JOTI JOURNAL

Vol. IX
June 2003 (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

TRAINING COMMITTEE

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH

JABALPUR - 482 007

1.	Hon'ble Shri Justice Bhawani Singh	Chief Justice & Patron
2.	Hon'ble Shri Justice Rajeev Gupta	Chairman
3.	Hon'ble Shri Justice Dipak Misra	Member
4.	Hon'ble Shri Justice S.P. Khare	Member
5.	Hon'ble Shri Justice Arun Mishra	Member
6.	Hon'ble Shri Justice N.S. 'Azad'	Member
7.	Hon'ble Shri Justice Sugandhi Lal Jain	Member
8.	Hon'ble Shri Justice S.K. Pande	Member

• • •

EDITOR

Aryendra Kumar Saxena — Director

SUB-EDITOR

Ved Prakash Sharma — Addl. Director

JOTI JOURNAL JUNE, 2003

SUBJECT- INDEX

From the pen of the Editor 61

PART-I
(ARTICLES & MISC.)

1. Speech delivered by Hon'ble Shri Justice Bhawani Singh, Chief Justice, High Court of Madhya Pradesh 63
2. Address by Hon'ble Shri Justice Rajeev Gupta, Administrative Judge, High Court of Madhya Pradesh 69
3. Address by Hon'ble Shri Justice Dipak Misra, Judge, High Court of Madhya Pradesh 71
4. Split of case against absconding accused 74
5. Identification of accused: A ready reference 78
6. Temporary injunction- Basic legal issues 84
7. न्यायालयीन प्रबंधन 92
8. Application of Information Technology in Judiciary- Learn it yourself 98
9. Reduction to lower grade or stage- (some lesser cases) 102
10. Office bearers of Madhya Pradesh Judicial officers' Association 103

PART-II
(NOTES ON IMPORTANT JUDGMENTS)

ACT/TOPIC		NOTE NO.	PAGE NO.
ACCOMMODATION CONTROL ACT, 1961 (M.P.)			
Section 12 (1) (f)	- Bona fide need of son alleged - Pending litigation son joining service - This itself will not prove lack of bon afide	181	144
Section 13 (1) & (2)	- Dispute about arrears of rent without there being dispsute about rate of rent- Dispute not covered by Section 13 (1) and 13 (2)	168	136

ACT/TOPIC		NOTE NO.	PAGE NO.
ADVERSE POSSESSION			
	- Batai possession being permissive possession may not be basis of adverse possession	165	134
ADVOCATES			
	- Strike/boycott of Courts by lawyers- A lawyer has no right to go on strike or to give a call for boycott- Refusal to attend Court in pursuance to call for strike by Bar is unprofessional- Duty of Court and duty of lawyer explained	128	99
ADVOCATES ACT, 1961			
Section 35	- Professional misconduct by advocate - Relationship between advocate and his client is of trust- Preservation of mutual trust must for judicial system	134	105
ARBITRATION AND CONCILIATION ACT, 1996			
Section 9	- Interim relief under Section 9- Application seeking such relief can be filed only before the District Judge who is the principal Civil Court of original Jurisdiction.	141	110
BANKER AND CUSTOMER			
	- Interet rate - Terms of contract providing change in rate of interest on the basis of rise of interest on account of the RBI Circulars - For charging higher rate bank not required to give notice to the borrower	129	101
CIVIL PROCEDURE CODE, 1908			
Section 47, 152	- Defect in decree regarding identity of immovable property- Defect can be cured by making resort to Section 152 or 47 CPC	143 (ii)	113
O.5 Rr. 17 and 19	- Service of summons on defendant by affixing copy of summons- Return of summons should be accompanied by the affidavit of the process server or he should be examined in the Court	154	122

ACT/TOPIC		NOTE NO.	PAGE NO.
O.6 R. 17	- Amendment of plaint- Suit filed without seeking appropriate relief- May be allowed to be added later- Amendment- Effect - Normally it relates back to the date of suit unless directed otherwise.	157	125
O.7 R. 3 and O.20 R. 3	- Suit for immovable property- Details regarding property should be given in the plaint- Requirement of O.7 R. 3 Explained - Duty of the Court also explained	143 (i)	113
O.22 R. 6	- Death of defendant after recording of evidence but before arguments - Whether hearing of arguments a stage of hearing of suit- Yes	169	136
O. 41 Rr. 23, 23-A	- Order 41 Rule 23 and 23-A - Distinction between	163 (i)	131
O.41 R. 33	- Power of the Appellate Court under Order 41 Rule 31-A-Ambit and scope- Decree may be passed even in favour of a party who has not filed appeal	178	142
CONSUMER PROTECTION ACT, 1986			
Section 25 and 27	- Whether Forum has power to execute its own order - Yes	185	147
COURT FEES ACT, 1870			
Section 7 (iv) (c) Sch. II Art. 17	- Plaintiff not a party to the deed seeking declaration simpliciter- Ad valorem court fees not payable- Fixed court fees as per Art. 17 of Sch. II payable	142	111
Section 13	- Refund of court fees- Principle- Remand under O.41 R. 23 CPC- Appellant not entitled to claim refund of court fees	163 (ii)	131
Section 35	- Exemption on payment of Court fees under the Notification issued by the Govt. u/s 35-Such an exemption will not automatically survive on plaintiff's death to his L. Rs.	137	107
CRIMINAL PROCEDURE CODE, 1973			
Section 125	- Maintenance in respect of legitimate child- Father is liable to maintain his legitimate or illegitimate child	136	107

ACT/TOPIC		NOTE NO.	PAGE NO.
Section 125	- Muslim female child's right to claim maintenance against father-Right is till attaining majority or till marriage	158	126
Section 128	- Application for recovery of maintenance allowance-Wife not required to file fresh application every succeeding month	132	104
Section 154	- Delay in lodging F.I.R.- Effect of - No rule that it would automatically render prosecution case doubtful	188 (ii)	150
Section 169, 178 and 173	- Final report not binding on Magistrate-Magistrate may take cognizance on the materials collected during investigation	177	141
Section 169	- Filing of charge-sheet-Magistrate cannot direct the investigation agency to file a charge-sheet-Report submitted by investigation agency that no case is made out-Magistrate may still take cognizance	189	154
Section 174	- Holding of inquest under Section 174-Requirements and object- Details of incident foreign to the scope of Section 174	188 (iii)	150
Section 227	- Framing of charge-No requirement in law either to give opportunity to accused to produce evidence in defence or to consider such evidence as the defence may produce-Matter further referred to a large bench	190	154
Section 317	- Exemption of the accused during trial- Normal rule, evidence should be taken in presence of accused-Recording of evidence in absence of accused after his exemption-Discretion regarding grant of exemption, exercise of- Law explained	164 (ii)	132
Section 321	- Order passed under Section 321 is not appealable but revisonable-No specific grounds for withdrawal envisaged in the section - Scope and ambit of Section 321 explained	171	137
Section 325	- Exercise of powers by Judicial Magistrate under Section 325 by sending the proceedings to C.J.M. -		

ACT/TOPIC		NOTE NO.	PAGE NO.
	Framing of charge and recording of evidence not rendered illegal under Section 461 (1)	172	138
Sections 384, 385 and 386	- Appellate Court, duty of-While reversing the finding of conviction the appellate Court should examine the evidence	188 (i)	150
Section 397 (2)	- Interlocutory order - Test to determine interlocutory order	164 (i)	132
Section 428	- Applicability of Section 428- Period of detention under a preventive detention law can not be set off	186	148
Section 437 (6)	- Section 437 (6) is applicable in offences punishable under M.P. Excise Act	133	104
Section 451, 457	- Intimation regarding confiscation of vehicle not sent u/s 47-D Excise Act by Collector to the Criminal Court- Criminal Court can pass orders regarding interim custody of seized vehicle	175	140
Section 451, 457	- Power under Section 451 regarding disposal of property - Power should be exercised expeditiously and judiciously - Duty of the Magistrate explained regarding disposal of various type of properties	182	144
CRIMINAL TRIAL			
	- Appreciation of evidence - Evidence of I.O. if found trustworthy can be sole basis of conviction without corroboration	173 (ii)	139
	- Appreciation of evidence - Solitary witness - If not wholly reliable corroboration necessary	183	146
	- Defective investigation - Effect of	188 (iv)	150
	- Related witness-Relationship itself not a factor to effect credibility of a witness	191 (i)	156
	- Maxim falsus in uno falsus in omnibus-Not a sound rule-Note applicable in India	191 (ii)	156
	- Discrepancies in evidence-Effect of	191 (iii)	156
	- Non-explanation of injuries of accused-Mere non-explanation may not affect prosecution case in all cases	191 (iv)	156
	- Sentence-Merely because occurrence took place sometime back-Not a factor to reduce sentence	191 (v)	156

ACT/TOPIC		NOTE NO.	PAGE NO.
EVIDENCE ACT, 1872			
Section 24	- Extra Judicial Confession - Evidentiary value of - If voluntary and trustworthy can be the basis of a conviction	160	128
Section 68 & 71	- Proof of will- Ambit and scope of Section 71 explained	150	119
Section 134	- No particular number of witnesses required to prove a fact	188 (v)	150
EXCISE ACT, 1915 (M.P.)			
Section 47-D	- Intimation regarding confiscation not sent by Collector to the criminal Court- Criminal Court can pass orders regarding interim custody of seized vehicle	175	140
HINDU LAW			
	- Right of widow having limited interest to sell the property for future maintenance - Whether widow having limited interest can sell the property for future maintenance- Yes-Conditions explained	170	137
INDIAN PENAL CODE, 1860			
Sections 34 and 149	- Common intention and common object- Distinction explained	146	116
Section 97	- Right of private defence whether available against an act done in exercise of right of private defence-No	166	135
Section 300	- Death due to neurogenic shock resulting from injury to testicles and scortum caused by the respondent- During incident respondent saying that he would not leave the deceased alive and then hitting him by knee on the private parts- Held, conviction should be under 302 I.P.C.	187	149
Section 300 and 302	- Death by single blow- No principle that in all cases Section 302 is not attracted	179	143
Section 304-B	- Proof of offence under Section 304-B- Prosecution bringing the case within Section 304-B- Presumption under		

ACT/TOPIC		NOTE NO.	PAGE NO.
	Section 113-B Evidence Act will operate- Defence of accused of total denial-Presumption remains unrebutted	148	118
Section 376 (2) (g)	- Gang rape- Essential ingredients establishing offence under Section 376 (2) (g) explained	149	118
INTERPRETATION OF STATUTES			
	- Basic principles of construction of statutes, explained	127	99
MOTOR VEHICLES ACT, 1988			
Section 140	- Quantum of compensation in case of death of a child- Law explained	155	123
Section 147	- Liability of insurance company regarding persons travelling in goods vehicle - Insurance company not liable for such passengers	144	114
Section 166, 168	- Compensation, grant of-No restriction that compensation be awarded only up to the amount claimed-It should be just	145	115
N.D.P.S. ACT, 1985			
Section 8	- Chemical Analyst's report given by the regional laboratory- Such a report is covered by Section 293 (1) of Cr.P.C.- Formal proof by calling Chemical Analyst not necessary	135 (i)	106
	- C.F.S.L. form - Deposit in Malkhana- There is no specific provision for depositing it in Malkhana	135 (ii)	106
Section 50	- Scope and applicability of Section 50- Section 50 though mandatory but only substantial compliance is required	173 (i)	139
NEGOTIABLE INSTRUMENTS ACT, 1881			
Section 138	- Cheque, dishonour of due to incomplete signature of drawer- Not an offence under Section 138 of the Act	139	109
PRACTICE & PROCEDURE			
	- Subsequent events- Power of the Court to take note of subsequent events- Law explained	130 (ii)	102

ACT/TOPIC		NOTE NO.	PAGE NO.
PRECEDENTS			
	- Binding nature of procedents- Two conflicting decisions of the benches of co-ordinate strength- Which one is binding as precedent- Law explained	152	121
PREVENTION OF FOOD ADULTERATION ACT, 1954			
Section 2 (xiii)	- Sale of an article of food to the Food Inspector for analysis- It is a sample under Section 2 (xiii) though there is element of compulsion in it	159	127
Section 7 (1) and 16 (1) (a) (i)	- Training and qualification of Food Inspector- It can not be challenged in collateral proceedings	176	141
PREVENTION OF FOOD ADULTERATION RULES, 1954			
Rule 9	- Rule 9 does not cast a duty upon the Food Inspector to hold inquiry whether curd was prepared from buffalo's milk or cow's milk	131	103
RENT CONTROL AND EVICTION			
	- Premises-Classification into residential and non-residential- Determination of- Law explained	147	117
	- Bona fide requirement'- Meaning and conriotation	130 (i)	102
S.C. & S.T. (PREVENTION OF ATROCITIES) ACT, 1989			
Section 14	- Grant of bail in cases triable by Special Court- Only the Special Court can exercise jurisdiction	151	120
SERVICE LAW			
	- Departmental enquiry against Government employee- Employee kept under put off duly participating in enquiry without complaining about non-payment of subsistence allowance- Enquiry not vitiated	140	109
	- Suspension order may be withdrawn and can be passed second time	153	122

ACT/TOPIC		NOTE NO.	PAGE NO.
	- Transfer of an employee- Presumption is that transfer is bona fide-Transfer not to be lightly interfered by Courts	174	140
	- Date of birth- Change- Unless bona fide clerical error in recording it- No change permissible	180	143
	- Deemed confirmation, when- Law explained	184	147
SPECIFIC RELIEF ACT, 1963			
Section 22	- Relief of possession is implicit in the relief of specific performance- Relief of possession not prayed in the suit- Decree silent on the point of possession- Executing Court can grant delivery of possession to plaintiff/ decree holder	161	129
STAMP ACT, 1899			
Section 33 (1)	- Examination and impounding of instrument- Requirements explained- Section does not empower authorities to direct a party to produce document for the purpose of examination and impounding	138	108
SUCCESSION ACT, 1925			
Section 63 (c)	- Proof of will-Requirement of attestation by two or more witnesses- Under Section 68 Evidence Act even one attesting witness may prove the execution of will but attestation by two witnesses must be proved	150	119
TELEGRAPHS ACT, 1885			
Section 7-B	- Claim regarding liability and damages- Arbitrator has jurisdiction to consider such disputes raised before him	156	125
WORDS AND PHRASES			
	- `Moral Turpitude' - Meaning of- Offence under Section 323/149 I.P.C. not an act of moral turpitude	167	135

ACT/TOPIC	NOTE NO.	PAGE NO.
ZAMINDARI ABOLITION ACT, 1951 (M.B.)		
Section 41 - Expression `Personal Cultivation' constructively also means right to possess against trespasser- Person having such right to possess though not in actual possession be deemed to be tenant from the date of vesting	162	130
PART-III		
(CIRCULARS/NOTIFICATIONS)		
1. सामान्य भविष्य निधि के अंतिम भुगतान परिपत्र दिनांक 22-10-02		15
2. म.प्र. शासन, विधि और विधायी कार्य विभाग अधिसूचना फा. क्रमांक 17 (ई) 4/ 2003/234/21– ब (दो), न्यायालय फीस की कटौती के संबंध में		16
3. उच्च न्यायालय मध्यप्रदेश का ज्ञापन क्रमांक बी/6821/ बी.एफ. 9/91 दिनांक 29–8–91, न्यायिक अधिकारियों की साक्ष्य		17
4. उच्च न्यायालय मध्यप्रदेश का ज्ञापन क्रमांक बी/5326/ बी.एफ. 9/93 दिनांक 14–10–93, न्यायिक अधिकारियों की साक्ष्य		18
5. Notification No. G.S.R. 530 (E) dt. 29-7-2002 regarding amendment in the Prevention of food Adultiration Rules, 1955		18
PART-IV		
(IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS)		
1. The Representation of the people (Amendment) Ordinance, 2002		75
2. The Constitution (Eighty-Sixth Amendment) Act, 2002		78

-CORRIGENDUM-

In Part IV of April, 2003 issue at page 72 in 19th line form the top, please read 'Commission' in place of 'Government'. The error has crept in due to printing error in the source material. The inconvenience caused to our readers is hereby regretted.

We are thankful to publishers of SCC, ANJ, AIR, MPLJ, MPJR, MPHT, RN, JLJ, AIR SCW for using some of their material in this Journal.

- Editor

FROM THE PEN OF THE EDITOR

A.K. SAXENA
Director

In my last Editorial, I tried to highlight the importance of positive thinking in our life, but to my mind that was an incomplete one and I was not satisfied with the depth of thoughts enshrined therein. Thoughts are endless and it is not possible to reach at the end or highest point of a thought even after continuous thinking for the whole life. When our mind or heart reaches at the point of satisfactory solution after continuous thinking, there comes the end of thinking process. It is a normal process but not the real one. I am no exception. Despite my unsatisfied feeling, I cannot continue with the thinking process under my Editorials on a particular point because this Journal is not my personal one and our system and the Judicial Officers have so many problems which should be highlighted through this Journal from time to time. Therefore, I would like to take only a step further and not more than that to have some more deep probing about our way of thinking.

You must have noticed that at one place in my last Editorial, I quoted two lines of the great poet, Kabirdas where the philosophy of whole life was described in simple but beautiful terms. That was the essence of life but how to achieve it, is a matter of continuous thinking. It is not very difficult to arrive at a conclusion and in fact, we know its answer but except very few, nobody takes the pain to think over and does not try to adopt it in real life. On the other hand most of the people intentionally ignore it for a meagre and temporary benefit of their own. They never try to achieve long lasting benefits of life, i.e. peace of mind.

Every person has two types of personalities. Our outer personality is not the real one. It is only a fictitious show piece, a frame, if I say so. The true or genuine element is the soul, i.e. inner mind and heart. What we think from our inner soul without having any kind of unwarranted or uncalled for influence and act accordingly, their only reflects the real personality. To develop it, it is necessary to hear the voice of the inner soul which always shows the right path. But, it is sad to state that most of the people always try to give priority to those ideas which are controlled and governed by many a factor that are neither germane nor seemly. The acts influenced by purity of thoughts are the real ones which can only be grow up from the beats of the innermost soul. Our thoughts are bound to be influenced. One should not think that thoughts can be born without any influence. My emphasis is on eradication of undue influence on the thinking process. Purity of thoughts makes the person capable of doing any good and impossible things. To make it easy, one's heart and mind should be pure and the process of introspection should be our constant friend and companion.

One should not see others with repugnance. On the other hand, amiableness should rest in ourselves. Criticising others is an easy task, a time-passing venture for many. Before doing so, we must look at ourselves. It will help us in refraining ourselves from criticising others. Nobody is perfect. All of us have weaknesses but if we try to eschew our weaknesses, it would certainly help us in the conversion of our personality. We will be distinct from others. What three monkeys of Mahatma Gandhi say, I think all of us know it. No doubt, it is not very easy to run on the

path shown by Mahatma Gandhi but at least one can try to move slowly on it. Everybody know that "he who digs a pit for others falls first into it" and "he who would sow well, must reap well". One more factor which is responsible for the downfall of mankind, is greediness. One should not be avaricious or convetous. We should abandon it immediately.

We may or may not believe in fortune (Bhagya). Whether our acts decide our rebirth; whether we receive any reward or punishment during our next life according to our acts; or whether there is a possibility of reincornation according to acts done during the life time; I don't want to discuss all these issues here as neither it is a proper platform nor I am a saint. Apart from that, India is a secular country where followers of different religion reside. The Preamble of our Constitution also provides the ideals of secularism. But what I want to emphasise is only the essence of 'Granthas' or 'Holy Books' of all religions that there should be purity of thought in every mankind. Purity of thoughts means love, affection and respect for each other without having greediness, illwill and I don't think that any of the 'Granthas' or 'Holy Books' has said against it. I am of the strong view that our acts decide our future of present life. Doing good 'Karma' is the only way of the success of real life. Not for nothing it has been said that 'Karma' meets fate or 'Karma' has magnetic effect on 'Bhagya'.

It is very easy to achieve short lived success by doing wrongful acts. One may also harm other by substituting wrong facts with or without intention to get benefits for himself. It is very easy to talk bad about others, but day will come when we will look back and find that we did nothing for our eternal peace but there would be no time to take corrective measures. At that juncture it would be futile to say it is never too late to mend. Hence, one must sit for a while in solitude and endeavour to evaluate what one had done in the past and then pop a question whether one is entitled to claim total satisfaction or peace for oneself. This kind of self thinking process will certainly help you to do the acts which could have been described as positive one.

We, Judicial Officers are meant for dispensation of justice. Dispensation of justice is not a mechanical act. Our mind must be open and heart should also accompany. It does not mean that Judge should try to do justice against the facts and law. While doing justice, the heart should also be guided by legal and factual preposition but not by emotions or sentiments. The concept of mercy is totally different that what has been stated hereinabove. This preposition is also applicable in every moment of life and we should try to adopt it in our life not only as a judge but also as a human being. We are not saints but at least, we can do our 'Karma' in a saintly manner while dealing with different matters. The Judiciary is like the oasis in our society. The society is full of evils. Why should we not try to do our acts in saintly manner? It is just a matter of positive thinking and I am sure that it is not very much difficult to adopt it in our life. No doubt, while doing so, we will have to face numerous problems but it is a part of life. Acceptance of the same guides us in the midst of darkness.

Rest in next issue.

PART - I

SPEECH DELIVERED
BY
HON'BLE SHRI JUSTICE BHAWANI SINGH
CHIEF JUSTICE, HIGH COURT OF MADHYA PRADESH
AT THE INAUGURATION CEREMONY OF THE
MADHYA PRADESH JUDICIAL OFFICERS' ASSOCIATION
CONFERENCE HELD AT JABALPUR
APRIL 12, 2003

It is a great pleasure to participate in this Conference today. I extend my thanks to the organizers of this Conference for extending me opportunity to be the Chief Guest of the Inaugural Function of this conference in which Judicial Officers from all over the State are present. Holding of **Judicial Officers' Conference** is of great importance. It gives opportunity to them to sit at a place, deliberate on various topics of interest and relevance and go back with broader vision and zeal to grapple with the problems in their courts.

In a democratic set up, Judiciary plays significant role not only in adjudicating the rights of litigant public, but also in maintaining checks and balance between the three organs of the State. It protects the rights of citizens and supervises State action, least it may lead to arbitrariness and autocracy in exercise of power of judicial review. For this purpose, framers of the Constitution approved the views once expressed by **Sir Winston Churchill** in the House of Commons as Prime Minister of England with regard to independence of the Judiciary. He said-

> "The principle of complete independence of the judiciary from the executive is the foundation of many things in our Island life..... The Judge has not only to do justice between man and man.... He also has to do justice between citizens and the State. He has to ensure that the administration conforms with the law and to adjudicate upon the legality of the exercise by executive of its powers."

The independence of judiciary not only means that the judges should be fearless, impartial and beyond the control and superintendence of the executive but also that the requirements of the judges and Courts in respect of the process of administration of justice must not depend upon the discretion of the Government. With a view to achieve this objective, Articles 124 to 147 and

Articles 214 to 237 are incorporated in the Constitution of India. To ensure its independence, Judiciary should be provided with the means and resources necessary for the proper fulfilment of its judicial functions. The enforcement of the rule of law by the Judges can be frustrated by the late appointment of Judges, lack of court rooms and staff to serve the Courts. Phenomenal rise in litigation demands creation of more courts and increase in strength of the Judges and the staff. All the three actions have to be taken simultaneously for achieving excellence. The budget allocation for judiciary should be sufficient so that Courts do not starve for lack of funds. Everyone understands, Judiciary does not mean Judges and Judicial Officers, it includes all such persons/ officers/officials who, in one way or the other, contribute in the administration of justice. Members of the Bar, ministerial staff assisting the Judges in the Courts and Officers discharge important functions at different levels which ultimately result in delivering justice to the people. Unless the Courts are properly and adequately staffed, the Judges can hardly perform their judicial functions properly and effectively. With a view to achieve this objective, Constitution makers invested the Chief Justice and the High Court with exclusive power in matters of appointment, promotion, posting, disciplinary action etc. qua the officers and staff in our Judiciary.

Some aberrations in the system are being pointed out here and there. Even if taken to be true, they can be surmounted collectively and effectively. Since we realize that these irritants, if allowed to persist, would bring bad name to the system. Indian Judiciary has high traditions. It met many challenges in the past and do so in present and future as well. I firmly believe that with the cooperation of all, Indian Judiciary would make significant progress and come up to the expectations of the people of this country.

The biggest challenge seems to be the huge pendency of cases in the Courts. It would be wrong to castigate the legal system since it has continued and functioned well over the period of time. Whenever and wherever slackness has been found, corrective steps have been taken to make it suitable to meet the challenges. Since Independence, our population has increased manyfolds. There is phenomenal increase in litigation. However, growth of Judicial Officers and staff has been far below the requirement as compared to USA, Canada, England, Australia and other countries, so far as Judge population ratio is concerned. However, there cannot be over-night increase in the strength of Judges and infrastructures. In can be gradual depending upon how much attention the State pays towards the development of Judiciary in the State. Till it takes place, we have to remain content with existing courts, Judges and staff and should not get frightened by the back-log of cases, rather grapple

with this problem with the best of our ability. However, the Administration should know that the work in Courts has increased many times. Laws have multiplied. Transactions have increased and people are becoming more and more conscious of their rights. But the number of Judges has remained constant. This has led to arrears and frustration amongst the litigant, lawyers and Judges, giving rise to different kinds of tensions. The Government itself being a big litigant is subject to several orders of stay, prohibitory orders, injunctions etc., leading to delay in completion of several projects and works and disposal of large number of tax and financial matters. Therefore, for quick disposal of such cases, save litigants from frustration and save millions of court hours which are being wasted in courts, it is imperative that the State should increase the strength of judicial officers at various levels.

The Management of Court system needs to be modernized by taking advantage of technology. While computers have invaded all fields of activities in the country and modern technological advances have radically altered the working in offices, judicial branch of the State has not been equipped with these technologies for lack of funds. Therefore, it is necessary that adequate funds are made available by the State so that with application of modern technologies in Court management, there is proper and quicker disposal of cases.

Need for imparting training to the members of the Judiciary at every level to improve performance and efficiency has been felt since training can significantly upgrade the capability to discharge duties. Therefore, training programmes to judicial officers of various categories throughout the year are conducted. It is expected that judicial officers would participate in training programmes regularly and upgrade their legal knowledge and court management techniques.

Edmund Burka described 'justice' as the aim of all law and Government, 'the standing policy of civil society'. It is this, which raises man above the brute and brings him into communication with his Maker. The function and ability to administer justice, which **Justinian** defined as "the constant and perpetual will to give every man his due" is an attribute, most difficult to cultivate and every one who has successfully acquired virtues of a truly judicial mind is worthy of highest respect in the society. To be able to stand impartial in judgment, amid circumstances which excite the patience, to maintain equipoise, surging the currents around is to have reached the highest elevation of the intellect and the affections.

No nation can be happy if its standards of justice are low. In order that, spirit of justice may prevail in the society, existence of good Judges is as

essential as the availability of good laws. A sound system of administration of justice should possess a planned body of laws based on wide concepts of social justice, a judicial hierarchy, comprised of the Bench and the Bar, learned in law, inspired by high principles of professional conduct and existence of suitable guarantees to ensure fair trial.

The judicial process must also remain un-polluted by personal pride or an erroneous sense of dignity. As very rightly said, the best guarantee of justice is the personality of the Judges. It is the Judge who must bring honour to the seat of justice rather than claim that the seat of justice must honour him. Trust and confidence of the Bar and the people must constitute his greatest asset. Road to dignity is humility. Though it is not possible for every one to become a great Judge, there should be no difficulty in every Judge trying his best to be a good Judge. Greatness may not be destined for all, it may not be within the reach of all, but goodness certainly is within the reach of all those who are really keen in that behalf. There is no reason why one should not try to be a good judge. **Mr. Justice H.R. Khanna** once said-

> "We, in the world of law, have for long taken for granted the respect of the people. There is a stir today, spirit of skepticism, and to some extent, of iconoclasm. There is also much greater awareness of rights and people are acquiring new consciousness of the strong points and shortcomings of different human institutions. Many of us in the world of law have so far been allergic to criticism. There is, perhaps, need today for change in our mental attitudes. If weaknesses have crept into the system, they cannot be wishfully brushed under the carpet nor can criticism be silenced even by threat of contempt of Court. Contempt of Court is no answer to genuine criticism of the functioning of our Courts".

The Majesty and the dignity of law and that of its dispensers have always been recognized in India from times immemorial. In ancient India, law was not separated from **Dharma** and included in it and the same has been subjected to various changes both from inside and outside. Customs and traditions shaped it, rules of conduct and the dread of the other world molded it. Foreign invasions and the absorption of invaders, who became part of this country, had its affect on law and on those who were administering law, though not to the same extent on the Panchayat as it was known then, Administering Justice, in a Locality. Qazi system came and thereafter codified laws gradually came into existence with the advent of British Rule and Anglo-Saxan Laws and the Courts established by them were based on that pattern. In ancient

India also, the King was and continued to be source of justice. While administering and delivering justice, he too was to follow and abide by certain Code of Conduct and etiquette. **Manu the Great,** in Manu Smriti, has observed -

> "Having occupied the chair of justice with his body will attire and mind composed, the Judge shall salute the guardian deity and then proceed with the trial.... either sitting or standing.... without ostentation in his dress or ornaments, let him examine the affairs of litigant parties. Let the King prepare a just compensation for good and a just punishment for bad. The rule of strict justice let him never transgress."

Due to enlargement in the jurisdiction and duties of King, it was considered necessary that Judges be appointed for exercising the powers of mind for dispensation of justice and the King reserved superior power in himself and this is how the King delegated his powers to the Judges appointed by him. For the Judges so appointed, Code of Conduct and etiquette was also prescribed.

Thus, **Katyayan** in his Poorvee Mimansa said -

> "A Judge should be austere and restrained, impartial in temperament steadfast, God fearing, assiduous in his duties, free from anger leading a righteous life".... and so has said **Shukra in Shukra Neetisar-** "Judges appointed by the King should be well versed in the procedure, be wise, of good character and temperament, soft in words, impartial to friend or foe, truthful, learned in law, active, free from anger, greed or desire."

Kautilya in his famous Arthashastra laid down that Judges shall settle disputes free from all kinds of circumventions, with mind undaunted, and unchanged in all moods and circumstances, pleasing and affable to all. Arthashastra enumerates the judicial misconduct and punishment for the same by stating -

> "When a Judge threatens, browbeats, sends out or unjustly silences any one of the disputants in his Court, he shall first of all be punished."

This shows that law givers of ancient India were fully conscious of judicial conduct and etiquette and they laid down what gradually came to be established as the society developed. Their dictates are relevant even today and cover practically all the bare requirements.

In the medieval period, particularly in Moghul period, the appointment

order of Qazi directed him to be just, honest and impartial and to hold trials in presence of parties and court hours. He was forbidden from accepting present from the people of the place where he was to serve and not to attend entertainments given by anybody or everybody.

The manner and etiquette of judicial officers are essential since Judge holds a unique position in the Society. He exercises powers which are different from those exercised by executive officers. Therefore, they have to maintain dignity of the Court by their behaviour and manner and see that the faith and confidence reposed in them by common man is not lost by their behaviour, manner and mode of working. Our behaviour has always to be courteous since it does not cost anything. A Judge, who is irritable and impatient neither brings good name to the institution nor is able to do proper justice to the parties.

Assuming that there are some difficulties in our way, we should not feel frustrated. Be hard working and untiring; be honest and full of integrity; be fearless and independent; be cooperative and humble. Remember-

"PAROPKARAYA PHALANTI VRIKSHAH
PAROPKARAYA VAHANTI NADYAH
PAROPKARAYA DUHANTI GAVAH
PAROPKARATHAM MIDAM
SHAREERAM."

(Hitopadesha- Mitralabha- 150)

which means, the trees bear fruits to serve others, the rivers flow to serve others, cows give milk to serve others. This human body is meant to serve others.

Remember- we are discharging divine function. It is necessary to pray-

> "May God give me grace to hear patiently, to consider diligently, have due sense of humility in order that we may not be misled by our vanity or egoism. We administer proper justice without fear or favour to anybody."

I am confident that judicial officers will relish and remember participation in this Conference. I wish for the grand success of the Conference.

(Bhawani Singh)
Chief Justice

●

ADDRESS

BY

HON'BLE SHRI JUSTICE RAJEEV GUPTA

ADMINISTRATIVE JUDGE, HIGH COURT OF MADHYA PRADESH
AT THE INAUGURATION CEREMONY OF THE
MADHYA PRADESH JUDICIAL OFFICERS' ASSOCIATION
CONFERENCE HELD AT JABALPUR
APRIL 12, 2003

After the elaborate and exhaustive address of brother Dipak ji, there is hardly any topic left for me to address. However, I will like to share my feelings with the audience.

From my experience of about thirty years in the legal field, say more than twenty years of practice as an advocate and of more than eight years of judgeship, I have prepared a formula which if taken by the judicial officers in an appropriate and prescribed dose regularly, is bound to make them excellent judicial officers. While preparing this formula I have consulted my doctor friends also. We have also taken into consideration the three plus points of the three different pathies of medical science- Allopathy, Ayurvedic and Homeopathy. Like allopathic medicine it is quick in action; like ayurvedic it is based on natural habits; and like homeopathy it has no side-effects, not even if taken in excess. I can see signs of anxiety on the faces in the audience to know the secret of this formula. I will not hide it anymore.

