P. & Anr., (1995) 2 SCC 689,* this Court considered the question in detail. It was held that before Section 28-A of the Act can be invoked, a person must show that he is person interested and is aggrieved as in respect of other lands covered by the same notification under Section 4, higher compensation has been awarded. An aggrieved person who had not made an application for Reference under Section 18 of the Act thus becomes entitled to apply under Section 28-A of the Act. The right to an aggrieved person under Section 28-A arises only when the Reference Court grants compensation in excess of the amount awarded by the Collector under Section 11. It was also observed that such an application can be made in writing by any 'aggrieved' person. The said expression would cover any interested person who had failed to make an application for Reference under Section 18 and would not be confined to those who received compensation under protest. It was also indicated that Section 28-A is a 'complete Code' in itself providing

substantive right to 'an aggrieved person' to claim compensation equal to that awarded to his neighbour covered by the same notification under Section 4(1).

In Union of *India v. Pradeep Kumari, (1995) 2 SCC 736,* this Court discussed the object underlying Section 28-A of the Act and observed that: (SCC pp. 743-44, para 10)

> "10. .... [such object] would be better achieved by giving the expression `an award' in Section 28-A its natural meaning as meaning the award that is made by the court in Part III of the Act after the coming into force of Section 28-A. If the said expression in Section 28-A(1) is thus construed, a person would be able to seek re-determination of the amount of compensation payable to him provided the following conditions are satisfied:
>
> (i) An award has been made by the court under Part III after the coming into force of Section 28-A;
>
> (ii) By the said award the amount of compensation in excess of the amount awarded by the Collector under Section 11 has been allowed to the applicant in that reference;
>
> (iii) The person moving the application under Section 28-A is interested in other land covered by the same notification under Section 4(1) to which the said award relates;
>
> (iv) The person moving the application did not make an application to the Collector under Section 18;
>
> (v) The application is moved within three months from the date of the award on the basis of which the re-determination of amount of compensation is sought; and
>
> (vi) Only one application can be moved under Section 28-A for re-determination of compensation by an applicant.

A Constitution Bench of this Court in *Union of India v. Hansoli Devi, (2002) 7 SCC 273* held that dismissal of an application seeking reference under Section 18 on the ground of delay also would not come in the way of the claimant for re-determination of compensation under Section 28A of the Act. Such person can be said to be a 'person aggrieved' and would be entitled to make an application to receive compensation provided the conditions of the said section are complied with.

From the aforesaid decisions, in our judgment, the law is well settled and it is that against an award, if the Reference Court allows the applicant and awards any amount of compensation in excess of the amount awarded by the Land Acquisition Officer under Section 11 of the Act, any person interested in

the land covered by the same notification may make an application under Section 28A of the Act within the period specified in the said section and may seek the same relief which has been granted to other land-owners by the Reference Court.

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

We see no illegality in keeping the applications under Section 28-A of the Act pending till the issue is finally settled by the Court and a decision has been arrived at as observed by this court in the case of *Babua Ram v. State U.P.* (supra) in detail.

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207. LAND REVENUE AND TENANCY ACT, 1950 (M.B.) – Section 54 (vii) QUWAID MUAFIDARAN JUJBE ARAZI WA NAKDI, SAMVAT 1991 (RIASAT GWALIOR) – Sections 4, 5, 6, 13 & 16

Right to worship *(Puja)* is heritable right – As per the records, land was given to the deity – Forefathers of plaintiff were *pujaris* – Held, after their death, plaintiff became *pujari* by virtue of heritable right – Deity *(Mandir)* is Bhumiswami of the suit land and not the *pujari*.

Mangidas v. State of Madhya Pradesh

Judgment dated 19.12.2008 passed by the High Court in S.A. No. 275 of 1997, reported in 2009 (I) MPJR 300

Held:

By hammering on the stand of plaintiff that by operation of law on coming into force of the Code, he became Bhumiswami of the suit property, it has been contended by learned Government Advocate that if the document Ex. P/5 which is khasra of *Samvat 1984* (corresponding year 1927) is taken into consideration in its *stricto sensu,* it would reveal that not only the temple Radha Krishna Ji but the suit land also has been entered as *Milkiyat Sarkar, the Gwalior Government* (property of Gwalior State) and, therefore, the suit property is of *Aukaf* department of the Government and such property would not vest in *Pujari* and the *Pujari* would not become Bhumiswami by operation of law on coming into

force of the Code. In this context, learned Government Advocate has invited my attention to the decision of Supreme Court in *Kanchaniya (Mst.) and others v. Shiv Ram and others, 1992 Revenue Nirnay 194.* However, learned Government Advocate did not dispute the proposition that the plaintiff is the *Pujari* of the Mandir Radha Krishnaji and Mandir is the Bhumiswami of the suit property.

On going through Patt Ex. P/1, it is difficult to hold that the same is in respect to the suit property for the simple reason that the description which has been mentioned in Ex. P/1 does not tally with the description of the suit property. In the said document any particular survey number etc. has not been mentioned. Even for the sake of argument, if it is accepted that by virtue of said Patta the land in question was given to the plaintiff's forefather Baba Manohardas, there should have been relevant entry in revenue record on the basis of the said Patta. But, the plaintiff did not file any such revenue record and therefore, even if it is held that the Patta was granted to fore-father of appellant/plaintiff, it cannot be said that the plaintiff/appellant acquired Bhumiswami right over the disputed land by operation of law.

On bare perusal of a very important document Ex. P/4 which is the certified copy of Khasra *Samvat* 1984 (Corresponding year 1927), it is revealed that the Mandir Radha Krishna Ji is shown to be the property of Gwalior State and *Pujari* of the said temple Daulatram s/o Kishan Bairagi has been shown. The same position has been shown about the suit property also as the suit land has been shown to be the property of Gwalior State and the land has been shown to be the *Muafi*, in the revenue record. In the oldest revenue record khasra of *Samvat* 1984, which has been placed on record, the temple Radha Krishna Ji as well as the suit property is shown to be of Gwalior State and the disputed land has been shown to be the *Muafi* land and, therefore, the said land is Government land. In the *Kishtband Khatoni* of the year 1986-87 (ex. P/3) Mandir Radha Krishna has been shown to be the Bhumiswami of the suit land in column No. 2 and Raghunathdas s/o Daulatdas has been shown to be the *Pujari*, the Collector Ujjain has been shown to be *Vyawasthapak* (Manager). The family tree Ex. P/2 has been proved by plaintiff. Accordingly, Daulatdas was the son of Kishan Bairagi, Raghunathdas was the son of Daulatdas and Mangidas (plaintiff) is the son of Raghunathdas. In the khasra of *Samvat* 1984 (corresponding year 1927) Ex. P/4 the name of *Pujari* Daulatdas s/o Kishan Bairagi has been mentioned. Similarly in *Kishtbandh Khatoni* Ex. P/3 the name of *Pujari* Raghunathdas s/o Daulatdas has been shown and the plaintiff is the son of Raghunathdas. The disputed land is *Muafi* land and was given to the temple during the period of erstwhile Gwalior State and, according to Sections 4, 5, 6, 13 and 16 of Qawayad Muafidaran Jujbe Arzi Wa Nakdi, Samvat 1991 (Riyasat Gwalior) in short Qawayad Muafidaran) the right of *Pujari* are heritable and proprietary. The name of Pujari Daulatdas s/o Kishan Bairagi has been shown in the Khasra of Samvat 1984. The name of Raghunathdas s/o Daulatdas as *Pujari* has been shown in *Kishtbandh Khatoni* Ex. P/3. The plaintiff is the son of Raghunathdas and, therefore, he will inherit the right of *Pujari* . Learned Single

Judge of this Court in *Ghanshyamdas and others v. M.P. State and another, 1995 RN 235,* while considering the various provisions of Qawayad Muafidaran and putting emphasis to Sections 4, 5, 6, 13 and 16 and by placing reliance on the decision of Supreme Court in *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282* and *Mst. Raj Kali Kuer v. Ram Rattan Pandey, AIR 1955 SC 493* has categorically held that the rights of *Pujari* under Qawayad Muafidaran are heritable and proprietary and their right cannot be taken away by executive instructions. According to me, the decision of *Ghanshyamdas* (supra) is applicable in the present case.

Apart from this, the defendants/State Government itself has admitted in paras 1 and 15 of the written statement that the land in question is in the Bhumiswami right of Mandir Radha Krishna and plaintiff is the *Pujari* of the said temple andhis name is entered in the revenue record, therefore, when it is defendant's own case, the status of plaintiff as *Pujari* and this right conferred to him inheritance cannot be disputed.

Thus, I am of the view that the disputed land was given to the deity only and forefather of plaintiff were *Pujaris* and after their death, plaintiff/appellant became *Pujari* by virtue of heritable right and, therefore, the judgment of two Courts below up to that extent is perverse. The decision of Supreme Court in *Kanchaniya (Mst.)* (supra) is not applicable in the present case because in that case the Government land was given on Patta by the *Pujari* and the Patta holder from *Pujari* was claiming the Bhumiswami right.

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208. LAND REVENUE CODE, 1959 (M.P.) – Sections 185, 190 & 257 (O)
CONSTITUTION OF INDIA – Article 227
CIVIL PROCEDURE CODE, 1908 – Section 9
Jurisdiction of Civil Court – Question of Bhumiswami Rights, determination of – Determination of question of Bhumiswami rights lies within the province of the Civil Court except in cases falling under Section 257 of the Land Revenue Code – Section 257 (O) of Land Revenue Code gives limited jurisdiction to revenue authorities to decide the claims of occupancy tenant for conferral of Bhumiswami rights, therefore, in cases where status of claimant as occupancy tenant is in dispute, Section 190 of the Land Revenue Code cannot be invoked – In a case where the status as occupancy tenant is in dispute, the Tehsildar has no jurisdiction to go into the question and record a finding about the status of occupancy tenant under Section 185 of the Land Revenue Code – Proper remedy lies with the Civil Court.

Vimla Bai Choudhary (Smt.) v. Board of Revenue & Ors.

Judgment dated 13.10.2008 passed by the High Court in Writ Petition No. 2565 of 2002, reported in 2009 (I) MPJR 321

Held:

The core question that arises for consideration is whether in a case where the status of the claimant as occupancy tenant is disputed, the revenue authorities can examine the merits of the claim and record a finding about the status as occupancy tenant and pass an order conferring the Bhumiswami rights under section 190 of the Code?

Section 190 of the Code deals with conferral of Bhumiswami right on occupancy tenant. Under section 190 Bhumiswami rights can be conferred on occupancy tenant but status of a person as occupancy tenant cannot be decided. Therefore, section 190 can be attracted only when the status of a person as occupancy tenant is not in dispute

Section 257 of the Code deals with exclusive jurisdiction of the revenue authorities.

This court in the matter of *Rawala v. Dettia and others, 1978 RN 12,* has held as under :

> 4. The lower appellate Court felt that under section 257(o) of the M.P. Land Revenue Code the claims by an occupancy tenant for conferral of the rights of Bhumiswami fall within the exclusive jurisdiction of the Revenue Tribunal under section 190 of the M.P. Land Revenue Code. Section 190 of the Code no doubt empowers the Revenue Tribunal to confer the rights of a Bhumiswami; but it contemplates that these rights could only be conferred on an occupancy tenant but whether a person claiming the rights of a Bhumiswami is an occupancy tenant or not, is not within the jurisdiction of Revenue Tribunal to determine under section 190 of the Code. That question therefore will be for the Civil Court to decide and section 257(o) of the Code will therefore not come into operation restricting jurisdiction of the Civil Court to entertain the suit for declaration of title.

