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JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE
HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

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SUBJECT- INDEX

PART-IV
(IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS)

We are thankful to the Publishers of SCC, AIR, MPLJ, MPJR, MPHT, MPWN, JLJ and ANJ for using some of their material in this Journal.

- Editor

FROM THE PEN OF THE EDITOR

A. K. SAXENA
Director

District Judiciary of India is under fire since last couple of years. It is a matter of concern and serious thinking. We are under continuous watch of everyone and our one and only one erroneous step attracts heavy criticism. Now-a-days, the litigants are vigilant towards their right or wrong interests and they try to take all the steps to get the success. The norms, behaviour and way of presentation of the Bar members have changed rapidly and now the third front has emerged gradually in the scenerio, i.e. Media. The importance of above mentioned categories of persons or institutions cannot be denied and there appears no danger to subordinate judiciary from them if they do not cross their limits. But think of a situation when anyone of them crosses the limit then the situation may take the worst turn and the faith of common people in Judiciary may get an uncalled for jolt.

A healthy criticism should always be welcomed by everyone and it is rather necessary for the good health of any institution. But at the same time, indulgence in undue, unfair criticism is very dangerous for prosperity of the institution and District Judiciary is not an exception to it. One day I was coming back to my headquarters after availing headquarter leave and at that time I overheard a person who was sitting in that train. He was explaining a case to his co-passengers to whom he was unknown. This gentleman was praising himself for his good work and by that time I could gather from his conversation that he is an advocate. But the worst part of it, he was criticising one of the retired Presiding Officer of a Tribunal. I do not know whether that advocate was right or wrong in respect of different activities of that Presiding Officer. I also refrained myself as I was not having any intention to indulge in arguments with the advocate. But the manner in which he was criticising the retired Presiding Officer and that too before unknown co-passengers, was disgraceful. What should be the role of advocates and media, is not the subject- matter of this editorial and, therefore, I am not expressing my views on that aspect here. What I want to communicate, is the role of Judicial Officers in and outside the Court so that any sane person may not criticise the working of District Judiciary in an unhealthy manner.

A Judicial officer must possess certain qualities while working in Court or outside the Court. If I say in few words that 'one must do justice to everyone', it means I have stated each and every quality of a judge. When I say, I shall do justice, it means I shall be polite and curtious to everyone, but at the same time I shall be firm in discharging of my duties. It further includes that I shall perform my duties to the best of my ability and knowledge. I shall be prompt in delivering judgments and orders. I shall be knowledgeable and always anxious to know the correct law. I shall be vigilant towards my divine duties. I shall be impartial and honest not only while doing judicial work but also during discharge of other duties and liabilities.

The word 'dishonesty' has a very wide scope. It cannot be arrested in a narrow sense. The words 'honesty' and 'dishonesty' cannot be defined but this much can be said that any act which does not have any wrongful intention is an honest act. A very thin line exists between the two. If I try to summarise each and every act of dishonesty, I have to explain in volumes which is not possible here. Honesty is the basic feature of judicial system. The judicial officer being the part of this system, has to remain honest all the time so that the trust of common people in judiciary may not be shaken at any point of time. There is no relation

between the honesty and the perks. If our pay and perks are less, it does not mean that we may turn into a dishonest judicial officer and if our pay is sumptuous, we will remain honest. Honesty comes from our heart. It is a principle of life. If we act according to our principles, nobody can dare to deviate us from the path of doing justice. But what to say about those persons who do certain acts knowing fully well that they are doing dishonest acts and causing injustice to others.

There are several examples of dishonest acts and some of them are - (1) Doing no work and claiming as if I am the only sincere worker ; (2) Taking bribe and doing the work is a grave misconduct and comes under the first degree of dishonesty; (3) Same degree of dishonesty can be attached to feelings of caste and region; (4) Giving undue or unfair advantage intentionally and that too against law is a grave dishonest act; (5) to pressurise the suborinates to act according to our wishes is also dishonest act; (6) Doing an act having effect of fear is also a dishonest act. These are very few examples of dishonesty and I would like to elaborate my views here only on dishonesty based on caste or regional feelings which is a matter of great concern. The caste or regional feelings should not come in our way while doing justice or administrative duties. If laws or rules permit to extend a favour on caste basis, no question of dishonesty arises as we have to perform our duties according to different rules and laws. But if we try to perform our duties (judicial, administrative or personal one) on caste basis or regional feelings, it only means that we are doing the acts of injustice and we are also trying to push our judicial system into hell. Doing injustice to anyone on caste or regional feelings, taking any administrative action on that feelings so that the person of a particular caste or region may get something for which he is not entitled as per rules, to extend undue support to dishonest employee of fellow caste or same region, to act against the persons of other castes on that feelings or to give undue support to wrong doers of fellow caste or region in their day-to-day working, all these acts shall fall under the scope of dishonesty. There cannot be any justice either on judicial side or administrative side when our acts are being affected by caste or regional feeling. In this respect, I do not want to comment on other systems as I am not concerned with them. I hereby confine myself to District Judiciary only as I am part of if and if I say something about it, I shall not be crossing my limits.