The formula carries the brand name Mixture Formula P-3. This P-3 denotes the three ingredients of the formula. The three ingredients are- **Punctuality, Promptness** and **Politeness.**

POLITENESS-

I will take the last one first. It is the base line of the formula. To be polite, always pays in life. If a judicial officer is polite with his superiors and subordinates, lawyers and litigants, he is bound to get their fullest cooperation. That will not only help him in discharging his duties efficeintly but also ensure him good A.C.R. from his District Judge and Portfolio Judge with very good grading. If it becomes his habit to remain polite, he is bound to behave politely with

his family members also and then he will certainly prove himself as an excellent husband or excellent wife as the case may be.

PROMPTNESS-

This is second ingredient of the formula. A judicial officer, if is prompt in delivering his orders and judgments in time and so also in corresponding to the letters received from the High Court and the superiors, there is no reason for an adverse entry in his A.C.R. in that behalf.

PUNCTUALITY-

The third and the foremost ingredient of this formula is punctuality. Being punctual is no extra qualification of a judicial officer. To be punctual is an essential requirement of a Judge. If the District Judge himself is not punctual, how can he enforce punctuality among other officers of his district and so also his staff. We have come across many cases where the judicial officers who are in the habit of coming late to the court, come forward with the excuse that "My body clock is so tuned" or that "What is the point in my coming to the court in time when the lawyers are not punctual". Other excuses are that "Even if I come late, I do work for full eight hours" or that "I am disposing of sufficient number of cases". But gentlemen, one thing is to kept in mind. Courts are not 'pan shops' which can be opened whenever we like and can be closed whenever we choose to do so. It is an institution. Every institution has a built-in element of discipline and the first and the foremost is the **Punctuality.** So every officer is required to be in his court well in time. He has to commence the proceedings on time and remain in the court for the whole of the period prescribed in that behalf.

To sum up, my motto for the days is -**Be Polite, Be Punctual, Be Prompt** and the entire sky is yours.

●

ADDRESS

BY

HON'BLE SHRI JUSTICE DIPAK MISRA

JUDGE, HIGH COURT OF MADHYA PRADESH

AT THE INAUGURATION CEREMONY OF THE MADHYA PRADESH JUDICIAL OFFICERS' ASSOCIATION CONFERENCE HELD AT JABALPUR

APRIL 12, 2003

The duties of a judicial officer are regarded as sacrosanct and divine. He is bestowed with the authority to pronounce judgements on his fellowmen, their activities, the situation created by them by applying the legal parameters in such adjudication. Long back it had been said, one can interpret oneself to oneself but it is an onerous task to judge others. In ordinary course of life everyone tries to avoid to take decisions whereas a judge is obligated to take decisions everyday. Thus, the duty, is not only sanctified but also arduous because of its different call.

To perform the duties of a judge every officer must graduate into a profound situation and should put immense efforts to glorify the office. The glow and lustre of the office must be consistent and there has to be a constant endeavour to keep the luminosity alive. A man who is a graduate today and stops learning tomorrow becomes uneducated the day after tomorrow. Thus, learning must be a continuous process and a judge must follow the path of incessant and sustained graduating.

A person who joins judiciary in whatever capacity is not to pave the path of a career because it is not a career but a sacred mission. When one says so, it is not meant that a judge should not have career orientation but the career should be like a mercury on motion. The primal aspect of his duty should be commitment to the rule of law and pledge to justice.

A judgment by a judge reflects five aspects - the man, his passion, his compassion, his prejudice and the inner contradiction. To put it in a different terminology his-social philosophy. But rigorous endeavour has to be made to abandon the aforesaid facets and dedicated and devoted efforts should be made to serve the law of the land. It is because he should remember that he

is a part of our Organic law-the Fountain Headour compassionate Constitution.

A Judge must possess wider vision, firmly embedded values and unshaken commitment to justice, creative imagination, penetrating perception and real discipline of law. Judicial dignity should become an insegregable part of his total personality. He should have catholicity of approach and unchain himself from all kinds of opacity. He should never be maudlin and bear in mind that rationality is his real forte.

A Judge should not use harsh words when sweet ones are at hand. To do so is to prefer a raw fruit to a ripe one. Endeavour should be made to maintain coolness, calmness, composure and serenity because all these form the essential part of judicial dignity. He must remain unruffled and unagitated when faced with difficult situation. If I am permitted to say so he must appear as cool as a cucumber.

A Judge should be extra careful, to be meticulously correct in whatever he does. The finer points and subtler analysis should not miss him. He must remember to dot the 'i's and cross the 't's. His functioning must be in the apple pie order.

A Judge should be at peace with himself as perturbation and lack of inner equilibrium destroys the basic fabric of a judge. Self improvement on each day should be his motto. He should be guided by the principle, "this is the pedestal but I must turn over the new leaf every day". It is imperative for him to remain undisturbed. To put it in another way he should hold the olive branch unto himself and pedestrianise any kind of intranquility.

The Judge or an adjudicator must understand how the human brain functions. I do not intend to state that he should have the deep knowledge of a neurologist but he must be aware that there are five centres of intelligence, namely, intellectual brain, moving brain, instinctive brain, emotional brain and unifier brain. He should try his level best to utilize the unifier brain which is least physical and least tangible. Its principal function is the harmonisation of all the brains as far as possible. The decision making process is a part of the unifier brain. To develop the aforesaid brain the judge must focus his attention and achieve the high level of concentration. He must remember that accident is never a part of greatness.

A Judge must abandon excesses in all matters which include anger, pride, too much of joy and self estimation. Indulgence in excess mars the talent. Therefore, he should not yield to inferior endowments of nature and ostracise them from every quarter. He should have the broadness of the ocean, newness of the trees and humility of the river. He should masticate and digest the principles of law as an obedient and disciplined student.

A Judge should have 'gunas' -values in life, he must be a good man with right disposition. Ancients had said :

"Asto gunaah purusam deepayanthi
Pragyaan cha Koulyam cha dama shrutham cha
Paraakramascha behuvositha cha
Daanam Jatha Shakthi Kruthagyatha cha."

Lastly I must say that the daily prayer of a Judge should be thus :-

"I will pave the path of good and forget the evil,
I will honour knowledge and eschew ignorance,
I will follow truth and shun falsehood,
I will lead an unbending life and ostracise luxury,
I will live for justice and never guillotine it,
I will live like a hermit and work like a horse,
I will keep myself healthy and not suffer from judge's disease,

Thus, in essence there cannot be adieu to sacrosanctity, lonely stroll in the temple of justice and divorce between humility and authority conferred by our sensitive Constitution.

●

SPLIT OF CASE AGAINST ABSCONDING ACCUSED

A.K. SAXENA
Director

It is a matter of common knowledge that there are several causes for delay in dispensation of justice in criminal cases and the absconding of accused at the stage of pre-trial or during the trial is one of the most important causes. Even disposal of session trials normally delayed because of the absconding of accused and huge number of cases which are pending in the Courts of Magistrate, are not exception to it. It is necessary to go through the different provisions of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') and citations, so that the trial Magistrates and the Judges can dispose of those cases as early as possible in which some of the accused persons are present and remaining are absconding.

COMMITTAL OF CASE - MEANING

Under the old Code of Criminal Procedure, the word 'accused' was used at several places and now under the present Code, the word 'case' has been used in place of 'accused'. A confusion may arise as to whether the whole case can be committed to session Court irrespective of the fact that some accused are absconding. This matter was considered in a case *Ram Deo Roy Vs. Ram Dhyan Roy & Anr., 1993 (2) Crimes 538* and it was observed thus :

> "But in view of such change now sometimes confusion arises as to whether the whole case is committed by the Court of Magistrate to the Court of Sessions under Section 209 of the Code or the case of particular *accused who has appeared or has been brought before him*, as required under section 209 of the Code, can be committed under this provision. In every case there are allegations against each and every accused, otherwise he cannot be declared to be an accused in the case. Therefore, it has to be held that unless a particular accused appears or is brought before the committing Magistrate his case cannot be committed to the Court of session."

In *Kesavan Natesan Vs. Madhavan Peethambharan and others, 1984 Cr.L.J. 324* and *Israil Rai & Ors. Vs. State of Bihar, 1994 (3) Crimes 535*, it was held as follows :

> "..... there can be plurality of commitment proceeding if situation will so demand and Section 209, Cr.P.C. clearly says that when the accused is before the Court and the offence is triable by the Court of Sessions, then the case is to be committed to the Court of Sessions. It was also held that word 'case' in Section 209 of the new Cr.P.C. only means case presented to the Court and taken on file and nothing more and the expression 'case' is not synonymous with occurrence of crime or transaction and as such the Court can commit an accused to

the Court of Sessions but cannot commit a transaction or crime or an offence to the Sessions and thus the 'case' only means the case taken on file by the Magistrate after taking cognizance."

Thus it is clear that the word 'case' only means the case taken on file by the Magistrate after taking cognizance and, therefore, the only case of those accused persons can be committed who are present before the Court.

SPLIT UP OF CASE AT THE COMMITTAL STAGE

Section 299 of the Code provides that if it is proved that an accused person has absconded and there is no immediate prospect of arresting him, the Court may, in his absence, examine the witnesses produced on behalf of the prosecution. But the real problem arises when Court finds that the accused has absconded either at the stage of committal proceedings or during the trial before the Magistrate or the Judge. The accused persons also prefer to remain absconded so that the trial against them or against the other accused persons may not be disposed of at the earliest or till they win over the witnesses. To depricate such type of practice, the Court should always try to take recourse of the provision which has been provided under Section 317 (2) of the Code. The Section runs as follows :

"317. (1) .....

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately."

Section 317 (2) comes under the Chapter XXIV relating to the general provisions as to inquiries and trials. The words "Judge or Magistrate" have also been provided under this section. The word 'Inquiry' includes the committal proceedings pending before the Magistrate. Undoubtedly, the provision of Section 317 (2) is applicable to the committal proceedings also.

Now it has to be seen whether a Magistrate can commit the case against all the accused persons where the accused is absconding. For this purpose we have to consider the provision under Section 209 of the Code which reads thus:

"209. *Commitment of case of Court of Session when offence is triable exclusively by it.*- When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall-

(a) commit, after complying with the provisions of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) .....

(c) .....

(d) ....."

Here the words, "the accused appears or is brought before the Magistrate" are relevant. It means where the accused is not appeared or is not brought before the Magistrate, the Magistrate is not empowered to commit the case in absence of accused. In support of above contention, I may quote some cases. *Onkar Singh and others Vs. State, 1976 Cri, L.J. 1774, H.M. Revanna Vs. State of Karnataka, 1997 (4) Crimes 253 and Ram Deo Roy's* case (supra) where it has been clearly laid down that Section 209 of the Code was intended to prevent passing of committal order in cases where the accused was absconding and was never brought before the Court. The order of committal of a case to Sessions Court without securing presence of all accused persons is unsustainable. Therefore, before passing of a committal order, it is necessary for a Magistrate to take all steps to secure the attendance of absent or absconding accused persons. It is often possible that the accused may remain absconded despite the issuance of arrest warrants or even after proclamation and attachment of immovable properties. In that situation, the Magistrate can split up the case and he is fully empowered to commit the case of those accused persons who appeared or brought before him. In the case of H.M. Revanna (supra) it has been laid down as follows :-

> "..... Therefore, viewed from any angle the order passed by the learned Magistrate committing the accused persons to take up the trial without securing their presence requires interference of this Court. However, it is also made clear that, if the Magistrate cannot secure the presence of the accused persons, he is at liberty to split up the case against the persons who are present before the Magistrate and to proceed with the case following the necessary procedure as contemplated under Cr.P.C. as well as Criminal Rules of Practice, 1968."

Though the provisions of Karnataka Criminal Rules of Practice, 1968 cannot be made applicable here but even then it is clear from the provisions of Sections 207, 209 and 226 of the Code that if an accused does not appear or is not brought before the Magistrate, the case against him cannot be committed. In these circumstances, the Magistrate has to split up the case of those accused persons who are facing the committal proceedings. If it is not done by the Courts then it would become a mockery of judicial process by keeping the whole case pending for commitment. The case of those accused who are present before the Magistrate cannot and should not remain pending for their whole life on the pretext that other accused are absconding. It would cause injustice to those accused persons who have appeared before the Court and also to the complainant.

It is also very much clear from the principles laid down in Ram Deo Roy's case (supra) that if the case is committed against the absconded accused, the Sessions Judge has no power to try the case against that accused even if he surrender before Sessions Court. He has to go to committal Court and in that situation the Sessions Court can stay the further proceedings of sessions trial in anticipation of committal of the case of that accused or proceed with the trial of the other accused persons.

SPLIT OF CASE DURING TRIAL

Sub-section (2) of Section 317 gives power to every Judge and Magistrate to split up a case against an absconding accused. During trial if an accused does not participate and remain absconding, his case can be splitted up and the trial can be commenced against those persons who are present before the Court. In *Re : Doraisingam and others, 1983 Cr.L.J. 1765* it has been held that where the personal attendance of accused in Court is necessary and the accused is absconding, the Judge or Magistrate can split up a case against an absconding accused. In this case, after examination of two witnesses for the prosecution, one accused remained absent and he could not be traced even after proclaimation was made under Section 82 and attachment of immovable properties was effected under Section 83 of the Code.On reference made by the Sessions Judge, it was ordered that as the second accused has made himself scared, the Additional Sessions Judge has to deal with the matter in accordance with sub-section (2) of Section 317 of the Code.

One should not have wrong notions that once the inquiry or trial starts, the case cannot be splitted up and no progress can be made until and unless the absconding accused appears or brought before the Court. To safeguard the interest of complainant and the accused persons who are facing the inquiry or trial, the Judge or Magistrate is fully empowered to split up the case under Sub-section (2) of Section 317 of the Code.

In the end, I would like to clarify one more point. There is no rule that where more than one case arising out of same incident have been filed before the Magistrate and these cases have been committed to the Sessions Court separately, their registration number would remain the same as only one incident took place. As earlier stated that there can be plurality of commitment proceedings if situation so demands, therefore, in my humble opinion, there is no bar in registering separate sessions trials arise out of the different committal orders . If a session trial is registered in Sessions Court in which number of witnesses have been examined and in the meanwhile the case of an accused of same incident who was absconding, committed to Sessions Court, then his case can be tried separately with the help of original papers which were filed with the first case, if situation so demands. If there is no sufficient progress in the first trial, then certainly, the later trial can join the first trial and can be decided by taking common evidence in the cases.

IDENTIFICATION OF ACCUSED : A READY REFERENCE

By- Awdhesh Kumar Shrivastava
President
District Consumer Disputes
Redressal Forum
Shivpuri (M.P.)

As we know when the offence is committed by an offender not known to the victim or witnesses, the identification of that particular offender becomes relevant in order to connect him with the crime. Under S.9 of Indian Evidence Act the evidence relating to identification of such person is declared as relevant. During investigation to ascertain the identity and identification of offender,Test Identification (T.I.) Parade is also held, so that by passage of time, the offender could not reach beyond the memory of victim/witness and it may not become impossible or unnatural to identify the offender at the stage of trial. The law of identification has now developed a lot and instead of mentioning it in descriptive way, it would be useful to describe it point wise.

A. PURPOSE & EVIDENTIARY VALUE OF IDENTIFICATION:

The purpose of identification is multifarious. The Court (DOCK) identification provides a substantive evidence enabling the Court to convict the accused. The identification during T.I. Parade as held by Hon'ble Supreme Court in different cases including *Matru Vs. State of U.P., AIR 1971 SC 1050=1971 Cr.L.J. 913 and Daya Singh Vs. State of Haryana, AIR 2001 SC 1188= 2001 Cr.L.J. 1268= (2001) 3 SCC 468,* though not a substantive evidence, it enables the witnesses to satisfy themselves that the prisoner is really the one who was seen by them in connection with the crime. As held in *State of Maharashtra Vs. Suresh, (2000) 1 SCC 471* it also satisfies the Investigation Authorities that the suspect is the real person whom the witnesses had seen in connection with the occurrence and the investigation proceeding is on right lines. The T.I. Parade, as held in *Rameshwar Singh Vs. State of J & K, AIR 1972 SC 102,* not only furnishes corroboration of the evidence to be given by witnesses in court at the trial but it also provides the witnesses to have an earlier opportunity of recalling the impressions of features of accused left in their mind during incident. *(Suraj Pal Vs. State of Haryana, (1995) 2 SCC 64.)* Mode of identification can be by shape of body, gait, manner of walking or even by voice. *[Kedar Singh Vs. State of Bihar, 1999 Cr.L.J. 601 (SC).]*

B. NECESSITY OF TEST IDENTIFICATION :

The T.I. Parade is not necessary in each and every case. As held in *Mehtab Singh Vs. State of M.P., AIR 1975 SC 174 = 1975 Cr.L.J. 290* and *State of M.P. Vs. Kailash Vasudeo Pd. Tiwari, 1992 M.P.L.J. 775,* where the witnesses are previously known to the accused, the test identification is not necessary. In cases where the accused was arrested at the spot or he remained in company of a witness for hours, the T.I. Parade was held not necessary. *Roony Vs. State of*

Maharashtra, AIR 1998 SC 1251, Romesh Kumar Vs. State of Punjab, 1993 Cr.L.J. 1800 (SC), Santanu and other Vs. State of M.P., 2000 (2) M.P.H.T. 98 (NOC). Similarly when accused was seen by the witness for a quite number of times at different point of time and places, T.I. parade is not necessary. *(Suresh Chand Bahri Vs. State of Bihar, AIR 1994 SC 2420 = 1994 Cr.L.J. 3271).* But as held in *Rajesh Govind Jagesha Vs. State of Maharashtra, (1999)8 SCC 428 = AIR 2000 SC 160 = 2000 Cr.L.J. 380,* where the accused is not known to the witnesses, it is obligatory on the prosecution to hold T.I. parade.

C. FAILURE TO HOLD T.I. PARADE :

Since the Court (DOCK) identification is the only substantive evidence and the T.I. Parade is not a substantive evidence so the failure to hold the T.I. Parade is not always fatal, though to some extent it casts a doubt to the testimony of a witness on the point and as held in *George Vs. State of Kerala, AIR 1998 SC 1376* and *Ramdayal Vs. State of M.P., 1993 M.P.L.J. 532,* in absence of T.I. Parade the substantive evidence of identification in Court after a long time becomes a weak piece of evidence and no reliance can be placed on it unless it is satisfactorily corroborated. In *State of H.P. Vs. Lekhraj (2000) 1 SCC 247 = 2000 Cr.L.J. 244* where the name of accused was not included in FIR, the court identification by witness was not found reliable in absence of T.I. Parade. It does not mean that the evidence would be held as totally irrelevant or inadmissible. The real credence of such evidence would depend on the facts and circumstances of each case.

Where (1) the accused were strangers to witnesses (2) accused altering their appearance during occurrence and (3) witnesses only got fleeting glimpse of accused. It would be risky to rely on identification without corroboration and T.I. Parade. *(State of Maharashtra Vs. Sukhdeo Singh, AIR 1992 SC 2100= (1992) 3 SCC 700).* Similarly in a case *Shri Ram Vs. State of U.P., AIR 1975 SC 175 = 1975 Cr.L.J. 420 = (1975) 3 SCC 495,* the cricumstance, that the accused, at earlier stage had asked for a T.I. Parade and it was opposed and denied by prosecution, was held an important fact in his favour. In another case *State of U.P. Vs. Askok Dixit, (2000) 3 SCC 70,* no T.I. Parade held about two accused. One accused though known to witness but no role played by that accused was mentioned in police statement. Another accused was not known to the witness. Identification of these two accused in Court were not accepted.

However as held in *Harbhajan Singh Vs. State of J & K, AIR 1975 SC 1814 = 1975 Cr.L.J. 1553, Naniya Vs. State of M.P., 1995 MPLJ 439 = 1995 Cr.L.R. (M.P.) 50 = 1995 JLJ 157,* failure to hold an identification parade does not make inadmissible the evidence of identification in Court. It is also not fatal where corroborative and conclusive evidence is present. Similarly, as held in *S.N. Dubey Vs. N.V. Bhoir, (2000) 2 SCC 254,* in absence of T.I. Parade, the Court identification may not be sufficient for conviction but if it stands corroborated by evidence of another eye witness and other evidence its value can not be held diminished. In case *Asha Vs. State of Rajsthan, AIR 1997 SC 2828 = 1997 Cr.L.J. 3508,* where

assailants were previously known to one eye-witness and their names were written in FIR, failure of T.I. Parade was held, is of no consequence. Similarly as held in *Daya Singh Vs. State of Haryana, (2001) 3 SCC 468 = AIR 2001 SC 1188* where the accused declined to themselves for test parade, the absence of T.I. Parade was found not fatal. In *Surendra Narayan @ Munna Panday Vs. State of U.P., AIR 1998 SC 192 = 1997 (4) Crimes 255* it was observed that failure to hold T.I. Parade after demanded by accused was not found fatal in each case.

In *Laxmi Raj Shetty Vs. State of T.N. 1988 (2) Crimes 107 = (1988) 3 SCC 319 = AIR 1988 SC 1274* where witnesses identified the accused first time in Court without any T.I. Parade, but the witnesses saw the photograph of the accused carried by another and identified him to be the person involved. It was held that such identification must take the place of a test identification. Similarly in *Pammi Vs. State of M.P., AIR 1998 SC 1185* where the witnesses not seeing accused first time and names of some accused were also mentioned in FIR, failure to hold T.I. Parade was held not to vitiate the evidence. In another case *Sampat Tatyada Shinde Vs. State of Maharashtra, AIR 1974 SC 791 = (1974) 4 SCC 213 = 1974 Cr.L.J. 674,* though the witness was not asked to identify the appellant at T.I. Parade, however his evidence that the accused had purchased the pipe (weapon of offence) from his shop cannot be held unreliable when the very fact of purchase of pipe was a fact discovered at the instance of the accused.

However in a case *State of U.P. Vs. Charles Gurmukh Sobhraj, (1996) 9 SCC 472 = 1996 Cr.L.J. 3844,* where hotel employees identifying the accused foreigner before Court after a lapse of 5 years though they had only a brief occasion to see the accused when he had come to stay and that too in usual course of business and no special reason as to retain the image of foreigner for such a long period was available. The absence of T.I. Parade was held a circumstance and evidence not relied on.

D. DELAY IN HOLDING T.I. PARADE :

Delay in holding T.I. Parade, though by itself does not furnish a ground for rejection of evidence regarding identification by witness in Court, but if the delay is not explained, it casts a doubt in relying upon the evidence. So as to quantum of delay, a deliberate delay of few days may be significant, on the other hand if the delay is well explained, it casts no infirmity in the evidence.

For instance, a delay of 15 days as held in *Ramanand Ramnath Vs. State of M.P., (1996) 8 SCC 514 = 1996 (2) Crimes 57 (SC),* was inconsequencial. Similarly, in *Murarilal Jiwaram Sharma Vs. State of Maharashtra, AIR 1997 SC 1593 = 1997 Cr.L.J. 782,* delay by Executive Magistrate who could not hold T.I. Parade due to his pre-occupation was held insignificant. However, an unexplained delay of 3 weeks in *Suha & Shiv Sankar Vs. State of U.P., AIR 1987 SC 1222* = 1987 *Cr.L.J. 991 &* delay of 5 weeks from arrest in *Rajesh Govind Vs. State of Maharashtra, AIR 2000 SC 160 = 2000 Cr.L.J. 380,* and even a delay of 4 days in *Bali Ahir Vs. State of Bihar, AIR 1983 SC 289* without explanation was found significant for detracting from the credibility of the evidence of identification. In another case

Ballavaram Peddi Narsi Reddi Vs. State of A.P., AIR 1991 SC 1468 = 1991 Cr.L.J. 1833 = (1991) 3 SCC 434 where attack on deceased launched suddenly and accused persons disappeared soon and sufficiency of light at the scene of occurrence not made by prosecution. The identification of accused was held not established though T.I. parade was held only after 2 days.

The delay in holding T.I. Parade due to late arrest of the accused is another circumstance and as held in *Brijmohan Vs. State of Rajsthan, AIR 1994 SC 739,* identification can not be rejected on the ground that the witnesses are not capable to identify after three months. In this case the T.I. Parade was held within 25 hours of arrest.

E. T.I. PARADE - WHETHER DEFECTIVE OR NOT RELIABLE :

In order to accept the identification made during T.I. Parade as a corroborative evidence, it is necessary that the T.I. Parade should have been held without any unexplained delay, and further the same should have been conducted by an independent person with utmost sincerity and fairness. The T.I. Parade also looses its value when the accused, whom the witness had to identifying in T.I. Parade was already seen. Though it does not mean that the T.I. Parade should be disbelieved on technical errors, but the Court has to assess the value and reliability of the T.I. Parade. As held in *State of Maharashtra Vs. Suresh, (2000) 1 SCC 471* if Officer conducting T.I. Parade, permits dilution of the modality to be followed in a parade, he should see to it that such relaxation would not impair the purpose for which the parade is held. In another case *Santa Singh Vs. State of Punjab, AIR 1956 SC 526 = 1956 Cr.L.J. 930* where after arranging the T.I. Parade the police left the field and the identification proceeding were held in exclusive direction and supervision of the Punch witnesses, the identification was not rejected.

In *Ganpat Singh Vs. State of Rajasthan, (1997) 11 SCC 565,* where the accused was shown to the witness in police station prior to the T.I. Parade, no reliance was placed on such identification. Similarly in *Suryamoorthy Vs. Govinda Swamy (1989) 3 SCC 24 = AIR 1989 SC 1410 = 1989 Cr.L.J. 1451,* Photographs of accused appeared in local news papers and accused also kept in police lock up for a few days before T.I. Parade, held, evidence of T.I. Parade was not found reliable. Similarly, in *Prahlad Singh Vs. State of M.P., AIR 1997 SC 3442 = 1998 (1) JLJ 84 (SC) = 1997 Cr.L.J. 4078,* where the prosecutrix accepted that she was tutored by her father and police and accused was shown to her prior to identification, her evidence on point of identification was not held credible. In *Tahir Mohd. Vs. State of M.P., AIR 1993 SC 931 = 1993 Cr.L.J. 193 = 1993 JLJ 416* during T.I. Parade, the suspects were put up with the fetters on their legs, whereas the other under trial prisoners who were mixed up, were unfettered, it was held that it creates a lurking suspicion in the mind of Court as to whether the witness took a clue in identifying the suspect as they identified the suspects without any margin of error.

In *Ahmed Bin Salam Vs. State of A.P., AIR 1999 SC 1617,* police asked witness to identify the persons who were on scooter and who threw bomb towards deceased and the witness replying affirmative, it was not held to be T.I. Parade.In *Vijayan Vs. State of Kerala, (1999) 3 SCC 54,* not only photograph of the accused shown to the witness but also in all local newspapers his photograph published-it was held that, in the circumstances, test identification parade rightly disbelieved by the trial Judge particularly when no special feature indicated by the witness. Similarly in *Chaman Vs. State of U.P., AIR 1992 SC 601=1993 (Supp.) 1 SCC 403,* where much paper make-up on the faces of participants and accused. rendered the identification parade unreliable and it was not found safe to convict on basis of such identification parade.

However where (1) The height of accused was less than the persons with whom he was mixed up (2) he had a scar and (3) witness identified the accused after two rounds, all these facts were not held to make the testimony of witness unreliable. *(Balbir Singh Vs. State of Rajasthan, AIR 1997 SC 1704 = 1997 Cr.L.J. 1197.) In State of U.P. Vs. Sheoram, AIR 1974 SC 2267 = 1975 Cr.L.J. 14,* it was held that wrong identification by one witness would not affect the identification parade.

F. PROOF :

The fact of T.I. Parade should be proved as any other fact and as held in *Rajesh Govind Jagesha Vs. State of Maharashtra, (1999) 1 SCC 428,* the onus to prove that the T.I. Parade was held properly, lies on the prosecution and not on the accused to prove the contrary. As held in *Coflans Piedade Fernandes Vs. U.T. of Goa, Daman & Diu, AIR 1977 SC 135 = 1977 Cr.L.J. 167,* the person who is supposed to have identified the assailants at the T.I. Parade must himself give evidence in regard to the identification. Further as held in *Wakil Singh Vs. State of Bihar, 1981 (Supp.) SCC 28 = AIR 1981 SC 1392 = 1981 Cr.L.J. 1014,* the evidence of Magistrate who held T.I. Parade is necessary and mere signing the cyclostyled or printed certificate to that effect is not sufficient. However in *State of Bihar Vs. Pashupati Singh, AIR 1973 SC 2699 = 1973 Cr.L.J. 1832 = (1974) 3 SCC 376,* a Test Identification Chart cannot be excepted to contain a complete statement and as discussed in *Somappa Vs. State of Mysore, AIR 1979 SC 1831 = 1979 Cr.L.J. 1358* only because of some defects in T.I. Parade proceeding the evidence of witnesses regarding participation of accused can not be rejected. In *Seikh Umar Ahmed Vs. State of Maharashtra, AIR 1998 SC 1922* where the Court finds strong possibility of accused have been shown to witness before T.I. Parade, their identification in Court becomes meaningless and the conviction can not be based on such identification.

However as held in *Radha Ballabh Vs. State of U.P., 1995 (Supp.)3 SCC 119,* Identification Parade is a strong corroborative circumstance to the identification of accused in court and it can not be rejected on mere suspicion that the accused might have been shown to the witnesses. Further as held in *Siya Ram Rai Vs. State of Bihar, AIR 1973 SC 51 = 1973 Cr.L.J. 155,* identification parade cannot be

challenged on the ground of irregularity in the manner of holding it or on the ground of undue delay, when the Magistrate who held the parade and I.O. have not been cross- examined. Further as held in *Ram Nath Mahto Vs. State of Bihar, AIR 1996 SC 2511 = 1996 Cr.L.J. 3585,* even a conviction may be upheld where witness correctly identifying the accused at T.I. Parade, but in court he did not identify him and evidence of Magistrate confirms the T.I. Parade. In another case *Vijayan Vs. State of Kerala, (1999) 3 SCC 54,* though witness identifying the accused in T.I. Parade but failed to identify him in Court, it was held that identification in T.I. Parade losses its importance in view of his weak evidence.

Where many accused persons are put for identification in a T.I. Parade and the witness only identify some of them, the failure of the witness to identify some of accused who were paraded for identification, his evidence can not be rejected regarding those whom he correctly identified. *Mehbub Samsuddin Malek Vs. State of Gujarat,(1996) 10 SCC 480, Salvir Vs. Surat Singh, AIR 1997 SC 1160 = (1997) 4 SCC 192.*

Identification by photo may also be held admissible but only for the purpose of framing charges and it would become substantive evidence only when the witness identify the accused in Court. *Umar Abdul Shakoor Vs. Intelligence Officer, (2000) 1 SCC 138.*

G. MEMORY - WITH FLUX OF TIME :

Though as held in *Delhi Admn Vs. Balkrishna, AIR 1972 SC 3 = 1972 Cr.L.J. 1* it cannot be laid down, as a proposition of law, that the witnesses would not be able to identify the offender after lapse of a long time, but the Court will have to be cautious when such evidence is before it. On the otherhand as observed in *Ravinder Kumar and Another Vs. State of Punjab, (2001) 7 SCC 690,* it would be highly improbable for the witnesses to retain the impression of the assailant for so many months when they were not knowing them previously and saw them at the time when the assailant was running away from the place of occurrence. However as held in *Rajendra Prasad Vs. State of Bihar, AIR 1977 SC 1059 = 1977 Cr.L.J. 613 = (1977) 2 SCC 205,* a bizarre incident has a tendency to stick in mind and when any cause to recollect the same occurs, it gets refreshed again and in such case the evidence may be believable.

In *Vijayan Vs. State of Kerala, (1999) 3 SCC 54.* the Identification of the accused in court many years after the occurrence was not accepted keeping in view that the witness having seen the face of the accused while opening the door it was not possible to remember the same for the purpose of identification after 5 years of the occurrence.

H. SAFEGUARDS :

Where a large number of accused participated in the incident and several persons saw the incident, it would be safe to insist on atleast two reliable witnesses for identification. *(Chandrashekhar Bind Vs. State of Bihar, (2001) 8 SCC*

690 ,Vinay Kumar Singh Vs. State of Bihar, AIR 1997 SC 322 = 1997 Cr.L.J. 362 = 1997 (1) SCC 283.)

Though as held in *Vinay Kumar Singh Vs. State of Bihar (Supra)*, it would not be proper to draw a hiatus between injured and non- injured witnesses as for capacity to identify assailants while in action but where the light is not sufficient, the situation may be otherwise. As held in *State of U.P. Vs. Jageshwar, AIR 1983 SC 349*, the identification of 14-15 persons at dead of night in the light of a tiny lantern is inherently difficult. Similarily, as held in *Girja Shankar Mishra Vs. State of U.P., AIR 1993 SC 2618 = 1994 (Supp.)1 SCC 26* it would also be unsafe to convict the accused when no overtact has been imputed to him. In *Karan Singh Vs. State, AIR 1992 SC 1438 = 1992 Cr.L.J. 2333*, where occurrence took place about sun set and the witnesses had little opportunity to see the faces of suspects, no reliance can be placed on such identification when no special features of suspects are mentioned before police.