This court while examining the same issue in the matter of *Sanwal and others v. Laxmibai and others, 1991 RN 114,* has held as under:

> "27. In the instant case the real dispute between the parties centers round the question whether the defendants No.1 and 3 had acquired the status of occupancy tenants in respect of the suit lands. There is no provision in the Code which empowers any Revenue Officer to determine the status of occupancy tenant. Section 190 which deals with conferral of Bhumiswami rights on occupancy tenants can operate only when the person who claims to have acquired Bhumiswami rights under section 190 of the Code is admittedly an occupancy tenant. But that is not the situation in the present case.

> 33. In the instant case defendants no.1 and 3 claimed to have acquired status of occupancy tenants and consequently the status of Bhumiswami in respect of the suit-lands under section 190 of the Code. The jurisdiction for deciding such a claim is vested in the civil court and not in the Revenue Authority and the decision in the case of *Rawala* (supra) is on all fours applicable to the facts of the instant case. As such, it is held that the civil suit filed by the plaintiff challenging the defendants claim of status as occupancy tenant inrespect of the suit-land, is maintainable".

In the case of *Reshma Bai* (Smt.) *and others v. Kanchansingh and others, 1996 RN 144,* the Division Bench of this Court again reiterated the view that an occupancy tenant may approach the revenue authority under section 190 when there is no dispute of status as occupancy tenant.

The Full Bench of this Court in *State of M.P. and others v. Balveer Singh and others, 2001(3) MPHT 255,* has held that :

> 66. (3) The determination of question of bhumiswami rights lies within the province of the Civil Court excepting the cases falling within the ambit of those specified under Section 257 of the Code.

In *Halimanbai & others v. Narain & others, 1997 RN 100,* this Court has held that conferral of Bhumiswami rights under section 190 is automatic and right is acquired by operation of law.

Judgments in the matter of *Gutti v. Mohanlal and others, 1969 MPLJ 470* and *Balaji and others v. Derha and others, AIR 1982 MP 195* do not help the respondents as they do not lay down anything contrary to what has been held in the matters of *Rawala* (supra) and *Sanwal* (supra).

It can be safely held that determination of question of Bhumiswami rights lies within the province of the Civil Court except in cases falling under section 257 of the Code. Section 257(O) gives limited jurisdiction to revenue authorities to decide the claims of occupancy tenant for conferral of Bhumiswami rights, therefore, in cases where status of claimant as occupancy tenant is in dispute, section 190 of the Code cannot be invoked.

A perusal of the order of the Tahsildar indicates that the status of the respondent no.5 as occupancy tenant was in dispute. The Tahsildar had no jurisdiction to go into the question and record a finding about the status of occupancy tenant under Section 185. Proper remedy in such a case was to relegate the parties to avail the remedy of civil suit. The Additional Commissioner had rightly placed reliance upon the judgments of this court reported in *Sanwal* (supra) while taking a view that in the facts of the case the revenue court had

no jurisdiction to confer the status of occupancy tenant to the respondent no.5. Clear error of law was committed by the Board of Revenue in reversing the order of the Additional Commissioner while exercising the revisional jurisdiction.

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209. LEGAL SERVICES AUTHORITIES ACT, 1987 – Sections 2(d), 20 (1) (ii), 20 (5), 21, 22 & 22-E

Power, purpose, scope and procedure of Lok Adalat on compromise. Either award on the basis of compromise or return of the matter to the Court – No third course open for any direction – Directions for determining rights/objections/title of parties prior to any settlement are not permissible.

There cannot be a binding award by the Lok Adalat without final settlement – Final and tentative award distinguished – Each and every case cannot be referred to the Lok Adalat by the Court – Examples of mechanical reference cited and judicial training to avoid mechanical reference suggested.

Directions regarding uniform law and functioning of Lok Adalats given to NALSA – When a case is to be heard and decided on merits by a Court, the conduct of parties before the Lok Adalat or other ADR Fora, howsoever stubborn or unreasonable, is totally irrelevant.

B.P. Moideen Sevamandir and another v. A.M. Kutty Hassan

Judgment dated 12.12.2008 passed by the Supreme Court in Civil Appeal No. 7282 of 2008, reported in (2009) 2 SCC 198

Held:

It is unfortunate that the learned members of the Lok Adalat and the learned Single Judge totally lost sight of the purpose and scope of Lok Adalats.

When a case is referred to the Lok Adalat for settlement, two courses are open to it : (a) if a compromise or a settlement is arrived at between the parties, to make an award, incorporating such compromise or settlement (which when signed by the parties and countersigned by the members of the Lok Adalat, has the force of a decree); or (b) if there is no compromise or settlement, to return the record with a failure report to the court. There can be no third hybrid order by the Lok Adalat containing directions to the parties by way of final decision, with a further direction to the parties to settle the case in terms of such directions. In fact, there cannot be an 'award' when there is no settlement. Nor can there be any 'directions' by the Lok Adalat determining the rights/obligations/title of parties, when there is no settlement. The settlement should precede the award and not vice versa, as this Court expressed in *State of Panjab v. Jalour Singh, (2008) 2 SCC 660*

When the Lok Adalat records the minutes of a proceeding referring to certain terms and directs the parties to draw a compromise deed or a memorandum of settlement and file it before the court, it means that there is no

final or concluded settlement and the Lok Adalat is only making tentative suggestions for settlement; and such a proceeding recorded by the Lok Adalat, even if it is termed as an 'award', is not an 'award of the Lok Adalat'.

Although the members of Lok Adalats have been doing a commendable job, sometime they tend to act as Judges, forgetting that while functioning as members of Lok Adalats, they are only statutory conciliators and have no judicial role. Any overbearing attitude on their part, or any attempt by them to pressurize or coerce parties to settle matters before the Lok Adalat (by implying that if the litigant does not agree for settlement before the Lok Adalat, his case will be prejudiced when heard in court), will bring disrepute to Lok Adalats as an alternative dispute resolution process (for short 'ADR process') and will also tend to bring down the trust and confidence of the public in the Judiciary.

Such kind of orders by Lok Adalats are the result of lack of appropriate rules or guidelines. Thousands of Lok Adalats are held all over the country every year. Many members of Lok Adalats are not judicially trained. There is no fixed procedure for the Lok Adalats and each Adalat adopts its own procedure. Different formats are used by different Lok Adalats when they settle the matters and make awards. We have come across Lok Adalats passing 'orders', issuing 'directions' and even granting declaratory relief, which are purely in the realm of courts or specified Tribunals, that too when there is no settlement.

As an award of a Lok Adalat is an executable decree, it is necessary for the Lok Adalats to have a uniform procedure, prescribed Registers and standardized formats of awards and permanent record of the awards, to avoid misuse or abuse of the ADR process. We suggest that the National Legal Services Authority as the apex body, should issue uniform guidelines for the effective functioning of the Lok Adalats. The principles underlying following provisions in the Arbitration and Conciliation Act, 1996 relating to conciliators, may also be treated as guidelines to members of Lok Adalats, till uniform guidelines are issued: Section 67 relating to role of conciliators; Section 75 relating to confidentiality; and Section 86 relating to admissibility of evidence in other proceedings.

Lok Adalats should also desist from the temptation of finding fault with any particular litigant, or making a record of the conduct of any litigant during the negotiations, in their failure report submitted to the court, lest it should prejudice the mind of the court while hearing the case.

We may now turn to the role of courts with reference to Lok Adalats. Lok Adalats is an alternative dispute resolution mechanism. Having regard to Section 89 of Code of Civil Procedure, it is the duty of court to ensure that parties have recourse to the Alternative Dispute Resolution (for short 'ADR') processes and to encourage litigants to settle their disputes in an amicable manner. But there should be no pressure, force, coercion or threat to the litigants to settle disputes against their wishes. Judges also require some training in selecting and referring cases to Lok Adalats or other ADR processes.

Mechanical reference to unsuited mode of ADR process may well be counter productive. A plaintiff who comes to court alleging unlawful encroachment by a neighbour may well ask what kind of settlement he should have with an encroacher in a Lok Adalat. He cannot obviously be asked to sacrifice a part of his land for purposes of amicable settlement thereby perpetuating the illegality of an encroachment. A plaintiff alleging fraud and forgery of documents against a defendant may well ask what settlement he can have with a fraudster or forger through ADR process as any settlement may mean yielding to or accepting fraud or forgery.

When a case is to be heard and decided on merits by a court, the conduct of the party before the Lok Adalat or other ADR fora, howsoever stubborn or unreasonable, is totally irrelevant. A court should not permit any prejudice to creep into its judicial mind, on account of what it perceives as unreasonable conduct of a litigant before the Lok Adalat. Nor can its judgment be 'affected' by the cantankerous conduct of a litigant. It cannot carry 'ill-will' against a litigant, because he did not settle his case. It is needless to remind the oath of office, which a Judge takes when assuming office. He is required to perform his duties without fear or favour, affection or ill-will. Any settlement before the Lok Adalat should be voluntary. No party can be punished for failing to reach the, settlement before the Lok Adalat.

Any admission made, any tentative agreement reached, or any concession made during the negotiation process before the Lok Adalat cannot be used either in favour of a party or against a party when the matter comes back to the court on failure of the settlement process. To deny hearing to a party on the ground that his behaviour before the Lok Adalat was cantankerous or unreasonable would amount to denial of justice. When deciding a matter on merits of a case, if a court carries any prejudice against a party on account of his conduct before an ADR forum, it will violate the inviolable guarantee against prejudice or bias in decision making process. Such conduct can neither be permitted nor be tolerated and requires to be strongly deprecated. Every Judge should constantly guard against prejudice, bias and prejudging, in whatever form. Judges should not only be unbiased, but seem to be unbiased. Judiciary can serve the nation only on the trust, faith and confidence of the public in its impartiality and integrity.

The observation by the High Court that the parties having arrived at a settlement before the Lok Adalat, could not refuse to file a compromise petition in court, is also erroneous. If there was a final settlement before the Lok Adalat, there would have been an award and there was no need for the matter to come before the court for further hearing. If parties state that before the Lok Adalat that they will enter into an agreement and file it before the court, it only means that there was only a tentative settlement before the Lok Adalat.

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210. LIMITATION ACT, 1963 – Articles 64 & 65

Adverse possession is not a pure question of law but a blended one of fact and law – Requisitions – Explained.

The law of adverse possession is extremely harsh for the true owner and a windfall for dishonest person – It is irrational, illogical and disproportionate – Needs urgent suitable change.

Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan & Ors.

Judgment dated 23.09.2008 passed by the Supreme Court in Civil Appeal No. 1196 of 2007, reported in AIR 2009 SC 103

Held:

A plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

The law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. There is therefore, an urgent need of fresh look regarding the law on adverse possession. The Union of India is recommended to seriously consider and make suitable changes in the law of adverse possession.

In the instant case, it was held that the plaintiff having failed to plead the case of adverse possession and no issues having been framed in that behalf and the plaintiff having miserably failed to establish title to the suit property, the suit for declaration and possession ought not have been decreed on ground of adverse possession.

[Also see *P.T. Munichikkanna Reddy & others v. Revamma & others, AIR 2007 SC 1753.*]

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211. LIMITATION ACT, 1963 – Article 74

Suit for damages for malicious prosecution – Period of limitation therefor – Suit filed within a period of one year from the date on which the order of acquittal attains finality is within limitation in terms of Article 74 of the Limitation Act.

S.D.Tiwari v. Gurmeet Singh alias Billu and another
Judgment dated 19.11.2008 passed by the High Court in Civil Revision No. 164 of 2008, reported in 2009 (1) MPLJ 318

Held:

There seems to be much controversy on the question of limitation with respect to Article 74 of the Limitation Act. Calcutta High Court in the case of *Bibhuti Bhusan Chakravarti and another v. Tarun Gupta, AIR 1978 Calcutta 302* has held the suit for damages on account of malicious prosecution as barred by limitation because the plaintiff had no notice of filing of an application for grant of leave to appeal before Supreme Court within one year from the date of acquittal. Plaintiff was held to have notice of such filing of the application after the period of limitation of one year at expiry. Therefore, it was held in such circumstances that such a leave application which was filed after one year from the date of acquittal cannot be taken advantage of by the plaintiff for extending the period of limitation.

On the other hand, Madras and Nagpur High Courts are of the view that the limitation would commence not from the discharge or acquittal at the first instance but from the date of attaining finality. Full Bench of Madras High Court while dealing with Article 23 (present Article 74) in the case of *Soora Kulasekara Chetty and another v. Tholasingam Chetty, AIR 1938 Madras 349* has observed:-

> "The wording "when the plaintiff is acquitted" cannot be divorced from the words "or the prosecution is otherwise terminated". In our opinion the Article provides that time shall run when the plaintiff is acquitted or when the prosecution comes to an end in some other manner. If the acquittal is followed by other proceedings the prosecution is terminated not by the acquittal but by the order passed in the subsequent proceedings and this construction was placed on the Article by a Bench of this Court consisting of Bakewell and Phillips JJ. in *AIR 1920 Mad 151=57 IC 635*".

This Court may also be guided by the earlier decision of the Nagpur High Court (which happens to be the predecessor of this Court) in the case of *Sk. Mehtab s/o Sh. Farid vs. Balaji s/o Krishnarao and another, 1946 NLJ 113= AIR (33) 1946 Nagpur 46.* I may profitably quote following paragraph from the *Sk. Mehtab's* decision:-

> "Under Section 435, Criminal Procedure Code, the High Court or any Sessions Judge or District Magistrate or any Sub-Divisional Magistrate empowered by the Provincial Government in this behalf may call for and examine the record of any proceeding before any inferior criminal Court for the purpose of satisfying itself as to the correctness,

legality or propriety of any finding, sentence or order and as to the regularity of any proceedings of an inferior Court. Under Section 436 of the Code, the High Court or the Sessions Judge, or the District Magistrate, may send back for further enquiry into any complaint which has been dismissed under Section 203 or sub-section(3) of Section 204 or into the case of any person accused of an offence who has been discharged. An improper order of discharge may be set aside and the accused may be committed to stand his trial before a Court of Session under Section 437, Criminal Procedure Code. In *ILR 1. Luck. 215* it was held that the proceedings came to an end when the Sessions Judge finally refused to commit the appellants for trial. In other cases the Sessions Judge and the District Magistrate can report the case to the High Court under Section 438 of the Code with a recommendation that the sentence be reversed or altered. The powers of the High Court in revision are given in Section 439 of the Code. The order of acquittal or order of discharge is not final and is liable to be set aside in appeal or revision as the case may be by an order passed by the appellate revisional Court. So long as these proceedings are pending, no action lies on the ground that they have been wrongfully instituted. This is based on the principle stated in *(1861) 10 C.B. (N.S.) 592* at p. 604 in these words:

> "It is a rule of law, that no one shall be allowed to allege of a still depending suit that it is unjust. This can only be decided by a judicial determination, or other final event of the suit in the regular course of it. That is the reason given in the cases which established the doctrine, that, in actions for a malicious arrest or prosecution, or the like, it is requisite to state in the declaration the determination of the former suit in favour of the plaintiff, because the want of probable cause cannot otherwise be properly alleged."

I may also successfully refer to the decision of Division Bench of Allahabad High Court in the case of *B. Madan Mohan Singh v. B. Ram Sunder Singh, AIR 1930 Allahabad 326* wherein it has been observed:-

> "When the application under Section 436 is preferred before a Sessions Judge and notice to show cause has been issued, the Judge has himself power to make further enquiry into the case of the accused person who has been

discharged or direct any subordinate Magistrate to make such enquiry. While such a proceeding is pending before a Sessions Judge, the accused, in our opinion is being prosecuted and in order to save himself from a retrial he must satisfy the Judge that there is no case against him. Taking the word "prosecution" in its wider sense we fail to see why it should not include a criminal proceeding of this nature before a Sessions Judge or a High Court. If this view were not to be accepted the result would be that the discharged person would be compelled to institute his suit for damages even though the matter is still subjudice and is being considered by the Sessions Judge or by the High Court. It seems extraordinary that a plaintiff should be compelled to sue while it is yet a question whether his retrial is not going to be ordered. Of course as soon as the order of discharge was passed the prosecution in the Magistrate's Court terminated. If no further proceedings are taken the prosecution must be deemed to have terminated on that date. But if, as a matter of fact, the matter is taken up in revision to a higher authority which has power of interference and proceedings sanctioned by the Criminal Procedure Code are being pursued, the prosecution can no longer be said to have finally terminated. Its final termination would be only when the proceedings in revision have come to an end in favour of the discharged person."

It is well settled that the law of limitation is based on consideration of public policy and expediency. The cardinal point in limitation law is not the fixation of periods to enable filing of suits but to demarcate the period after which no suit can be brought in respect of a particular cause of action. Conservative view adopted by Bombay and Allahabad High Courts seems to have been taken ignoring the object of limitation. An order of acquittal of discharge which is under scrutiny before superior Court, if is treated as ultimate date of limitation, the plaintiff would be compelled to institute a suit under this Article which would remain subject to the outcome of the proceedings before the Superior Court. On the contrary, if the said Article is construed so as to allow the plaintiff to sue on attaining finality of the order of acquittal or discharge, it would truly serve the object of limitation. On the other hand, if the plaintiff is compelled under this Article to sue within one year after the acquittal at first instance and the acquittal is thereafter converted into conviction nothing would remain with the Civil Court to be adjudicated upon on account of vanishing of the cause of action itself. Law of limitation is always to be interpreted in a manner beneficial to the plaintiff. If narrow construction is given to the word "acquittal" in 'Article 74' it may in

peculiar circumstances lead to irreversible situation. If the plaintiff immediately on his acquittal but during pendency of appeal against it sues for damages for malicious prosecution and obtains decree in his favour during pendency of criminal appeal itself and further such a decree attains finality with the passage of time, afterwards, if the appeal is allowed and the acquittal is converted into conviction, the defendant would be highly prejudiced because he would be facing a decree with no cause of action resulting into irretrievable injustice. Thus, in my considered opinion, the learned trial Judge has acted with a correct and reasonable approach while interpreting Article 74 and has not committed any jurisdictional error. There cannot be the contrary intention of the legislature.

In Article 74 time from which the period begins to run is described as "when the plaintiff is acquitted or the prosecution is otherwise terminated. Final termination of prosecution is not expressly mentioned. If an order of discharge is challenged in superior Court it is treated as continuation of the prosecution. Likewise, if the acquittal is challenged in superior Court, there would be no justification in not allowing the plaintiff to watch the outcome of such proceedings and to sue for damages for malicious prosecution under this Article after the order of acquittal in his favour attains finality. This in my considered opinion, would be a correct and reasonable approach while interpreting Article 74. Contrary construction may increase the litigation because if the plaintiff is compelled to sue immediately after the order of acquittal at first instance during pendency of challenge to order of acquittal at first instance during pendency of challenge to order of acquittal in superior Court, he would be severally prejudiced if the order of acquittal is converted into order of conviction by superior Court. Moreover, cause of action on the basis of acquittal cannot be legally said to be undisputable available to the plaintiff if the order of acquittal is under scrutiny in legal proceedings before superior Court. This being so, I prefer to take support from Full Bench decision of *Madras High Court and of Nagpur High Court* (supra).

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***212. MONEY LENDERS ACT, 1934 (M.P.) – Sections 3 (1) (a), 3 (1) (b), 7, 7 (b) & 7(c)**

CIVIL PROCEDURE CODE, 1908 – Section 34

(i) Maintenance of account by money lender for each debtor separately and furnishing statement of accounts every year to debtors, as prescribed, is mandatory – On failure to comply with either of requirements, Court can disallow interest – Lower Court was not justified in awarding interest – Appeal allowed.

(ii) Discretion of Court to award interest – Held, Section 7 of the Act has overriding effect – Court cannot grant interest under Section 34 of the Code in case of breach of Section 7 of the Act.

Narayan (deceased) through LRs. v. Sobhagmal Rakhabchand
Judgment dated 23.09.2008 passed by the High Court in S.A No. 182 of 1996, reported in I.L.R. (2009) M.P. NOC 6

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213. MOTOR VEHICLES ACT, 1988 – Sections 165 & 166
Non-registration of vehicle – Claim petition, maintainability of – Registration of a vehicle is not contemplated in the definition of 'Motor Vehicle' under the Motor Vehicles Act, 1988 – Sections 165 as well as 166 of the Act are not confined to the accidents resulting merely from the use of registered motor vehicle.
Gajrani v. Manoj Jain
Judgment dated 09.01.2009 passed by the High Court in Miscellaneous Appeal No. 1422 of 2001, reported in 2009 (2) MPLJ 142

Held:

Section 166 of the M.V. Act enables a person to submit application for compensation arising out of an accident of the nature specified in sub-section (1) of Section 166 of the said Act.

Sub-section (1) of Section 165 empowers the claims tribunal to adjudicate upon the claims for compensation in respect of accidents involving the death of or bodily injury to persons arising out of the use of motor vehicles. The word 'accident' is not defined in the Motor Vehicles Act or Rules made thereunder.

Apex Court in the case of *Shivaji Dayanu Patil and another v. Vatschala Uttam More, (1991) 3 SCC 530* has observed: –

> "36. This would show that as compared to the expression "caused by", the expression "arising out of" a wider connotation. The expression "caused by" was used in Sections 95 (1) (b) (i) and (ii) and 96 (2) (b) (ii) of the Act. In Section 92-A. Parliament, however, chose to use the expression "arising out of" which indicates that for the purpose of awarding compensation under Section 92-A, the casual relationship between the use of the motor vehicle and the accident resulting in death or permanent disablement is not required to be direct and proximate and it can be less immediate. This would imply that accident should be, connected with the use of the motor vehicle but the said connection need not be direct and immediate. This construction of the expression "arising out of the use of a motor vehicle" in Section 92-A enlarges the field of protection made available to the victims of an accident and is in consonance with the beneficial object underlying the enactment."

It may further be seen that motor vehicle is defined in Clause 28 of Section 2 as mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty five cubic centimeters.

Thus, registration of motor cycle is not contemplated in the definition of motor vehicle under the provisions of M.V. Act, 1988. Sections 165 as well as 166 of the said Act are not confined to the accidents resulting merely from the use of registered motor vehicles.

This Court in *Bhanwarlal v. Sardar Kabulsingh and others, 1989 MPLJ 16* has observe that only because of confusion in the digits of vehicle number by a rustic illiterate claimant, the claim petition for compensation for the injuries arising out the motor accident should not be thrown out unless it is held that the accident as alleged by the claimant had not taken place and there was no rashness and negligence on the part of the driver, claim petition cannot legally be dismissed as not maintainable.

It is further found that the claim petition under Section 166 of M.V. Act is maintainable despite absence of particulars of registration as well as chassis and engine number. Impugned award dismissing thereby the claim petition on the ground of not providing registration number of the offending motor cycle is set aside.

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***214. MOTOR VEHICLES ACT, 1988 – Sections 166 & 165 (1)**

Murder of driver of truck by cleaner – Claim case, maintainability of – Maintainability of claim case is to be decided on the basis of evidence by examining whether the death was by reason of accidental murder or simpliciter murder – Held, order passed by the Tribunal, without holding such inquiry about the maintainability of claim case, is illegal – Matter remitted back to decide the objection as to the maintainability of claim petition afresh after recording evidence.