●

TEMPORARY INJUNCTION- BASIC LEGAL ISSUES

VED PRAKASH
Additional Director

An injunction is a judicial process commanding an act which the Court regards as essential to justice or restraining an act which it thinks contrary to equity or good conscience. It is an equitable relief of preventive nature, the grant, or refusal of which lies with the discretion of the Court. In India the law relating to injunction is found in part-III chapter VII & VIII of the Specific Relief Act, 1963 consisting of section 36 to 42. While the relief of perpetual injunction, being a final relief, can be granted only by the decree of the Court after hearing on the merits of the suit, a temporary injunction, being a relief of interim nature, is usually granted during the pendency of a suit for preservation of property in dispute till the rights asserted by the parties to the suit are determined on merits. Section 37 (1) of Specific Relief Act, 1963 makes it clear that the relief of temporary injunction, which is regulated by the provisions of Code of Civil Procedure (section 94 (c) and order 39 rules 1 to 5 C. P. C), may be granted at any stage of the suit and may continue either until a specified time or until further orders of the Court.

It is common experience that in most of the suits the issue regarding grant or refusal of temporary injunction generates lot of heat and dust inside the Courtroom thereby raising its temperature sometimes to the optimum level. Despite this, the Court is expected to render justice in utmost judicious manner without being swayed by the pitch or heat of the arguments. In such a situation the conceptual clarity, regarding basic aspects of the field in the mind of the judge may pave the way for sound exercise of judicial discretion in an equitable and just manner. Hence, here is an attempt to deal with some of the basic issues, which are of recurring importance.

THE THREE PILLARS:

The question regarding grant of temporary injunction requires, almost ritualistically, that the party seeking it holds prima facie case and balance of convenience in his/her favour and further that if such relief is refused he/she will suffer irreparable loss. Nay not say ritualistic approach has the inherent tendency of degenerating into rigidity of outlook which may in turn result in injustice. Here comes the role of discretion. It has aptly been said that it is the discretion, which converts pleasure of administering law into the charm of delivering justice. Therefore, the discretion should not be allowed to be shackled in a ritualistic approach. The Apex Court in this respect in *Dalpat Kumar Vs. Prahlad Singh, A. I. R. 1993 SC 276* reminded that the phrases *"prima facie case", "balance of convenience"* and *"irreparable loss"* are not rhetoric phrases for incantation, but words of width and elasticity to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of discretion to meet the ends of justice.

PRIMA FACIE CASE:

The first and foremost requirement for grant of temporary injunction is that the party seeking such relief must establish prima facie case in his/her favour. To make out prima facie case a party is not required to establish his title, it is enough if he can show that he has fair question to raise as to the existence of the alleged right and that the property in the meantime should be preserved as such. Putting its seal of approval on the aforesaid principle, our own High Court in *Shankar Lal Rathore Vs State of M. P. 1978 J. L. J. 51* observed that prima facie case does not imply prima facie title. To make out a prima facie case plaintiff is not required to make out a title in respect of the property. In Dalpat Kumar (Supra) , the Apex Court propounded that prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. *Prima facie* case is substantial question raised, Bona fide, which needs investigation and a decision on merits. Explaining the aspect of prima facie case, our own High Court in *Madan Lal Vs Masonic Lodge, 1991 J. L. J. 266* observed that prima facie case should be considered in relation to available relevant material on record to examine the probability of plaintiff's ultimate success in the suit. In the light of the aforesaid pronouncements of our own High Court as well as of the Apex Court it can be said that to make out a prima facie case a party is required to show before the Court that not only he/she has a fair question to raise as to the existence of the alleged right but also that he/she has probability of success in the suit.

IRREPARABLE LOSS:

A temporary injunction, as a general rule, will not be granted unless it is shown that its refusal will result in irreparable loss to the party seeking such relief. An injury/loss is irreparable when it cannot be adequately compensated in terms of money, (see:*Kuldip singh Vs Subhash Chandra Jain, A. I. R. 2000 SC 1410)*, or where there exists no certain pecuniary standard for the measurement

of the damages. An injury to be irreparable need not be such as to render its repair physically impossible. Thus, an injury/loss can be treated as irreparable:

(i) where it cannot be adequately compensated in damages, or

(ii) where there exists no certain pecuniary standard for the determination of damages.

Further, it may be noted that to render an injury irreparable it is not necessary that the pecuniary loss or damage should be great. Acts committed without just cause or excuse that interfere with ones business, credit, or profits do amount to irreparable injury.

BALANCE OF CONVENIENCE:

the Court is further required to take into consideration the relative inconvenience which the parties will sustain by the refusal or grant of temporary injunction. The rule is that when issuance of a temporary injunction will cause great hardship to the defendant and will confer no benefit or very little benefit in comparison to the applicant then it is proper to refuse temporary injunction. The rule permitted the Court to take into consideration the relative inconvenience which will be suffered by the respective parties by reason of the allowance or refusal of the injunction.

EQUITIES:

In addition to the aforesaid three basic requirements, the party must also show that equity lies in his/her favour. The maxim that he who seeks equity must do equity applies with full force in such a situation. As the refusal or grant of temporary injunction ultimately rests with the sound discretion of the Court, it is the duty of the Court to take into consideration the conduct of the party claiming the relief. As a general rule a temporary injunction cannot be sought as a matter of right, though the three basic requirements for its grant have been established, and if it appears to the Court that the party seeking such relief has acted dishonestly, fraudulently or illegally in respect to the matter in dispute or that he has encouraged, invited or contributed to the injury sought to be prevented it may well be refused. Highlighting this aspect the Apex Court in *M/S Gujarat Bottling Co Ltd. Vs. Coca Cola Co. A.I.R. 1995 SC 2372* laid down that apart from other considerations the party seeking the relief must also show that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the opposite party.

TEMPORARY INJUNCTION AND SECTION 38/41 SPECIFIC RELIEF ACT, 1963:

Section 38 of the Specific Relief Act, 1963 provides conditions in which a perpetual injunction may be granted. Section 41 of the Act further enumerates situations in which an injunction cannot be granted. By Code of Civil Procedure (MP Amendment) Act, 1984 order 39 rule 2 (2) was amended and a proviso was added which is as under:

Provided that no such injunction shall be granted:-

(a) Where no perpetual injunction would be granted in view of the provisions of section 38 and section 41 of the Specific Relief Act, 1963; and any order for injunction granted in contravention of these provisions shall be void.

Interpreting this amended provision it was held in *Shrimati Bhagwanti Vs Anna @ Appa 1997 (ii) MPJR 94*, that if in a suit a permanent injunction cannot be granted under section 38 and 41 of the Specific Relief Act, 1963 no temporary injunction can be granted by the Court. It was also made clear by the Court that the amendment by way of proviso covers both rules 1 and 2 of order 39.

QUESTION OF JURISDICTION / MAINTAINABILITY OF SUIT:

In two division bench decisions of our own High Court (*Moolchnd Vs Shri N. K. Satsangi and others 1992 JLJ 340* & *Mangji Vs Asha Devi 1994 (2) M.P.W.N.95)* it was expressed that question of maintainability of suit either for want of jurisdiction or on other count cannot be raised and decided at the time of granting of temporary injunction; implying thereby that the Court should not look into the question of jurisdiction or maintainability of suit while dealing with the question of grant of interim injunction. This view, however, is not in conformity with the view taken by the Apex Court in *Shiv Kumar Chadda Vs Municipal Corporation Delhi 1993 (2) M.P.W.N.73,* wherein it was authoritatively laid down that before an interim injunction can be issued the Court must be satisfied that a strong prima facie case has been made out by the plaintiff including on the question of maintainability of suit. In consonance with the aforesaid view in *Vindhya Telelinks ltd. Vs State Bank of India and others 1995 JLJ 609 (D.B.)* it has been laid down that before granting injunction, the Court is required to consider the existence of a prima facie case which would also imply prima facie consideration of the jurisdiction of the Court. There would not be a prima facie case, if the Court considering has apparently no jurisdiction to entertain the suit. If the Court holds that it does not possess jurisdiction and/or the suit is barred under some provisions of law and/or the suit is otherwise not maintainable, then certainly the Court considering the prima facie case has to hold that there is no prima facie case in favour of the plaintiff. It has been further laid down that every Court must bear this aspect in mind and seek its prima facie satisfaction that it has jurisdiction to entertain the suit before it proceeds to pass an order injuncting the defendant. Once the Court is satisfied that it has jurisdiction prima facie, then, the Court would be called upon to consider a prima facie case on the facts of the case.

TEMPORARY INJUNCTION REGARDING POSSESSION:

Where parties to the suit claim to be in possession of the suit property, temporary injunction should not be granted restraining the defendant from interfering with the plaintiff's possession unless the Court finds a very strong probability that the plaintiff is in possession, refer: *Shankar Lal Rathore (Supra)*. The Apex Court while dealing with the aspect of possession in *Gangubai Bably Vs*

Sitaram Balchandra A. I. R.1983 SC 742 laid down that when injunction is sought the Court may have to examine whether the party seeking assistance of the Court was at any time in lawful possession of the property, if so, one would prima facie ask the other side how the plaintiff was dispossessed. Here a pertinent question arises as to whether nature of possession should be examined while deciding question of temporary injunction. In a number of authorities (*Nahar Singh Vs Kashi Ram, 1986 (i) MPWN 160, Kishan Singh Vs Mani Ram, 1985 M. P. W.N. 323, Narbada Vs Bira, 1961 JLJ S.N. 345* & *Chitto Vs Sakharam 1982 MPLJ 409*), the view has been expressed that while dealing with the question of issuance of interim injunction only factum of possession should be considered and legality or otherwise of such possession should not be looked into. However, in *Kamal Singh Vs Jaiaram Singh, 1986 CC LJ (MP) 349*, this line of reasoning was not accepted by the Court and it was held that if accepted, it will lend to misuse of provisions of order 39 rules 1 & 2 and the seasoned Court- birds will not even hesitate in overciting muscle practice in dispossessing the true owner having title of the land with him and will file a suit for seeking injunction just dispossessing him a preceding day of the filing of the suit, therefore, possession for which the law does not give any legal sanctity will not be construed to be possession. This view is fortified by the pronouncement of the Apex Court in *Mahadeo Savlaram Shelke Vs Pune Municipal Corporation, (1995) 3 SCC 33* where it has been held that it is settled law that no injunction could be granted against the true owner at the instance of persons in unlawful possession. Therefore, it can be said that the view expressed in *Kishan Singh (Supra)* lays down the correct position of law.

TEMPORARY INJUNCTION IN A SUIT FOR DECLARATION SIMPLICITER:

In a suit for declaration of title simpliciter Court has power under order 39 rules 1 & 2 or even under section 151 C.P.C. to grant an interim injunction pending suit where the plaintiff is in possession of property and there is a threat to dispossess him, refer:*Mannubai Vs Shrimati Kamla Devi A. I. R. 1996 SC 1946.*

GRANT OF EX PARTE INJUNCTION:

Order 39 rules 3 is repository of power of the Court to issue ex parte temporary injunction in cases of urgency. Rule 3 requires that in all cases the Court shall, before grant of an injunction, direct notice of the application to be given to the opposite party, except where it appears that object of granting injunction itself would be defeated by delay. Proviso to rule 3 says that where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay. Interpreting the aforesaid provisions, the Apex Court in *Shiv Kumar Chadda (Supra)* observed that the requirement of recording the reasons for grant of ex parte injunction, cannot be held to be mere formality, therefore, whenever a Court considers it necessary in the facts and circumstances of a particular case to pass an order of injunction with-

out notice to other side, it must record the reasons for doing so and should take into consideration while passing an order of injunction all relevant factors, including as to how the object of granting injunction itself shall be defeated if an ex parte order is not passed. The issue regarding grant of ex parte injunction was considered in detail by the Apex Court in *Morgan Stanley Mutual Fund Vs Kartick Das 1994 A. I. R. SCW 2801.* The Apex Court expressed that as a principle ex parte injunction can be granted only exceptionally. It was further laid down that while considering the grant of ex parte injunction the following factors must weigh with the Court:-

1. Whether irreparable/serious mischief will ensue to plaintiff.
2. Whether refusal will involve greater injustice than grant.
3. The time at which plaintiff had notice of the act complained of.
4. Whether plaintiff had acquiesced for sometime-if yes-ex parte injunction not to be granted.
5. Utmost good faith on the part of the applicant be shown.
6. Even if granted ex parte injunction would be for a limited period of time.
7. General principles as prima facie case/balance of convenience / irreparable injury would also be considered.

One more aspect which requires attention is that a party securing an order under O. 39 R. 3 cannot take advantage of it without complying with requisites of clauses (a) and (b) of Rule 3, viz. sending copy of order to opposite party and filing an affidavit stating that copies of the aforesaid order are delivered. Further such an order is appealable, refer : *A. Venkatasubbiah Naidu Vs. Chellappan and Ors AIR 2000 SC 3032.*

GRANT OF INTERIM INJUNCTION UNDER SECTION 151 C. P.C.

Now it is no more res integra that in situations not covered by order 39 rules 1 & 2 C. P.C a temporary injunction may be granted by the Court under its inherent powers under section 151 C. P.C. The law in this respect was authoritatively laid down by the Apex Court in *Manohar Lal Chopra Vs Rai Bahadur Rao Raja Seth Hiralal 1962 Supp. (1) SCR 450.* The Court held that Civil courts had inherent power to issue temporary injunction in cases which are not covered by the provisions of order 39 Civil Procedure Code. The provisions of the Code were not exhaustive. There was no prohibition in section 94 against the grant of a temporary injunction in circumstances not covered by order 39. It was further made clear that inherent powers were not to be exercised when their exercise was in conflict with the express provisions of the Code or was against the intention of the Legislature. Such powers were to be exercised in very exceptional circumstances.

INJUNCTION AGAINST PUBLIC AUTHORITIES:

Very often temporary injunction is sought to prevent the public authorities to proceed with execution or implementation of public utility schemes or con-

tracts for execution thereof. In such cases public interest is one of the material and relevant considerations. No doubt the Court should be always willing to extend its discretion in favour of a person whose rights are being encroached upon by the action of the public authorities but at the same time the larger issue of interest of the public at large should also not be sidetracked. Considering this aspect the Apex Court in *Mahadeo Savlaram Shelke (Supra)* made it clear that while exercising discretionary power in such cases the Court should adopt the procedure of calling upon the plaintiff to file a bond to the satisfaction of the Court that in the event of his failing in the suit to obtain the relief asked for in the plaint, he would adequately compensate the defendant for the loss ensued due to the order of injunction granted in favour of the plaintiff. The Court was of the view that even otherwise the Court while exercising its equity jurisdiction in granting injunction has also jurisdiction and power to grant adequate compensation to mitigate the damages caused to the defendant by grant of injunction restraining the defendant to proceed with the execution of the works etc. The Court further made it clear that the pecuniary award of damages is consequential to the adjudication of the dispute and the result therein is incidental to the determination of the case by the Court. It was also laid down that the pecuniary jurisdiction of the Court of first instance should not impede nor be a bar to award damages beyond its pecuniary jurisdiction and that such a procedure would act as a check on the abuse of the process of the Court and adequately compensate the damages or injury suffered by the defendant by act of Court at the behest of plaintiff.

INJUNCTION AGAINST BANK GUARANTEE:

As a general rule injunction against encashing the bank guarantee should not be granted by the Court unless the plaintiff shows that the bank guarantee was obtained by practicing fraud on the bank and that, there is no other adequate alternate remedy and that plaintiff is likely to suffer an irreparable loss, refer:*Svenska Handelsbanker Vs Indian Charge Chrome and others A. I. R. 1994 SC 626.*

INJUNCTION AGAINST ATTEMPTED ALIENATION :

the law is well settled that courts have power to issue a temporary injunction restraining attempted alienation of the suit property. No doubt the doctrine of lis pendence as enshrined in section 52 of the Transfer of Property Act may take care of the interest of the plaintiff in respect of alienation of the disputed property pending trial but that by itself may not be sufficient remedy in all cases and may also give rise to multiplicity of suits. The law in this respect was elaborately considered by our own High Court in *Devi Prasad Vs Babulal 1993 (1) MPJR 462* and it was laid down that extra care and caution has to be adopted by the Court to see that the plaintiff does not intend to achieve something else of it and is not acting with the ulterior motive in the garb of seeking a temporary injunction. The Court observed that people do not ordinarily alienate their property but for reason and , therefore, a temporary injunction granted without care

and caution may have the effect of making the situation irreversible and by the time the case comes to be decided, it may become practically impossible to place the person injuncted in the same position in which he would have been if the injunction was not granted. The Court pointed out that the necessity of a strong prima facie case arises in such cases because the plaintiff must have extra strength for piercing into the umbrella of shelter taken by the defendant under section 52 of the Transfer of Property Act. Whether the plaintiff has reasonable prospects of obtaining permanent injunction at the end of the suit and how the plaintiff would suffer irreparable injury in spite of the protection enjoined by him under section 52 of Transfer of Property Act, are the additional questions which must be posed by the Court to itself while considering a prayer for the grant of temporary injunction restraining alienation of the suit property.

DEFENDANT'S RIGHT TO SEEK TEMPORARY INJUNCTION:

A bare look at the provisions of rule 1 and 2 of order 39 very clearly indicates that under sub- rule (a) of rule 1, a temporary injunction can be issued when property in dispute is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree. Phrase " any party" used in this sub- rule makes it clear that either party to the suit, whether plaintiff or defendant, may seek a temporary injunction if the provisions cover the case. However, temporary injunction under sub- rule (b) of rule 1 and sub-rule 1 of rule 2 may be granted only at the instance of the plaintiff against defendant. Law laid down by our own High Court in *Sushila Singh Vs Vijay Shankar shukul 1990 MPJR S. N. 20* may usefully be referred in this connection, where in it has been observed that " any party" under order 39, rule 1 (a) is wide enough to cover the plaintiff as well as the defendant.

TEMPORARY INJUNCTION IN MANDATORY FORM:

A temporary injunction in mandatory form may well be granted under the provisions of order 39 rules 1 and 2, of course such an injunction can be issued only in exceptional situations. The Apex Court in *Dorab Cawasji Warden Vs Coomi Sorab Warden A. I. R. 1990 SC 867* laid down following guidelines for the grant of temporary injunction in mandatory form:

1. The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.
2. It is necessary to prevent irreparable or serious injury, which normally cannot be compensated in terms of money.
3. The balance of convenience is in favour of the one seeking such relief.

The aforesaid discussion though not exhaustive attempts to cover fundamental aspects touching the issue of grant or refusal of temporary injunction and if kept in view while dealing with the matter may prove very helpful.

●

न्यायालयीन प्रबंधन

ए.के. सक्सेना
संचालक

प्रस्तावना

वर्तमान में भारतीय अधीनस्थ न्यायालयों में न्यायिक प्रकरण अत्यधिक संख्या में लंबित हैं। मध्यप्रदेश राज्य में भी अधीनस्थ न्यायालय इसके अपवाद नहीं हैं। यहां भी लगभग प्रत्येक न्यायालय में मानक स्तर से कई गुना अधिक कार्य है तथा न्यायिक अधिकारीगण कार्य के अत्यधिक बोझ से दबे हुये हैं। लगभग सभी न्यायिक अधिकारीगण द्वारा मानक स्तर से अधिक तथा द्रुत गति से कार्य किया जा रहा है। कहीं–कहीं तो प्रकरणों की प्रस्तुत संख्या से अधिक प्रकरणों का निराकरण भी किया जा रहा है, परन्तु कार्य को कम करने के लिए यह आवश्यक है कि न्यायालयीन कार्य का प्रबंधन उचित रूप से किया जावे, ताकि न्यायिक अधिकारीगण जितनी मेहनत कर रहे हैं, उतनी मेहनत में और अच्छे परिणाम प्राप्त किये जा सके। इसके साथ ही साथ प्रशासकीय कार्य को भी त्वरित गति से पूर्ण किया जाना अति आवश्यक है। प्रशासकीय कसावट न्याय प्रशासन की छवि को और उज्जवल बनाने में महत्वपूर्ण रूप से सहायक होती है।

न्यायालयीन प्रबंधन का महत्व

न्यायालयीन प्रबंधन एक ऐसी विषय वस्तु है, जिस पर उसके महत्व को समझते हुए वर्तमान में विशेष रूप से ध्यान दिया जा रहा है। मध्यप्रदेश उच्च न्यायालय द्वारा इसके महत्व को दृष्टिगत रखते हुए न्यायिक अधिकारीगण प्रशिक्षण एवं अनुसंधान संस्थान (J.O.T.R.I.) के अन्तर्गत चलाये जा रहे प्रत्येक स्तर के न्यायिक अधिकारियों के लिए नियत किये गये पाठ्यक्रम में न्यायालयीन प्रबंधन जैसे महत्वपूर्ण विषय को भी सम्मिलित किया गया है, जिस पर प्रशिक्षण के दौरान विशेष रूप से बल दिया जा रहा है। इसी विषय पर नई दिल्ली में एक अन्तर्राष्ट्रीय सम्मेलन भी हो चुका है और वहां भी न्यायालयीन प्रबंधन के विषय के महत्व पर विशेष रूप से चर्चा हुई।

मध्यप्रदेश उच्च न्यायालय के निर्देशानुसार कुछ जिलों में पायलेट प्रोजेक्ट चलाये जा रहे हैं। अनेक जिलों में ये पायलेट प्रोजेक्ट महत्वपूर्ण सफलता भी प्राप्त कर चुके हैं। इस प्रोजेक्ट के अन्तर्गत लगभग वर्तमान अधोसंरचना तथा कर्मचारीगण के साथ अधिकतम प्रकरणों के निराकरण का प्रयास एक नियत अवधि में किया जाता है। पायलेट प्रोजेक्ट के अन्तर्गत प्रकरणों के शीघ्र निराकरण के लिए कोई पृथक से प्रक्रिया निर्धारित नहीं है, परन्तु इसके उपरांत भी प्रकरणों का निराकरण शीघ्रता से होता है और इसका एकमात्र कारण उचित रूप से किया गया न्यायालयीन प्रबंधन है। जिस–जिस पायलेट प्रोजेक्ट के जिले में जिला न्यायाधीश व अन्य न्यायाधीशगण ने उचित न्यायालयीन प्रबंधन किया, वहां–वहां पायलेट प्रोजेक्ट सफल रहा है।

न्यायालयीन कार्य भविष्य में बढ़ना है और इसका एक महत्वपूर्ण कारण है, न्यायालयों पर समाज की आस्था व विश्वास। दूसरा कारण यह भी है कि व्यक्ति अपने अधिकारों के प्रति जागरूक हो रहा है। परन्तु जब न्यायालय शीघ्रता से न्याय प्रदान करने में सक्षम नहीं होती हैं, तब लोगों का

विश्वास इस न्याय व्यवस्था से डगमगाने लगता है और लोग अपने विवादों का निराकरण न्यायालय से न करवाकर अवैधानिक तरीकों से करने लगते हैं। यह एक सभ्य समाज के लिए घातक है। जब न्यायालय से शीघ्र न्याय मिल सकने की जानकारी समाज में रहने वालों को होती है, तब वे अपने विवादों का निराकरण अवैधानिक तरीकों से करने की अपेक्षा न्यायालय से ही करवाना उचित समझते हैं। उनकी आस्था न्यायालयीन प्रक्रिया में बढ़ती है और तब प्रकरणों की प्रस्तुति भी बढ़ती जाती है। शासन से यह अपेक्षा करना व्यर्थ है कि प्रकरणों की संख्या बढ़ने के साथ–साथ न्यायालयों में न्यायाधीशगण की संख्या व अधोसंरचना भी तत्काल बढ़ा दे। इन परिस्थितियों में न्यायालयीन प्रबंधन का महत्व और भी बढ़ जाता है।

न्यायालयीन प्रबंधन का अर्थ

न्यायालयीन प्रबंधन को एक परिभाषा में बांधना कठिन है, परन्तु इसका एक मोटे तौर पर यह अर्थ है कि प्रतिदिन के लिए न्यायालयीन तथा प्रशासकीय कार्य इस प्रकार से नियत किया जावे कि नियत किया गया कार्य, अपवादों को छोड़, उसी दिन पक्षकारों एवं कर्मचारीगण से कराया जावे तथा न्यायिक अधिकारी द्वारा किया जावे। दूसरे शब्दों में कहा जा सकता है कि किसी दिनांक के लिए अथवा नियत अवधि के अन्दर पूर्ण करने के लिए जो कार्य नियत किया गया है, वह कार्य उसी दिनांक को अथवा अवधि के अंदर पूर्ण होना चाहिये। ऐसा केवल उचित न्यायालयीन प्रबंधन द्वारा ही कर पाना संभव है।

न्यायालयीन प्रबंधन के महत्वपूर्ण तत्व

न्यायालयीन प्रबंधन के विषय का विस्तार अधिक है तथा इसके अन्तर्गत प्रशासकीय प्रबंधन भी आता है। अतः इसमें भ्रम की स्थिति नहीं होनी चाहिए कि न्यायालयीन प्रबंधन (Court Management) के अन्तर्गत केवल प्रकरण प्रबंधन (Case Management) पर ही विचार किया जाना है। किसी भी न्याय व्यवस्था की सफलता के लिए न्यायाधीशगण, अभिभाषकगण, पक्षकार तथा कर्मचारीगण महत्वपूर्ण होते हैं। इनमें से किसी के भी व्यवस्था के अनुरूप कार्य न करने पर सम्पूर्ण व्यवस्था चरमरा जाती है। इन चारों वर्ग में न्यायाधीश का कार्य सबसे प्रमुख व महत्वपूर्ण होता है। वह न्यायिक व्यवस्था का आधार स्तंभ है और वही न्यायालयीन प्रबंधन के लिए सम्पूर्ण रूप से उत्तरदायी भी होता है। यह न्यायिक अधिकारी पर ही निर्भर करता है कि उसके न्यायालय का कार्य सुचारू रूप से हो।

प्रबंधन प्रत्येक न्यायिक अधिकारी की व्यक्तिगत क्षमता पर निर्भर करता है। यहां यह नहीं मानना चाहिये कि न्यायालयीन प्रबंधन कोई कठिन विषयवस्तु है। इसे अत्यधिक सुगमता से प्राप्त किया जा सकता है, परन्तु इसके लिए यह आवश्यक है कि न्यायिक अधिकारी में आवश्यक गुणों का समावेश हो। वह अपना दायित्व निर्वहन भार समझ कर न करे। जो भी कार्य सौंपा जावे, उसे ईमानदारी से अपनी सम्पूर्ण क्षमता के अनुरूप पूर्ण करे। ऐसा करने के लिए स्वप्रेरणा होनी आवश्यक है। कहीं से भय प्रदर्शित किया जावे, तभी कोई कार्य करेंगे, ऐसा नहीं होना चाहिये। यदि न्यायिक अधिकारीगण अपनी कार्यप्रणाली से एक उदाहरण प्रस्तुत करते हैं, तो कोई कारण नहीं है कि अभिभाषक, पक्षकार अथवा कर्मचारीगण इसमें किसी प्रकार से बाधक बनें। अतः कहने का तात्पर्य

केवल यही है कि उचित एवं प्रभावपूर्ण न्यायालयीन प्रबंधन का सम्पूर्ण उत्तरदायित्व न्यायिक अधिकारी का ही है।

न्यायालयीन प्रबंधन को दो भागों में विभक्त किया जा सकता है। प्रथम प्रशासकीय प्रबंधन तथा दूसरा प्रकरण प्रबंधन। दोनों ही प्रकार के प्रबंधन न्यायालय से संबंधित सम्पूर्ण कार्य को सुचारू रूप से चलाने के लिए महत्वपूर्ण है। ये प्रबंधन एक–दूसरे के पूरक हैं। अतः न्यायिक अधिकारीगण को दोनों पर ही समान रूप से ध्यान देने की आवश्यकता है। दोनों ही प्रकार के प्रबंधन का दायित्व न केवल जिला न्यायाधीश, अपितु व्यवहार न्यायाधीश वर्ग–2 के स्तर तक के न्यायिक अधिकारी का भी होता है।

प्रशासकीय प्रबंधन एवं प्रकरण प्रबंधन के लिए अनेक महत्वपूर्ण तत्व हैं, जिनमें से कुछ दोनों के लिए समान हैं। अतः दोनों प्रकार के प्रबंधनों के लिए महत्वपूर्ण तत्वों को यहां पर साथ–साथ लिया जा रहा है।

(i) समय की पाबन्दी :

सफल न्यायालयीन प्रबंधन के लिए समय की पाबंदी सर्वाधिक महत्वपूर्ण एवं आधारभूत सोपान है। न्यायिक अधिकारी के लिए समय का पाबन्द होना अति आवश्यक है, अन्यथा सम्पूर्ण न्यायालयीन प्रबंधन पर प्रतिकूल प्रभाव पड़ता है। नियमित रूप से न्यायालय में समय पर उपस्थित होना तथा नियत समय पर कार्य प्रारंभ करना (किसी गंभीर परिस्थिति के अपवाद को छोड़कर) एक सामान्य प्रक्रिया के अन्तर्गत किसी भी न्यायिक अधिकारी के लिए आवश्यक होना चाहिए और इसमें व्यर्थ के स्पष्टीकरण कोई महत्व नहीं रखते हैं। समय की पाबन्दी किसी भय के कारण नहीं होनी चाहिये, अपितु भयरहित, स्वेच्छा, स्वप्रेरणा से तथा कर्तव्य मानकर होनी चाहिये। समय पर कार्य करने का यह प्रभाव होता है कि न्यायालय से संबंधित जो भी व्यक्ति हैं, वे सभी समय पर उपस्थित होकर अपना–अपना कार्य करने का प्रयास करने लगते हैं और प्रशासकीय व न्यायालय का कार्य व्यवस्थित रूप से आरंभ होता है।

(ii) निष्ठापूर्ण कार्य

निष्ठा के अन्तर्गत उन सभी गुणों का समावेश होता है, जो एक न्यायिक अधिकारी में होने चाहिये अथवा जिनके संबंध में न्यायिक अधिकारी से अपेक्षा की जाती है। ईमानदारी, मेहनत, लगन से कार्य करना, सौम्य, सरल और मृदु स्वभाव बनाये रखना और साथ ही अपने कर्तव्य के प्रति दृढ़ रहना, एक न्यायिक अधिकारी के लिए सामान्य गुण हैं। इन गुणों का प्रभाव दीर्घ तथा स्थायी होता है। अतः अस्थायी लाभ के लिए, इन गुणों को छोड़ना न तो उचित है और न ही न्यायिक अधिकारी के जीवन के पक्ष में है।

(iii) कठोर निर्णय

प्रशासकीय दक्षता तथा प्रकरण प्रबंधन के लिए न्यायिक अधिकारी को कठोर निर्णय लेने से नहीं डरना चाहिये। कठोर कार्यवाही से जहां कार्य न करने वाले लोगों में भय पैदा होता है, वहीं जो व्यक्ति गंभीरता से कार्य कर रहे हैं, उन्हें बल मिलता है और उनके कार्य की सराहना होती है। जहां

समझाने के बाद भी कार्य न करने वाले व्यक्तियों में कोई बदलाव न हो, वहां कठोर निर्णय ही न्यायालयीन प्रबंधन को सही दिशा दिखाने में सक्षम होते हैं।

(iv) समान दृष्टि

न्यायालयीन प्रबंधन के लिए यह एक महत्वपूर्ण बिन्दु है। न्यायालयीन अधिकारी द्वारा किया गया कोई भी न्यायिक अथवा प्रशासकीय कार्य समान दृष्टि से किया गया होना चाहिये। भेद–भाव रहित एवं सद्भावना पूर्वक कार्य करने से न्यायिक अधिकारी की गरिमा तो बढ़ती है, साथ ही साथ अभिभाषकगण, पक्षकारगण तथा कर्मचारीगण में न्यायिक अधिकारी के प्रति विश्वास भी पैदा होता है और विश्वास पैदा होने पर कोई भी न्यायिक तथा प्रशासकीय कार्य कम से कम समय में किया जा सकता है।

(v) विधि में दक्षता

विधि व नियमों की जानकारी अधिक से अधिक होनी आवश्यक है। इसके लिए अनवरत अध्ययन तथा महत्वपूर्ण बिन्दुओं पर आपसी विचारविमर्श करना अति आवश्यक है। ऐसा होने पर कोई भी निर्णय लेने में अधिक समय व्यतीत नहीं करना होगा। यही एक ऐसा बिन्दु है, जिस पर ध्यान न देने से अनेक न्यायिक अधिकारीगण को यह कहते हुए देखा जा सकता है कि लगातार मेहनत करने पर भी निराकृत किये गये कार्य का परिणाम संतोषप्रद नहीं है अथवा प्रशासकीय कार्य करने में अत्यधिक समय व्यतीत करना पड़ता है। अतः न्यायालयीन प्रबंधन के लिए विधि एवं नियमों का ज्ञान होना अत्यन्त आवश्यक है, अन्यथा परिणाम तक पहुंचने में अत्यधिक समय लग सकता है। इसके विपरीत विधि एवं नियमों की जानकारी होने पर अत्यंत कम समय में उचित परिणाम पर पहुंचा जा सकता है।