Shamim Bano v. Rajesh Kumar and another

Judgment dated 06.01.2009 passed by the High Court in Miscellaneous Appeal No. 3507 of 2007, reported in 2009 (2) MPLJ 85

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215. MOTOR VEHICLES ACT, 1988 – Sections 166, 168 and Schedule II
Compounding the amount of compensation for disability in non-fatal motor accidents.

Asraf Alli v. Naveen Hotels Limited and another

Judgment dated 19.12.2008 passed by the Supreme Court in Civil Appeal No. 7430 of 2008, reported in (2009) 2 SCC 755

Held:

In computing the amount of compensation, the court may in a given case take the benefit of the structured formula as envisaged in the table appended to the Second Schedule of the Motor Vehicles Act, 1988, Note 5 whereof reads as under:

"5. Disability in non-fatal accidents:

The following compensation shall be payable in case of disability to the victim arising out of non-fatal accidents:

Loss of income, if any, for actual period of disablement not exceeding fifty-two weeks.

Plus either of the following :-

(a) In case of permanent total disablement the amount payable shall be arrived at by multiplying the annual loss of income by the Multiplier applicable to the age on the date of determining the compensation, or

(b) In case of permanent partial disablement such percentage of compensation which would have been payable in the case of permanent total disablement as specified under item (a) above.

Injuries deemed to result in Permanent Total Disablement/ Permanent Partial Disablement and percentage of loss of earning capacity shall be as per Schedule I under Workmen's Compensation Act, 1923."

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***216. MOTOR VEHILCES ACT, 1988 – Sections 166, 168 and Schedule II**
WORKMEN'S COMPENSATION ACT, 1923 – Schedule I

(i) A claimant who had suffered injuries in a motor vehicle accident resulting in amputation of both legs is entitled to 100% compensation in terms of Workmen's Compensation Act, 1923, Schedule I. The amount of compensation which represents the loss of income can be calculated either in terms of the structured formula as contained in the Motor Vehicles Act, 1988, Schedule II or on the basis of the other material brought on record.

A person, although alive, but not in a position to move and even for every small thing has to depend upon the services of another, a direction under the note appended to the Schedule II to deduct one-third of the amount from his total income need not always be insisted upon – In a case where the injured had suffered 100% disability, the legal principle for determination of compensation applicable to a deceased can, in appropriate cases, taking note of all relevant facts, be reasonably applied even in a case of totally permanent disabled person – Moreover, the multiplier may be increased where the plaintiff is a high taxpayer.

(ii) The claimant aged 55 years was to retire within a few years, but in view of the injuries suffered he had to give up his job. The life expectancy of an Indian citizen is about 62 years.

The respondent (claimant) has become totally immobile – He was a highly placed employee in a prestigious public sector undertaking. By reason of termination of service, he is not only deprived of his salary but also various other allowances to which he was otherwise entitled to – His family members could have taken benefit of some of the allowances – It is not necessary to interfere either with the application of multiplier of eight or non-deduction of one-third from his net salary.

However, what was the net salary of the respondent (claimant) should have been determined – An employee, when not in employment, is not to pay his tax. *Income tax payable from the salary, therefore, was required to be deducted* – The High Court has directed payment of interest at the rate of 9% per annum – From the gross income of the respondent (claimant), the amount of income tax, as was applicable at the relevant time, should be deducted.

Oriental Insurance Company Limited v. Ram Prasad Varma and others

Judgment dated 13.01.2009 passed by the Supreme Court in Civil Appeal No. 106 of 2009, reported in (2009) 2 SCC 712

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217. N.D.P.S. ACT, 1985 – Section 37 (1) (b)
CRIMINAL PROCEDURE CODE, 1973 – Section 439

The power to grant bail to a person accused of having committed an offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of CrPC, it is also subject to restrictions placed by Clause (b) of sub-section (1) of Section 37 of the NDPS Act.

In these conditions, the satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds.

Union of India v. Rattan Malik alias Habul

Judgment dated 23.01.2009 passed by the Supreme Court in Criminal Appeal No. 137 of 2009, reported in (2009) 2 SCC 624

Held:

It is plain from a bare reading of the non-obstante clause in Section 37 of the NDPS Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions *viz* (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".

The expressions 'reasonable grounds' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn, points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. [Vide *Union of India v. Shiv Shanker Kesari, (2007) 7 SCC 798.]* Thus, recording of satisfaction on both the aspects, noted above, is *sine qua non* for granting of bail under the NDPS Act.

While considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence (s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.

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***218. N.D.P.S. ACT, 1985 – Section 57**
EVIDENCE ACT, 1872 – Section 24

(i) Section 57 of NDPS Act, nature of – Provision is directory – Compliance in substance is sufficient.

(ii) Extra judicial confession, reliability of – Extra judicial confession cannot *ipso facto* be termed to be tainted – If made voluntarily and duly proved, can be relied upon by Court.

Dwarkalal & Anr. v. Government of India

Judgment dated 15.10.2008 passed by the High Court in Criminal Appeal No. 1006 of 2003, reported in 2009 (II) MPJR 59

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219. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 118 & 139
Dishonour of cheque – The burden of complainant to prove existence of debt or liability does not absolve on account of provisions of presumption under Sections 118 and 139 of N.I. Act.

P. Venugopal v. Madan P. Sarathi

Judgment dated 17.11.2008 passed by the Supreme Court in Criminal Appeal No. 1699 of 2008, reported in AIR 2009 SC 568

Held:

Section 138 of the Negotiable Instruments Act reads as under:

> *"Dishonour of cheque for insufficiency, etc., of funds in the account.* – Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:
>
> Provided that nothing contained in this section shall apply unless-
>
> (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the, receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice."

The Act raised two presumptions; one contained in Section 118 of the Act and other in Section 139 thereof. Section 118(a) reads as under:

> "*118. Presumption as to negotiable instruments.*– Until the contrary is proved, the following presumptions shall be made:-
>
> (a) Of consideration.- that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration:
>
> Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him."
>
> Section 139 of the Act reads:
>
> "*139. Presumption in favour of holder.* – It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability."

Indisputably, in view of the decisions of this Court in *Krishna Janardhan Bhat v. Dattatraya G. Hegde, (2008) 4 SCC 54* the initial burden was on the complainant. The presumption raised in favour of the holder of the cheque must be kept confined to the matters covered thereby. The presumption raised does not extend to the extent that the cheque was issued for the discharge of any debt or liability which is required to be proved by the complainant. In a case of this nature, however, it is essentially a question of fact.

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220. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 118, 138 & 139 EVIDENCE ACT, 1872 – Sections 4 & 114

(i) Dishonoured cheques alleged to be issued for purchase of woollen carpets by the accused but the documentary and oral evidence produced by the accused shows that complainant himself had declared to Sales Tax Department that no sale of woollen carpets had taken place during the relevant period i.e. 1994-1995 – Held, the accused has discharged the onus of proving that the cheques were not received by the holder for discharge of debt or liability – Hence, accused has rebutted the presumption against him under Section 139 and therefore, offence under Section 138 also not proved against accused.

(ii) 'Presumption', meaning and purpose thereof explained.

(iii) Where a Court raises a presumption then distinction between 'may presume' and 'shall presume' comes to an end, till it is disproved – Standard of proof required for rebuttal – Reiterated.

Kumar Exports v. Sharma Carpets

Judgment dated 16.12.2008 passed by the Supreme Court in Criminal Appeal No. 2045 of 2008, reported in (2009) 2 SCC 513

Held:

In a civil suit to enforce a simple contract, the plaintiff has to aver in his pleading that it was made for good consideration and must substantiate it by evidence. But to this rule, the negotiable instruments are an exception.

In a significant departure from the general rule applicable to contracts, Section 118 of the Act provides certain presumptions to be raised. This Section lays down some special rules of evidence relating to presumptions. The reason for these presumptions is that, negotiable instrument passes from hand to hand on endorsement and it would make trading very difficult and negotiability of the instrument impossible, unless certain presumptions are made. The presumption, therefore, is a matter of principle to facilitate negotiability as well as trade. Section 118 of the Act provides presumptions to be raised until the contrary is proved (i) as to consideration, (ii) as to date of instrument, (iii) as to time of acceptance, (iv) as to time of transfer, (v) as to order of endorsements, (vi) as to appropriate stamp and (vii) as to holder being a holder in due course.

Section 139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.

Presumptions are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Indian Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely,

(1) "may presume" (rebuttable), (2) "shall presume" (rebuttable) and (3) "conclusive presumptions" (irrebuttable). The term 'presumption' is used to designate an inference, affirmative or disaffirmative of the existence of a fact, conveniently called the "presumed fact" drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal. Presumption literally means "taking as true without examination or proof".

Section 4 of the Evidence Act inter-alia defines the words 'may presume' and 'shall presume' as follows:-

> "4. 'may presume' .– Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved or may call for proof of it;
>
> 'shall presume' .– Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved: ....."

In the former case the Court has an option to raise the presumption or not, but in the latter case, the Court must necessarily raise the presumption. If in a case the Court has an option to raise the presumption and raises the presumption, the distinction between the two categories of presumptions ceases and the fact is presumed, unless and until it is disproved.

Section 118 of the Act inter alia directs that it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. Section 139 of the Act stipulates that unless the contrary is proved, it shall be presumed, that the holder of the cheque received the cheque, for the discharge of, whole or part of any debt or liability.

Applying the definition of the word 'proved' in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability. A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.

The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the

Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over.

The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act.

The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue.

The defence of the appellant (accused) was that he had agreed to purchase woolen carpets from the respondent (complainant) and had issued the cheques by way of advance and that the respondent (complainant) did not supply the carpets. It is the specific case of the respondent (complainant) that he had sold woolen carpets to the appellant (accused) on 6.8.1994 and in discharge of the said liability the appellant (accused) had issued two cheques, which were ultimately dishonoured. In support of his case the respondent produced the carbon copy of the bill. A perusal of the bill makes it evident that there is no endorsement made by the respondent accepting the correctness of the contents of the bill. The bill is neither signed by the appellant (accused).

On the contrary, the appellant (accused) examined one official from the Sales Tax Department, who positively asserted before the Court that the respondent had filed sales tax return for the Assessment Year 1994-95 indicating that no sale of woolen carpets had taken place during the said Assessment Year and, therefore, sales tax was not paid. The said witness also produced the affidavit sworn by the respondent (complainant) indicating that during the year 1994-95 there was no sale of woolen carpets by the respondent (complainant). Though the complainant was given sufficient opportunity to cross-examine the said witness, nothing could be elicited during his cross-examination so as to create doubt about his assertion that no transaction of sale of woolen carpets was effected by the respondent (complainant) during the year 1994-95. Once the testimony of the official of the Sales Tax Department is accepted, it becomes evident that no transaction of sale of woolen carpets had taken place between the respondent (complainant) and the appellant (accused), as alleged by the respondent (complainant). When sale of woolen carpets had not taken place, there was no existing debt in discharge of which, the appellant (accused) was expected to issue cheques to the respondent (complainant). Thus the accused has discharged the onus of proving that the cheques were not received by the holder for discharge of a debt or liability.

Under the circumstances the defence of the appellant (accused) that blank cheques were obtained by the respondent (complainant) as advance payment also becomes probable and the onus of burden would shift on the complainant. The complainant did not produce any books of account or stock register maintained by him in the course of his regular business or any acknowledgement for delivery of goods, to establish that as a matter of fact woolen carpets were sold by him to the appellant (accused) on August 6, 1994 for a sum of Rs. 1,90,348.39. Having regard to the materials on record, this Court is of the opinion that the respondent (complainant) failed to establish his case under Section 138 of the Act as required by law and, therefore, the impugned judgment of the High Court is liable to be set aside.

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***221. PREVENTION OF FOOD ADULTERATION ACT, 1954 – Sections 7/16 & 13 (2)**

EVIDENCE ACT, 1872 – Sections 3 & 134

(i) Sole testimony of Food Inspector, reliability of – Corroboration of main witness by independent witness is a rule of prudence and not the requirement of law – Testimony of Food Inspector cannot be rejected merely for want of corroboration by independent witnesses.

(ii) Service of notice, presumption of – The mere fact that A/d receipt is not filed or received back, is not sufficient to rebut or dislodge the presumption of service of notice sent by registered post in absence of any evidence to the contrary.

Chhotelal v. State of Madhya Pradesh

Judgment dated 20.06.2008 passed by the High Court in Criminal Revision No. 114 of 1999, reported in 2009 (2) MPHT 15

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222. SPECIFIC RELIEF ACT, 1963 – Sections 9, 10 & 20

Sale agreement is a bilateral contract and not a unilateral contract – In India, an agreement of sale signed by the vendor and delivered to and accepted by the purchaser, is considered as valid contract.

Aloka Bose v. Parmatma Devi and others

Judgment dated 17.12.2008 passed by the Supreme Court in Civil Appeal No. 6197 of 2000, reported in (2009) 2 SCC 582

Held:

The observation in *Md. Mohar Ali v. Mohd. Mamud Ali, AIR 1998 Gau 92* stating that an agreement of sale is an unilateral contract is not correct. An unilateral contract refers to a gratuitous promise where only one party makes a promise without a return promise. Unilateral contract is explained thus by *John D. Calamari & Joseph M. Perillo* in *The Law of Contracts* (4th Edition Para 2-10(a) at pages 64-65):

> "If A says to B, 'If you walk across the Brooklyn Bridge I will pay you $ 100,' A has made a promise but has not asked, B for a return promise. A has asked B to perform, not a commitment to perform. A has thus made an offer looking to a unilateral contract. B cannot accept this offer by promising to walk the bridge. B must accept, if at all, by performing the act. Because no return promise is requested, at no point is B bound to perform. If B does perform, a contract involving two parties is created, but the contract is classified as unilateral because only one party is ever under an obligation."

All agreements of sale are bilateral contracts as promises are made by both - the vendor agreeing to sell and the purchaser agreeing to purchase.

An agreement of sale comes into existence when the vendor agrees to sell and the purchaser agrees to purchase, for an agreed consideration on agreed terms. It can be oral. It can be by exchange of communications which may or may not be signed. It may be by a single document signed by both parties. It can also be by a document in two parts, each party signing one copy and then exchanging the signed copy as a consequence of which the purchaser has the copy signed by the vendor and a vendor has a copy signed by the purchaser. Or it can be by the vendor executing the document and delivering it to the purchaser who accepts it.

Section 10 of the Act provides all agreements are contracts if they are made by the free consent by the parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void under the provisions of the Contract Act. The proviso to Section 10 of the Act makes it clear that the section will not apply to contracts which are required to be made in writing or in the presence of witnesses or any law relating to registration of documents.

In any agreement of sale, the terms are always negotiated and thereafter reduced in the form of an agreement of sale and signed by both parties or the vendor alone (unless it is by a series of offers and counter-offers by letters or other modes of recognized communication). In India, an agreement of sale signed by the vendor alone and delivered to the purchaser, and accepted by the purchaser, has always been considered to be a valid contract. In the event of breach by the vendor, it can be specifically enforced by the purchaser. There is, however, no practice of purchaser alone signing an agreement of sale.

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223. SPECIFIC RELIEF ACT, 1963 – Sections 41 & 14

Contract not specifically enforceable, breach of – Remedy therefor – Injunction cannot be granted to prevent such breach – Adequate relief in such a case would be compensation in terms of money.

Managing Director, Century Textile Industries Ltd. and others v. Smt. Manju Gupta and another

Judgment dated 22.01.2009 passed by the High Court in Writ Petition (l) No.29 of 2009, reported in 2009 (2) MPHT 84 (DB)

Held:

Learned Counsel for the respondent submitted that present is a case of breach of the agreement because the defendants without observing the conditions of the agreement abruptly terminated the agreement that too, without making payment of the earlier balance, without directing refund of the security and without observing the condition of issuing one month's notice. It is also submitted by him that the plaintiffs have present as the only business to earn their livelihood, an injunction certainly should have been granted in their favour.

Section 41 of the Specific Relief Act clearly provides that, an injunction cannot be granted, – (e) to prevent the breach of a contract the performance of which would not be specifically enforced and (h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust. In the present matter if clauses (e) and (h) of Section 41 are read in juxtapositions with Section 14 of the Act then it would become clear that a contract cannot be specifically enforced where for the non-performance of the contract compensation in money is an adequate relief and the contract is in its nature determinable. In the present case if the plaintiffs feel that because of illegal termination of the contract they are losing the business then they would certainly be entitled to sue the defendants for damages. They can also file a suit for settlement of accounts and recovery of their commission etc. and for refund of the security. It is not in dispute before us that the contract between the parties is determinable in nature despite submission of learned Counsel for the respondents is that the contract was illegally determined. For application of Section 14 the termination whether is legal or illegal is not material, the question is whether the contract in its nature is determinable. If the contract can be determined then in view of Section 14, the contract cannot be specifically enforced and if the contract cannot be specifically enforced then under Section 41 an injunction cannot be granted. Section 41 only says that an injunction cannot be granted, therefore, it would be for the Courts to decide that the injunction whether in the nature of temporary injunction, perpetual injunction or mandatory injunction in the circumstances can be granted. It is trite to say that if a final or mandatory injunction cannot be granted in favour of a party then it would be an illegal exercise of the power in granting temporary injunction which would stand determined with the determination of the suit.

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***224. STAMP ACT, 1899 – Sections 33 and 35**
REGISTRATION ACT, 1908 – Section 49

(i) Section 35 of Stamp Act provides that an instrument shall be inadmissible in evidence for any purpose if the same is not duly stamped and Section 33 casts a duty upon every person who has authority to receive evidence and every person in discharge of a public office before whom the instrument is produced if it appears to him that the same is not duly stamped to impound the same – Sub-section (2) of Section 33 of the Stamp Act lays down the procedure for undertaking the process of impounding.

(ii) Section 49 of Registration Act provides for use of unregistered document (which otherwise requires to be registered by Section 17 of Registration Act or by any provision of Transfer of Property Act, 1882) as evidence of any collateral transaction not required to be affected by registered instrument but Section 35 of the Stamp Act rules out applicability of such provision as it is categorically provided therein that a document of insufficiently

stamped or unstamped document shall not be admitted for any purpose whatsoever – Hence, without compliance of the provisions of Sections 35 and 33 of the Stamp Act such document cannot be used for collateral transaction as provided under Section 49 of Registration Act. [*Bondar Singh v. Nihal Singh, (2003) 4 SCC 161* distinguished]

In *Ram Rattan v. Parma Nand, AIR 1946 PC 51* it was held that the words 'for any purpose' in Section 35 of the Stamp Act, should be given their natural meaning and effect and would include a collateral purpose (and that) an unstamped partition deed cannot be used to corroborate the oral evidence for the purposes of determining even the factum of partition as distinct from its terms. (Also see *T. Bhaskar Rao v. T. Gabriel, AIR 1981 AP 175, Bhaskarabhotla Padmanabhaiah v. B. Lakshminarayana, AIR 1962 AP 132* and *Sanjeeva Reddi v. Johanputra Reddi, AIR 1972 AP 373*)

Avinash Kumar Chauhan v. Vijay Krishna Mishra

Judgment dated 17.12.2008 passed by the Supreme Court in Civil Appeal No. 7350 of 2008, reported in (2009) 2 SCC 532

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225. SUCCESSION ACT, 1925 – Section 63 (c)
EVIDENCE ACT, 1872 – Sections 68, 69, 70 & 90

Presumption regarding 30 years old documents not applicable to "Will" – A Will must be proved in terms of Section 63 (c) of Indian Succession Act and Section 68 of Evidence Act – In case the said provisions cannot be complied with, Sections 69 and 70 of Evidence Act, providing for exceptions in relation thereto, would be attracted.

Bharpur Singh and others v. Shamsher Singh

Judgment dated 12.12.2008 passed by the Supreme Court in Civil Appeal No. 7250 of 2008, reported in (2009) 3 SCC 687

Held:

The provisions of Section 90 of the Indian Evidence Act keeping in view the nature of proof required for proving a Will have no application. A Will must be proved in terms of the provisions of Section 63(c) of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. In the event the provisions thereof cannot be complied with, the other provisions contained therein, namely, Sections 69 and 70 of the Indian Evidence Act providing for exceptions in relation thereto would be attracted. Compliance with statutory requirements for proving an ordinary document is not sufficient, as Section 68 of the Indian Evidence Act postulates that execution must be proved by at least one of the attesting witness, if an attesting witness is alive and subject to the process of the Court and capable of giving evidence. [See *B. Venkatamuni v. C.J. Ayodhya Ram Singh, (2006) 13 SCC 449,]*

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226. SUCCESSION ACT, 1925 – Sections 372 & 373

Succession certificate, issuance of – Court is required to decide summarily the right to certificate and not the title to the subject matter.

Nirmala Bai and another v. Nityagopal @ Premnarayam and others Judgment dated 19.11.2008 passed by the High Court in Miscellaneous Appeal No. 1625 of 2005, reported in 2009 (2) MPLJ 90

Held:

Section 372 of the Indian Succession Act, 1925, enables a person to submit application for grant of succession certificate in respect of debt or security of the deceased who dies intestate. Clause (b) of sub-section (1) requires the applicant to specify the right in which he claims. Section 373 of the said Act provides a procedure for dealing with such an application. Clause (b) of sub-section (3) of section 373 requires the Succession Judge to decide in a summary manner the right to the certificate. Thus, all that is required is to hold a summary enquiry into the right to certificate with a view on the one hand to facilitate collection of debts due to deceased and prevent their being time-barred and on the other hand to afford protection to debtors by appointing a representative to deceased and authorizing him to give a valid discharge for the debt. While deciding an application for succession certificate, the Court is called upon only to make summary enquiry about the rights to the succession certificate and not in respect of title to the assets. The purpose of grant of certificate is not to give litigant parties an opportunity of litigating contested question of title to property. The object of Part X of Indian Succession Act is to obtain appointment of some person to give legal discharge to debtors to estate for debts due. It is not intended that nice questions of law as to rights of parties to estate of deceased should be decided on an application under it. *RM.VR. Veerappa Chettiar v. M. Ars. S. Kavuveri Achi and others, AIR 1955 NUC (Madras) 3943.*

Larger Bench of Calcutta High Court constituted by five Judges in the case of *Brojendra Sunder Banerji v. Niladrinath Mukherjee and others, AIR 1929 Calcutta 661* has observed: –

> "In my opinion it is not the law that the Court upon an application for a certificate has to decide for itself, as a condition of granting the certificate, that the case is not in which the debt was due to the deceased person within the meaning of Section 214. A reasonable and sensible claim to be enabled to proceed against a third party as being a debtor of a deceased person is sufficient for the purpose of clothing the Court with jurisdiction under Section 373 and may be regarded as ground for entertaining the application."

Larger Bench has further quoted:

"In 1875 we find Glover, J., repeating the same rule and in the same way as Jackson, J., had done:

"The current of decisions in this Court....seems to lay it down that the petitioner for a certificate need do nothing more than prove his title to collect the debts if there are any. I should certainly have though that it was first necessary to show that there was a need for the certificate by giving at least prima facie evidence of the existence of debts; but as I have not been shown any decision going to that length I am willing to follow the rulings mentioned above, and to hold that the petitioners' title was the thing to be looked to. *Beemul v. Shibur, (1875) 24 W.R. 211.*"

It has been further clearly observed: –

"Prima facie a person disputing the title of the deceased to the debts in question is only putting himself out of Court, showing good reason why some willing person other than himself should be authorized to assert the claim in the right of the deceased".