(vi) प्रकरणों पर पूर्वावलोकन

प्रकरण प्रबंधन के लिए प्रकरणों का पूर्व अवलोकन करना अत्यन्त आवश्यक है और संभवतः यही बिन्दु सबसे उपेक्षित भी है। जिस दिनांक के लिए जितने भी प्रकरण नियत है, उनका एक दिन पूर्व अवलोकन नहीं किया जाता है, तो उस स्थिति में उस नियत दिनांक पर न्यायालयीन समय में जितना कार्य हो पाना संभव था, वह नहीं हो पाता है। कौन सा प्रकरण किस स्तर पर है, उसमें नियत दिनांक पर क्या कार्यवाही होनी है, किस प्रकरण में कितना समय लगने की संभावना हो सकती है, किस प्रकरण में किस पक्षकार को कोई कार्यवाही करने के लिए कितने अवसर दिये जा चुके हैं, आदि, इन समस्त तथ्यों की जानकारी यदि न्यायिक अधिकारी को पूर्व से नहीं होगी, तब उतना कार्य किया जाना संभव नहीं होगा, जितना कि होना चाहिये था। किसी भी न्यायिक अधिकारी द्वारा न्यायालय में अपनाई गई कार्यशैली को देखकर ज्ञात किया जा सकता है कि वह प्रकरणों का पूर्वावलोकन कर पूर्ण तैयारी से न्यायालय में विराजमान है या नहीं। साथ ही साथ माह के अंत तक उसके द्वारा किये गये कार्य से भी इस संबंध में जानकारी हो सकती है। अतः प्रकरणों का यदि पूर्वावलोकन किया जावे, तब इनका निराकरण अधिक से अधिक हो सकता है, क्योंकि न्यायिक अधिकारी का अपने प्रकरण प्रबंधन पर पूरा नियंत्रण रहता है।

(vii) प्रकरणों में दिनांक नियत किया जाना

प्रकरणों में आगामी दिनांक नियत किये जाने के कार्य पर न्यायिक अधिकारी का पूर्णतः नियंत्रण होना चाहिये अन्यथा कभी कम या कभी अत्यधिक संख्या में प्रकरण नियत होते रहेंगे और न्यायालय का कार्य अव्यवस्थित हो जायेगा। इसके लिए बोर्ड डायरी को पूर्ण व्यवस्थित होना चाहिये। किस प्रकरण में किस कार्यवाही के लिए कौनसी दिनांक नियत की जानी है, यह संपूर्ण कार्य न्यायिक अधिकारी के निर्देश में होना आवश्यक है। इसके लिए यह कदापि आवश्यक नहीं है कि प्रतिदिन नियत किये गये समस्त प्रकरणों को न्यायिक अधिकारी अपने बोर्ड पर रख लें और किसी प्रकरण में साक्ष्य लेने या तर्क सुनने में व्यस्त हो जावे एवं अभिभाषकगण या पक्षकारगण अपने प्रकरणों में होने वाली सामान्य सी कार्यवाही के लिए भटकते रहें। यह भी उचित नहीं होगा कि न्यायिक अधिकारी सामान्य सी कार्यवाही करने के लिये अपना अधिकांश समय निकाल दें और साक्ष्य, तर्क आदि महत्वपूर्ण कार्यवाही के प्रकरण शाम को बढ़ा दिये जावें। दिनांक नियत करने के कार्य पर पूर्ण नियंत्रण होने का यह तात्पर्य नहीं है कि यह संपूर्ण कार्य न्यायिक अधिकारी स्वयं ही करें। इसका स्पष्ट अर्थ है कि यह कार्य न्यायालय में पदस्थ कर्मचारीगण भी करें, जो केवल न्यायिक अधिकारी द्वारा दिये गये निर्देशों के अनुरूप ही किया जाये। इससे न्यायालय का समय व्यर्थ नहीं होगा, आवश्यक कार्य समय पर होगा और अभिभाषकगण, पक्षकारगण को असुविधा का सामना भी नहीं करना होगा।

(viii) अधीनस्थों के कार्य की नियमित जांच

यह एक महत्वपूर्ण प्रक्रिया प्रशासकीय एवं प्रकरण प्रबंधन के लिये निर्धारित है और लगभग पूर्णरूप से उपेक्षित भी है। किसी भी स्तर के न्यायिक अधिकारी को अपने अधीनस्थ न्यायिक अधिकारीगण व कर्मचारीगण के कार्य का नियमित अवलोकन करना चाहिये। इससे न केवल समय पर कार्य होंगे, अपितु गबन, सम्पत्ति व रिकार्ड के त्रुटिपूर्ण विनिष्टीकरण, प्रकरणों का गुमना आदि जैसी गंभीर स्थितियों से भी बचा जा सकेगा। इससे प्रकरणों के निराकरण तथा प्रशासकीय कार्य में होने वाले विलम्ब से भी बचा जा सकता है। इसके अलावा यह भी जानकारी लगातार रहती है कि कौन–कौन से कर्मचारी या अधिकारी कार्य नहीं कर रहे हैं, जिससे उनके विरूद्ध आवश्यक कार्यवाही यथा समय करना आसान हो जाता है।

(ix) प्रकरणों का विचारण

न्यायालय में प्रकरणों के विचारण के दौरान यह ध्यान देने योग्य तथ्य है कि न्यायिक अधिकारी को पक्षकारों की आवाज लगवाते रहने तथा उनकी उपस्थिति के लिए इंजतार करते रहने में समय व्यर्थ नहीं गंवाना चाहिये। यदि किसी प्रकरण के पक्षकार या अभिभाषकगण उपस्थित हैं तथा उस प्रकरण में कार्यवाही तत्काल की जाना संभव है, तब ऐसे प्रकरण का विचारण तत्काल आरंभ कर देना चाहिये। वादप्रश्न तथा अभियुक्त परीक्षण के प्रश्न पूर्व से तैयार होने चाहिये। साक्ष्य को नियंत्रित करना आवश्यक है। लिखित तर्क प्रस्तुत होने चाहिये। मौखिक तर्क में अनावश्यक तथ्यों का समावेश नहीं हो। अन्तर्वर्तीय आवेदनों का निराकरण तत्काल या शीघ्र होना आवश्यक है। समंस, वारंट की

तामीली हो, इस पर विशेष ध्यान देने की आवश्यकता है। अनावश्यक स्थगन किसी भी स्टेज पर अनुचित है, इसके संबंध में कठोरता अपनानी आवश्यक है। निर्णय या आदेश, अपरिहार्य कारण छोड़ प्रत्येक स्थिति में नियत दिनांक को सुनाये जाना चाहिये। निर्णय या आदेश तैयार करने के कारण अन्य प्रकरणों की सुनवाई या उनकी प्रगति रोक देना घोर आपत्तिजनक तथा नियम विरूद्ध है। निर्णय व आदेश नियमानुसार लिखे जावें एवं उनमें व्यर्थ के तथ्य अथवा एक जैसे तथ्यों को बार–बार दोहराने जैसी स्थिति नहीं होनी चाहिये। इस तरह प्रकरणों के विचारण के दौरान उचित प्रबंधन करने से कम समय में अधिक से अधिक कार्य किया जाना संभव है।

(x) न्यायालयीन तथा कार्यालयीन वातावरण

सौहार्द्रपूर्ण वातावरण में न्यायालयीन व कार्यालय का कार्य त्वरित गति से होता है। न्यायिक अधिकारी पर ही यह दायित्व आता है कि वह अपने न्यायालय या कार्यालय का कार्य उचित वातावरण में पूर्ण करे। वातावरण को बिगाड़ने का कार्य अनेक प्रकार के लोग करते हैं, परन्तु इससे प्रभावित हुये बिना न्यायिक अधिकारी को अपना कार्य पूरा करना चाहिये, जो कि न्यायालयीन प्रबंधन का एक महत्वपूर्ण पहलू है।

(xi) प्रगतिशील विचारधारा

किसी भी स्तर के न्यायिक अधिकारी को अपने कर्तव्य एवं उत्तरदायित्व के संबंध में प्रगतिशील विचारधारा को अपनाना आवश्यक है। यथास्थिति या असम्बद्धता का भाव रखने वाले न्यायिक अधिकारी का कोई महत्व नहीं है। प्रत्येक कार्यप्रणाली में सुधार की संभावनायें सदैव विद्यमान रहती हैं। कनिष्ठ न्यायिक अधिकारी हमेशा वरिष्ठ से मार्गदर्शन की अपेक्षा रखते हैं। प्रत्येक न्यायिक अधिकारी का यह दायित्व है कि वह स्वस्थ परिस्थितियों में कार्य करे तथा रहे और जहां इस प्रकार की स्थिति न हो, वहां उनका निर्माण करने का प्रयास करे। यह भावना उचित नहीं है कि किसी स्थान विशेष पर कुछ वर्ष ही रहना है। स्वस्थ विचारधारा वाला न्यायिक अधिकारी ही त्वरित गति से उचित न्यायदान में सक्षम रहता है। अतः विचारधारा में प्रगतिशीलता लाया जाना आवश्यक है, जो कि उचित न्यायालयीन प्रबंधन का आवश्यक व महत्वपूर्ण तत्व है।

इस लेख को पढ़ने के बाद यह विचार आ सकता है कि आखिर एक न्यायिक अधिकारी क्या–क्या करे। वास्तव में ऐसी स्थिति नहीं है। यदि हमारा लक्ष्य उचित न्यायालयीन प्रबंधन कर त्वरित गति से न्यायदान करना है, लक्ष्य की प्राप्ति के लिए मन में तीव्र उत्कंठा है तथा साथ ही साथ इस लक्ष्य की प्राप्ति के लिए हमारे साधन किसी प्रकार के राग या द्वेष से लिप्त नहीं हैं, तब उसके लिए आवश्यक गुण स्वतः ही हमारे अंदर पैदा हो जायेंगें। आवश्यकता केवल यही है कि न्यायालयीन प्रबंधन के लिए आवश्यक तत्वों को हम बोझ न मानें, उन्हें मन से आत्मसात कर उन पर दृढ़ता से पालन करें, तो आप देखेंगे कि न्यायालयीन प्रबंधन कार्य कितनी त्वरित गति से परन्तु सुगमता से पूर्ण हो रहा है और न्याय व्यवस्था में किस तरह से समाज की आस्था बढ़ रही हैं। यह महत्वपूर्ण सच्चाई है कि उचित न्यायालयीन प्रबंधन से ही प्रकरणों का अंबार आसानी से कम किया जा सकता है और इस सच्चाई से मुंह मोड़ना न्याय व्यवस्था एवं समाज दोनों के लिए घातक होगा।

●

APPLICATION OF INFORMATION TECHNOLOGY IN JUDICIARY - LEARN IT YOURSELF

(CONTINUED FROM PREVIOUS ISSUE)

Regardless of their shapes, sizes, capabilities and prices modern digital computers are conceptually similar. They can, nevertheless, be divided into several categories on the basis of their sizes, cost and performances. Microcomputers, the most commonly used of them all, are low-cost, convenient and efficient machines. These are designed usually to fit on desktop. Such machines are called personal computers or PCs. Some minicomputers, on the other hand, are small enough to fit in a briefcase. These are called "laptops", as they can be put on one's lap opened like a briefcase and operated. Others are even smaller and can fit into a pocket. Such machines are called "palm tops" because they can be opened and operated like a digital diary on the top of one's palm. Mini computers, with capabilities suited to a business, school or laboratory, are generally too expensive for personal use. The mainframe computers are large expensive machines with capability of serving the needs of major business enterprises, government departments, scientific research establishments and the like. The largest and fastest of them all are called supercomputers. Personal computers are most suitable for the needs (and the pocket) of a subordinate Judge; therefore, for the purposes of this article, we shall limit ourselves to personal computers.

OVERVIEW OF A COMPUTER SYSTEM:-

Every computer system has two main components.

(i) Hardware and

(ii) Software.

All physical parts of a computer system or everything that we can actually touch are collectively known as hardware whereas software is something that imparts intelligence (so-called) to a computer. As such, all the tangible ware like monitor, keyboard, mouse, systems unit etc belonging to a computer system is hardware.Software on the other hand is that intangible component which drives the computer. It includes a personal computer's operating system, programmes and data. It is like human mind (not brain). It actually puts life in a otherwise dead computer system and makes it performe the tasks that we want it to perform.

Take for example, our household tape recorder. The tape recorder, the cassettes and the remote control unit are instances of hardware whereas songs or speeches that we record on the cassettes are examples of software.

HARDWARE:-

As we have seen, a computer is more than just hardware but the hardware is the best starting point to learn how your PC operates. A computer system is a collection of interrelated parts that work together to do the desired task. We need not really learn the technical name of every part of our PC, however, if we do it does help. It is like a motorcar. We are not required to learn about carburetor, fan

belt, fuel pump or the like, in order to drive a car. In other words you don't have to be mechanic to drive a car. However, you'll have to learn about starter switch, accelerator, clutch, breaks and the steering wheel before you venture to drive it. It is the same with computers.

A classical block diagram of a computer showing the basic elements is as follows.

Fig.-1

BLOCK DIAGRAM

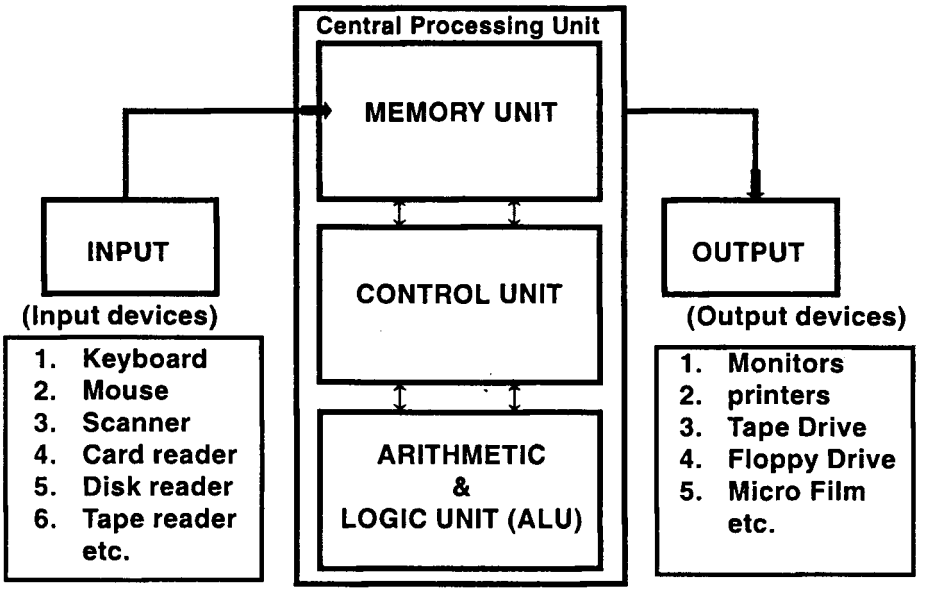
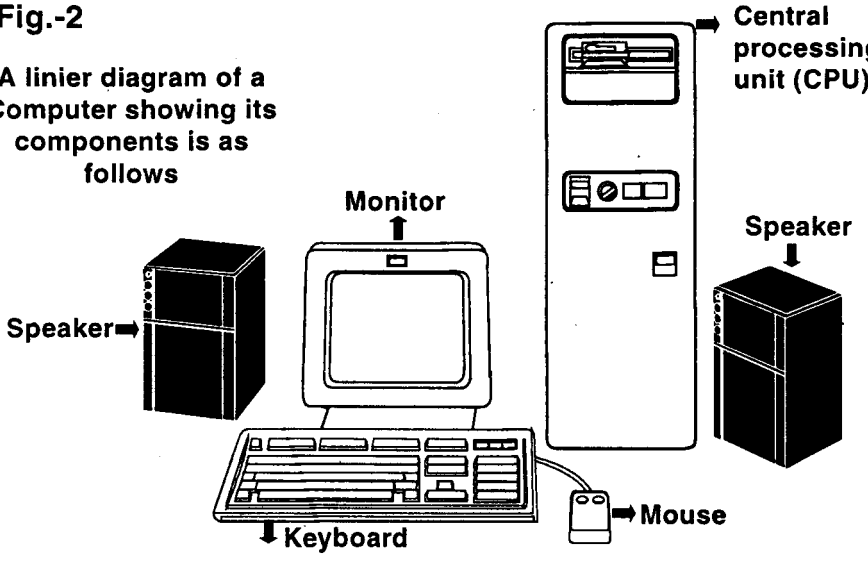
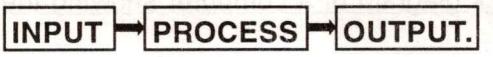


Fig.-2

A linier diagram of a Computer showing its components is as follows



A computer is based on complex technology but it works on a simple principle. It processes and analyses data, that is, raw facts and figures (input) as per set of instructions (programmes) and converts it into useful information (output). This simple principle may be depicted by following diagram:



For this purpose we need input devices, a processor and output devices in order to perform a task. So, in a computer system, we have, input devices like keyboard, mouse, microphone, joystick etc. These can be used to feed different types of data into a computer system. Then we have a systems unit that processes and analyses the data fed by input devices. Lastly we have output devices like monitors, printers and speakers that show the results of processing. Now we shall take a look at the devices individually.

INPUT DEVICES:-

Input devices to a processor are what eyes and ears are to brain. Keyboard, Mouse, Joystick, Light Pen, Scanner, Touch Screen, Microphone and Track Ball are some of the examples of input devices. Keyborad mouse and microphone are most commonly used input devices. Therefore, for the present we shall limit ourselves to these devices. We shall learn about the scanners at a later stage.

KEYBOARD :

Keyboard has to be the most commonly used input device. It resembles very much to the keyboard of an electronic typewriter, with a few additional keys. Several kinds of keyboards are available but most personal computers use 104 keyboard. It is so-called because it has 104 keys. In these keyboards, the cursor control keys are duplicated to allow easier use of numeric pad. Keyboards are great for entering the text and controlling several kinds of tasks.

It would not be out of place here to learn about binary language and digital domain. Computers are electronic devices. Electronic components only understand electrical signals. These can recognize only two states, either current is flowing or it is not flowing. For them, a switch is either on or it is off. So, if processor of a computer understands only on or off, how do we make it understand English, or for that matter, Hindi alphabets and numbers? How do we communicate with a computer? To solve this problem binary system or binary language has been devised. In this system, 'one' stands for 'on' and 'zero' stands for 'off.' In other words numerical 'one' symbolizes 'on' and numerical 'zero' symbolizes 'off.' All the numbers and alphabets have been assigned specific combinations of 'zeros' and 'ones.' These combinations are usually of eight positions. In the early days, different computer companies had their own way of encoding alphabets and numbers. Later on, a standard method was formed. This method

is called the American Standard Code for Information Interchange, ASCII-8. It allows 128 (2 raised to the power 8) different characters.

The binary digits are called BITS. BI standing for Binary and TS standing for Digits. A BIT represents one position, which can either be a '1' or a '0.' Eight bytes constitute one character, which may either be an alphabet or a number or a punctuation mark.

For example following may be codes for different alphabets :

10000001-A

10001010-J

10011010-Z

These days, we often hear about digital cameras, digital televisions, digital music systems and even digital washing machines. Most of us wonder as to what the term "digital" means and how our good old analog camera, television or music systems differ from the digital ones. Digital equipment is nothing but a gadget that can understand and execute a command issued in binary language. So in the digital gadget the processor counts on and off positions of current whereas in analog equipment the processor measures current.

Coming back to the point, when we press a particular key on the keyboard the current flows or does not flow in accordance with the American standard code assigned to that particular character.

MOUSE :-

Depending upon the type, a mouse is an electromechanical or electro-optical hand held device. It is used as a pointer. Most mouses have two buttons, left button and right button with a small pulley in between for scroll functions. Every electromechanical mouse has a rubber or metallic ball underneath. When we held a mouse in our hand and move it on a flat horizontal surface the metallic ball moves. Its movements are detected by mechanical sensors within the mouse, which in turn move the cursor (a small electronic arrow) correspondingly on the monitor's screen. When we have got the cursor at the desired place we can issue command by clicking the mouse. In an optical mouse, the movements are detected by laser rays. It has no mechanical moving parts. Optical mouse responds more quickly and precisely then mechanical mouse but then it is also more expensive. Of late cordless mouse has also been introduced.

MICROPHONE :-

There are certain softwares that enable the user to feed data in voice. Such softwares convert speech files into electronic files, which are recognizable by the processor of the computer. Microphones are needed to work with such software.

(To be continued in next issue)

●

REDUCTION TO LOWER GRADE OR STAGE- SOME LESSER CASES

P.K.TIWARI
Accounts Officer (Retd.)
High Court of M.P.,
JABALPUR

In an earlier article published in 'JOTI JOURNAL' for the month of February, 2003 cases of regulation of pay to lower grade or stage by specified stages for specified periods have been illustrated. But there may be differently worded orders of reduction to lower grade. Generally, three types of such cases come across. The purpose of this article is to illustrate such cases :-

(i) A Government servant drawing pay @ Rs. 2300/- in the scale of 2000- 60- 2300- 75- 3200 is reduced by 2 stages for 2 years from 1-1-98. How is his pay to be regulated. His pay regulation during operation of reduction in same scale shall be as under :-

Date	Pay Scale	Pay	
31-12-97	2000-3200	2100	
1-1-98		2180	reduction by 2 stages
1-1-99		2240	Here increments accruing intermediately have been allowed
1-1-2000		2300	

(ii) A Government servant drawing pay @ Rs. 2300/- in the scale of 2000- 60- 2300- 75- 3200 is reduced to the stage of 2180/- for 2 years period from 1-1-98. The pay regulation during the operation of reduction in the same scale shall be as under :-

Date	Pay Scale	Pay
31-12-97	2000-3200	2300
1-1-98		2180
1-1-99		2180
1-1-2000		2300

(iii) Reversion to Lower Grade - Stage Not Specified :-

Fixation of pay is done under FR 28. FR 28 provides as under :-

The authority which orders the transfer of a Government servant as a penalty from a higher to a lower grade or post may allow him to draw any pay not exceeding the maximum of the lower grade or post which it may think proper. Provided that the pay allowed to be drawn by a Government servant shall not exceed the pay which he would have drawn by the operation of Rule 22 read with clause (b) or clause (c), as the case may be of Rule 26.

FR 22 deals with initial fixation of pay and FR 26 with increments.

The following illustration shall clarify the pay fixation case:

A Government Servant drawing pay at the stage of 2825 in the pay scale of 2000-60-2300- 75-3200 from 1-6-2002 is reverted to lower grade in the pay scale of 1640-60- 2600- 75- 2900 with effect from 1-8-2002. The pay in that scale was Rs. 2540 from 1-7-99. How is his pay to be regulated in revertion.

Date	Lower grade Scale 1640-2900	Higher grade Scale 2000-3200	
1-7-98	2480		
1-7-99	2540		
1-6-2000	(2540)	2675	FR 22 (a) (i) in Central FRC
1-7-2000	(2600)	2675	FR 22-D in M.P. Govt. FR
1-6-2001	(2600)	2750	Increment u/FR 26
1-7-2001	(2675)	2750	
1-6-2002	(2675)	2750	
1-6-2002	(2675)	2825	Increment
1-7-2002	(2750)	2825	
1-8-2002	2750	-	(Reverted)
1-7-2003	2825	-	

OFFICE BEARERS OF MADHYA PRADESH JUDICIAL OFFICERS' ASSOCIATION

In the general meeting of Madhya Pradesh Judicial Officers' Association, held on 12 & 13th April, 2003 at Jabalpur, the President was elected by the members of the Association and the remaining office bearers were nominated by the President.

Following are the names of office bearers of Madhya Pradesh Judicial Officers' Association:

1. Shri A.N.S. Shrivastava,
   District & Sessions Judge, Jabalpur - President
2. Shri I.S. Shrivastava,
   The then Registrar,
   StateAdministrative Tribunal, Jabalpur - Vice-President
3. Shri Gyan Prakash Agrawal,
   Civil Judge Class-I, Ujjain - Secretary
4. Shri Upendra Singh,
   Civil Judge Class-I, Jabalpur - Joint-Secretary

5. Shri Hausla Prasad Singh,
Additional District & Sessions
Judge, Sehora, District, Jabalpur - Treasurer

EXECUTIVE MEMBERS

1. Shri Awadesh Kumar Shrivastava
The then Special Judge (C.B.I.), Jabalpur
2. Smt. Shashi Kiran Dubey
Additional District & Sessions Judge, Jabalpur
3. Shri H.N. Bajpai
Additional District & Sessions Judge, Jabalpur
4. Smt. N.V. Kaur
Additional District & Sessions Judge, Jabalpur
5. Shri B.S. Bhadoriya
Civil Judge Class-I, Jabalpur
6. Shri Sanjeev Kalgaonkar
Civil Judge Class-I, Bhopal
7. Shri D.P.S. Gour
Civil Judge Class-II, Jabalpur
8. Shri Ajay Singh
Civil Judge Class-II, Maihar, Distt., Satna

DIVISIONAL SECRETARIES

1. Shri R.N. Patel
The then Additional District & Sessions Judge, Rewa - Rewa
2. Shri Manohar Mamtani
The then Additional District & Sessions Judge, Morena - Chambal
3. Shri A.M. Saxena
Additional District & Sessions Judge, Hoshangabad - Hoshangabad
4. Shri A.K. Singh
Chief Judicial Magistrate, Sagar - Sagar
5. Shri Rajesh Gupta
Special Railway Magistrate, Indore - Indore
6. Shri K.K. Sharma
Special Railway Magistrate, Jabalpur - Jabalpur
7. Shri Pavan Sharma
Civil Judge Class-I, Ujjain - Ujjain
8. Shri Suresh Singh
Special Railway Magistrate, Gwalior - Gwalior
9. Shri Vijay Chandra
Special Railway Magistrate, Bhopal - Bhopal

PART - II

NOTES ON IMPORTANT JUDGMENTS

127. INTERPRETATION OF STATUTES :

Interpretation of Statutes - Basic principles of construction of statutes explained.

Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd. and others
Judgment dt. 3.12.2002 by the Supreme Court in Civil Appeal No. 8003 of 2002, reported in (2003) 2 SCC 111

Held :

It is the basic principle of construction of statute that the same should be read as a whole, then chapter by chapter, section by section and words by words. Recourse to construction or interpretation of statute is necessary when there is ambiguity, obscurity, or inconsistency therein and not otherwise. An effort must be made to give effect to all parts of the statute and unless absolutely necessary, no part thereof shall be rendered surplusage or redundant.

True meaning of a provision of law has to be determined on the basis of what it provides by its clear language, with due regard to the scheme of law.

Scope of the legislation on the intention of the legislature cannot be enlarged when the language of the provision is plain and unambiguous. In other words statutory enactments must ordinarily be construed according to its plain meaning and no words shall be added, altered or modified unless it is plainly necessary to do so to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute.

It is also well settled that a beneficent provision of legislation must be liberally construed so as to fulfil the statutory purpose and not to frustrate it.

●

128. ADVOCATES :

Strike/Boycott of Courts by lawyers - A lawyer has no right to go on strike or to give a call for boycott not even on token strike - Refusal to attend Court in pursuance of a call for strike by Bar Association/Bar Council is unprofessional or unbecoming for a lawyer- Duty of lawyer and duty of Court explained.

Ex-Capt. Harish Uppal Vs. Union of India and another
Judgment dt. 17.12.2002 by the Supreme Court in Writ Petition (C) No. 132 of 1988, reported in (2003) 2 SCC 45

Held :

It is the duty of every advocate who has accepted a brief to attend trial, even though it may go on day to day and for a prolonged period. It is also settled law that a lawyer who has accepted a brief cannot refuse to attend court be-

cause a boycott call is given by the Bar Association. It is settled law that it is unprofessional as well as unbecoming for a lawyer who has accepted a brief to refuse to attend court even in pursuance of a call for strike or boycott by the Bar Association or the Bar Council. It is settled law that courts are under an obligation to hear and decide cases brought before them and cannot adjourn matters merely because lawyers are on strike. The law is that it is the duty and obligation of courts to go on with matters or otherwise it would tantamount to becoming a privy to the strike. It is also settled law that if a resolution is passed by Bar Associations expressing want of confidence in judicial officers, it would amount to scandalising the courts to undermine its authority and thereby the advocates will have committed contempt of court. Lawyers have known, at least since *Mahabir Prasad Singh vs. Jacks Aviation (P) Ltd., (1999) 1 SCC 37* that if they participate in a boycott or a strike, their action is ex facie-bad in view of the declaration of law by this Court. A lawyer's duty is to boldly ignore a call for strike or boycott of courts/s. Lawyers have also known, at least since *Roman Services (P) Ltd. vs. Subhash Kapoor, (2001) 1 SCC 118* that the advocates would be answerable for the consequences suffered by their clients if the non-appearance was solely on grounds of a strike call.

It must also be remembered that an advocate is an officer of the court and enjoys special status in society. Advocates have obligations and duties to ensure smooth functioning of the court. They owe a duty to their clients. Strikes interfere with administration of justice. They cannot thus disrupt court proceedings and put interest of their clients in jeopardy. In the words of *Mr. H.M. Servai,* a distinguished jurist;

> "Lawyers ought to know that at least as long as lawful redress is available to aggrieved lawyers, there is no justification for lawyers to join in an illegal conspiracy to commit a gross,criminal contempt of court, thereby striking at the heart of the liberty conferred on every person by our Constitution. Strike is an attempt to interfere with the administration of justice. The principle is that those who have duties to discharge in a court of justice are protected by the law and are shielded by the law to discharge those duties, the advocates in return have duty to protect the courts. For, once conceded that lawyers are above the law and the law courts, there can be no limit to lawyers taking the law into their hands to paralyse the working of the courts. *'In my submission'*, he said that 'it is high time that the Supreme Court and the High Courts make it clear beyond doubt that they will not tolerate any interference form any body or authority in the daily administration of justice. For in no other way can the Supreme Court and the High Courts maintain the high position and exercise the great powers conferred by the Constitution and the law to do justice without fear or favour, affection or ill will."

In conclusion, it is held that lawyers have no right to go on strike or give a call for boycott, not even on a token strike. The protest, if any is required, can

only be by giving press statements, TV interviews, carrying out of court premises banners and/or placards, wearing black or white or any colour armbands, peaceful protest marches outside and away from court premises, going on *dharnas* or relay fasts etc. It is held that lawyers holding *vakalats* on behalf of their clients cannot not attend courts in pursuance of a call for strike or boycott. All lawyers must boldly refuse to abide by any call for strike or boycott. No lawyer can be visited with any adverse consequences by the Association or the Council and no threat or coercion of any nature including that of expulsion can be held out. It is held that no Bar Council or Bar Association can permit calling of a meeting for purposes of considering a call for strike or boycott and requisition, if any, for such meeting must be ignored. It is held that only in the rarest of rare cases where the dignity, integrity and independence of the Bar and/or the Bench are at stake, courts may ignore (turn a blind eye) to a protest abstention from work for not more than one day. it is being clarified that it will be for the court to decide whether or not the issue involves dignity or integrity or independence of the Bar and/or the Bench. Therefore in such cases the President of the Bar must first consult the Chief Justice or the District Judge before advocates decide to absent themselves from court. The decision of the Chief Justice or the District Judge would be final and have to be abided by the Bar. It is held that courts are under no obligation to adjourn matters because lawyers are on strike. On the contrary, it is the duty of all courts to go on with matters on their boards even in the absence of lawyers. In other words, courts must not be privy to strikes or calls for boycotts. It is held that if a lawyer, holding a *vakalat* of a client, abstains from attending court due to a strike call, he shall be personally liable to pay costs which shall be in addition to damages which he might have to pay his client for loss suffered by him.

●

129. BANKER AND CUSTOMER :

Interest rate - Terms of contract providing change in rate of interest on the basis of rise of interest on account of the RBI circulars- For charging higher rate bank not required to give notice to the borrower.
Syndicate Bank Vs. R. Veeranna and others
Judgment dt. 19.12.2002 by the Supreme Court in Civil Appeal No. 972 of 1995, reported in (2003) 2 SCC 15

Held :

The High Court while holding that the party is bound to pay the interest at the agreed rate took the view that the Bank could not automatically charge the increased rate of interest merely on the basis of rise of interest on account of the RBI circulars. It is not a case of automatically charging the increased rate of interest; charge of higher rate is based on agreement between the parties. The High Court was clearly in error in holding that the principles of natural justice were violated on the ground that the defendants were not put on notice before enhancing the rate of interest when the parties are bound by the terms of the

contract. The application of the principles of natural justice cannot be read into the express terms of the contract.

●

130. RENT CONTROL AND EVICTION:

(i) Expression "Bonafide requirement"- Meaning and connotation.

(ii) Subsequent events- Power of the Courts to take note of subsequent events- Law explained.

Atma S. Berar Vs. Mukhtiar Singh

Judgment dt. 12.12.2002 by the Supreme Court in Civil Appeal No. 2898 of 2000, reported in (2003) 2 SCC 3

Held :

(i) One of the grounds for eviction contemplated by all the rent control legislation, which otherwise generally lean heavily in favour of the tenants, is the need of the owner landlord to have his own premises, residential or non-residential, for his own use or his own occupation. The expressions employed by different legalisations may vary such as "bona fide requirement", "genuine need", "requires reasonably and in good faith", and so on. Whatever be the expression employed, the underlying legislative intent is one and that has been demonstrated in several judicial pronouncements of which we would like to refer to only three.