Thus, it can be safely said that in proceedings under section 373 Succession Act, Court has power to confine itself entirely to question of right to certificate and not to decide upon title, reality and character of claim.

I may also derive little strength from the decision of Nagpur High Court in the case of *Kisan Gopal Madan Gopal v. Chunnilal Hanamantram and others, AIR 1938 Nagpur 47,* wherein the grant of succession certificate was opposed by the objector on the ground that a Will was executed by the deceased in his favour. Pollock J. while deciding the matter has held that the decision would involve the question of valid execution of the Will alleged by the objector, but it will not involve the question whether the deceased was entitled to dispose of the property mentioned in the Will. Thus, in an application for issuance of succession certificate whether debt/security in respect of which the certificate is applied for belonged to the deceased or not is irrelevant and cannot be gone into because it would amount to decide the question of title thereto.

In the case in hand, appellants are admittedly the daughters of deceased Ram Bai, who held the subject FDR in her sole name. Learned lower Court has held in paragraph 12 that Ram Bai had no independent source of income and the money deposited in her name in the subject FDR was by Manaklal, who was husband of the mother of respondents. Thus, the learned subordinate Judge has not decided the right to certificate but has decided the title to the subject FDR ignoring that it was in the sole name of Ram Bai. This is, obviously, beyond the scope of Par-X of the Indian Succession Act. Sub-section (3) of Section 373 of the said Act, clearly lays down that if a Judge cannot decide the right to the certificate without determining questions of law or fact which seem to be too

intricate and difficult for determination in a summary proceeding, he may nevertheless grant a certificate to the applicant if he appears to be the person having prima facie the best title thereto.

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227. SUCCESSION ACT, 1925

"Will" interpretation thereof – Intention of testator is determinative factor – It can be ensured from the construction of the Will and the surrounding circumstances – The Court will put itself in the armchair of the testator.

Narendra Gopal Vidyarthi v. Rajat Vidyarthi

Judgment dated 02.12.2008 passed by the Supreme Court in Civil Appeal No. 7010 of 2008, reported in (2009) 3 SCC 287

Held:

In *Navneet Lal v. Gokul, (1976) 1 SCC 630* it has been held:

> "8. From the earlier decisions of this Court the following principles, *inter alia,* are well established:
>
> '(1) In construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered; but that is only for the purpose of finding out the intended meaning of the words which have actually been employed. (*Ram Gopal v. Nand Lal, AIR 1951 SC 139*)
>
> (2) In construing the language of the will the court is entitled to put itself into the testator's armchair [*Venkata Narasimha Appa Row v. Parthasarathy Appa Row,* (1913-14) 41 IA 51] and is bound to bear in mind also other matters than merely the words used. It must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense... But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document. [*Venkata Narasimha case (supra)* and *Gnanambal Ammal v. T. Raju Ayyar, AIR 1951 SC 103*]
>
> (3) The true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory. (*Raj Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer, AIR 1953 SC 7*)

(4) The court must accept, if possible, such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative. The court will look at the circumstances under which the testator makes his will, such as the state of his property, of his family and the like. Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further, where one of the two reasonable constructions would lead to intestacy, that should be discarded in favour of a construction which does not create any such hiatus. (*Pearey Lal v. Rameshwar Das, AIR 1963 SC 1703*)

(5) It is one of the cardinal principles of construction of wills that to the extent that it is legally possible effect should be given to every disposition contained in the will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the will. (*Ramachandra Shenoy v. Hilda Brite, AIR 1964 SC 1323*)' "

[See also *Arunkumar v. Shriniwas, (2003) 6 SCC 98*]

This aspect of the matter has recently been considered in *Bajrang Factory Ltd. v. University of Calcutta, (2007) 7 SCC 183,* wherein it was held :

"39. With a view to ascertain the intention of the maker of the will, not only the terms thereof are required to be taken into consideration but also all circumstances attending thereto. The will as a whole must, thus, be considered for the said purpose and not merely the particular part thereof. As the will if read in its entirety, can be given effect to, it is imperative that nothing should be read therein to invalidate the same.

40. In construing a will, no doubt, all possible contingencies are required to be taken into consideration, but it is also a well-settled principle of law that only because a part of a document is invalid, the entire document need not be invalidated, if the former forms a severable part. ..."

In *Anil Kak v. Kumari Sharda Raje, (2008) 7 SCC 695,* this Court stated:

> "37. The testator's intention is collected from a consideration of the whole Will and not from a part of it. If two parts of the same Will are wholly irreconcilable, the court of law would not be in a position to come to a finding that the Will dated 4.11.1992 could be given effect to irrespective of the appendices. In construing a Will, no doubt all possible contingencies are required to be taken into consideration. Even if a part is invalid, the entire document need not be invalidated, only if it forms a severable part. [See *Bajrang Factory Ltd.* (supra)]
>
> 38. In *Halsbury's Laws of England,* 4th Edn. Vol. 50, page 239, it is stated:
>
> '408. *Leading principle of construction:* The only principle of construction which is applicable without qualification to all wills and overrides every other rule of construction is that the testator's intention is collected from a consideration of the whole will taken in connection with any evidence properly admissible, and the meaning of the will and of every part of it is determined according to that intention'."

In *Shyamal Kanti Guha v. Meena Bose, (2008) 8 SCC 115* it is stated :

> "9. Keeping in mind the aforementioned backdrop, the Will should be construed. It should be done by a Court indisputably placing itself on the arm-chair of the testator. The endeavour of the Court should be to give effect to his intention. The intention of the testator can be culled out not only upon reading the Will in its entirety, but also the background facts and circumstances of the case."

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228. TRADE MARKS ACT, 1999 – Section 134
CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 and 2

(i) Use of identical or similar trade name/mark – Temporary injunction, issuance of – Injunction is a relief of equitable nature and balance is to be struck while dealing with a matter of injunction inasmuch as it is to be ensured that the plaintiff's rights are to be protected without causing obstruction/disturbance to the exercise of rights by defendants in a rightful manner.

(ii) Right to sue for the purposes mentioned in Section 134 of the Trade Marks Act, 1999 is in no way, curtailed by Section 22 of the Companies Act, 1956

Marble City Hospital and Research Centre Pvt. Ltd. v. City Hospital and Research Centre Pvt. Ltd. and others

Judgment dated 23.01.2009 passed by the High Court in Miscellaneous Appeal No. 3688 of 2008, reported in 2009 (2) MPLJ 73

Held:

First and foremost objection of learned senior counsel is that the suit of the plaintiff does not fall under Section 134 of the Trade Marks Act, 1999 and no application for temporary injunction could be entertained on the pleadings contained in the plaint as well as in the application under Order 39, Rules 1 and 2 Civil Procedure Code. Section 134 empowers a District Court to entertain a suit. –

(a) for the infringement of a registered trade mark; or

(b) relating to any right in a registered trade mark; or

(c) for passing off arising out of the use of the defendant of any trade mark which is identical with or deceptively similar to the plaintiffs trade mark, whether registered or unregistered.

It further enables the registered proprietor and the registered user to bring the suit by virtue of explanation contained in it. "Mark" and "Trade Mark" are defined in clause (m) and clause (zb) of sub-section (1) of section 2 of the said Act in the following manner : –

(m) "mark" includes a device, brand heading, label, ticket, name, signature, work, letter, numeral, shape of goods, packaging or combination of colours or any combination therof;

(zb) "trade mark" means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of any person from those of others and may include shape of goods, their packaging and combination of colours.

Aforesaid definitions make it clear that the definition of mark is of inclusive nature whereas definition of trade mark is of exhaustive nature. Clause (c) of Section 134 is not confined to registered trade marks. Plaintiff's contention is that he has been using the name of Marble City Hospital and Research Centre Pvt. Ltd. since 1997 as its trade name which would fall within the word "mark" as defined in clause (m). "Trade mark" defined in clause (zb) means a mark capable of being represented graphically. Word "graphical representation" has been defined in the Trade Marks Rules, 2002 as representation of a trade mark for goods or services in paper form. Thus, words 'Marble City Hospital and Research Centre' are found to be capable of being represented in graphical manner and fall within the definition of trade mark for the purposes of clause (zb) as well as provisions of the Trade Marks Act, 1999.

Further submission of learned senior counsel is that sub-section (2) of Section 20 of the Companies Act, 1956 has been amended in the year 1999 and the plaintiff had an alternate remedy in the form of Section 22 of the said Act. Plaintiff/appellant could have applied to the Central Government for making change in the name of the defendants' company. This, too, is not impressive because the right of the defendants to sue for the purposes mentioned in Section134 of the Trade Marks Act, 1999 is in no way curtailed by Section 22 (supra). Moreover, Section 22 does not enable an unregistered proprietor of the trade mark to submit an application for change in the name of another company seeking its registration by identical name.

As regards merits of the case, it is not disputed that Marble City Hospital and Research Centre is running since 1997 whereas the defendants have opened new hospital in the name of City Hospital and Research Centre. The words Marble City Hospital and Research Centre Pvt. Ltd. and City Hospital and Research Centre Pvt. Ltd. do not tally fully but they are partly, substantially and phonetically identical. They cannot be said to be absolutely distinct and different. There perhaps would not have any dispute, if they were situated at different locations with a substantial distance between them. The dispute seems to be more or less on account of inter se dispute between the lessor and lessee of the Marble City Hospital and Research Centre.

Hon'ble Supreme Court of India in the case of *Laxmikant V. Patel v. Chetanbhai Shah and another, (2002) 3 SCC 65* has observed: –

> "It is common in the trade and business for a trader or a businessman to adopt a name and/or mark under which he would carry on his trade or business. According to Kerly (Law of Trade Marks and, Trade Names, Twelfth Edition, para 10.49), the name under which a business trades will almost always be a trade mark (or if the business provides services, a service mark, or both). Independently of questions of trade or service mark, however, the name of a business (a trading business or any other) will normally have attached to it a goodwill that the Courts will protect. An action for passing-off will then lie wherever the defendant company's name, or its intended name, is calculated to deceive, and so to divert business from the plaintiff, or to occasion a confusion between the two businesses. If this is not made out there is no case. The ground is not to be limited to the date of the proceedings; the court will have regard to the way in which the business may be carried on in the future, and to its not being carried on precisely as carried on at the date of the proceedings. Where there is probability of confusion in business, an injunction will be granted even though the defendants adopted the name innocently."

It is further observed in paragraph 10: –

> "A person may sell his goods or deliver his services such as in case of a profession under a trading name or style. With the lapse of time such business or services associated with a person acquire a reputation or goodwill which becomes a property which is protected by Courts. A competitor initiating sale of goods or services in the same name or by imitating that name results in injury to the business of one who has the property in that name. The law does not permit any one to carry on his business in such a way as would persuade the customers or clients in believing that the goods or services belonging to someone else are his or are associated therewith. It does not matter whether the latter person does so fraudulently or otherwise. The reasons are two. Firstly, honesty and fair play are, and ought to be, the basic policies in the world of business. Secondly, when a person adopts or intends to adopt a name in connection with his business or services which already belongs to someone else it result in confusion and has propensity of diverting the customers and clients of someone else to himself and thereby resulting in injury."

Hon'ble Supreme Court in the case of *Parle Products (P) Ltd. v. J.P. & Co. Mysore, AIR 1972 SC 1359* has held that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him. Thus, the test to determine the distinction is the similarity and not the dissimilarity between the competing marks.