In *Ram Das v. Ishwar Chander, (1988) 3 SCC 131* M.N. Venkatachaliah, J. (as His Lordship then was) speaking for the three-Judge Bench, said: (SCC pp. 134-35, para 11)

> "11. Statutes enacted to afford protection to tenants from evicition on the basis of contractual rights of the parties make the resumption of possession by the landlord subject to the satisfaction of certain statutory conditions. One of them is the bona fide requirement of the landlord, variously described in the statutes as 'bona fide requirement', 'reasonable requirement', bona fide and reasonable requirement' or, as in the case of the present statute, merely referred to as 'landlord requires for his own use'. But the essential idea basic to all such cases is that the need of the landlord should be genuine and honest, conceived in good faith; and that, further, the court must also consider it reasonable to gratify that need. Landlord's desire for possession, however honest it might otherwise be, has inevitably a subjective element in it and that, that desire, to become a 'requirement' in law must have the objective element of a 'need'. It must also be such that the court considers it reasonable and, therefore, eligible to be gratified. In doing so, the court must take all relevant circumstances into consideration so that the protection afforded by law to the tenant is not rendered merely illusory or whittled down."

In *Gulabbai v. Nalin Narsi Vohra, (1991) 3 SCC 483* reiterating the view taken

in *Bega Begum v. Abdul Ahad Khan, (1979) 1 SCC 273* it was held that the words "reasonable requirement" undoubtedly postulate that there must be an element of need as opposed to a mere desire or wish. The distinction between desire and need should doubtless be kept in mind but not so as to make even the genuine need as nothing but a desire.

Recently, in *Shiv Sarup Gupta v. Dr. Mahesh Chand Gupta, (1999) 6 SCC 222* this Court in a detailed judgment, dealing with this aspect, analysed the concept of bona fide requirement and said that the requirement in the sense of felt need which is an outcome of a sincere, honest desire, in contradistinction with a mere pretence or pretext to evict a tenant refers to a state of mind prevailing with the landlord. The only way of peeping into the mind of the landlord is an exercise undertaken by the judge of facts by placing himself in the armchair of the landlord and then posing a question to himself- whether in the given facts, substantiated by the landlord, the need to occupy the premises can be said to be natural, real, sincere, honest. If the answer be in the positive, the need is bona fide. We do not think that we can usefully add anything to the exposition of law of requirement for self-occupation than what has been already stated in the three precedents.

(ii) The power of the court to take note of subsequent events is well settled and undoubted. However, it is accompanied by three riders: firstly, the subsequent event should be brought promptly to the notice of the court; secondly, it should be brought to the notice of the court consistently with the rules of procedure enabling the court to take note of such events and affording the opposite party an opportunity of meeting or explaining such events; and thirdly, the subsequent event must have a material bearing on right to relief of any party.

●

131. PREVENTION OF FOOD ADULTERATION ACT, 1954 - Rule 9

Rule 9 does not cast a duty upon the food inspector to hold inquiry whether curd was prepared from buffalo's milk or cow's milk.
Mahendra Kumar G. Petal & Anr. Vs. State of Gujarat & Anr.
Reported in 2002 (2) ANJ (SC) 988

Held :

Perusal of rule 9 shows that no duty is cast upon the food inspector to hold enquires and give a finding that he had ascertained that the curd was prepared out of the buffalo's milk and not from the cow's milk. The Allahabad High Court appears to have completely ignored entry no. 11.02.04 in appendix B of the Prevention of Food Adulteration Act which provides as under:

"A. 11.02.04 *'dahi or curd'* means the product obtained from pasteurised of boiled milk. By souring, natural or otherwise, by a harmless lactic acid or other bacterial culture, *dahi* may contain added cone sugar, *dahi* shall have the same minimum percentage of milk fat and milk solids non-fat as the milk from which it is prepared.

Where *dahi* or curd is sold or offered for sale without any indication of class of milk, the standards prescribed for *dahi* prepared from buffalo milk shall apply. Milk solids may also be used in preparation of this product."

In the absence of any explanation offered by the person from whom the article of food if purchased and samples taken, the milk or its product has to be deemed to be milk or the product (curd) made out of the buffalo's milk.

●

132. CRIMINAL PROCEDURE CODE, 1973 - Section 128
Application for recovery of maintenance allowance - Wife not required to file fresh application every succeeding month.
Leelabai Vs. Kailashchandra
Reported in 2003 (1) ANJ (MP) 23

Held :

In the present case, learned revisional Court has erred in quashing the whole proceeding of recovery pending in Misc. Criminal Case No. 13/98 which was registered on the basis of the application filed on 29th Dec. 1992 by the applicant/ wife. After filing of this application, the applicant/ wife was not required to file any further application for the amount which became due every suceeding month in future and for the purpose of recovery of the said amount, this Misc. Criminal Case No. 13/98, shall survive, in which husband/ non-applicant is required to make the payment at the rate of Rs. 400/- per month. The husband deposited the amount of Rs. 5700/- in the CCD A/c and on that date the trial Court was not apprised about depositing of the amount in CCD A/c. Even the wife/applicant was not knowing this fact of deposit of the amount. Therefore, the question of termination of the proceedings initiated on the basis of the application dated 29th Dec. 1992 does not arise and on the basis of the same application, the amount claimed and the amount falling due in future, would be recoverable and for this purpose this application will survive.

●

133. CRIMINAL PROCEDURE CODE, 1973- Section 437 (6)
Section 437 (6) is applicable in offences punishable under M.P. excise Act.
Rajendra Vs. State of M.P.
Reported in 2003 (1) ANJ (MP) 53

Held :

Section 437 sub-section (6) is reproduced as under:

"437. When bail may be taken in case of non-bailable offence:-

(1) .....
(2) .....
(3) .....
(4) .....
(5) .....

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs."

This Provision is showing that if the trial is not completed within a period of 60 days from the date fixed for recording evidence then the accused, who is in custody, is entitled to be released on bail. If the Court is of the opinion that the accused in not entitled for bail then it is obligatory on the part of the Court to assign reason for refusing the bail. In view of mandatory Provision of Section 437 sub-section (6) Cr.P.C. the applicant is entitled to be released on bail. There is no special reason on the basis of which his prayer may be refused. Similar view has been taken in the case of Saritadevi vs. State of *Himachal Pradesh (2000 (2) Crimes 543)* and in the case of *Mohd. Abdul vs. State of West Bangal (1991 Crimes (II) 741).*

●

134. ADVOCATES ACT, 1961 - Section 35

Professional misconduct by advocate- Relationship between advocate and his client is of trust- Preservation of mutual trust must be for judicial system.

Vikas Deshpande Vs. Bar Council of India and others

Reported in AIR 2003 SC 308

Held :

Appellant took advantage of the situation that the complainants facing death sentence and obtained the power of attorney on misrepresentation in his favour and sold the property of the complainants. Further, the appellant fraudulently appropriated the sale proceeds for his gain. He has committed a grave professional misconduct.

Relationship between an advocate and his client is of trust and, therefore, sacred. Such acts of professional misconduct and the frequency with which such acts are coming to light distresses as well as saddens us. Preservation of the mutual trust between the advocate and the client is a must otherwise the prevalent judicial system in the country would collapse and fail.

Such acts do not only affect the lawyers found guilty of such acts but erode the confidence of the general public in the prevalent judicial system. It is more so, because today hundred percent recruitment to the Bench is from the Bar starting from the subordinate judiciary to the higher judiciary. You cannot find honest and hard working Judges unless you find honest and hard working lawyers in their chambers. Time has come when the Society in general, respective Bar Council of the States and the Judges should take note of the warning bells and take remedial steps and nip the evil or the curse, if we may say so, in the bud.

●

135. N.D.P.S. ACT, 1985 - Section 8

(i) Chemical Analyst's report given by the Regional Laboratory- Such a report is covered by Section 293 (1) of Cr.P.C.- Formal proof by calling Chemical Analyst not necessary.

(ii) CFSL Form - Deposit in Malkhana - There is no specific provision for depositing the CFSL Form in Malkhana.

Mohanlal Vs. State of M.P.
Reported in 2003 (1) MPLJ 227

Held :

(i) Learned counsel also submitted that Chemical Examiner, who has given report, Exh. P/33, has not been examined. As such this report, cannot be considered. In this regard the counsel placed reliance on the judgment of this Court passed in *Kaniram Vs. State of M.P., (2001 (I) EFR 74.)*

In oppugnation Mr. Girish Desai, Dy. Advocate General, appearing for the State, submitted that all mandatory Provisions have been, properly and with due diligence, complied with. He further, submitted that Chemical Examiner's report, Ex. P/33 is given by Regional Legal Scientific Laboratory, Rau, Indore and this Laboratory, has been established under the State Forensic Science Laboratory, Sagar by order dated 4th Dec. 1992. Therefore, the report given by this laboratory, is fully covered under section 293 (1)/section 4 (1) of the Code of Criminal Procedure. He has also filed relevant notification to this effect.

Having heard learned counsel for the parties and after careful perusal of the entire record of the case, it emerged that the decision of this Court given in *Kanirman's* case (supra) is not applicable to the case on hand because in this case chemical Analyst's report, has been given by the Regional Laboratory, Indore which is duly covered under section 293 (1)/ section 4 (1) of the Criminal Procedure Code, whereas in the case of Kaniram (supra) the report was given by chemical examiner of the Govt. Opium and Alkaloid Factory, Neemuch. Apart from this, if the appellant wanted to examine Chemical Examiner, he could have filed appropriate application to this effect and Court has power under section 293 Criminal Procedure Code to call any such expert as to the subject matter of his report. It is not mandatory for the prosecution to examine Chemical Examiner or Assistant Chemical Examiner.

(ii) Learned Counsel has placed reliance on the judgment of Delhi High Court passed in the case of *Amarjeet Singh's* case (supra) regarding non depositing of CFSL form in Malkhana along with the case property. I have gone through this judgment. In paragraphs 5, 7 and 8, the question of depositing of CFSL form, has been discussed. It appears that Court has considered this aspect only to strengthen the fact that seized property was properly sealed and kept intact containing the same seal which was affixed on the

seized property till it reaches the hands of Chemical Examiner. In the present case, the statement of Head Constable Ashok Singh (PW 2), Omprakash (PW 3), ASI Tiwari (PW 10) and Sub Inspector CL Verma (PWII) are categorically establishing the fact that seized contraband article, was duly sealed on the spot by affixing the seal of Police Station. Thereafter, immediately on the same day, case property was deposited in MALKHANA. Along with sample of seal, one sealed sample packet with draft were sent through Omprakash (PW 3) Constable to FSL on 3-8-1996 and the same were received on the same day. The Chemical Examiner received the property and found the seal intact tallying with the sample of seal. Apart from this, under Act as well as Rules framed thereunder, there is no specific provision for depositing CFSL form in Malkhana.

●

136. CRIMINAL PROCEDURE CODE, 1973 - Section 125

Maintenance in respect of legitimate child- Father is liable to maintain his legitimate or illegitimate child.

Manoj Kumar Gautam Vs. Laxmi Bai and another

Reported in 2003 (1) MPLJ 257

Held :

It is settled position of law that a father is liable to maintain his child, legitimate or illegitimate. The basis of a maintenance application on behalf of the child is its paternity, irrespective of the fact of legitimacy or illegitimacy. Even in case of a woman of bad character, her illegitimate child was held entitled for maintenance on the proof of paternity in *Hiralal, 18A, 107-108, Lingappa 27M 13.15.*

Then, at the time of consideration of grant of interim maintenance, the fact of paternity is not required to be proved, which has to be decided at the time of final hearing of the case, on merits.

●

137. COURTS FEES ACT, 1870 - Section 35

Exemption on payment of Court fees under the Notification issued by the Government under Section 35- Such an exemption will not automatically survive on plaintiff's death to his L.Rs.

Mangilal and another Vs. Rameshchandra and others

Reported in 2003 (1) MPLJ 290

Held :

But it would be logical to hold that a case of exemption granted under section 35 of the Court Fees Act is also a case of personal right because under the notification exemption is granted to the persons and on his death the exemption would come to an end automatically. Therefore, the Court below has rightly directed the applicants that if their case is covered by the Notification and they are entitled to seek exemption they may file proper application and satisfy the Court. Thus, looking to the language of Notification it would not be prudent to hold that

the exemption would continue even after the death of a person in whose favour it was granted because after the death of the plaintiff, the legal representatives have to prove that they are entitled to prosecute the suit and right to sue survive in their favour and they are also entitled to get the relief. It is logical because thereafter they will also get the benefit and fruits of the decree.

●

138. INDIAN STAMP ACT, 1899- Section 33 (1)
Examination and impounding of instrument- Requirements explained - Section does not empower authorities to direct a party to produce document for the purpose of examination and impounding.
South Eastern Coalfields Ltd. Vs. State of M.P. and others
Reported in 2003 (1) MPLJ 314

Held :

Counsel for the respondents has tried to justify the order by taking shelter of section 33 of the Stamp Act. Section 33 (1) reads as under :

> "33 (1) *Examination and impounding of instruments.*- Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same."

Bare reading of the above quoted provision section 33 (1) makes it clear that three conditions must be fulfilled : (1) the authority empowered to impound a document must be the authority specified therein; (2) the instrument in question is not stamped according to the Act; and (3) the instrument is produced or comes in the performance of his functions. Section does not empower authorities to direct party to produce document for purpose of ascertaining whether it was properly stamped or not.

In *Mohd. Amir Ahmed Khan vs. Deputy Commissioner and others, AIR 1956 Allahabad 453,* Full Bench held that the phrase "produced or comes in the performance of his function" as used in this section means production of the instrument concerned in evidence or for the purpose of placing reliance upon it by one party or the other. The word 'produce' was considered in *Lala Uttam Chand vs. Perma Nand and others, AIR 1942 Lahore 265* and it was held that mere production of a document in compliance with an illegal demand will not confer authority to impound. Word 'produce' means produced in ordinary course of law and not produced under compulsion. To attract section 33 there has to be production of document as contemplated by section 33. This is not a case here. Document has not been produced before any authority as mentioned under section 33.

●

139. NEGOTIABLE INSTRUMENTS ACT, 1881 - Section 138

Cheque dishonour of due to incomplete signature of drawer- Not an offence under Section 138 of the Act.

Vinod Tanna and another Vs. Zaher Siddiqui and others

Reported in 2003 (1) MPLJ 373 (SC)

Held :

The gravamen of the accused- petitioner's case before the High Court was that the grounds on which the cheque had not been honoured would not constitute offence under section 138 of the Act, inasmuch as the ingredients that the account-holder had no sufficient funds at the credit of his account or that the amount in the cheque exceeded the amount which the account- holder had at his credit, had not been established in the case. Even there was no direction from the drawer to stop payment and the only ground on which the cheque appears to have not been honoured is that the drawer's signature was incomplete.

The High Court, however, having noted the aforesaid contentions, being of the opinion that in view of the judgment of this Court in *Modi Cements Ltd. vs. Kuchil Kumar Nandi, 1998 (1) Mh. L.J. (SC) 898 = (1998) 3 SCC 249,* refused to quash the proceedings. Hence the present appeal by the accused.

In fact, a plain reading of section 138 of the Act makes it crystal clear that unless the conditions precedent mentioned therein are satisfied, the said penal provision cannot be attracted. In this view of the matter and on the admitted facts, as referred to in paragraph 5 of the impugned judgment, we have no hesitation in coming to the conclusion that the High Court committed error in relying upon the judgment of this Court in *Modi Cements case, 1998 (1) Mh. L.J. 898 (SC) = (1998) 3 SCC 249* and refusing to quash the criminal proceedings.

●

140. SERVICE LAW :

Departmental enquiry against Government employee- Delinquent employee kept under foot of duty participating in the enquiry without complaining about non-payment of subsistence allowance will not vitiate the enquiry.

Union of India and others Vs. V.K. Girdonia and another

Reported in 2003 (1) MPLJ 387

Held :

Learned counsel appearing for the petitioners, contends that CAT committed serious error while deciding the two questions, which fell for consideration before it. The respondent was kept under put-off duty and he participated in the enquiry at Jabalpur, from time to time, without ever complaining that due to non-payment of subsistence allowance he could not defend himself, since he could not meet the expenses from the place of duty to the place of enquiry. Therefore, holding that the departmental enquiry stood vitiated on this count, is not sustainable. We find force in this submission. Assuming, put-off duty means suspen-

sion, since the respondent was not discharging duty, non-payment of subsistence allowance was neither claimed by him nor did he ever raise grievance that he could not participate the enquiry for lack of funds. Always, he had been attending departmental enquiry which was being held at Jabalpur. Therefore, it cannot be assumed that due to non-payment of subsistence allowance, he was prejudiced in defending himself in the departmental enquiry. There is no whisper or any application or protest by the respondent making claim for put off duty/ suspension allowance at a stage of enquiry. Therefore, holding that the enquiry was vitiated due to non-payment of subsistence allowance, is clearly unsustainable.

●

141. ARBITRATION AND CONCILIATION ACT, 1996 - Section 9
Interim relief under Section 9 - Application seeking such relief can be filed only before the District Judge who is the principal Civil Court of original civil jurisdiction.
Industrial Gases Limited Vs. Kusum Ingots and Alloys Limited
Reported in 2003 (1) MPLJ 422

Held :

Section 7 of the M.P.Civil Courts Act provides that the Court of the District Judge shall be the principal Civil court of original jurisdiction in the civil district. In the High Court Rules also there is no provision which provides original civil jurisdiction to the High Court to hear the original suits. Therefore, admittedly, in M.P. the High Court is not having the original civil jurisdiction to entertain any petition or suit except in cases where jurisdiction has been conferred to the High Court under the special laws.

8. Section 2 (1) (e) of the Act of 1996 defines the Court as under :-

"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 of a grade inferior to such principal Civil Court, or any Court of Small Causes;"

8-A. Section 9 of the Act of 1996 reads as under :-

Interim measures, etc. by Court- A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court :-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purpose of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely :-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject- matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

From the aforesaid two definitions it is obvious that interim orders under section 9 can only be passed by the principal Civil Court of original jurisdiction in a district, though the High Court has also been included in the definition when it exercises its ordinary original civil jurisdiction. Now it is also clear that in M.P. the High Court does not exercise its ordinary original civil jurisdiction and as per section 7 of the M.P. Civil Courts Act it is the District Judge who is the principal civil Court of original jurisdiction in the civil district. Therefore, application under section 9 of the Act of 1996 can be filed before the principal Civil Court of original jurisdiction in a district which is the Court of District Judge.

●

142. COURT FEES ACT, 1870 - Section 7 (iv) (c) and Sch. II, Art. 17
Plaintiff not party to the deed seeking declaration simplicitor- Ad valorem court fees not payable- Fixed court fees as per Art. 17 of Sch. II payable.
Rameshchandra and others Vs. Jayendra Singh and others
Reported in 2003 (1) MPLJ 379

Held :

The Full Bench of M.P. High Court in the case of *Santosh Chandra and others vs. Gyansundar Bai and others, 1970 MPLJ 363 = 1970 JLJ 290,* has clearly held that :-

> "Where it is necessary for a plaintiff to avoid an agreement or a decree or a liability imposed, it is necessary for him to avoid that and unless he seeks the relief of having that decree, agreement, document or liability set aside, he is not entitled to a declaration simpliciter. In such cases the question of Court-fees has to be determined under section 7 (iv) (c) of the Act. But, however, where a plaintiff is not a party to such a decree, agreement, instrument or liability and he cannot be deemed to be a representative in interest of the person who is bound

by that decree, agreement, instrument or liability, he can sue for a declaration simpliciter, provided he is also in possession of the property. The matter may be different if he is not in possession of the property. In that event, the proviso to section 42 of the Specific Relief Act might be a bar to the tenability of a suit framed for the relief of declaration simpliciter. But that would be a different aspect. All the same, if the plaintiff is not bound by that decree or agreement or liability and if he is not required to have it set aside, he can claim to pay Court-fees under any of the sub-clauses of Article 17, Schedule II of the Court-fees Act."

Following the aforesaid law, a Single Bench of this Court in *Pratap Kunji vs. Puniya Bai,* reported in *1976 MPLJ 627 = 1976 JLJ 703,* held :-

"That where a person who is a party to an agreement or transaction and his allegation is that it is not binding on him because it was obtained by misrepresentation or fraud, it is necessary for him to seek the consequential relief of setting aside such agreement of transaction and as such the suit falls within the purview of section 7 (iv) (c) of the Court Fees Act. But the question of avoiding an agreement or an instrument arises only where it is voidable. If it is wholly void a mere declaration that it is so, is sufficient and it is not necessary for the plaintiff to seek the relief of setting aside something which has no existence in law. "This Court thus clearly stated that" it is not necessary to ask for relief of setting aside an agreement or an instrument which is wholly viod. "The aforesaid view seems to have been followed uniformly by this Court as would be clear from *Thumaribai vs. Mankibai (1981) (1) MPWN,* Note 63, *Johanram vs. Dasmatbai, 1982 MPWN, Note 464 and Bisahin vs. Mehtar, 1983 MPLJ,* Note 31. The aforesaid view of this Court is fully supported by the decision of the Supreme Court in *Ningwa vs. Byrappa Hirekurabar, AIR 1968 SC 956,* where their Lordships have clarified the distinction between a contract which is voidable and remains valid until it is avoided and a contract which is void for which it is not necessary to seek any relief."

And further in the case of *Linmat (Smt.) and others vs. Purushottam and others, 1985 MPLJ 748 = 1985 JLJ 747,* it has been held by this High Court that :-

"If the executor of the sale-deed was on old, sick and infirm person and was never told that the document being executed by him, was a sale-deed but was told that the document was required for ensuring proper management of his lands, then the fraudulent misrepresentation would be not merely as to the contents of the document but also its character.

The sale-deed would be wholly void and not merely voidable. In such circumstances, it would not be necessary for the applicants to seek

the relief of setting-aside the sale-deed. In such a case it cannot be accepted that the consequential relief of setting-aside the sale-deed is implicit in the relief of the declaration and requires ad valorem Court-fees under section 7 (iv) (c) of the Court-fees Act.

Article 17 (iii) of the Second Schedule to the Court Fees Act shall apply to such a case, *AIR 1968 SC 956, 1970 MPLJ (FB) 145= 1970 JLJ 112 (FB), ILR 1939 Nag. 373 relied on; 1976 JLJ 703, 1981 (1) MPWN 63, 1982 MPWN 464,* discussed".

Again in the case of *Durgasingh vs. Ramkali, 1982 JLJ SN 72* it has been held by the Supreme Court that "There is a distinction between fraudulent, misrepresentation as to character of a document and as to its contents as well as to character of the document, the transaction is wholly void. In such a case, it is not necessary for the plaintiff to seek a relief for setting aside the document and no consequential relief is implicit in the relief for declaration which may require ad valorem Court- fee under section 7 (iv) (c). The question of avoiding a document only arises where it is voidable, out where it is wholly void, a mere declaration, that it is so, is sufficient and it not necessary for the plaintiff to seek relief of setting aside something which has no existence in law.

In the case of *Kuntidevi vs. Roshanlal, 1987 MPLJ 25,* this Court has held that - "Where the plaintiff is *prima facie* bound by the sale deed, she being a party thereto, the relief of declaration simpliciter is not available to her under the proviso to section 42 of the Specific Relief Act and the declaration claimed by her necessarily involves the prayer for consequential relief of cancellation of the sale deed. Therefore, it was held that she has to pay ad valorem court-fee on the value of the sale deed.

From the aforesaid discussion, it is clear that the law is demarcating a line between two kinds of transactions in which a person is a party and another in which he is not a party. Where the person who is seeking declaration is a party to a transaction, he is required to pay ad valorem court-fee where the agreement is voidable but where transaction in which he is not party and if he is party the same is wholly void, he can seek relief of declaration without getting the relief of cancellation and in that case he is required to pay only fixed Court-fees as per Article 17 of Schedule II.

●

143. CIVIL PROCEDURE CODE, 1908- Sections 47, 152, O.7 R.3 and O.20 R.3

(i) Suit for immovable property- Details regarding property should be given in plaint- Requirement of O.7 R.3 explained- Duty of the Court also explained.

(ii) Defect regarding identity of immovable property- Defect can be cured by making resort to Section 152 or Section 47 CPC.

Pratibha Singh and another Vs. Shanti Devi Prasad and another Judgment dt. 29.11.2002 by the Supreme Court in Civil Appeals Nos. 7891-92 of 2002, reported in (2003) 2 SCC 330

Order 7 Rule 3 CPC requires where the subject- matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it. Such description enables the court to draw a proper decree as required by Order 20 Rule 3 CPC. In case such property can be identified by boundaries or numbers in a record for settlement of survey, the plaint shall specify such boundaries or numbers. Having perused the revenue survey map of the entire area of RS Plot No. 595 and having seen the maps annexed with the registered sale deeds of the defendant judgment- debtors we are clearly of the opinion that Sub-plots Nos. 595/I and 595/II were not capable of being identified merely by boundaries nor by numbers as sub-plot numbers do not appear in records of settlement or survey. The plaintiffs ought to have filed the map of the suit property annexed with the plaint. If the plaintiffs committed an error the defendants should have objected to it promptly. The default or carelessness of the parties does not absolve the trial court of its obligation which should have, while scrutinizing the plaint, pointed out the omission on the part of the plaintiffs and should have insisted on a map of the immovable property forming the subject-matter of the suit being filed.

(ii) When the suit as to immovable property has been decreed and the property is not definitely identified, the defect in the court record caused by overlooking of provisions contained in Order 7 Rule 3 and Order 20 Rule 3 CPC is capable of being cured. After all a successful plaintiff should not be deprived of the fruits of decree. Resort can be had to Section 152 or Section 47 CPC depending on the facts and circumstances of each case- which of the two provisions would be more appropriate, just and convenient to invoke. Being an inadvertent error, not affecting the merits of the case, it may be corrected under Section 152 CPC by the Court which passed the decree by supplying the omission. Alternatively, the exact description of decretal property may be ascertained by the executing court as a question relating to execution, discharge or satisfaction of decree within the meaning of Section 47 CPC. A decree of a competent court should not, as far as practicable, be allowed to be defeated on account of an accidental slip or omission. In the facts and circumstances of the present case, we think it would be more appropriate to invoke Section 47 CPC.

●

144. MOTOR VEHICLES ACT, 1988 - Section 147

Liability of insurance company regarding persons travelling in a goods carriage- Carrying passengers in "goods carriage" not contemplated in the Act- Vehicle not required to be insured in respect of such passengers- Insurance Company not liable for such passengers.

Oriental Insurance Co. Ltd. Vs. Devireddy Konda Reddy and others Judgment dt. 24.1.2003 by the Supreme Court in Civil Appeals Nos. 981-90 of 2002, reported in (2003) 2 SCC 339

Held :

The difference in the language of "goods vehicle" as appearing in the old

Act and "goods carriage" in the Act is of significance. A bare reading of the provisions makes it clear that the legislative intent was to prohibit goods vehicle from carrying any passenger. This is clear from the expression "in addition to passengers" as contained in the definition of "goods vehicle" in the old Act. The position becomes further clear because the expression used is "goods carriage" is solely for the carriage of "goods". Carrying of passengers in a goods carriage is not contemplated in the Act. There is no provision similar to clause (ii) of the proviso appended to Section 95 of the old Act prescribing requirement of insurance policy. Even Section 147 of the Act mandates compulsory coverage against death of or bodily injury to any passenger of "public service vehicle". The proviso makes it further clear that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in goods vehicle would be limited to liability under the Workmen's Compensation Act, 1923 (in short "the WC Act"). There is no reference to any passenger in "goods carriage".

The inevitable conclusion, therefore, is that provisions of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carriage and the insurer would have no liability therefore.

●

145. MOTOR VEHICLES ACT, 1988 - Sections 166 and 168
Compensation, grant of - No restriction that compensation be awarded only up to the amount claimed- Compensation should be just- In appropriate cases more compensation than claimed may be granted.
Nagappa Vs. Gurudayal Singh and others
Judgment dt. 3.12.2002 by the Supreme Court in Civil Apeal No. 7989 of 2002, reported in (2003) 2 SCC 274

Held :

Firstly, under the provisions of the Motor Vehicles Act, 1988, (hereinafter referred to as "the MV Act") there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case, where from the evidence brought on record if the Tribunal/court considers that the claimant is entitled to get more compensation than claimed, the Tribunal may pass such award. The only embargo is- it should be "just" compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the MV Act. Section 166 provides that an application for compensation arising out of an accident involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both, could be made (a) by the person who has sustained the injury; or (b) by the owner of the property; or (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the

case may be. Under the proviso to sub-section (1), all the legal representatives of the deceased who have not joined as the claimants are to be impleaded as respondents to the application for compensation. The other important part of the said section is sub-section (4) which provides that "the Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act". Hence, the Claims Tribunal in an appropriate case can treat the report forwarded to it as an application for compensation even though no such claim is made or no specified amount is claimed.

●

146. INDIAN PENAL CODE, 1860 - Sections 34 and 149
Common intention and common object- Distinction explained.
Chittarmal Vs. State of Rajasthan
Judgment dt. 8-1-2003 by the Supreme Court in Criminal Appeals Nos. 1150-51 of 2001, reported in (2003) 2 SCC 266

Held :

It is well settled by a catena of decisions that Section 34 as well as Section 149 deal with liability for constructive criminality i.e. vicarious liability of a person for acts of others. Both the sections deal with combinations of persons who become punishable as shares in an offence. Thus they have a certain resemblance and may to some extent overlap. But a clear distinction is made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a prearranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or preconcert. Though there is a substantial difference between the two sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under Section 149 overlaps the ground covered by Section 34. Thus, if several persons numbering five or more, do an act and intend to do it, both Section 34 and Section 149 may apply. If the common object does not necessarily involve a common intention, then the substitution of Section 34 for Section 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of Section 34 for Section 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non-applicability of Section 149 is, therefore, no bar in convicting the appellants under Section 302 read with Section 34 IPC, if the evidence discloses commission of an offence in furtherance of the common intention of them all. (See *Barendra Kumar Ghosh v. King Emperor, AIR 1925 PC 1, Mannam Venkatadari v. State of A.P., (1971) 3 SCC 254, Nethala Pothuraju v. State of A.P., (1992) 1 SCC 49 and Ram Tahal v. State of U.P., (1972) 1 SCC 136.*

●

147. RENT CONTROL AND EVICTION

Premises, classification into residential and non-residential- Determination of - Law explained.

Precision Steel & Engg. Works and another Vs. Prem Deva Niranjan Deva Tayal

Judgment dt. 9.12.2002 by the Supreme Court in Civil Appeal No. 2227 of 2000, reported in (2003) 2 SCC 236

Held :

Premises are capable of being classified into residential and non-residential depending on the purpose of letting. This is the broad classification. Question of construction and determining the purpose of letting may pose difficulty when the premises are let for mixed, composite or dual purposes i.e. where the entire promisees are allowed to be used for an overlapping purpose or the premises forming the subject-matter of one tenancy are allowed to be used for purposes more than one. In such a case it cannot be said that the premises would cease to be of either category i.e. they would be neither residential nor non-residential. Rather it would be necessary to find out what is the "main and dominant purpose" of letting as distinguished from "subsidiary, ancillary or incidental purpose". The theory of determining the purpose of letting by reference to finding out the main and dominant purpose of letting has ample judicial authority to derive support from. In *Sewa Singh (Dr) v. Ravinder Kaur, (1971) 3 SCC 981* it was held that residential building will remain so even if it is used by a person engaged in one or more of the professions partly for his business or partly for his residence. The building in the occupation of the tenant was undoubtedly residential and on the evidence it was found that part of it was being used by the tenant, a medical practitioner for examining patients and prescribing medicines. In *Allenbury Engineers (P) Ltd. v. Ramkrishna Dalmia, (1973) 1 SCC 7* to determine whether the tenancy was for manufacturing purpose within the meaning of Section 106 of the Transfer of Property Act, 1882, the Constitution Bench applied the test of "main and dominant purpose" as distinguished from "incidental purpose". The dominant purpose of lease was for storage and resale of the vehicles. Some spare parts were manufactured and used in the vehicles as incidental to the main purpose of disposal of the vehicles as without repairing or reconditioning the vehicles the disposal could hardly have been possible. It was held that the dominant purpose of the lease as manufacturing purpose was not established. In *Sant Ram v. Rajinder Lal, (1979) 2 SCC 274* a cobbler carried on cobbler's business in the shop. Incidentally, he slept in the back portion of the shop at night while he worked during the day. On the off days he would go home at night. It was held that the purpose of letting remained exclusively commercial as the user of the back portion for sleeping in the night was not incompatible with day's user.

●

148. INDIAN PENAL CODE, 1860 - Section 304-B

Proof of offence under Section 304-B- Prosecution bringing the case within the ambit of Section 304-B- Presumption under Section 113-B Evidence Act will operate-Onus to rebutt such presumption on the accused- Defence of accused was of total denial- Presumption remains uninterrupted.

State of Karnataka Vs. M.V. Manjunathegowda and another

Judgment dt. 7.1.2003 by the Supreme Court in Criminal Appeals Nos. 1530-31 of 1995, reported in (2003) 2 SCC 188

Held :

The aforesaid legal position, as it stands now, is that in order to establish the offence under Section 304-B IPC the prosecution is obliged to prove that the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances and such death occurs within 7 years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband. Such harassment and cruelty must be in connection with any demand for dowry.

If the prosecution is able to prove the aforesaid circumstances then the presumption under Section 113-B of the Evidence Act will operate. It is the rebuttable presumption and the onus to rebut shifts on the accused.

The accused was examined under Section 313 CrPC. The defence of the accused was a total denial. Therefore, the presumption as to dowry death envisaged under Section 113-B of the Evidence Act remains unrebutted.

●

149. INDIAN PENAL CODE, 1860 - Section 376 (2) (g)

Gang rape- Essential ingredients establishing offence under Section 376 (2) (g) explained.

Ashok Kumar Vs. State of Haryana

Judgment dt. 17.12.2002 by the Supreme Court in Cr. Appeal No. 734 of 2002, reported in (2003) 2 SCC 143

Held :

In order to establish an offence under Section 376 (2) (g) IPC, read with Explanation I thereto, the prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such an event, if rape had been committed by even one, all the accused will be guilty irrespective of the fact that she had been raped by one or more of them and it is not necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. In other words, this provision embodies a principle of joint liability and the essence of that liability is the existence of common intention; that common intention presupposes prior concert which may be determined from the conduct of offenders revealed during the course of action and it could arise and be formed suddenly, but, there must be meeting of minds. It is not enough to have the same

intention independently of each of the offenders. In such cases, there must be criminal sharing marking out a certain measure of jointness in the commission of offence.

●

150. SUCCESSION ACT, 1925 - Section 63 (c)
EVIDENCE ACT, 1872 - Sections 68 and 71
Proof of will- Requirement of attestation by two or more witnesses- Under Section 68 Evidence Act even one attesting witness may prove the execution of the will but attestation by two witnesses must be proved- Ambit and scope of Section 71 Evidence Act explained.
Janki Narayan Bhoir Vs. Narayan Namdeo Kadam
Judgment dt. 17.12.2002 by the Supreme Court in Civil Appeal No. 11194 of 1995, reported in (2003) 2 SCC 91

Held :

On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of the Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a court of law by examining at least one attesting witness even though the will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of Section 63 viz, attestation by two attesting witnesses in the manner contemplated therein, the examination of the other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by the other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the *execution of the will* does not merely mean the signing of it by the testator but it means fulfilling and proof of all the

formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.

Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Sectior 68 of the Evidence Act, to meet a situation where it is not possible to prove the execution of the will by calling the attesting witnesses, though alive. This section provides that if an attesting witness denies or does not recollect the execution of the will, its execution may be proved by other evidence. Aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. Section 71 has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the will and other attesting witnesses though are available to prove the execution of the same, for reasons best known, have not been summoned before the court. It is clear from the language of Section 71 that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of will as required under clause (c) of Section 63 of the Succession Act, it cannot be said that the will is proved as per Section 68 of the Evidence Act. It cannot be said that if one attesting witness denies or does not recollect the execution of the document, the execution of will can be proved by other evidence dispensing with the evidence of other attesting witnesses though available to be examined to prove the execution of the will. Yet another reason as to why other available attesting witnesses should be called when the one attesting witness examined fails to prove due execution of the will is to evert the claim of drawing adverse inference under Section 114 Illustration (g) of the Evidience Act. Placing the best possible evidence, in the given circumstances, before the Court for consideration, is one of the cardinal principles of the Indian Evidence Act. Section 71 is permissive and an enabling section permitting a party to lead other evidence in certain circumstances.

●

151. SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 - Section 14
CRIMINAL PROCEDURE CODE, 1973 - Section 439
Grant of bail in a case triable by Special Court- Only the Court of competent jurisdiction, i.e. Special Court can exercise jurisdiction regarding grant of bail.
Mirchi alias Rakesh Jain Vs. State of M.P.
Reported in 2003 (I) MPJR 140

Held :

It is, however, argued that the jurisdiction to grant bail is different than that of trying a case. A person when he is arrested at a particular place can move the Court of competent jurisdiction for grant of bail and that Court is authorized to grant him bail, under the facts and circumstances of the case. It is apparent that this argument has no basis in the eyes of law. Section 439 of the Code of Criminal Procedure does not confer jurisdiction to any Sessions Court to grant bail. It confers power on the Court of competent jurisdiction. Therefore, it would be proper to interpret the words 'Sessions Court' in Section 439 of the Code of Criminal Procedure as the 'Special Court' under the Act in relation to offence committed under the Act.

●

152. PRECEDENTS :

Binding nature of precedents - Two conflicting decisions of the cordinate strength- Which one is binding as precedent- Law explained. Jabalpur Bus Operators Association & Ors. Vs. State of M.P. & Anr. Reported in 2003 (I) MPJR 158 (F.B.)

Held

With regard to the High Court, a Single Bench is bound by the decision of another Single Bench. In case, he does not agree with the view of the other Single Bench, he should refer the matter to the Larger Bench. Similarly, Division Bench is bound by the judgment of earlier Division Bench. In case, it does not agree with the view of the earlier Division Bench, it should refer the matter to Larger Bench. In case of conffict between judgments of two Division Benches of equal strength, the decision of earlier Division Bench shall be followed except when it is explained by! the latter Division Bench in which case the decision of later Division Bench shall be binding. The decision of Larger Bench is binding on Smaller Benches.

In case of conflict between two decisions of the Apex Court, Benches comprising of equal number of Judges, decision of earlier Bench is binding unless explained by the latter Bench of equal strength, in which case the later decision is binding. Decision of a Larger Bench is binding on smaller Benches. Therefore, the decision of earlier Division Bench, unless distinguished by laltter Division Bench, is binding on the High Courts and the Subordinate Courts. Similarly, in presence of Division Bench decisions and Larger Bench decisions, the decisions of Larger Bench are binding on the High Courts and the Subordinate Courts. No decision of Apex Court has been brought to our notice which holds that in case of conflict between the two decisions by equal number of Judges, the later decision is binding in all circumstances, or the High Courts and Subordinate Courts can follow any decision which is found correct and accurate to the case under consideration. High Courts and Subordinate Courts should lack competence to interpret decisions of Apex Court since that would not only defeat what

is envisagaed under Article 141 of the Constitution of India but also militate hierarchical supremacy of Courts. The common thread which runs through various decisions of Apex Court seems to be that great value has to be attached to precedent which has taken the shape of rule being followed by it for the purpose of consistency and exactness in decisions of Court, unless the Court can clearly distinguish the decision put up as a precedent or is *per incuriam,* having been rendered without noticing some earlier precedents with which the Court agrees. Full Bench decision in *State of M.P. Vs. Balveer Singh, 2001 (I) MPJR (FB) 546= 2001 (2) MPLJ 644* which holds that if there is conflict of views between the two co-equal Benches of the Apex Court, the High Court has to follow the judgment which appears to it to state the law more elaborately and more accurately and in conformity with the scheme of the Act, in our considered opinion, for reasons recorded in the preceding paragraph of this judgment, does not lay down the correct law as to application of precedent and is, therefore, over-ruled on this point.

●

153. SERVICE LAW :

Suspension order may be withdrawn and can be passed second time. Chandra Pal Singh Pundhir Vs. M.P. Board of Secondary Education, Bhopal & Ors.
Reported in 2003 (I) MPJR 105

Held :

The apex Court in the case of U.P. Rajya Utpadan Mandi Parishad vs. Rajiv Rajan, 1993 Supp. (3) SCC 483 has made it clear that there is no restriction on the authority to pass a suspension order second time. The first order might be withdrawn by the authority on the ground at that stage, the evidence appearing against the delinquent employee is not sufficient or for some reason, which is not connected with the merits of the case.

●

154. CIVIL PROCEDURE CODE, 1908 - O. 5 Rr. 17 and 19

Service of sommons on defendant by affixing copy of summons- Return of summons should be accompanied by the affidavit of the process server or he should be examined by the Court.
Smt. Shakuntala Singh Vs. Basant Kumar Thakur & Ors.
Reported in 2003 (I) MPJR 107

Held :

Apart from this when the service was seriously disputed by the appellant in the trial Court it was obligatory on the part of respondent to examine process server who has affected the service. In absence of such, service cannot be held to be valid, it is contrary to the provisions of Rule 17, 19 of Order 5 C.P.C. This Court in the case of Baijnath Vs. Harishankar reported in 2001 (2) MPLJ 142 has considered this question and held:

"19. In *Kunja vs. Lalaram and others (1987 MPLJ 746)*, it has been laid down that the provisions of Rule 19 of Order 5 of the Code are mandatory and cast a duty on the Court to make a judicial order while accepting service effected in the manner prescribed under Rule 17 of Order 5 of the Code. It has further been observed that non-compliance of Order 5, Rule 19 will cause serious injustice to the defendant. Bombay High Court in *Baburao Soma Bhoi Vs. Abdul Raheman Abdul Rajjak Khatik 2000 (1) Mh. L.J. 481 = (1999)* All India High Court cases 3725, has observed that the return of summons should be accompanied by the affidavit of the process server, which is in Form 11 of the First Schedule of the Appendix "B" of the Code. If the return report of the process server is without an affidavit, the Court has to record the statement of process server and after making further enqulry, the Court should hold that the summons has been duly served or not.

20. In the instant case as noticed above, the trial Court without examining the process server, directed that the appellant/defendant No. 1 be proceeded against ex parte; even though the report of the process server was not accompanied with his affidavit. Obsiously such a course was not permissible.

24. In the instant case, since the trial Court has not made any enquiry regarding the service of summons on the appellant as also regarding the refusal of summons reported by serving officer, the mandatory requirements of Order 5, Rule 19 of the Code have not been duly complied with. The approach of the trial Court during trial as also while holding the enquiry on the application of the appellant under Order 9 Rule 13, Civil Procedure Code, for setting aside ex parte judgment and decree passed against him, appears to be rather causal and negligent, as has been pointed out above. Moreover, the cause of delay shown by the appellant is belated filing of the said application under Order 9, Rule 13 read with section 151 of the Code also deserves acceptance."

●

155. MOTOR VEHICLES ACT, 1988 - Section 140
Quantum of compensation in case of death of a child- Law explained. Kishan Pillay & Poonam Pillay Vs. Kishore Singh Chouhan & Ors. Reported in 2003 (I) MPJR 121

Held :

The Apex Court in the recent judgment in case of *Lata Wadhwa Vs. State of Bihar (2001) 8 SCC 197* has considered the adequacy of the compensation. In the case of a child below ten years, the Apex Court has found that a uniform sum of Rs. 50.000/- has been held to be payable by way of compensation, to which the conventional figure of Rs. 25,000/- has to be added. The Apex court in para 11 of the judgment held:

11. In case of the death of an infant, there may have been no actual pecuniary benefit derived by its parents during the child's lifetime. But this will not necessarily bar the parents' claim and prospective loss will found a valid claim provided that the parents establish that they had a reasonable expectation of pecuniary benefit if the child had lived. This principle was laid down by the House of Lords in the famous case of Taff Vale Rly. v. Jenkins and Lord Atkinson said thus; "all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. If is quite true that the existence of this expectation is an inference of fact- there must be basis of fact from which the inference can reasonably be drawn; but I wish to express my emphatic dissent from the proposition that it is necessary that two of the facts without which the inference cannot be drawn are, first, that the deceased earned money in the past, and, second, that he or she contributed to the support of the plaintiff. There are, no doubt, pregnant pieces of evidence, but they are only pieces of evidence and the necessary inference can, I think, be drawn from circumstances other than and different from them."

At the same time, it must be held that a mere speculative possibility of benefit is not sufficient. Question whether there exists a reasonable expectation of pecuniary advantage is always a mixed question of fact and law. There are several decided cases on this point, providing the guidelines for determination of compensation in such cases but we do not think it necessary for us to advert, as the claimants had not adduced any material on the reasonable expectation of pecuniary benefits, which the parents excepted. In case of a bright and healthy boy, his performance in the school, it would be easier for the authority to arrive at the compensation amount, which may be different from another sickly, unhealthy, rickety child and bad student, but as has been stated earlier, not an iota of material was produced before Shri Justice Chandrachud to enable him to arrive at a just compensation in such cases and, therefore, he has determined the same on an approximation. Mr. Nariman, appearing for TISCO on his own, submitted that the compensation determined for the children of all age groups could be doubled, as in his views also, the determination made is grossly inadequate. Loss of a child to the parents is irrecoupable, and no amount of money could compensate the parents".

Considering the aforesaid, the Apex Court found that apart from minimum compensation of Rs. 50,000/-, the parents are entitled for conventional compensation of Rs. 25,000/- which has to be added in minimum compensation. Considering the aforesaid, the Apex Court has found that the parents of a minor child below ten years are entiled minimum of Rs. 75,000/- by way of compensation.

●

156. TELEGRAPH ACT, 1885 - Section 7-B

Claim regarding liability and damages- Arbitrator has jurisdiction to consider such disputes reaised before him.

Sawai Mahendra Maharaj Madhukar Shah Joo Deo Vs. Union of India & Ors.

Reported in 2003 (I) MPJR SN 19

Held :

This appeal was admitted on 25.10.89 on following substantial questions of law :

"1. ----------

2. Whether the learned lower appellate Court was justified in holding that the alleged dispute was liable to be referred to-arbitration and should be referred to arbitration?"

The learned counsel for the appellant submits that this matter cannot be referred to arbitration, because (a) appellant has claimed damages, which cannot be considered by the arbitrator, (b) the arbitrator cannot consider the fact whether appellant is liable to pay enhanced rent in view of the provisions of Rule 196 of the Indian Telegraph Rules and (c) the proceedings before the Arbitrator will take long time and the present suit is pending since 1980.

The apprehension of the counsel for the appellant is misconceived. The arbitrator is having jurisdiction to decide the question of damages and liability of the appellant for the enhanced rent. The arbitrator while deciding the dispute between the parties has jurisdiction to consider all the disputes raised before it. In these circumstances, the contention of the appellant as raised cannot be accepted.

●

157. CIVIL PROCEDURE CODE, 1908 - O. 6 R. 17

Amendment of plaint- suit filed without seeking appropriate relief- May be allowed to be added later- Amendment- Effect- Normally amendment relates back to the date of suit unless directed otherwise.

Sampath Kumar Vs. Ayyakannu & Anr.

Reported in 2003 (I) MPJR 91 (SC)

Held :

The short question arising for decision is whether it is permissible to convert through amendment a suit merely for permanent prohibitory injunction into suit for declaration of title and recovery of possession.

In *Mst. Rukhmabai v. Lala Laxminarayan and others, AIR 1960 SC 335,* this Court has taken the view that where a suit was filed without seeking an appropriate relief, it is a well settled rule of practice not to dismiss the suit automatically but to allow the plaintiff to make necessary amendment if he seeks to do so.

Order 6, Rule 17 of the CPC confers jurisdiction on the Court to allow either

party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting-forth and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No strait-jacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment.

An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases the Court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed. (See *observations in Siddalingamma and another v. Mamtha Shenoy, (2001) 8 SCC 561).*

In the present case the amendment is being sought for almost 11 yean after the date of the institution of the suit. The plaintiff is not debarred from instituting a new suit seeking relief of declaration of title and recovery of possession on the same basic facts as are pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction and which is pending. In order to avoid multiplicity of suits it would be a sound exercise of discretion to permit the relief of declaration of title and recovery of possession being sought for in the pending suit.

●

158. CRIMINAL PROCEDURE CODE, 1973 - Section 125
Muslim female child's right to claim maintenance against father- Right is till attaining majority or till marriage.
Jasrath vs. Mst. Guddi & Anr.
Reported in 2003 (I) MPJR 51

Held :

Female child is entitled for maintenance under Section 125 of the Code of Criminal Procedure, even after attaining the age of majority, till she is married, as explained by their Lordships of Supreme Court in *Noor Saba Khatoon Vs. Mohd. Quasim, reported in 1997 (3) Crimes 106 (SC).* The relevant portion of the aforesaid pronouncement runs as follows :-

"7. Indeed Section 3 (1) of 1986 Act begins with a non obstante clause "notwithstanding any thing contained in any other law for the time being in force" and clause (b) thereof provides that a divorced woman shall be entitled to a reasonable and fair provision for maintenance by her former husband to maintain the children born out of the wedlock for a period of two years from the date of birth of such children, but the non-obstante clause in our opinion only restricts and confines the right of a divorce muslim woman to claim or receive maintenance for herself and for maintenance of the child/children till they attain the age of two years, notwithstanding anything contained in any other law for the time being in force in that behalf. It has nothing to do with independent right or entitlement of the minor children to be maintained by their muslim father. A careful reading of the provisions of Section 125 Cr.P.C. and Section 3 (1) (b) of the 1986 Act makes it clear that the two provisions apply and cover different situations and there is no conflict, much less a real one, between the two. Whereas the 1986 Act deals with the obligation of a muslim husband vis-a-vis his divorced wife including the payment of maintenance of her for a period of two years of fosterage of maintaining the infant/infants, where they are in the custody of the mother, the obligation of a muslim father to maintain the minor children is governed by Section 125 Cr.P.C. and his obligation to maintain them is absolute till they attain majority or are able to maintain themselves, whichever date is earlier. In the case of female children this obligation extends till their marriage. Apart from the statutory provisions referred to above even under the Muslim Personal Law, the right of minor children to receive maintenance from their father, till they are able to maintain themselves, is absolute."

●

159. PREVENTION OF FOOD ADULTERATION ACT, 1954 - Section 2 (xiii) Sale of an article of food to the Food Inspector for analysis- It is a sample under section 2 (xiii) though there is element of compulsion in it.

State of M.P. Vs. Dimak Chand
Reported in 2002 (2) ANJ (MP) 962

Held :

A sale of an article of food to the food Inspector for using it for analysis would be a sale as is specifically mentioned in clause (xiii) of Section 2 of the Act, whether it is voluntary or not and even though there is an element of compulsion in it. [See *Mohd Yamin Vs. The State of U.P. and another (AIR 1973 S.C. 484)* and *The Food Inspector, Calicut vs. Cherukattil Gopalan and another (AIR 1971 S.C. 1725)*].

When the seller readily agrees to allow the Food Inspector to take the sample and accepts the price it will be a case of voluntary sale. If the vendor does not

agree to the sample being taken, Food Inspector may take the sample even against his wishes. In that case also it will be a sale under Clause (xiiii) of Section 2 of the Act. When the Food Inspector tenders the price there is full copliance with Section 10 (3) of the Act and the transaction would be a sale irrespective of the fact that the seller declined to accept the price. It is not necessary for the prosecution to prove that the accused sold the article to other persons or carried on the business of sale of the article as a regular feature. Thus, the sale of an article of food for analysis will not take the case out of clause (xiii) of Section 2 of the Act.

●

160. EVIDENCE ACT, 1872- Section 24
Extra Judicial confession- Evidentiary value of - If voluntary and trustworthy can be the basis of a conviction.
Gopal Singh Vs. State of M.P.
Reported in 2002 (2) ANJ (MP) 977

Held :

As regards the evidentiary value of extra judicial confession, the legal position on the point is made reluctant by the *Supreme Court in State of Punjab v. Gurdeep Singh JT 1999 (6) SC 514* in following terms: "Confession in common acceptation means and implies acknowledgement of guilt- its evidentiary value and its acceptability however shall have to be assessed by the Court having due regard to the credibility of the witnesses. In the event, however, the Court is otherwise in a position having due regard to the attending circumstances believes the witness before whom the confession is made and is otherwise satisfied that the confession is in fact voluntary and without there being any doubt in regard there to, an order of conviction can be founded on such evidence. There is no denial of the fact that extra judicial confession is admissible in evidence and thereon to the extent of even basing conviction of the accused. The extra judicial confession by itself if, otherwise in conformity with the law, can be treated as substantive evidence, and in appropriate cases it can be used to punish an offender. This statement or law stands qualified to the extent that the Court should insist on some assuring material or circumstance to treat the same as piece of substantive evidence. There must be some cogent reasons for making a confession. The confession in the normal course of events are made to avoid harassment by the police and to a person who could otherwise protect the accused against such a harassment."

The apex court also quoted with approval following observations made in the case of *M.K. Anthony [1985 Cr.L.J. 493]:*

> "There is neither any rule of law nor of prudence that evidence furnished by extra judicial confession cannot be relied upon unless corroborated by some other credible evidence. The Courts have considered the evidence of extra judicial confession a weak piece of evi-

dence. If the evidence about extra judicial confession comes from the mouth of witness/witnesses who appear to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused; the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, if it passes the test, the extra judicial confession can be accepted and be the basis of a conviction. In such a situation, to go in search of corroboration itself tends to cast a shadow of doubt, over the evidence. If the evidence of extra judicial confession is reliable, trust worthy and beyond reproach the same can be relied upon and a conviction can be founded thereon."

The legal position thus emerges it that an extra judicial confession, if voluntary, can be relied upon by the court in convicting the accused. Any such confession has to be proved like any other fact and would depend on the circumstances, the time when the confession was made and above all the credibility of the witnesses who speak of such a confession.

●

161. SPECIFIC RELIEF ACT, 1963 - Section 22

Relief of possession is implicit in the relief of specific performance- Relief of possession not prayed in suit- Decree silent on the point of possession- Executing Court can grant delivery of possession to plaintiff/decree holder.

Sunderlal and others Vs. Gopal Sharan

Reported in 2003 (1) MPHT 330

Held :

Shri K.L. Mangal relying on sub-section (2) of Section 22 has vehemently urged that in the present case the plaintiff has not asked for any relief for possession and, therefore, the said relief cannot be granted to him in execution proceedings. For this purpose, he relied on the judgment of the Apex Court in the case of *Adcon Electronics Pvt. Ltd. Vs. Daulat and another [(2001) 7 SCC 698].* He invited my attention to para 16 of the said judgment. In para 16 of the said judgment, the Apex Court has reproduced Section 22 and has laid down that in a suit for specific performance of a contract for sale of immovable property containing a stipulation that on execution of the sale-deed the possession of the immovable property will be handed over to the purchaser. In such a case, it is necessary for the purchaser to specifically ask for relief of possession.

The question whether the relief for possession is implicit in a decree for specific performance was not there before Their Lordships in the aforesaid case.

Moreover, earlier judgment of the Apex Court in the case of *Babulal Vs. M/s. Hazarilal Kishori Lal and others [(1982) 1 SCC 525]* was not brought to the notice of Their Lordships nor the provisions of Section 55 of Transfer of Property Act were under consideration before the Apex Court and, therefore, the said judgment is quite distinguishable from the facts and circumstances of the present case. Section 55 of the Transfer of Property Act castes a duty on the seller of immovable property to hand over the possession of the property to the purchaser. The Apex Court in its earlier judgment in the case of *Babulal* (supra) has specifically laid down that a decree for specific performance embraces within its ambit not only the execution of the sale-deed but also possession of the property. A similar view is taken by this Court in its judgment in the case of *Bata Shoe Co. Vs. Preetamdas and others (1983 JLJ 422).* In the said judgment, this Court has held that in execution of a decree for specific performance of sale where the decree is silent on the question of delivery of possession, the Executing Court can direct delivery of possession. For this purpose this Court has relied on its judgment in the cases of *Dadulal Hanumanlala Vs. Deo Kunwar (1983 JLJ 234)* and *Brijmohan Vs. Chandrabhaga Bai (AIR 1948 Nagpur 406).* Similar view is taken by Calcutta High Court in the cases of *Subodh Kumar Banerjee Vs. Hiramoni Dasi and others [AIR 1955 Calcutta 267 (DB)]* and *Debabrata Tarafder Vs. Biraj Mohan Bardhan (AIR 1983 Calcutta 51);* as well as by this Court in the cases of *Shrikrishna Gupta Vs. Sitaram Mohanswaroop Nigam [1997 (2) MPLJ 501]* and *Mohd. Yakub Vs. Abdul Rauf and another, 2002 (1) M.P.H.T. 216.*

●

162. ZAMINDARI ABOLITION ACT, 1951 (M.B.) - Section 41
Expression 'personal cultivation' constructively also means right to possess against trespasser - Person having such right, though not in actual possession be deemed to be tenant from the date of vesting.
Choudhary Udai Singh and another Vs. Narayanibai and others
Reported in 2003 RN 12 (SC)

Held :

In *Harishchandra Behra v. Garbhoo Singh, (1961 JLJ 780),* the expression personal cultivation is explained as not mere bodily cultivating the land but constructively also and also the right to possess against a trespasser. If a wrongdoer takes possession, steps to exclude him can certainly be taken and cultivation of trespassers in such circumstances cannot clothe him with any right and his cultivation has to be deemed to be on behalf of rightful owner. Thus, the appellants are entitled to claim right to possess in respect of the land in question. We are further fortified by the decision in *Himatrao v. Jaikishandas and others, [1966 JLJ 1006 = 1966 (3) SCR 815]* where a distinction has been drawn between a suit brought by a proprietor in his character as proprietor for possession of property and in his individual right to possess in respect of the said property against the trespasser. The High Court lost sight of the provisions of Section 41 of the Act which enable even a proprietor holding land Khudkasht or Sir, should

be deemed to be tenant from the date of vesting. If the appellants were entitled to be put in possession of the land and the same had been deprived of by a trespasser which possession has to be recognised as that of the person who is entitled lawfully to cultivate the land in question.

●

163. CIVIL PROCEDURE CODE, 1908 - O. 41 Rr. 23 and 23A
COURT FEES ACT, 1870 - Section 13

(i) Order 41 Rules 23 and 23A- Distinction between.

(ii) Refund of court fees- Principle- Remand under O. 41 R. 23- Appellant not entitled to claim refund of court fees.

Ram Lal and others Vs. State of M.P. and others
Reported in 2003 (1) JLJ 35

Held :

(i) Order 41. Rule 23 CPC contemplates "where a matter is disposed of on a preliminary point and the decree is reversed in appeal" whereas O. 41 R. 23A deals with remand in other cases. It contemplates "where the case has been disposed of otherwise than on a preliminary point and the decree is reversed in appeal and a retrial is considered necessary". Thus, the distinguishing feature in both the Rules is that in earlier Rule the matter is disposed of on preliminary point, whereas in the latter Rule it is decided otherwise than on a preliminary point.

(ii) The principle with regard to refund of court-fees is that when there is no legal obligation to pay the court-fees the Court orders, in substance, the law to be carried out, and not to increase the liability upon the litigant. But the principle cannot be extended in support of a litigant who has paid court fees for which, in law, he was liable, but who, because of certain circumstances feels that equitable considerations require that he should not be asked to pay the court fees. This has been held so in a judgment reported in AIR 1953 Nagpur, 300 *(Ranjan Lal v. Shankar Lal).*

We are, therefore, of the considered opinion that the remand was only under O.41, R.23A, CPC. If the remand was only under R. 23A, then of course the petitioners would not be entitled to claim refund of he court fees. It has been held so by a Division Bench of this Court in a judgment reported in 1983 JLJ 356 = AIR 1983 MP 110 *(M/s Kiran Electricals v. State Bank of Indore and another).* The Division Bench has held while interpreting S. 13 of the Court Fees Act that if remand to the lower Court has been made by the High Court exercising the powers conferred on it under O. 41, R.23A CPC, then there cannot be any order for refund of court-fees. This view was also followed by a learned Single Judge of this Court in a case reported in 1989 (II) MPWN 174 = 1989 MPLJ 199 *(Radhakishan Biharilal v. Mohanlal Radhakishanji).*

●

164. CRIMINAL PROCEDURE CODE, 1973 - Section 397 (2) & 317

(i) Interlocutory order- test to determine interlocutory order.

(ii) Exemption of the accused during trial- Normal rule, evidence should be taken in presence of accused- Recording of evidence in absence of accused after his exemption- Exercise of discretion regarding grant of exemption - Law explained.

Bhaskar Industries Ltd. Vs. Bhiwani Denim and Apparels Ltd. and others.

Reported in 2003 (1) JLJ 56

Held :

(i) The interdict contained in section 397 (2) of the Code of Criminal Procedure (for short 'the Code') is that the powers of revision shall not be exercised in relation to any interlocutory order. Whether an order is interlocutory or not, cannot be decided by merely looking at the order or merely because the order was passed at the interlocutory stage. The safe test laid down by this Court through a series of decisions is this : if the contention of the petitioner who moves the superior Court in revision, as against the order under challenge is upheld, would the criminal proceedings as a whole culminate? If they would, then the order is not interlocutory in spite of the fact that it was passed during any interlocutory stage.

A three- Judge Bench of this Court in *Madhu Limaye v. State of Maharashtra (AIR 1978 SC 47)* laid down the following test :

> "An order rejecting the plea of the accused on a point which, when accepted, will conclude the particular proceeding, will surely be not an interlocutory order within the meaning of section 397 (2)."

That was upheld by the four-Judge Bench of this *Court in V.C. Shukla v. State through CBI AIR 1980 SC 962.*

The above position was reiterated in *Rajendra Kumar Sitaram Pande v. Uttam (1999) 3 SCC 134.* Again in *K.K. Patel v. State of Gujarat (2000) 6 SCC 195* this Court stated thus:

> "It is now well-nigh settled that in deciding whether an order challenged is interlocutory or not as for section 397 (2) of the Code, the sole test is not whether such order was passed during the interim stage (vide : *Amar Nath v. State Haryana (1977) 4 SCC 137, Madhu Limaye v. State of Maharashtra AIR 1978 SC 47, V.C. Shukla v. State through CBI AIR 1980 SC 962, Rajendra Kumar Sitaram Pande v. Uttam (1999) 3 SCC 134.* The feasible test is whether by upholding the objections raised by a party, it would result in culminating the proceedings, if so any order passed on such objections would not be merely interlocutory in nature as envisaged in section 397 (2) of the Code. In the present case, if the objection raised by the appellants were upheld by the Court the entire

prosecution proceedings would have been terminated. Hence, as per the said standard, the order was revisable."

(ii) Sub- section (1) envisages two exigencies when the Court can proceed with the trial proceedings in a criminal case after dispensing with the personal attendance of an accused. We are not concerned with one of those exigencies i.e. when the accused persistently disturbs the proceedings. Here we need consider only the other exigency. If a Court is satisfied that in the interest of justice the personal attendance of an accused before it need not be insisted on, then the Court has the power to dispense with the attendance of that accused. In this context, a reference to section 273 of the Code is useful. It says that;

> "273. Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader."

If a Court feels that insisting on the personal attendance of an accused in a particular case would be too harsh on account of a variety of reasons, can't the Court afford relief to such an accused in the matter of facing the prosecution proceedings?

The normal rule is that the evidence shall be taken in the presence of the accused. However, even in the absence of the accused such evidence can be taken but than his counsel must be present in the Court, provided he has been granted exemption from attending the Court. The concern of the criminal Court should primarily be the administration of criminal justice. For that purpose the proceedings of the Court in the case should register progress. Presence of the accused in the Court is not for marking his attendance just for the sake of seeing him in the Court. It is to enable the Court to proceed with the trial. If the progress of the trial can be achieved even in the absence of the accused the Court can certainly take into account the magnitude of the sufferings which a particular accused person may have to bear with in order to make himself present in the Court in that particular case.

These are days when prosecutions for the offence under section 138 are galloping up in criminal Courts. Due to the increase of inter-State transactions through facilities of the banks, it is not uncommon that when prosecutions are instituted in one State the accused might belong to a different State, sometimes a far distant State. Not very rarely, such accused would be ladies also. For prosecution under section 138 of the NI Act the trial should be that of a summons case. When a Magistrate feels that insistence of personal attendance of the accused in a summons case, in a particular situation, would inflict enormous hardship and cost to a particular accused, it is open to the Magistrate to consider how he can relieve such an accused of the great hardships, without causing prejudice to the prosecution proceedings.

Section 251 is the commencing provision in Chapter XX of the Code which deals with trial of summons cases by Magistrates. It enjoins on the Court to ask

the accused whether he pleads guilty whon the "accused appears or is brought before the Magistrate". The appearance envisaged therein can either be by personal attendance of the accused or through his advocate. This can be understood from section 205 (1) of the Code which says that :

> "205. (1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader."

Thus, in appropriate cases the Magistrate can allow an accused to make even the first appearance through a counsel. The Magistrate is empowered to record the plea of the accused even when his counsel makes such plea on behalf of the accused in a case where the personal appearance of the accused is dispensed with. Section 317 of the Code has to be viewed in the above perspective as it empowers the Court to dispense with the personal attendance of the accused (provided he is represented by a counsel in that case) even for proceeding with the further steps in the case. However, one precaution which the Court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the Court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in Court and that he has no objection in taking evidence in his absence. This precaution is necessary for the further progress of the proceedings including examination of the witnesses.

18. A question could legitimately be asked- what might happen if the counsel engaged by the accused (whose personal appearance is dispensed with) does not appear or that the counsel does not cooperate in proceeding with the case? We may point out that the legislature has taken care of such eventualities. Section 205 (2) says that the Magistrate can in his discretion direct the personal attendance of the accused at any stage of the proceeding. The last limb of section 317 (1) confers a discretion on the Magistrate to direct the personal attendance of the accused at any subsequent stage of the proceedings. He can even resort to other steps for enforcing such attendance.

●

165. ADVERSE POSSESSION :

Batai possession being permissive possession may not be basis of adverse possession.

Ghanshyamdas & Anr. Vs. Bharosa & Ors.