Phonetically similarity is also liable to be taken into consideration as observed by the Supreme Court in the case of *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd., (2001) 5 SCC 73.* In *Cadila's case* (supra), the necessary factors for deciding the question of deceptive similarity in an action of passing off on the basis of unregistered trade mark generally has been enumerated as follows: –

> "a) The nature of the marks i.e. whether the marks are word marks or label marks or composite marks, i.e. both words and label works.

b) The degree of resemblances between the marks, phonetically similar and hence similar in idea.

c) The nature of the goods in respect of which they are used as trade marks.

d) The similarity in the nature, character and performance of the goods of the rival traders.

e) The class of purchasers who are likely to buy the good bearing the marks they require, on their education and intelligence and a degree of care they are likely to exercise in purchasing and/or using the goods.

f) The mode of purchasing the goods or placing orders for the goods and

g) Any other surrounding circumstances which may be relevant in the extent of dissimilarity between the competing marks."

Looking to the dispute of present nature, following may be deduced for deciding the question of deceptive similarity: –

(a) Nature of the trade mark i.e. "Marble City Hospital and Research Centre Pvt. Ltd." and "City Hospital and Research Centre Pvt. Ltd."

(b) Degree if resemblances between the marks – except the work "Marble", remaining name is alphabetically as well as phonetically common.

(c) Nature of service. Both provide medical treatment services.

(d) Substantial similarity in the nature and character of the services rendered in the fields of Medicine, Orthopaedics, Gynaecology, Obstetrics, E.N.T., Ophthalmology, Neurosurgery etc.

(e) Class of patients – substantially identical.

(f) Dissimilarity is only about the word "Marble" which is found in the name of the plaintiff's hospital alone.

In the case of *Glendy v. Smith, (1865) 2 Drew & Sm. 476; 11 Jur. N.S. 964; 13 L.T. 11; 13 W.R. 1032; 6 N.R. 363; 62 E.R. 701* it was held that: –

> "It is not the question whether the public generally or even a majority of the public is likely to be mislead; but whether the unwary, the heedless, the incautious portion of the public would be likely to be misled."

From the aforesaid, it is clear that the two names of the plaintiff's and defendants' hospital namely Marble City Hospital and Research Centre Pvt. Ltd. and City Hospital and Research Centre Pvt. Ltd do not have total similarity, but they are not equally totally distinct. Literate class may not be misled, but misleading of illiteratè class cannot be totally ruled out, moreso, because both the hospitals are situated adjoining to each other at a common place. Supreme Court of India n a recent case of *Heinz Italia and another v. Dabur India Ltd., (2007) 6 SCC 1* has followed Lord Diplock's decision in *Erven Warnink BV v. J. Townend & Sons* that: –

> "The modern tort of passing off has five elements i.e. (1) a misrepresentation, (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence), and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so."

In another case *M/s Satyam Infoway Ltd. v. M/s Sifynet Solutions Pvt. Ltd., AIR 2004 SC 3540,* Supreme Court has observed: –

> "The next question is would the principles of trade mark law and in particular those relating to passing off apply? An action for passing off, as the phrase "passing off" itself suggests, is to restrain the defendant from passing off its goods or services to the public as that of the plaintiff's. It is an action not only to preserve the reputation of the plaintiff but also to safeguard the public. The defendant must have sold its goods or offered its services in a manner which has deceived or would be likely to deceive the public into thinking that the defendant's goods or services are the plaintiffs. The action is normally available to the owner of a distinctive trademark and the person who, if the word or name is an invented one, invents and uses it. If two trade rivals claim to have individually invented the same mark, then the trader who is able to establish prior user will succeed."

Normally, while deciding an application for temporary injunction, three necessary limbs of prima facie case, balance of convenience and irreparable of injury are taken into consideration. Fourth factor of conduct is also relevant as observed by this Court long back in the case of *Chhotey Singh and others v. Gangadhar and others, 1972 JLJ SN 68.* Injunction is a relief of equitable nature and a balance is to be struck while dealing with a matter of injunction in as much

as it is to be ensured that the plaintiffs rights are to be protected without causing obstructions/disturbance to the exercise of rights by the defendants in a rightful manner. While striking a balance, conduct of the parties gains important significance.

It is clear that the plaintiffs Hospital is a well reputed hospital with a known goodwill. Defendants' Hospital though, is a separate entity may mislead illiterate and unwary patients. It is true that the defendants/respondents even before this Court have categorically stated in paragraph-9 that they have not chosen the name of City Hospital and Research Centre to obtain advantage and passing off their deceptive or phonetic similarity identical to the appellants company.

At this juncture Section 27 of the Trade Marks Act, 1999 is also to be taken note of which recognizes common right of the trade mark owner to take action against any person for passing of f services. One important fact in the case which cannot be lost sight of is that the City Hospital of the defendants has already been inaugurated on 12.07.2008 and is running since then. This being so, there cannot be blanket restraint against user of land for hospital or user of words "City Hospital and Research Centre".

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229. TRANSFER OF PROPERTY ACT, 1881 – Section 52

(i) Doctrine of *lis pendens*, effect of – It prohibits a party from dealing with the property which is the subject matter of the suit – If property is acquired *pendente lite*, acquirer (transferee) is bound by decree ultimately obtained in the proceedings at the time of acquisition.

(ii) Attesting witness – No presumption as to his awareness of contents of document.

Shakuntaladevi and others v. Shivpuri Sahkari Bhumi Vikas Bank Maryadit and others

Judgment dated 25.11.2008 passed by the High Court in S.A No. 449 of 1999, reported in 2009 (1) MPLJ 467

Held:

I have heard the arguments of the learned counsel for the parties and perused the record of the case. From the pleadings of the parties it is not in dispute that Nathua executed an agreement on 13.10.1958 in favour of Jhinguria in respect of the suit land. The suit for specific performance of contract filed by Jhinguria was decreed on 13.7.1961. In execution proceedings sale deed in respect of the suit property was executed in favour of Jhinguria, on 17.8.1967 (Ex.P.2). On 17.5.1968 Jhinguria transferred the suit property to the original plaintiff Prem Narayan Sharma vide (Ex.P.3). The name of Prem Narayan Sharma was mutated by the Tahsildar vide Ex.P.5. After death of Prem Narayan Sharma property was inherited by his wife and her name was mutated in the revenue

record. On 16.2.1966 Nathua obtained loan from the respondent no.1 to 3 Bank and mortgage the suit land in favour of the Bank. No loan amount was paid and therefore, Bank initiated proceedings for auctioning the property. The sale Officer was appointed. The respondent no.10 in auction sale purchased the suit property on 28.6.1973. He being the highest bidder, his bid was accepted and the sale made in his favour was confirmed on 7.3.1979 by the Sale Officer. Thereafter on 5.1.1981 the civil suit was filed by the plaintiff. The objection of the respondents that the suit was barred by time and that the Court had no jurisdiction to entertain the suit and to try it was dismissed by the trial Court by deciding preliminary issues on 13.1.1982. The said dismissal order was confirmed by this Court in Civil Revision No.970/1982 on 26.7.1985.

The suit property was acquired pendente lite by the respondent no.10 after passing a decree in favour of Jhinguriya, the defendant no.10 acquirer is bound by the decree. Nathua had no right to mortgage the suit property in favour of the respondent Bank after 31.7.1961. Section 52 places a complete embargo on the transfer of immovable property, right to which is directly and specifically in question in a pending litigation. Therefore, the attachment is ineffective against the doctrine. This question was considered by the Apex Court in the case of *Kedarnath v. Sheonarain, AIR 1970 SC 1717,* wherein it has been held that if the property was acquired pendente lite, the acquirer is bound by the decree ultimately obtained in the proceedings pending at the time of acquisition. This result is not avoided by reason of the earlier attachment. Attachment of property is only effective in preventing alienation but it is not intended to create any title to the property. On the other hand, Section 52 places a complete embargo on the transfer of immovable property right to which is directly and specifically in question in a pending litigation. Therefore the attachment was ineffective against the doctrine.

In the case of *Samarendra Nath Sinha v. Krishna Kumar Nag, AIR 1967 SC 1440* it was observed by the Apex Court as follows:

> "...The purchaser *pendente lite* under this doctrine is bound by the result of the litigation on the principle that since the result must bind the party to it so must it bind the person deriving his right, title and interest from or through him. This principle is well illustrated in *Radhamadhub Holder v. Monohar, (1887) 15 Ind App 97* where the facts were almost similar to those in the instant case. It is true that Section 52, strictly speaking, does not apply to involuntary alienations such as Court sales but it is well established that the principle of *lis pendens* applies to such alienations. [See *Nilkant v. Suresh Chandra, (1885) 12 Ind App 171 and (1897) 24 Ind App 170* (PC)]."

This ground also has no validity.

In view of the law laid down by the Apex Court in the case of *Samarendra Nath Sinha* (supra) the contention of the learned counsel for the respondents that the sale was by auction through sale officer and the doctrine of lis pendence will not apply to such sale is misconceived and the same cannot be accepted. In the present facts and circumstances of the case the suit property purchased by Jhinguriya and thereafter by Prem Narayan Sharma was protected by doctrine of lis pendence.

The Apex Court in the case of *Raj Kumar v. Sardari Lal and others, (2004) 2 SCC 601* has held that the decree passed against the defendant is available for execution against the transferee or assignee of the defendant judgment-debtor and it does not make any difference whether such transfer or assignment has taken place after the passing of the decree or before the passing of the decree without notice or leave of the court.

In the case of *Amit Kumar Shaw and another v. Farida Khatoon and another, (2005) 11 SCC 403* it has been held that transferee pendente lite is bound by decree passed in suit. Para 15 is relevant which reads as under:

> "15. Section 52 of the Transfer of Property Act is an expression of the principle "pending a litigation nothing new should be introduced". It provides that pendente lite, neither party to the litigation, in which any right to immovable property is in question, can alienate or otherwise deal with such property so as to affect his appointment. This Section is based on equity and good conscience and is intended to protect the parties to litigation against alienations by their opponent during the pendency of the suit. In order to constitute a lis pendens, the following elements must be present:
>
> 1. There must be a suit or proceeding pending in a Court of competent jurisdiction.
> 2. The suit or proceeding must not be collusive.
> 3. The litigation must be one in which right to immovable property is directly and specifically in question.
> 4. There must be a transfer of or otherwise dealing with the property in dispute by any party to the litigation.
> 5. Such transfer must affect the rights of the other party that may ultimately accrue under the terms of the decree or order."

Recently the Apex Court in the case of *Usha Sinha v. Dina Ram and others, 2008 (4) M.P.L.J. 141* has held that purchaser of the suit property during the pendency of litigation has no right to resist or obstruct execution of decree passed by a competent Court. The doctrine of "lis pendens" prohibits a party from dealing with the property which is the subject matter of suit. "Lis pendens" itself is treated as constructive notice to a purchaser that he is bound by a decree to be entered in the pending suit. Para 24 is relevant which reads as under:

> "24. Rule 29 of Order XXI of the Code deals with cases wherein a suit has been instituted by the judgment-debtor against the decree-holder and has no relevance to cases of lis pendens wherein transfer of property has been effected by the judgment debtor to a third party during the pendency of proceedings. The High Court, in our opinion, rightly held that the appellant could not be said to be a "stranger" to the suit inasmuch as she was claiming right, title and interest through defendant Nos.4 and 5 against whom the suit was pending. She must, therefore, be presumed to be aware of the litigation which was before a competent Court in the form of Title Suit No.140 of 1999 instituted by a present respondent against the predecessor of the appellant. As held in *Bellamy v. Sabine, (1867) 1 DG and J 566 = 44 ER 847* the fact that the purchaser of the property during the pendency of the proceedings had no knowledge about the suit, appeal or other proceeding is wholly immaterial and he/she cannot resist execution of decree on that ground. As observed in *Silverline Forum Pvt. Ltd. v. Rajiv Trust, (1998) 3 SCC 723* a limited inquiry in such cases is whether the transferee is claiming his right through the judgment-debtor. In our judgment, the High Court was also right in observing that if the appellant succeeds in the suit and decree is passed in her favour, she can take appropriate proceedings in accordance with law and apply for restitution. That, however, does not preclude the decree holder from executing the decree obtained by him. Since the appellant is a purchaser pendente lite and she has no right to offer resistance or cause obstruction and as her rights have not been crystallized in a decree, Rule 102 of Order 21 of the Code comes into operation. Hence, she cannot resist execution during the pendency of the suit instituted by her. The order passed by the High Court, therefore, cannot be said to be illegal, unlawful or otherwise contrary to law."