Reported in 2003 (I) MPJR SN 5

Held :

Plea of batai and adverse possession are conflicting pleas. In the batai possession is permissive and the adverse possession cannot be claimed on the basis of permissive possession until and unless the defendants plead their hostile possession to the owner and further shows what is the starting point of his hostile possession against the owner and unless his adverse possession contin-

ues for 12 years, defendants cannot get any right in the property. Mere a long possession will not give any right to a person against the true owners.

●

166. INDIAN PENAL CODE, 1860 - Section 97

Right of private defence whether available against an act done in exercise of right of private defence - No.

Barelal Sahu Vs. State of M.P.

Reported in 2003 (I) MPJR SN 9

Held :

Right of private defence cannot be claimed against an act which is itself in exercise of the right of private defence. An aggressor cannot plead self-defence. The right to defend cannot include the right to offend. Section 97 I.P.C. confers on every person right to defend his property against any act which is an offence of criminal trespass or an attempt to commit such offence. A rightful owner is entitled to throw out physically a treapasser or one trying to infringe his right. In *Kashmiri Lal vs. State of Punjab (AIR 1997 SC 393)* it has been held by the Supreme Court that strictly speaking the right of private defence under the Indian Penal Code is entirely a preventive measure provided to a person or party, who is unlawfully attacked by another person or party, to dispel such attack. But there is no such right of private defence available under the Code against an attack which is in itself an offence. The law does not confer a right of self-defence on a person who invites an attack on himself by his own attack on another. The principle of right of self-defence cannot legitimately be utilised as a shield to justify an act of aggression. A person who is unlawfully attacked has every right to counteract and attack upon his assailant and cause such injury as may be necessary to ward off the apprehended danger or threat.

●

167. WORDS AND PHRASES :

'Moral Turpitude' - Meaning of- Offence u/s 323/149 I.P.C. not an act of moral turpitude.

Dhan Singh Thakur Vs. State of M.P. & Ors.

Reported in 2003 (I) MPJR SN 11

Held :

In the case of *Baleshwar Singh Vs. District Magistrate, AIR 1959* Allahabad 71 it was ruled that the expression 'moral turpitude' means anything done contrary to justice, honesty, modesty or good morals. It was further held that it implies deprivity and wickedness of character or disposition of the person charged with the particular conduct. Every false statement made by the person may not be moral turpitude, it would be so if it discloses vileness or depravity in the doing of any private and social duty which a person owes to his fellowmen or to the society.

In view of the aforesaid pronouncement of law there remains no scintilla of

doubt that a conviction under Section 323/119 does not amount to moral turpitude.

●

168. ACCOMMODATION CONTROL ACT, 1961 - Section 13 (1) & (2)
Dispute about arrears of rent without there being dispute about rate of rent- Dispute not covered by Section 13 (1) & 13 (2).
Prakash Gupta Vs. Smt. Ramrati Devi
2003 (I) MPJR SN 12

Held :

It is submitted on behalf of the defendant that he had raised the dispute as to arrears of rent and, therefore he was not obliged to deposit the rent till the time the dispute was decided by the trial Court. This argument cannot be accepted in view of the decision of the Supreme Court in *Jamnalal vs. Radheshyam, 2000 (2) M.P.L.J. 385* in which it has been held that where there is no dispute about the rate of rent the dispute is not covered by section 13 (2) of the Act and a tenant takes the risk of suffering an order of eviction by raising a dispute in regard to the amount of rent payable by him while admitting the rate of rent and not making payment or deposit under sub section (1) because where the dispute raised by the tenant is outside the ambit of sub-section (2), sub-section (1) of Section 13 of the Act does not become inoperative.

●

169. CIVIL PROCEDURE, 1908 - O.22 R.6
Death of defendant after recording of evidence but before arguments- Whether hearing of arguments a stage of hearing of suit - Yes.
Kasturi Bai & Ors. Vs. Kanhaiyalal
Reported in 2003 (I) MPJR 97

Held :

Now the question before me is whether hearing of arguments can be said to be the date of hearing ? The Code of Civil Procedure nowhere lays down any stage in the suit for hearing the arguments. However, the High Court Rules provide that the arguments should be heard before pronouncement of the judgment. In view of the said fact, according to the learned counsel for the appellants, it cannot be said that Tulsiram died after hearing was over. For this purpose, he relied on the judgment of Supreme Court in the case of *N.P. Thirugnanam (D) by L.Rs. V. Dr. R. Jagam Mohan Rao* and others, reported in AIR 1996 SC 116, and, *Sain Dass v. Devi Dass* and others, reported in AIR 1973 Jammu & Kashmir 70. Both these cases take a view that if the defendant dies after the arguments are concluded and before judgment is pronounced, the suit does not abate, but in the present case the arguments were not concluded as is clear from the order-sheets recorded by the trial Court and, therefore, it cannot be said that the hearing of the case was over.

●

170. HINDU LAW :

Right of widow having limited interest to sell the property for future maintenance - Whether widow having limited interest can sell the property for future maintenance- Yes - Conditions explained.
Ram Kishore and Anr. Vs. Shankar Lal (Dead) By L.Rs. & Ors.
Reported in 2003 (1) ANJ (SC) 232

Held :

The question that next arises for consideration is whether Jasoda- a widow, having limited interest in the property could sell the same for future maintenance. This position appears to be settled by certain decisions of different High Court like *P. Kuthalinga Mudaliar vs. M.M. Shanmuga Mudaliar & Ors. (AIR 1926 madras 464) and Ramalinga Iyer vs. Parvathathammal and Others (AIR 1926 Madras 1122.)* This Court in the case of *Jaisri Sahu vs. Raj Dewan Dubey and Others (1962 AIR SC 83)* held :

> "When a widow succeeds as heir to her husband, the ownership in the properties both legal and beneficial, vests in her. She fully represents the estate, the interest of the reversioners therein being only *spes successionis*. The widow is entitled to the full beneficial enjoyment of the estate and is not accountable to any one. If it true that she cannot alienate the properties unless it be for necessity or for benefit to the estate, but this restriction on her powers is not one imposed for the benefit of reversioners but is an incident of the estate as known to Hindu Law. It is for this reason that it has been held that when Crown takes the property by escheat, it takes it free from any alienation made by the widow of the last male holder which is not valid under the Hindu law, vide: Collector of *Masulipatam vs. Kavaly Venkata 8 Moo Ind. [App. 529, PC)]*. Where however, there is necessity for a transfer, the restriction imposed by Hindu law on her power to alienate ceases to operate and the widow as owner has got the fullest discretion to decide what form the alienation should assume. Her powers in this regard are, as held in a series of decisions beginning with *Hunooman Persaud vs. Mussamat Babooee Mundraj Koonweree 6 Moo Ind. [App. 393 (PC)* those of the manager of an infant's estate or the manager of a joint Hindu family.

●

171. CRIMINAL PROCEDURE CODE, 1973 - Section 321

Order passed under Section 321 is not appealable but revisable-No specific grounds for withdrawal envisaged in the section- Scope and ambit of Section 321 explained.
Usman Ali Khan vs. State of M.P. and others
Reported in 2003 (1) MPLJ 464

Held :

The Supreme Court in the case of *Sheonandan Paswan* (supra) has held :-

"There is no appeal provided by the Act against an order giving consent under section 321. But the order is revisable under section 397, Criminal Procedure Code. The Court in revision considers the materials only to satisfy itself about the correctness, legality and propriety of the findings, sentence or order and refrains from substituting its own conclusion on an elaborate consideration of evidence."

Under section 321 Criminal Procedure Code, no specific grounds for withdrawal have been envisaged by the Legislation. The Supreme Court again in *Sheo Nandan Pasawan's* case (supra) held in paras 90 and 91 as under :-

"90. "Section 321 Criminal Procedure Code is virtually a step by way of composition of the offence by the State. The State is the master of the litigation in criminal cases. It is useful to remember that by the exercise of function under section 321, the accountability of the concerned person or persons does not disappear. A private complaint can still be filed if a party is aggrieved by the withdrawal of the prosecution but running the possible risk of a suit of malicious prosecution if the complaint is bereft of any basis."

"91. "Since section 321 does not give any guidelines regarding the grounds on which a withdrawal application can be made, such guidelines have to be ascertained with reference to decided cases under this section as well as its predecessor section 494. I do not propose to consider all the authority cited before me for the reason that this Court had occasion to consider the question in all its aspects in some of its decisions. Suffice it to say that in the judgments rendered by various High Courts, public policy, interests of the administration, inexpediency to proceed with the prosecution for reasons of State and paucity of evidence were considered good grounds for withdrawal in many cases and not good grounds for withdrawal in certain other cases in those decisions".

●

172. CRIMINAL PROCEDURE CODE, 1973 - Sections 325 and 461
Exercise of powers by Judicial Magistrate under Section 325 by sending the proceedings to C.J.M. - Framing of charge and recording of evidence by Magistrate not rendered illegal under Section 461 (1).
Ramesh and another Vs. State of M.P.
Reported in 2003 (1) MPLJ 475

Held :

Having heard learned counsel for the parties and after perusing the entire record, this Court is of the opinion that under section 29, sub-section (2) of the Criminal Procedure Code, powers have been given to the Magistrate about passing of sentence of imprisonment and fine. Whenever learned JMFC finds that more than prescribed sentence is to be passed in a given case, he can exercise

powers under section 325, Criminal Procedure Code by sending the proceedings and forwarding the accused to the CJM and the same has been done in the case on hand. It doesn't mean that framing of charge and recording of statements of the witnesses by the JMFC, would render illegal. In the present case, Provision of section 461, clause (1) will not be attracted. This section will apply, only when a magistrate is not empowered by law to try the case. This section nowhere says about imposition of severe punishment. There is difference between jurisdiction of trial and jurisdiction to impose sentence.

●

173. N.D.P.S. ACT, 1985 - Section 50

(i) Scope and applicability of Section 50- Section 50 though mandatory but only substantial compliance is required.

(ii) Appreciation of evidence- Evidence of I.O. if found trustworthy can be sole basis of conviction without corroboration.

Ram Bilas Baba Vs. State of M.P.
Reported in 2003 (1) MPLJ 559

Held :

(i) The Investigating Officer has further deposed that he went to the spot with Rajendra Singh Yadav (P.W.3) and Onkar Singh Kushwah (P.W.1) and gave the notices Ex. P-10 and Ex. P-11 to them asking them whether they would give search to him or they want to be searched by some gazetted officer or Magistrate. " आप मुझसे तलासी देंगे या किसी राजपत्रित अधिकारी या मजिस्ट्रेट से तलासी लेवाएंगे।" They expressed that they have no objection if they are searched by him. It is argued on behalf of the appellants that this was not sufficient compliance with section 50 of the Act as the accused persons were not apprised of their 'right' to be searched by a Magistrate or gazetted officer and therefore they could not exercise that right. Reliance has been placed on two decisions of the Supreme Court in *K. Mohanan vs. State of Kerala, (2000) 10 SCC 222 and Kiluttumottil Razak vs. State of Kerala, (2000) SCC 465.* These decisions lay down that the accused should be 'informed about his right' to be searched in the presence of a Magistrate or gazetted officer and if it is not done the requirement of section 50 is not satisfied. These were the decisions of "two-judge bench". In *Joseph Fernandez vs. State of Goa, (2000) 1 SCC 707,* a three Judge bench of the Supreme Court had laid down the law as under :-

> "According to us the said offer is a communication about the information that the appellant has a right to be searched so. It must be remembered that the searching officer had only section 50 of the Act then in mind unaided by the interpretation placed on it by the Constitution Bench. Even then the searching officer informed him that if you wish you may be searched in the presence of a gazetted officer or a Magistrate. This according to us is in substantial compliance with the requirement of section 50. We do not agree with the contention that

there was non-compliance with the mandatory provision contained in section 50 of the Act."

The decision of the Supreme Court in *Joseph's case* which is of larger Bench lays down that substantial compliance with section 50 meets the statutory requirement. Following this decision it is held that in the present case there was substantial compliance with section 50 of the Act.

(ii) The evidence of the Investigating Officer is corroborated by the two constables and the documents which were prepared on the spot. Therefore, the accused persons could be convicted on the basis of the evidence which was found to be fully reliable. In *P.P. Beeran vs. State of Kerala, AIR 2001 SC 2420* it has been held by a three-judge Bench of the Supreme Court that the evidence of the Sub-Inspector, even if not corroborated by any other, can be made the sole basis for conviction.

●

174. SERVICE LAW :

Transfer of an employee- Presumption is that transfer is bonafide- Transfer not to be lightly interfered by Courts.
Ramashray Tripathi Vs. Union of India and others
Reported in 2003 (1) MPLJ 630

Held :

It is well settled position that administration can transfer the employee from one place to another and such order of transfer is not required to be interfered with lightly by the Court of law in exercise of its discretionary jurisdiction unless the Court finds that either the order is *mala fide* or that the service rules prohibit the transfer or the authority issuing the order did not have the competence to issue such an order.

In *State of U.P. and another vs. V. N. Prasad (Dr.) 1995 Supp. (2) SCC 151,* it has been held that presumption is in favour of the bona fide of the orders unless contradicted by acceptable material. Mala fide requires strong and convincing reasons.

●

175. M.P. EXCISE ACT, 2000 - Section 47-D
CRIMINAL PROCEDURE CODE, 1973 - Section 451/457
Intimation regarding confiscation not sent by Collector to the criminal Court- Criminal Court can pass orders regarding interim custody of seized vehicle.
Suresh Vs. State of M.P.
Reported in 2003 (1) MPLJ 638

Held :

The legal position is that if the Criminal Court has been given intimation as per provision under section 47-D of the Act about initiation of confiscation pro-

ceedings by the Collector regarding confiscation then the Criminal Court is ceased of the matter and has no jurisdiction to pass any order for interim custody, or confiscation of vehicle. But at the same time, the Collector has jurisdiction to pass order for interim custody of the vehicle or property looking to the facts and circumstances of the case and in the interest of safeguard of property as well as to protect the person suffering from financial loss. In the facts and circumstances of the present case, since there is no compliance of section 47-D of the Act uptill now and no notice has been issued by the Collector/Authority to the applicant for initiation of confiscation proceedings, it would be just and proper to release the vehicle on interim custody in favour of the applicant who is the Registered owner of the aforesaid vehicle.

●

176. PREVENTION OF FOOD ADULTERATION ACT, 1954- Section 7 (i) and 16 (1) (a) (i)
Training and qualification of Food Inspector- It can not be challenged in collateral proceedings.
Ramprasad Vs. State of Madhya Pradesh
Reported in 2003 (1) ANJ (MP) 117

Held :

According to the learned Dy. Advocate General Shri Desai, the qualifications of the Food Inspector cannot be looked into when he lays prosecution. He placed reliance on a judgment of the Supreme Court in *Suresh H. Rajput Vs. Bhartiben (AIR 1996 SC 2883).* In para 14, the Hon'ble Supreme Court has held as under :-

"..... the learned Magistrate had further held that the Food Inspector did not have training for required number of days and that, therefore, he was not competent to take the samples, We find that the Magistrate illegally proceeded on that assumption. The qualifications of the Food Inspector cannot be challenged in collateral proceedings. What is material is whether the Food Inspector had taken the samples in accordance with the provisions of the Act or the rules made thereunder. In case the Court finds that if he committed any contravention, what would be its effect on the prosecution is a matter to be considered but his qualifications cannot be looked into when he lays the prosecution for adulteration of the articles of food under the Act."

●

177. CRIMINAL PROCEDURE CODE, 1973 - Sections 169, 178 and 173 and 190 (1) (c)
Final report not binding on the Magistrate- Magistrate may take cognizance on the materials collected during investigation.
Fazil Mohd. Khan Vs. Rafique Ahmed & Two others
Reported in 2003 (1) ANJ (MP) 138

Held :

A final report is not binding on the Magistrate. If the Magistrate differs from the opinion of the Investigating Officer, he can take cognizance on the basis of materials collected during investigation. Simply because the Magistrate directed the police agency to make the copies of the material collected during investigation available, it could not be said that the Magistrate directed the police to file the challan.

On the combined reading of Sections 169, 178 and 173 of the Code and the definition of the "police report" in Section 2-R of the Code what is obtainable is that a report to be filed on the formation of the opinion of the police officer is the opinion of the police and not of the Court.

The Magistrate, under Section 190 of the Code is to take cognizance of the case in which the police has recognized that no offence is made out. A very wide power is conferred on the Magistrate to take cognizance of the offence. It is open to magistrate to take cognizance of the offence under Section 190 (1) (c) of the Code on the ground that after having due regard to the final report and the police record placed before him he has reason to suspect that the offence has been committed. While considering the application under Section 169 of the Code a Magistrate issues notice to the person who lodged the First Information Report. When the complainant appears before the Magistrate in response to the notice, he opposes the application under Section 169 of the Code and even if the final report is not accepted due to the protest of the complainant, the Magistrate under Section 190 (1) (c) of the code can take cognizance of an offence. The expression "own knowledge" includes the knowledge derived from police papers and final report under Section 169 of the Code.

●

178. CIVIL PROCEDURE CODE, 1908 - O.41 R. 33

Power of the Appellate Court under O.41 R. 31- Ambit and scope- Decree may be passed even in favour of a party who has not filed appeal.
Rama Singh & Ors. Vs. Ashok Sharma & Others
Reported in 2003 (1) ANJ (MP) 147

Held :

Rule 33 of Order 41 of C.P.C., enables appellate Court to pass any order/ decree which ought to have been passed. The general principle is that, a decree is binding upon the parties to it until it is setaside by appropriate proceeding, Ordinarily, the appellate court, must not vary or reverse a decree or order in favour of a party who has not preferred any appeal and this rule holds good notwithstanding Order 41 Rule 33 of CPC. However, in exceptional cases the rule enables the appellate Court to pass such decree or order as ought to have been passed even if such decree would be in bavour of the parties who have not filed any appeal. The power though discretionary should not be declined to be exercised merely on the ground that the party has not filed any appeal.

●

179. INDIAN PENAL CODE, 1860 - Sections 300 and 302

Death by single blow- No principle that in all cases Section 302 is not attracted.

Jham Singh & Ors. Vs. State of Madhya Pradesh

Reported in 2003 (I) MPJR 237

Held :

It has been held by the Supreme Court in *Mahesh Balmiki vs. State of Madhya Pradesh, AIR 1999 SC 3338* that there is no principle that in all cases of single blow Section 302 of the Indian Penal Code is not attracted. Single blow may, in some cases entail conviction under Section 302 of the Indian Penal Code, in some cases under Section 304 of the Indian Penal Code and in some other cases under Section 326 of the Indian Penal Code. The question with regard to nature of offence has to be determined on the facts and in the circumstances of each case. The nature of injury, whether it is on the vital or on the non-vital part of the body, the weapon used, the circumstances in which the injury is caused and the manner in which the injury is inflicted are all relevant facts which may go to determine the required intention or knowledge of the offender and the offence committed by him. In the instant case, the deceased was assaulted twice on his head by the appellants Asharam and Jham Singh with their respective Lathis. The deceased was unarmed and aged 60 years at the time of assault. These facts clearly establish that the appellants had intention of causing his death or of causing such bodily injury as is likely to cause death.

●

180. SERVICE LAW :

Date of birth - Unless bona fide clerical error in recording it, no change permissible

State of M.P. Vs. Mathura Singh & Anr.

Reported in 2003 (I) MPJR 249

Held:

Rule 84 of M.P. Financial Code (Volume-I) provides that date of birth once recorded must be deemed to be absolutely conclusive and except in the case of a clerical error no revision of such a declaration shall be allowed to be made at a later period for any purpose whatsoever.

The Hon. Apex Court in the case of *Union of India Vs. C. Rama Swamy and others, reported in (1997) 4 SCC 647*, has made it clear that bonafide clerical error would normally be one where an officer has indicated a particular date of birth in his application form or any other document at the time of his employment, but, by mistake or oversight a different date has been recorded. However, in the present case, it is nobody's case that any such bonafide clerical error has occurred in the service record.

●

181. ACCOMMODATION CONTROL ACT, 1961 (M.P.) - Section 12 (1) (f)
Bona fide need of son alleged - Pending litigation son joining service- Itself not sufficient to prove lack of bona fide need.
Pratap Rai & Anr. Vs. Uttam Chand & Anr.
Reported in 2003 (I) MPJR SN 22

Held :

It appears that though subsequent events have occurred in the case, Naresh Talreja after completion of his education has joined service. But after getting possession of the suit shop he will start his own business, as per the bonafide need found by the court below. This by itself is not a sufficient ground to deny the decree. Otherwise every person for whose need suit is filed, has to sit idle just to wait the result of suit for years. This is not the intention of legislation.

●

182. CRIMINAL PROCEDURE CODE, 1973 - Sections 451 and 457
Power under Section 451 regarding disposal of property - Power should be exercised expeditiously and judiciously - Articles not to be kept at police station for more than 15 days to one month - Duty of the Magistrate explained regarding disposal of various type of properties.
Sunderbhai Ambalal Desai Vs. State of Gujarat
Order dt. 1-10-2002 passed by the Supreme Court in S.L.P. (Cri.) No.2745 of 2002
Reported in 2002 AIR SCW 5301

Held :

Section 451 clearly empowers the Court to pass appropriate orders with regard to such property, such as -

(1) for the proper custody pending conclusion of the inquiry or trial;

(2) to order it to be sold or otherwise disposed of, after recording such evidence as it thinks necessary ;

(3) if the property is subject to speedy and natural decay, to dispose the same.

In our view, the powers under Section 451, Cr.P.C. should be exercised expeditiously and judiciously. It would serve various purposes, namely :-

1. Owner of the article would not suffer because of its remaining unused or by its misappropriation ;
2. Court or the police would not be required to keep the article in safe custody;
3. If the proper panchnama before handing over possession of article is prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary, evidence could also be recorded describing the nature of the property in detail ; and

4. This jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles.

With regard to valuable articles, such as, golden or silver ornaments or articles studded with precious stones, it is submitted that it is of no use to keep such articles in police custody for years till the trial is over. In our view, this submission requires to be accepted. In such cases, Magistrate should pass appropriate orders as contemplated under Section 451, Cr.P.C. at the earliest.

For this purpose, if material on record indicates that such articles belong to the complainant at whose house theft, robbery or dacoity has taken place, then seized articles be handed over to the complainant after :-

(1) preparing detailed proper panchnama of such articles;

(2) taking photographs of such articles and a bond that such articles would be produced if required at the time of trial ; and

(3) after taking proper security.

For this purpose, the Court may follow the procedure of recording such evidence as it thinks necessary, as provided under Section 451, Cr.P.C. The bond and security should be taken so as to prevent the evidence being lost, altered or destroyed. The Court should see that photographs of such articles are attested or countersigned by the complainant, accused as well as by the person to whom the custody is handed over. Still however, it would be the function of the Court under Section 451, Cr.P.C. to impose any other appropriate condition.

In case, where such articles are not handed over either to the complainant or to the person from whom such articles are seized or to its claimants, then the Court may direct that such articles be kept in bank lockers. Similarly, if articles are required to kept in police custody, it would be open to the SHO after preparing proper panchnama to keep such articles in a bank locker. In any case, such articles should be produced before the Magistrate within a week of their seizure. If required, the Court may direct that such articles be handed over back to the Investigating Officer for further investigation and identification. However, in no set of circumstances, the Investigating Officer should keep such articles in custody for a longer period for the purpose of investigation and identification. For currency notes, similar procedure can be followed.

In our view, whatever be the situation, it is of no use to keep such seized vehicles at the police stations for a long period. It is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles.

In case where the vehicle is not claimed by the accused, owner, or the insurance company or by third person, then such vehicle may be ordered to be auctioned by the Court. If the said vehicle is insured with the insurance company

then insurance company be informed by the Court to take possession of the vehicle which is not claimed by the owner or a third person. If Insurance company fails to take possession, the vehicles may be sold as per the direction of the Court. The Court would pass such order within a period of six months from the date of production of the said vehicle before the Court. In any Case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchnama should be prepared.

For articles such as seized liquor also, prompt action should be taken in disposing it of after preparing necessary panchnama. If sample is required to be taken, sample may kept properly after sending it to the chemical analyser, if required. But in no case, large quantity of liquor should be stored at the police station. No purpose is served by such storing.

Similarly for the Narcotic drugs also, for its identification, procedure under Section 451, Cr.P.C. should be followed of recording evidence and disposal. Its identity could be on the basis of evidence recorded by the Magistrate. Samples also should be sent immediately to the Chemical Analyser so that subsequently a contention may not be raised that the article which was seized was not the same.

However these powers are to be exercised by the concerned Magistrate. We hope and trust that the concerned Magistrate would take immediate action for seeing that powers under Section 451, Cr.P.C. are properly and promptly exercised and articles are not kept for a long time of the police station, in any case, for not more than fifteen days to one month.

●

183. CRIMINAL TRIAL :

APPRECIATION OF EVIDENCE- Solitary witness- If not wholly reliable corroboration necessary.

Lallu Manjhi and another Vs. State of Jharkhand

Judgment dt. 7.1.2003 passed by the Supreme Court in Criminal Appeal No. 15 of 2002, reported in (2003) 2 SCC 401

Held :

The law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness. (See : *Vadivelu Thevar v. State of Madras, AIR 1957 SC 614*)

●

184. SERVICE LAW :

Deemed Confirmation, when - Law explained.

Commissioner of Police, Hubli and another Vs. R.S. More

Judgment dt. 21-1-2003 by the Supreme Court in Civil Appeal No. 177 of 2000, reported in (2003) 2 SCC 408

Held :

In *High Court of M.P. v. Satya Narayan Jhavar, (2001) 7 SCC 161* a three - Judge Bench of this Court, while examining the question of deemed confirmation in service jurisprudence has categorized three classes of cases on the point. It was pointed out in SCC para 11 at p. 169 as under :

> "11. The question of deemed confirmation in service jurisprudence, which is dependent upon the language of the relevant service rules, has been the subject-matter of consideration before this Court, times without number in various decisions and there are three lines of cases on this point. One line of cases is where in the service rules or in the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. The other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that the officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry the order of termination has not been passed. *The last line of cases is where, though under the rules maximum period of probation is prescribed, but the same requires a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor has the person concerned passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired."*

●

185. CONSUMER PROTECTION ACT, 1986 - Sections 25 and 27

Whether Forum has power to execute its own order - Yes.

State of Karnataka Vs. Vishwabharathi House Building Coop. Society and others

Judgment dt. 17.1.2003, Passed by the Supreme Court in Civil Appeal No. 9927 of 1996, reported in (2003) 2 SCC 412

Held :

It is well settled that the cardinal principle of interpretation or statute is that courts or tribunals must be held to possess power to execute their own order.

It is also well settled that a statutory tribunal which has been conferred with the power to adjudicate a dispute and pass necessary order has also the power to implement its order. Further, the Act which is a self-contained code, even if it has not been specifically spelt out, must be deemed to have conferred upon the Tribunal all powers in order to make its order effective.

The terminology used in Section 25 of the Act to the effect "in the event of its inability to execute it", is of great significance. Section 25, on a plain reading, goes to show that the provision contained therein presuppose that the Forum or the Commission would be entitled to execute its order. It, however, may send the matter for its execution to a court only in the event it is unable to do so. Such a contingency may arise only in a given situation but in our considered opinion the same does not lead to the conclusion that the Consumer Courts cannot execute its own order and by compulsion it has to send all its orders for execution to the civil courts. Such construction of Section 25 in our opinion would violate the plain language used therein and, thus, must be held to be untenable.

●

186. CRIMINAL PROCEDURE CODE, 1973 - Section 428

Applicability of Section 428 - Period of detention under a preventive detention law cannot be set off.

Maliyakkal Abdul Azeez Vs. Asstt. Collectore, Kerala and another

Judgment dt. 17-1-2003 passed by the Supreme Court in CMP No. 9478 of 2002, reported in (2003) 2 SCC 439

Held :

The two requisites postulated in Section 428 of the Code are :

(1) During the stage of investigation, enquiry or trial of a particular case the prisoner should have been in jail at least for a certain period.

(2) He should have been sentenced to a term of imprisonment in that case.

If the above two conditions are satisfied then the operative part of the provision comes into play i.e. if the sentence of imprisonment awarded is longer than the period of detention undergone by him during the stages of investigation, enquiry or trial, the convicted person need undergo only the balance period of imprisonment after deducting the earlier period from the total period of imprisonment awarded.

A preventive detention as was held in *R.v. Halliday, 1917 AC 260* (AC at p. 268) "is not punitive but a precautionary measure". The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. No offence is proved, nor is any charge formulated; and the justification of such detention is suspicion or reasonable probability and

there is no criminal conviction which can only be warranted by legal evidence. In this sense it is an anticipatory action. Preventive justice requires an action to be taken to prevent apprehended objectionable activities. In case of punitive detention the person concerned is detained by way of punishment after being found guilty of wrongdoing where he has the fullest opportunity to defend himself, while preventive detention is not by way of punishment at all, but it is intended to prevent a person from indulging in any conduct injurious to the society. This position was noticed by this Court in *Kubic Darusz v. Union of India, (1990) SCC 568.*

In *Govt. of A.P. v. Anne Venkatesware , (1977) 3 SCC 298* this Court observed as follows : (SCC p. 303, para 7)

"It is true that the section speaks of the 'period of detention' undergone by an accused person, but it expressly says that the detention mentioned refers to the detention during the investigation, enquiry or trial of the case in which the accused person has been convicted. The section makes it clear that the period of detention which it allows to be set off against the term of imprisonment imposed on the accused on conviction must be during the investigation, enquiry or trial in connection with the 'same case' in which he has been convicted. We therefore agree with the High Court that the period during which the writ petitioners were in preventive detention cannot be set off under Section 428 against the term of imprisonment imposed on them."

The view was reiterated by a three-Judge Bench of this Court in *Champalal Punjaji Shah v. State of Maharashtra, (1982) 1 SCC 507.*

●

187. INDIAN PENAL CODE, 1860 - Section 300

Death due to neurogenic shock resulting from injury to testicles and scrotum caused by the respondent- During incident respondent saying that he would not leave the deceased alive and then hitting him by knee on the private parts- Held, conviction should be under Section 302 I.P.C.

State of Karnataka Vs. Mohamed Nazeer Alias Babu

Judgment dt. 24-1-2003 passed by the Supreme Court in Criminal Appeal No. 905 of 1995, reported in (2003) 2 SCC 444

Held :

As has been set out hereinabove, the evidence of the eyewitnesses, namely, PWs. 1,5,6 and 7 established beyond a reasonable doubt that the respondent came to the house of the deceased Amiruddin, caught hold of the deceased by his *banian*, lifted him up, hit him on the cheek and thereafter on the back of the neck. The evidence establishes that when he saw neighbours coming, he stated to Amiruddin that he would not leave him alive and then kicked Amiruddin with his right knee on the private parts. This resulted in the death of Aamiruddin. The evidence of the doctor has also not been disbelieved. The evidence of the doctor clearly shows that the death was caused due to neurogenic shock resulting from

injury to the testicles and scrotum. Thus the death is directly due to the injury caused by the respondent to the deceased. The injury was such that it was sufficient in the normal course to cause death. The injury resulted in death. The High Court was in error in stating that there was no injury. The High Court noted that death resulted from neurogenic shock but failed to note that the neurogenic shock was a result of the injury to the testicles and scrotum. The High Court omitted to note that such injury could be caused by a kick and was sufficient in normal course to cause immediate death. This was not a case where in a fit of anger or in a scuffle some act had taken place. We fail to understand how under such circumstances the High Court can conclude that the conviction can only be under Section 323 IPC. The injury caused was not even a simple injury. Section 323 would be wholly inappliable. This was a case where the conviction should have been under Section 302 IPC. In any event, this was a case where the High Court should never have interfered with the conviction under Section 304 (Part II) IPC.

●

188. CRIMINAL PROCEDURE CODE, 1973 - Sections 384, 385, 386, 154 & 174

EVIDENCE ACT, 1872 - Section 134

(i) Appellate Court, duty of- While reversing the finding of conviction the appellate court should examine the evidence.

(ii) Section 154 Cr.P.C.- Delay in lodging F.I.R.- Effect of- No rule that it would automatically render prosecution case doubtful.

(iii) Holding of an Inquest under Section 174 - Requirements and object- Details of incident foreign to the scope of Section 174.

(iv) Defective investigation - Effect of.

(v) Section 134 Evidence Act- No particular number of witness required to prove a fact.

Amar Singh Vs. Balwinder Singh and others

Judgment dt. 31.1.2003 passed by the Supreme Court in Criminal Appeal No. 1671 of 1995, reported in (2003) 2 SCC 518

Held :

(i) Section 384 CrPC empowers the appellate court to dismiss the appeal summarily if it considers that there is no sufficient ground for interference. Section 385 CrPC lays down the procedure for hearing appeal not dismissed summarily and sub-section (2) thereof casts an obligation to send for the records of the case and to hear the parties. Section 386 CrPC lays down that after perusing such record and hearing the appellant or his pleader and the Public Prosecutor, the appellate court may, in an appeal from conviction, reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a court of competent jurisdiction. It is, therefore, mandatory for the appellate court to peruse the record which will necessarily mean the statement of the witnesses.

In a case based upon direct eyewitness account, the testimony of the eyewitnesses is of paramount importance and if the appellate court reverses the finding recorded by the trial court and acquits the accused without considering or examining the testimony of the eyewitnesses, it will be a clear infraction of Section 386 CrPC.