In the case of *Smt. Chandrakantaben v. Vadilal Bapalal Modi, (1989) 2 SCC 630* it has been held by the Apex Court that there is no presumption that the attesting witnesses of a document must be assumed to be aware of its contents. In the case of *Badri Narayan and others v. Rajabagyathammal and others, (1996) 7 SCC 101* the Apex Court has held that the predecessor-in-interest of the respondents was an illiterate person. He put his thumb impression as an attestor on Ex. A-2. In the circumstances, the learned Single Judge held that unless it is established that the recitals in the documents were read out and explained to the said person, he cannot be deemed to have assented to them. In case of attesting by a person having interest in the subject matter of the document of transfer must be deemed to have affirmed the contents of the documents prima facie. In other words the rule stated is not a presumption of law nor an irrebuttable presumption. It is more in the nature of presumption of fact, whose efficacy and evidentiary value depends upon the facts of the given case.

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***230. TRANSFER OF PROPERTY ACT, 1881 – Section 54**

Sale of immovable property, completion of – Essential elements of sale are : (i) parties, (ii) subject-matter, (iii) transfer or conveyance, and (iv) price or consideration – However, the payment of price is not necessarily a *sine qua non* for completion of sale – If intended, the sale would be complete as soon as deed is registered whether the sale price has been paid or not.

Smt. Kanaklatabai v. Parvatibai and others

Judgment dated 20.11.2008 passed by the High Court in Second Appeal No. 375 of 1996, reported in 2009 (1) MPHT 505

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Note : Asterisk (*) denotes short notes.

PART - III

CIRCULARS/NOTIFICATIONS

NOTIFICATION REGARDING AMENDMENTS IN THE MADHYA PRADESH GENERAL PROVIDENT FUND RULES

(Published in M.P. Rajpatra Part 4, dated 02.01.2009 at page 1)

No. F. 5-2-2004-Rule-IV. – In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Madhya Pradesh, hereby, makes the following further amendments in the Madhya Pradesh General Provident Fund Rules, namely: –

AMENDMENTS

In the said rules, –

1. In rule 15. –

(i) for sub rule (1), the following sub-rule shall be substituted, namely: –

"(1) A subscriber may, if so desires, apply in the prescribed form, to the Competent Authority for obtaining advance not exceeding twenty five percent of the amount that stood to his credit at the end of the second year immediately preceding the year in which the advance is applied for."

(ii) for sub-rule (2), the following sub-rule shall be substituted, namely: –

"(2) (a) A subscriber shall not be entitled to get a fresh advance so long as an earlier advance has not been repaid in full.

(b) An advance under sub-rule (1), shall be granted only two times and limited to twenty five percent of the amount that stood to his credit at the end of the second year immediately preceding the year in which the advance is applied for in any financial year, subject to compliance of sub-rule (2) (a) above."

(iii) for sub-rule (8), the following sub-rule shall be substituted, namely : –

"(8) The authority competent to sanction advance under sub-rule (1) shall be Head of Office in case of Class IV and Class III employees and for others Head of the Department or Collector.

In case of advance of Head of Office, the Controlling Officer and in case of Head of the Department, the Administrative Department will be the Competent Authority.

Note: The Class 1 Gazetted Officer who is the Head of Office of the District at District Level office, shall be Head of Department for these rules.".

(iv) sub-rules (9) and (10) and Notes (1) and (2) below sub-rule (10) shall be omitted.

(v) for Appendix "K" appended to sub-rule (6) of rule 15,a new Appendix shall be substituted.

2. In rule 16 –

(i) sub-rule (3) shall be omitted.

(ii) In sub-rule (6) of rule 16 for the words and figure ".sub-rule (9) of rule 15" the words and figure "sub-rule (1) of rule 15" shall be substituted.

3. In rule 16-A–

(i) for sub-rule (1), the following sub-rule shall be substituted, namely : –

"(1) A subscriber may, if he so desires apply in the prescribed form, to the competent authority for withdrawing from the balance to his credit an amount not exceeding fifty percent to the amount that stood to his credit at the end of the second year immediately preceding the year of withdrawal.

Note : A withdrawal under this rule shall not be sanctioned if and advance under rule 15 has been sanctioned at the same time."

(ii) Sub-rule (2) shall be omitted.

4. In rule 16-B–

(i) for sub-rule (1), the following sub-rule shall be substituted, namely : –

"(1) Only two withdrawals in any financial year shall be allowed to the subscriber, subject to the limits laid down in rule 16-A (1)" .

(ii) for sub-rule (2), the following sub-rule shall be substituted, namely : –

"(2) The Competent Authority may sanction seventy five percent of the amount standing to the credit of the subscriber at the end of the second preceding financial year for any special reason.

Note.: The subscriber has to give the full details and proof for withdrawal under special reasons. The subscriber has to satisfy to the Competent Authority for drawing more amount under the sub-rule. The Competent Authority for the withdrawal under special reasons will be Head of the Department in case of Non Gazetted employees and Administrative Department in case of Gazetted employees.".

(iii) for sub-rule (3), the following sub-rule shall be substituted, namely : –

"(3) (a) Not withstanding the provisions of sub-rule (1), any time after the expiry of 20 years of service or 50 years of age a subscriber may, of he so desires, apply in the prescribed form to the Competent Authority for the withdrawal of the ninety percent of the entire balance standing to his credit and the Competent Authority on receipt of such an application from the subscriber shall allow the withdrawal of the ninety percent of the entire balance (together with interest up to the

last day of month preceding the month in which the application for withdrawal is made) after making adjustments, if any, in respect of advance taken by him.

Note : For sanctioning the drawal under above sub-rule the Competent Authority should follow the conditions laid down in the General Administration Department's memo No. C-3-24/2000/3/1, dated 22-8-2000 and Finance Department Memo No. F-5-5-2002-rule-IV, dated 25-1-2003.

(b) Drawal under sub-rule (3) (a) shall be allowed only for one time.".

(iv) Sub-rule (4) shall be omitted.

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार
अशोक दास, प्रमुख सचिव

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE MADHYA PRADESH CHIKITSAK TATHA CHIKITSA SEVA SE SAMBADDHA VYAKTIYON KI SURAKSHA ADHINIYAM, 2008

(No. 17 of 2008)

[Received the assent of the Governor on the 2nd August, 2008; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 6th August, 2008].

An Act to provide for prohibition of assault, criminal force, intimidation and threat against medical and health service persons and for matters connected therewith and incidental thereto.

Be it enacted by the Madhya Pradesh Legislature in the Fifty-ninth year of the Republic of India as follows:–

1. Short title, extent and commencement. – (1) This Act may be called the Madhya Pradesh Chikitsak Tatha Chikitsa Seva Se Sambaddha Vyaktiyon Ki Suraksha Adhiniyam, 2008.

(2) It extends to the whole of the State of Madhya Pradesh.

(3) It shall come into force from the date of its publication in the official Gazette.

2. Definition.– (1) In this Act, unless the context otherwise requires.–

(a) "medical and health service institutions" means all institutions providing medical and health services to people in the recognized system of medicine and which are under the control of the State Government and Central Government, or Government of India or State Government undertaking, or local bodies etc., and includes aforementioned institution in private sector duly registered and licensed under the Madhya Pradesh Upcharyagriha Tatha Rujopchar Sambandhi Sthapnaye (Registrikaran Tatha Anugyapan) Adhiniyam, 1973 (No. 47 of 1973), and also includes clinical establishment, hospital, maternity home, medical laboratory, nursing home and physio-therapy establishment;

(b) "medical and health service persons" in relation to medical and health service institutions shall include. –

(i) registered medical practitioners;

(ii) qualified nurses;

(iii) qualified midwives;

(iv) paramedical workers;

(v) medical students;

(vi) nursing students;

(vii) paramedical students;

(viii) others associated employees, that is helpers, ayahs, ward boys, ministerial staff etc., working in medical and health service institutions;

(c) "medical student" means student undergoing graduate or post-graduate courses in the recognized system of medicine;

(d) "nursing student" means student undergoing diploma or degree courses in Nursing, Midwifery etc.;

(e) "paramedical student" means student undergoing diploma or degree in paramedical courses;

(f) "recognized system of medicine" means the following system of medicine, namely: –

(i) modern scientific system of medicine (Allopathic) within the meaning of the Indian Medical Council Act, 1956 (No. 102 of 1956)

(ii) Homeopathic and Biochemic System of Medicine within the meaning of clause (d) of Section 2 of the Madhya Pradesh Homeopathy Parishad Adhiniyam, 1976 (No. 19 of 1976);

(iii) Ayurvedic System, Unani System and Naturopathy System of Medicine within the meaning of Section 2 of the Madhya Pradesh Ayurvedic, Unani Tatha Prakritic Chikitsa Vyavasayi Adhiniyam, 1970 (No. 5 of 1971);

(g) "registered medical practitioner" means a medical practitioner qualified in the system of medicine recognized under the law that is, modern system of medicine (Allopathic), Ayurvedic and Unani System of Medicine, Siddha and Naturopathy and Homeopathy and Biochemic System of Medicine and are duly enrolled in the State Medical Register of the said system of medicine (also including those having provisional registration).

(2) The words and expression used in this Act but not defined shall have the same meaning as assigned to them in the Madhya Pradesh Upcharyagriha Tatha Rujopchar Sambandhi Sthapnaye (Registrikaran Tatha Anugyapan) Adhiniyam, 1973 (No. 47 of 1973), the Madhya Pradesh Sah Chikitsiy Parishad Adhiniyam, 2000 (No. 1 of 2001) and the Indian Penal Code, 1860 (No. 45 of 1860)

3. Prohibition of assault, criminal force, intimidation and threat.– Any act of assault, criminal force, intimidation and threat to medical and health service person during or incidental to discharge of his lawful duties pertinent to medical and health care delivery within medical and service institutions or in a mobile clinic or in an ambulance shall be prohibited.

4. Penalty.– Whoever voluntarily commits any act in contravention of Section 3 shall be punished with imprisonment of either description for term which may extend to three months or with fine which may extend o ten thousand rupees or both.

5. Offence to be cognizable and non-bailable.– Any offence committed under Section 3 shall be cognizable and non-bailable.

6. Compounding of offence.– The offence punishable under this Act may be compounded by the aggrieved persons with the permission of the court.

7. Jurisdiction to try offences.– No court inferior to that of a Judicial Magistrate of the First Class shall try an offence punishable under this Act.

8. Act not in derogation of any other law.– The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

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Three things to ***respect*** *– Old Age, Nation and Law*

Three things to ***admire*** *– Intellect, Character and Credibility*

Three things to ***cultivate*** *– Sympathy, Cheerfulness and Contentment*

Three things to ***stick*** *– Promise, Punctuality and Perfection*

Three things to ***prevent*** *– Idleness, Falsehood and Teasing*

Three things to ***govern*** *– Tongue, Temper and Action*

Three things to ***watch*** *– Word, Behaviour and Character*

Three things to ***love*** *– Honesty, Purity and Truth*