(ii) There is no hard-and-fast rule that any delay in lodging the FIR would automatically render the prosecution case doubtful. It necessarily depends upon facts and circumsances of each case whether there has been any such delay in lodging the FIR which may cast doubt about the veracity of the prosecution case and for this a host of circumstances like the condition of the first informant, the nature of injuries sustained, the number of victims, the efforts made to provide medical aid to them, the distance of the hospital and the police station etc. have to be taken into consideration. There is no mathematical formula by which an inference may be drawn either way merely on account of delay in loding of the FIR. In this connection it will be useful to take note of the following observation made by this Court in *Tara Singh v. State of Punjab, 1991 Supp. (1) SCC 536* (SCC p. 541, para 4).

The delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are, one cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the report. Of course, in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts should be cautious to scrutinise the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for apapreciation and much depends on the facts and circumstances of each case.

In *Zahoor v. State of U.P., AIR 1991 SC 40* it was held that mere delay by itself is not enough to reject the prosecution case unless there are clear indications of fabrication.

(iii) The provision for holding of an inquest and preparing an inquest report is contained in Section 174 CrPC. The heading of the section is *"Police to en-*

quire and report on suicide etc." Sub-section (1) of this section provides that when the officer in charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspsicion that some other person has committed an offence, he shall immediately give information to the nearest Executive Magistrate and shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death describing such wounds, fractures, bruises, and other marks of injury as may be found on the body and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted. The requirement of the section is that the police officer shall record the apparent cause of death describing the wounds as may be found on the body and also the weapon or instrument by which they appear to have been inflicted and this has to be done in the presence of two or more respectable inhabitants of the neighbourhood. The section does not contemplate that the manner in which the incident took place or the names of the accused should be mentioned in the inquest report. The basic purpose of holding an inquest is to report regarding the apparent cause of death, namely, whether it is suicidal, homicidal, accidental or by some machinery etc. The scope and purpose of Section 174 CrPC was explained by this Court in *Pedda Narayana v. State of A.P., (1975) 4 SCC 153* and it will be useful to reproduce the same. (SCC pp. 157-58, para 11)

The proceedings under Section 174 have a very limited scope. The object of the proceedings is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of the proceedings under Section 174. Neither in practice nor in law was it necessary for the police to mention these details in the inquest report.

It is therefore not necessary to enter all the details of the overt acts in the inquest report. Their omission is not sufficient to put the prosecution out of court.

In *Khujji v. State of M.P., AIR 1991 SC 1853* (AIR para 8) this Court, after placing reliance upon the abov equoted decision, rejected the contention raised on behalf of the accused that the evidence of eye witnesses could not be relied upon as their names did not figure in the inquest report prepared at the earliest point of time. In *Shakila Khader v. Nausheer Cama, AIR 1975 SC 1324* (AIR para 5) it was held that an inquest under Section 174 CrPC is concerned with establishing the cause of the death only.

(iv) In *Karnel Singh v. State of M.P., (1995) 5 SCC 518* it was held that in cases of defective investigation the court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect and to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. In *Paras Yadav v. State of Bihar, (1999) 2 SCC 126* while commenting upon certain omssions of the investigating agency, it was held that it may be that such lapse is committed designedly or because of negligence and hence the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not. Similar view was taken in *Ram Bihari Yadav v. State of Bihar, (1998) 4 SCC 517* when this Court observed that in such cases the story of the prosecution will have to be examined dehors such omissions and contaminated conduct of the officials, otherwise, the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law-enforcing agency but also in the administration of justice.

(v) Learned Senior Counsel appearing for the accused-respondents has vehemently urged that the purpose of a criminal trial is not to support the prosecution theory but to investigate the offence and to determine the guilt or innocence of the accused and the duty of the Public Prosecutor is to represent the administration of justice and therefore the testimony of all the available eyewitnesses should be before the court and in support of this contention he has placed reliance on *State of U.P. v. Jaggo, (1971) 2 SCC 42.* It is true that the witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution, whether effect of their testimony is for or against the case of the prosecution. However, that does not mean that everyone who has witnesseed the occurrence, whatever their number be, must be examined as a witness.

The contention raised by learned counsel fails to take notice of Section 134 of the Evidence Act which provides that no particular number of witnesses shall in any case be required for the proof of any fact. A similar contention has been repelled by this Court in a very illustrating judgment in *Vadivelu Thevar v. State of Madras , AIR 1957 SC 614* and it will be useful to take note of para 11 of the Report, which reads as under : (AIR p. 619)

The contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognised in Section 134, which by laying down that "no particular number of witnesses shall, in any case, be required for the proof of any fact" has enshrined the well-recognised maxim that "Evidence has to be weighed and not counted". It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of

guilt depends entirely on circumstantial evidence. If the legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished.

●

189. CRIMINAL PROCEDURE CODE, 1973 - Section 169

Filing of charge-sheet- Magistrate cannot direct the investigating agency to file a chargesheet - Report submitted by investigating agency that no case is made out- Magistrate may still take cognizance.
M.C. Abraham and another Vs. State of Maharashtra and others
Judgment dt. 20-12-2002 passed by the Supreme Court in Criminal Appeal Nos. 1346 to 1352 of 2002, reported in (2003) 2 SCC 649

Held :

The principle, therefore, is well settled that it is for the investigating agency to submit a report to the Magistrate after full and complete investigation. The investigating agency may submit a report finding the allegations substantiated. It is also open to the investigating agency to submit a report finding no material to support the allegations made in the first information report. It is open to the Magistrate concerned to accept the report or to order further enquiry. But what is clear is that the Magistrate cannot direct the investigating agency to submit a report that is in accord with his views. Even in a case where a report is submitted by the investigating agency finding that no case is made out for prosecution, it is open to the Magistrate to disagree with the report and to take cognizance, but what he cannot do is to direct the investigating agency to submit a report to the effect that the allegations have been supported by the material collected during the course of investigation.

●

190. CRIMINAL PROCEDURE CODE, 1973 - Section 227

Framing of charge- No requirement in law either to give opportunity to accused to produce evidence in defence or to consider such evidence as the defence may produce- Matter further referred to a larger Bench.
State of Orissa Vs. Debendra Nath Padhi
Judgment dt. 6.2.2003 passed by the Supreme Court in Criminal Appeal No. 497 of 2001, reported in (2003) 2 SCC 711

Held :

The question for our consideration in this appeal is whether there is any statutory requirement compelling or permitting the trial court to take into consideration the material produced by the defence at the stage of taking cognizance or framing of charges. It is seen from Section 227 of the Code that in a case triable before the Court of Session, if the court on consideration of the record of the case and the documents submitted therewith and after hearing the submission of the prosecution and the accused if the Judge considers that there is no

sufficient ground for proceeding against the accused, he shall discharge the accused after recording reasons for doing so. This section nowhere contemplates an opportunity being given to the accused person to produce evidence in defence at that stage. The section is quite clear that whatever consideration that has to be made by the court, will have to be based on the record of the case and documents submitted therewith, and after hearing the submissions of the accused and the prosecution. If after doing so, the court comes to the conclusion that there is ground for presuming that the accused has committed an offence then the court shall frame charge under Section 228 of the Code, otherwise it shall discharge the accused under Section 227 of the Code. Almost similar is the requirement of law when a warrant case is being considered for framing a charge under Section 240 of the Code. This Court in the *case of Supdt.* and *Remembrancer of Legal Affairs.W.B. v. Anil Kumar Bhunja (1979) 4 SCC 274* following the judgment of this Court in *State of Bihar v. Ramesh Singh, (1977) 4 SCC 39* has held : (SCC p. 279, para 18)

"18. It may be remembered that the case was at the stage of framing charges; the prosecution evidence had not yet commenced. The Magistrate had, therefore, to consider the above question on a general consideration of the materials placed before him by the investigating police officer. At this stage, as was pointed out by this Court in State of Bihar v. Ramesh Singh, the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged, may justify the framing of charge against the accused in respect of the commission of that offence."

In *Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia (1989) 1 SCC 715* a two Judge Bench of this Court following the judgments in Union of *India Vs. Prafulla Kumar Samal, (1979) 3 SCC 4* and Ramesh Singh case has held : (SCCp. 721, para 14)

"14, These two decisions do not lay down different principles. Prafulla Kumar case has only reiterated what has been stated in Ramesh Singh case. In fact, Section 227 itself contains enough guidelines as to the scope of enquiry for the purpose of discharging an accused. It provides that 'the Judge shall discharge when he considers that there is no sufficient ground for proceeding against the accused. The 'ground' in the context is not a ground for conviction, but a ground for putting the accused on trial. It is in the trial, the guilt or the innocence of the accused will be determined and not at the time of framing of charge. The court, therefore, need not undertake an elaborate enquiry in sifting and weighing the material. Nor is it necessary to delve deep into various aspects. All that the court

has to consider is whether the evidentiary material on record if generally accepted, would reasonably connect the accused with the crime. No more need be enquired into."

In *Niranjan Singh Karam Singh Punjavi v. Jitendra Bhimraj Bijjaya, (1990) 4 SCC 76* another two-Judge Bench of this Court discussing the requirement under Section 227 of the Code has held : (SCC p. 83, para 4)

> "Under this section a duty is cast on the Judge to apply his mind to the material on record and if on examination of the record he does not find sufficient ground for proceeding against the accused, he must discharge him. On the other hand if after such consideration and hearing he is satisfied that a prima facie case is made out against the accused, he must proceed to frame a charge as required by Section 228 of the Code. Once the charge is framed the trial must ordinarily end in the conviction or acquittal of the accused. This is in brief the scheme of Sections 225 to 235 of the Code."

Almost similar is the view of this Court in *Nirmaljit Singh v. State of W.B.,(1973) 3 SCC 753* and *State of Bihar v. Ramesh Singh, (1977)4 SCC 39.*

From the above judgments referred to by the learned counsel for the appellant, it is clear that all that the court has to do at the time of framing a charge is to consider the question of sufficiency of ground for proceeding against the accused on a general consideration of the materials placed before it by the investigating agency. There is no requirement in law that the court at that stage should either give an opportunity to the accused to produce evidence in defence or consider such evidence the defence may produce at that stage.

Though the judgment relied upon by the learned counsel for the appellant set out in the case of *Anil Kumar Bhunja* is a judgment of a three-Judge Bench and all other judgments are of a two-Judge Bench, still in view of the fact that in the case of *Satish Mehra v. Delhi Admn., (1996) 9 SCC 766* the Bench had taken notice of the three-Judge Bench judgment of this Court in the case of *Anil Kumar Bhunja* and despite the same, the latter Bench had taken a somewhat different view, we think it appropriate that this matter should be referred to a larger Bench.

●

191. CRIMINAL TRIAL :

- **(i) Related witness- Relationship itself not a factor to effect credibility of a witness.**
- **(ii) Maxim Falsus in uno falsus in omnibus- Not a sound rule- Not applicable in India.**
- **(iii) Discrepancies in evidence- Effect of.**
- **(iv) Non-explanation of injuries of accused- Mere non-explanation may not affect prosecution case in all cases.**

(v) Sentence- Merely because occurrence took place sometime back -Not a factor to reduce sentence.

Rizan and another Vs. State of Chhattisgarh

Judgment dt. 21.1.2003 passed by the Supreme Court in Criminal Appeal No. 82 of 2003, reported in (2003) 2 SCC 661

Held :

We shall first deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

In *Dalip Singh v. State of Punjab, AIR 1953 SC 364* it has been laid down as under : (AIR p. 366, para 26)

> "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

The above decision has since been followed in *Guli Chand v. State of Rajasthan, (1974) 3 SCC 698* in which *Vadivelu Thevar v. State of Madras, AIR 1957 SC 614* was also relied upon.

We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in *Dalip Singh case* in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed: (AIR p. 366, para 25)

> "25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If

the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in- *'Rameshwar v. State of Rajasthan, AIR 1952 SC 54 (AIR at p. 59)*. We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel."

The maxim *falsus in uno falsus in omnibus* has no application in India and the witnesses cannot be branded as liars. The maxim *falsus in uno falsus in omnibus* has not received general acceptance nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called, "a mandatory rule of evidence". (See *Nisar Ali v. State of U.P., AIR 1957 SC 366*). Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. As observed by this Court in *State of Rajasthan v. kalki, (1981) 2 SCC 752* normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category into which a discrepancy may be categorized. While normal discrepancies to not corrode the credibility of a party's case, material discrepancies do so.

Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries.

Merely because the occurrence took place sometime back, same cannot be a factor to reduce the sentences. The appeal is without merit and is dismissed.

●

PART - III

CIRCULARS / NOTIFICATIONS

मध्यप्रदेश शासन

वित्त विभाग

मंत्रालय, वल्लभ भवन, भोपाल

क्रमांक एफ–5/3/2002/नियम/ चार भोपाल, दिनांक 22 अक्टूबर, 2002

प्रति

शासन के समस्त विभाग,
अध्यक्ष, राजस्व मण्डल, ग्वालियर,
समस्त कमिश्नर,
समस्त विभागाध्यक्ष,
समस्त कलेक्टर,
समस्त मुख्यकार्यपालन अधिकारी,
मध्यप्रदेश।

विषय :- सामान्य भविष्य निधि के अंतिम भुगतान प्राधिकार पत्रों का शीघ्र भुगतान सुनिश्चित किया जाना।

महालेखाकार (लेखा व हकदारी) द्वितीय, ग्वालियर द्वारा शासन के ध्यान में लाया गया है कि सामान्य भविष्य निधि के अंतिम भुगतान प्राधिकार पत्रों का भुगतान आहरण एवं संवितरण अधिकारियों द्वारा समय पर नहीं किया जाता है। समय पर भुगतान न करने से जहां एक ओर अभिदाता को परेशानी होती है वहीं दूसरी ओर अनावश्यक पत्राचार/ शिकायतें बढ़ती हैं। विलम्ब से भुगतान प्राप्त होने पर अभिदाता द्वारा विलंबित अवधि का ब्याज भी मांगा जाता है, जिसके फलस्वरूप शासन को ब्याज वहन करना पड़ता है एवं कभी–कभी न्यायालयीन प्रकरण भी बन जाते हैं।

2. अतः महालेखाकार से प्राधिकार पत्र प्राप्त होते ही समय पर अभिदाता को सामान्य भविष्य निधि का अंतिम भुगतान किया जाना सुनिश्चित किया जावे एवं तत्संबंध में महालेखाकार के पत्राचार का प्रत्युत्तर शीघ्र दिया जावे। यदि महालेखाकार से प्राधिकार पत्र प्राप्त होने के उपरांत सामान्य भविष्य निधि के भुगतान में विलंब किया जाता है, तब ऐसी स्थिति में संबंधित आहरण एवं संवितरण अधिकारी उत्तरदायी होंगे।

3. कृपया उक्त निर्देशों का पालन कड़ाई से सुनिश्चित किया जावे।

मध्यप्रदेश के राज्यपाल के नाम से तथा
आदेशानुसार,

(पी.सी.वर्मा)
उप सचिव,
मध्यप्रदेश शासन, वित्त विभाग

मध्यप्रदेश शासन, विधि और विधायी कार्य विभाग

अधिसूचना

भोपाल, दिनांक...../ फरवरी, 03

फा. क्रमांक 17 (ई) 4/2003/234/21 – ब (दो) – न्यायालय फीस अधिनियम, 1870 (1870 का सं. 7) की धारा 35 द्वारा प्रदत्त शक्तियों को प्रयोग में लाते हुए, राज्य सरकार, एतद् द्वारा इस विभाग की अधिसूचना क्रमांक 9–1–86 – ब– इक्कीस, दिनांक 10 अप्रैल 1987 में निम्नलिखित संशोधन करती है, अर्थात :–

संशोधन

उक्त अधिसूचना में, पैरा (1) के उप पैरा (3) में, शब्द "पक्षकार" उसके द्वारा पहले ही संदत्त की गई न्यायालय फीस वापस पाने का हकदार होगा" के स्थान पर शब्द "पक्षकार" उसके द्वारा पहले ही संदत्त की गई न्यायालय फीस के 10 प्रतिशत की कटौती के पश्चात् रकम वापस पाने का हकदार होगा।" स्थापित किए जाएं।

NOTIFICATION

F.No. 17 (E) 4/2003/ 234/21-B (II)- In exercise of the powers conferred by Section 35 of the Court Fees Act, 1870, (No. 7 of 1870), the State Government hereby makes the following amendment in this Department's notification No. 9-1-86- B-XXI dated 10th April, 1987, namely :-

AMENDENT

In the said notification,- in sub-para (3) of para (1) for the words "the party shall be entitled to refund of the court fees already paid by him", the words "the party shall be entitled to refund of an amount after deduction of 10 percent of the court fees already paid by him."

By Order And In the Name of The
Governor of Madhya Pradesh
Sd/-
ADDITIONAL SECRETARY
Govt. of M.P. Deptt. of Law & Legislative
Affairs Department

उच्च न्यायालय मध्यप्रदेश, जबलपुर

ज्ञापन

क्रमांक बी/6821/बी.एफ. 9/91 जबलपुर, दिनांक 29 अगस्त, 1991

प्रति,

जिला एवं सत्र न्यायाधीश,

.....

यथानिर्देशित आपसे अनुरोध है कि आपके जिले में पदस्थ समस्त न्यायिक अधिकारियों को इस तथ्य से अवगत करावें कि उनके यहां विलम्बित प्रकरणों में जब भी भविष्य में अन्य न्यायिक अधिकारियों (विशिष्टकर अन्य स्थानों में पदस्थ) की साक्ष्य हेतु आवश्यकता हो तो उन्हें समंस के साथ संबंधित न्यायिक अधिकारी को संबोधित "लेटर ऑफ रिक्वेस्ट" के अतिरिक्त उच्च न्यायालय से साक्ष्य हेतु ऐसे अधिकारियों के लिए आवश्यक अनुमति प्राप्त करने के संदर्भ में भेजे गए प्रतिवेदन में इस आशय की टीका निम्न बिन्दुओं पर आवश्यक रूप से स्पष्ट उल्लेख करें :–

(अ) पदाधिकारी का साक्ष्य किस तथ्य की पुष्टि के लिए आवश्यक है।

(ब) इसी तथ्य पर अन्य कौन कौन से साक्षी के साक्ष्य भी हैं?

(स) क्या अन्य शेष साक्षी के साक्ष्य अनुपलब्ध हैं?

(द) उक्त साक्ष्य के अभाव में प्रकरण के विनिश्चयन में क्या मूलभूत तथ्य असिद्ध रह जावेगा?

(य) निष्कर्ष पर क्या प्रभाव पड़ेगा?

आपसे यह भी निवेदन है कि अन्य जिले में पदस्थ न्यायिक अधिकारियों को साक्ष्य हेतु आहूत करने वक्त मांगी गई उक्त तथ्यों पर पीठासीन अधिकारी के टीका का स्वयं भी आंकलन करें, तद्न्तर न्यायिक अधिकारी की साक्ष्य आवश्यक ही है तो इसे रजिस्ट्री को अग्रेषित करें क्योंकि बहुधा केवल तकनीकी आधार पर एवं औपचारिक साक्षी होने के बावजूद भी न्यायिक अधिकारियों की साक्ष्य हेतु बुलाया जा रहा है। इस कारण से शासन को न केवल अपव्यय अपितु संबंधित आहूत किए गए न्यायिक अधिकारी के न्यायालय का कार्य भी अवरूद्ध हो जाता है।

विशिष्ट रूप से यह उल्लेखनीय है कि ऐसे समंस पर रजिस्ट्री की अनुमति प्राप्त करने हेतु कम से कम 45 दिन पूर्व संबंधित संमंस मय वांछित जानकारी, इस कार्यालय को आवश्यक रूप से प्राप्त हो जाना चाहिए।

एडीशनल रजिस्ट्रार

उच्च न्यायालय मध्यप्रदेश, जबलपुर

ज्ञापन

क्रमांक बी/5326/बी.एफ.9/93 जबलपुर, दिनांक 14 अक्टूबर 1993

प्रति,

जिला एवं सत्र न्यायाधीश,
सतना (म.प्र.)

विषय : न्यायिक अधिकारियों की साक्ष्य हेतु समंस की तामीली के संबंध में।

आदेशानुसार उपरोक्त विषय में आपके न्यायालय के ज्ञापन क्रमांक 1575 दिनांक 14.9.93 के संदर्भ में निम्नानुसार निर्देशित किया जाता है।

न्यायालय तथा न्यायिक अधिकारी (जिनकी साक्ष्य हेतु आवश्यकता है) यदि वे दोनों एक ही स्थान या एक ही जिले में पदस्थ हों, अन्यथा नहीं हों, उन्हें समंस के साथ लेटर ऑफ रिक्वेस्ट भेजना अनिवार्य है। तथा ऐसा निवेदन पत्र न्यायालय के पीठासीन अधिकारी स्वयं अपने हस्ताक्षर से भेजें। यदि न्यायालय एवं न्यायिक अधिकारी (जिनकी साक्ष्य हेतु आवश्यकता है) एक ही स्थान पर एक ही जिले में पदस्थ हों साक्ष्य हेतु अनुमति उच्च न्यायालय के माध्यम से भेजना आवश्यक नहीं है परन्तु उन्हें संबंधित जिला एवं सत्र न्यायाधीश के माध्यम से भेजकर जिला एवं सत्र न्यायाधीश द्वारा अनुमति प्राप्त करना आवश्यक है।

एडीशनल रजिस्ट्रार

●

Ministry of Health and Family Welfare (Department of Health) Notification No.G.S.R. 530 (E) dated the 29th July, 2002, Published in the Gazette of India (Extraordinary) Part II Section 3 (i) dated 30-7-2002 Pages 10-17.

In exercise of powers conferred by Section 23 of the **Prevention of Food Adulteration Act, 1954 (37 of 1954),** the Central Government, after consultation with the Central Committee for Food Standards, hereby makes the following rules further to **amend the Prevention of Food Adulteration Rules, 1955,** namely:-

1. (1) These rules may be called the **Prevention of Food Adulteration (7th Amendment) Rules, 2002.**

(2) They shall come into force after six months from the date of their publication in the Official Gazette.

2. In the Prevention of Food Adulteration Rules, 1955 (hereinafter referred to as the said rules), for rule 22, the following rule shall be substituted, namely:-

"22. **Quantity of sample to be sent to the public analyst.-** The quantity of sample of food to be sent to the public analyst/ Director for analysis shall be as specified in the Table below :

Table

	Article of Food	Approximate Quantity to be supplied
	(1)	(2)
1.	Milk	500 ml.
2.	Sterilized Milk/UHTMilk	250 ml.
3.	Malai/Dahi	200 gms.
4.	Yoghurt/Sweetened Dahi	300 gms.
5.	Chhana/Paneer/Khoya/Shrikhand	250 gms.
6.	Cheese/Cheese spread	200 gms.
7.	Evaported Milk/Condensed Milk	200 gms.
8.	Ice-Cream/Softy/Kulfi/Ice candy/Ice lolly	300 gms.
9.	Milk Powder/Skimmed Milk Powder	250 gms.
10.	Infant Food/Weaning Food	500 gms.
11.	Malt Food/Malted Milk Food	300 gms.
12.	Butter/Butter Oil/Ghee/Margarine/Cream/ Bakery Shortening	200 gms.
13.	Vanaspati, Edible Oils/Fats	250 gms.
14.	Carbonated Water	600 ml.
15.	Baking Powder	100 gms.
16.	Arrow root/Sago	250 gms.
17.	Corn flakes/Macaroni Products/Corn Flour/ Custard Powder	200 gms.
18.	Spices, Condiments and Mixed Masala (Whole)	200 gms.
19.	Spices, Condiments and Mixed Masala (Powder)	250 gms.
20.	Nutmeg/Mace	150 gms.
21.	Asafoetida	100 gms.
22.	Compounded Asafoetida	150 gms.
23.	Safforn	20 gms.
24.	Gur/jaggery, Icing Sugar, Honey, Synthetic Syrup, Bura	250 gms.
25.	Cane Sugar/Refined Sugar/Cube sugar, Dextrose Misri/ Dried Glucose Syrup.	200 gms.
26.	Artificial Sweetener	100 gms.
27.	Fruit Juice/Fruit Drink/Fruit Squash	400 ml.
28.	Tomato Sauce/Ketch up/Tomato Paste, Jam/Jelly/Marmalade/Tomato Puree/ Vegetable Sauce	300 gms.
29.	Non Fruit Jellies	200 gms.
30.	Pickles and Chutneys	250 gms.

(1)		(2)
31.	Oilseeds/Nuts/Dry Fruits	250 gms.
32.	Tea/Roasted Coffee/ Roasted Chicory	200 gms.
33.	Instant Tea/Instant Coffee/Instant Coffee-Chicory Mixture	100 gms.
34.	Sugar Confectionery/Chewing Gum/Bubble Gum	200 gms.
35.	Chocolates	200 gms.
36.	Edible Salt	200 gms.
37.	Iodised Salt/Iron Fortified Salt	200 gms.
38.	Food Grains and Pulses (Whole and Split)	500 gms.
39.	Atta/Maida/ Suji/Besan/ Other Milled Product/ Paushtik and Fortified Atta/Maida	500 gms.
40.	Biscuits and Rusks	200 gms.
41.	Bread/ Cakes/ Pastries	250 gms.
42.	Gelatin	150 gms.
43.	Catechu	150 gms.
44.	Vinegar/Synthetic Vinegar	300 gms.
45.	Food colour	25 gms.
46.	Food colour preparation (Solid/Liquid)	25 gm Solid/ 100 ml. liquid
47.	Natural Mineral water/Packaged Drinking Water	3000 ml. in three minimum origional sealed packs.
48.	Silver Leafs	1 gm.
49.	Prepared Food	500 gms.
50.	Proprietary Food (Non Standardised Foods)	300 gms.
51.	Canned Foods	6 sealed cans
52.	Food not specified	300 gms."

NOTE.- Foods sold in packaged condition (Sealed container/ package) shall be sent for analysis in its original condition without opening the package and alongwith original label to constitute the approximate quantity.

●

Mercy is a very noble quality,
but all the misdeeds don't deserve mercy.
To bestow mercy on the unpardonable
is a social crime.

-Smt. Suprama Mishra
(The author of 'Thus I Speak')

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE REPRESENTATION OF THE PEOPLE (AMENDMENT) ORDINANCE, 2002 NO. 4 OF 2002*

Promulgated by the President in the Fifty-third Year of the Republic of India.

An Ordinance further to amend the Representation of the People Act, 1951.

Whereas Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;

Now, therefore, in exercise of the powers conferred by clause (1) of article 123 of the Constitution, the President is pleased to promulgate the following Ordinance :-

1. Short title and commencement.—(1) This Ordinance may be called the Representation of the People (Amendment) Ordinance, 2002.

(2) Save as otherwise provided in this Ordinance, the provisions of this Ordinance shall come into force at once.

2. Insertion of new section 33A. — After section 33 of the Representation of the People Act, 1951 (43 of 1951) (hereinafter referred to as the principal Act), the following section shall be inserted, namely:-

"**33A. Right to information.**— (1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) of section 33, also furnish the information as to whether-

(i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;

(ii) he has been convicted of an offence [other than any offence referred to in sub-section (1) or sub-section (2), or covered in sub-section (3), of section 8] and sentenced to imprisonment for one year or more.

(2) The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in sub-section (1).

(3) The returning officer shall, as soon as may be after the furnishing of information to him under sub-section (1), display the aforesaid information by affixing a copy of the affidavit, delivered under sub-section (2), at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered.".

* Published in the Gazette of India (Extraordinary) Part II, Section 1 dated 24-8-2002 Pages 1-5.

3. Insertion of new section 33B. — After section 33A of the principal Act as so inserted, the following section shall be inserted and shall be deemed to have been inserted with effect from the 2nd day of May, 2002, namely :-

"**33B. Candidate to furnish information only under the Act and the rules.**— Notwithstanding anything contained in any judgment, decree or order of any Court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder.".

4. Insertion of new Chapter VIIA. — In Part V of the principal Act, after Chapter VII, the following Chapter shall be inserted, namely :-

"CHAPTER VIIA

Declaration of assets and liabilities

75-A. Declaration of assets and liabilities.— (1) Every elected candidate for a House of Parliament or the Legislature of a State shall, within ninety days from the date on which he makes and subscribes an oath or affirmation, according to the form set out for the purpose in the Third Schedule to the Constitution, for taking his seat in either House of Parliament or in the Legislative Assembly of a State or the Legislative Council of a State, as the case may be, furnish the information, relating to-

(i) the movable and immovable property of which he is the owner or a beneficiary;

(ii) his liabilities to any public financial institution; and

(iii) his liabilities to the Central Government or the State Government,

to the Chairman of the Council of States or the Speaker of the House of the People or the Chairman of the Legislative Council of a State or the Speaker of the Legislative Assembly of a State, as the case may be.

(2) The information under sub-section (1) shall be furnished in such form and in such manner as may be prescribed in the rules made under sub-section (3).

(3) The Chairman of the Council of States or the Speaker of the House of the People or the Chairman of the Legislative Council of a State or the Speaker of the Legislative Assembly of a State, as the case may be, may make rules for the purposes of sub-section (2).

(4) The rules made by the Chairman of the Council of States or the Speaker of the House of the People or, as the case may be, by the Chairman of the Legislative Council of a State or the Speaker of the Legislative Assembly of a State under sub-section (3) shall be laid, as soon as may be after they are made, before the Council of States or the House of the People or the Legislative Council or the Legislative Assembly, as the case may be, for a total period of thirty days which may be comprised in one session or in two or more successive sessions and shall take effect upon the expiry of the said period of thirty days unless they are sooner approved with or without modifications or disapproved by the Council of States or the House of the People or the Legislative Council or the Legislative Assembly and where they are so approved, they shall take effect

on such approval in the form in which they shall take effect on such approval in the form in which they were laid or in such modified form, as the case may be, and where they are so disapproved, they shall be of no effect.

(5) The Chairman of the Council of States or the Speaker of the House of the People or, as the case be, the Chairman of the Legislative Council of a State or the Speaker of the Legislative Assembly of a State may direct that any wilful contravention of the rules made under sub-section (3) by an elected candidate referred to in sub-section (1) may be dealt with in the same manner as a breach of privilege of the Council of States or the House of the People or the Legislative Council or the Legislative Assembly, as the case may be.

Explanation.— For the purposes of this section,-

(i) "immovable property" means the land and includes any building or other structure attached to the land or permanently fastened to anything which is attached to the land;

(ii) "movable property" means any other property which is not the immovable property and includes corporeal and incorporeal property of every description;

(iii) "public financial institution" means a public financial institution within the meaning of section 4A of the Companies Act, 1956 (1 of 1956) and includes bank; and

(iv) "bank" referred to in clause (iii) means-

(a) "State Bank of India" constituted under section 3 of the State Bank of India Act, 1955 (23 of 1955);

(b) "subsidiary bank" having the meaning assigned to it in clause (k) of section 2 of the State Bank of India (Subsidiary Banks) Act, 1959 (38 of 1959);

(c) "Regional Rural Bank" established under section 3 of the Regional Rural Banks Act, 1976 (21 of 1976);

(d) "corresponding new bank" having the meaning assigned to it in clause (da) of section 5 of the Banking Regulation Act, 1949 (10 of 1949); and

(e) "co-operative bank" having the meaning assigned to it in clause (cci) of section 5 of the Banking Regulation Act, 1949 (30 of 1949) as modified by sub-clause (i) of clause (c) of section 56 of that Act.".

5. Insertion of new section 125A.—After section 125 of the principal Act, the following section shall be inserted, namely:-

"**125A. Penalty for filing false affidavit, etc.**— A candidate who himself or through his proposer, with intent to be elected in an election,-

(i) fails to furnish information relating to sub-section (1) of section 33A; or

(ii) gives false information which he knows or has reason to believe to be false; or

(iii) conceals any information,

in his nomination paper delivered under sub-section (1) of section 33 or in his affidavit which is required to be delivered under sub-section (2) of section 33A, as the case may be, shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.".

6. Amendment of section 169.— In section 169 of the principal Act, in sub-section (2), clause (a) shall be renumbered as clause (aa) thereof, and before clause (aa) as so renumbered, the following clause shall be inserted, namely:-

"(a) the form of affidavit under sub-section (2) of section 33A.".

●

THE CONSTITUTION (EIGHTY-SIXTH AMENDMENT) ACT, 2002*

[12th December, 2002]

An Act further to amend the Constitution of India.

Be it enacted by Parliament in the Fifty-third Year of the Republic of India as follows :-

1. Short title and commencement.— (1) This Act may be called the Constitution (Eighty-Sixth Amendment) Act, 2002.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Insertion of new article 21A.— After article 21 of the Constitution, the following article shall be inserted, namely :-

"**21A. Right to education.**—The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.".

3. Substitution of new article for article 45.— For article 45 of the Constitution, the following article shall be substituted, namely :-

"**45. Provision for early childhood care and education to children below the age of six years.**— The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.".

4. Amendment of article 51A.— In article 51A of the Constitution, after clause (j), the following clause shall be added, namely :-

"(k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.".

---

* Received the assent of the President on the 12th December, 2002 and Act published in the Gazette of India (Extraordinary) Part II, Section 1.