Whenever a member of District Judiciary does any act illegally, irregularly, under undue influence or after receiving undue advantage and so on so forth, he commits dishonesty. It is immaterial whether he is peforming that act intentionally or negligently. It does not make any difference to other persons whether the illegal or irregular act of a judicial officer is intentional or negligent, but it invites undue criticism of whole judicial system for nothing. Here the idiom 'A black sheep infects the whole flock' (एक सड़ी मछली सारे तालाब को गंदा करती है।) applies in its true sense. If wrongful or dishonest acts of a judicial officer give a chance to others to criticise the whole system, it does not mean that the whole system is useless . That cannot be a true picture of the system. The whole system comes under undue criticism for nothing. So, our acts should be far from any kind of dishonesty. Our honest acts will certainly create healthy atmosphere in the society which will develop the faith of common people in our judicial system and resultantly, no sane person could dare to criticise unnecessarily the whole judicial system, which is one of the best systems of the world.

Rest in next issue.

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CHIEF JUSTICE OF INDIA

Hon'ble Shri Justice Ramesh Chandra Lahoti was sworn in as 35th Chief Justice of India by the President of India at Rashtrapati Bhawan, on June 1, 2004.

Born on 1st November, 1940 at Guna in Madhya Pradesh in the reputed family of lawyers. His Lordship's father Shri Ratan Lal Lahoti was an eminent lawyer. Had his earlier education at Guna. His Lordship passed B.Com. (Hons.) from

R.A.C. Poddar College of Commerce & Economics, Bombay. Did his LL.B. in 1960 from Holkar College, Indore. Stood first in merit in LL.B. and was awarded a Gold Medal. Enrolled as pleader in 1960 and then as an Advocate in 1961. Practised on Civil, Criminal and Revenue side at Guna from 1960 to 1977. On being selected to Madhya Pradesh Higher Judicial Services, was appointed as District Judge in April, 1977. Worked as District & Sessions Judge at Gwalior and Ambikapur (Sarguja). Resigned from this post in May, 1978 and thereafter started practice at the Gwalior Bench of the High Court of Madhya Pradesh. Worked as penal lawyer for the State, penal advocate for various Banks, Insurance Companies and Financial Institutions. Was standing counsel in High Court for Income-Tax Department at Gwalior. Founder Chief Editor of Madhya Pradesh Judicial Reporter, a Journal published from Gwalior. His Lordship was elevated as Judge of Madhya Pradesh High Court on 3rd of May, 1988. Transferred to Delhi High Court in the same capacity in 1994. His Lordship was elevated to Supreme Court on 09.12.1998. His Lordship was appointed as Chief Justice of India and took oath of this highest office of Indian Judiciary on 01.6.2004.

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

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PART - I

AWARD UNDER MOTOR VEHICLES ACT OBTAINED BY COLLUSION OR FRAUD- REMEDIES

A. K. SAXENA
Director

The object of various provisions with regard to payment of compensation enacted under Motor Vehicles Act, 1988 (hereinafter referred to as 'The Act') is to provide monetary help to those persons who face several difficulties on account of either death of the member of family or sustained injuries due to road accidents. There is a provision under Section 140 of the Act which immensely helps the needy claimants on the principle of no fault liability. While deciding the application under Section 140 of the Act, it is not at all necessary to look at the fault of either party who is involved in the accident. It is duty of the Claims Tribunal to pay interim compensation to claimants in a case of death or permanent injury where it appears that the death or permanent injury is caused on account of accident. The provisions of Indian Evidence Act, 1872 are also not applicable strictly to the cases filed under the Act. The claimant is not required to prove his case beyond reasonable doubt or as strictly as required in civil cases. The Act provides various beneficial provisions in favour of the claimants.

The important features like payment of interim compensation on no fault basis, inapplicability of various provisions of Evidence Act in their true sense and so and so forth, do not mean that a claimant who is not entitled to compensation on any grounds, should also get compensation. This is not the idea behind this beneficial enactment. The Act provides many options to the insurance company in case of collusive conduct of other parties. Although, some restrictions have been imposed under the Act in respect of defences available to insurance companies but the insurer can very well agitate all the defences in suitable cases. First of all, we have to consider those grounds under which the Insurance Company can avoid its liability. Section 149 (2) of the Act provides as follows:

"149 (1).....

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely-

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions namely -

(i) a condition excluding the use of the vehicle-

(a) for hire of reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without sidecar being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular."

It is very much clear from the above provisions of law that the insurance company can only agitate the grounds provided under Section 149 (2) of the Act. These are statutory grounds available to the insurer but it does not mean that the insurer cannot agitate other grounds which are not covered under Section 149 (2) or the insurer cannot defend its case on merits. Section 170 of the Act provides safeguards to the insurer if there is a collusion between the claimant and other non-claimants or other non-claimants failed to contest the claim. Section 170 of the Act reads thus:

> "170. **Impleading insurer in certain cases.**- Where in the course of any inquiry, the Claims Tribunal is satisfied that-
>
> (a) there is collusion between the person making the claim and the person against whom the claim is made, or
>
> (b) the person against whom the claim is made has failed to contest the claim,
>
> it may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in sub-section (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made."

The insurer has an effective tool in his hands to safeguard the public money as the insurance companies receive the permium against insurance from the public on account of legal provisions of compulsory insurance of the vehicles. No doubt, the satisfaction of Claims Tribunal in respect of collusion between the person making the claim and the person against whom the claim is made is paramount and, therefore, it is the duty of the insurer to satisfy any of the provisions of sub-section (a) or (b) of Section 170 of the Act so that the insurer can avail the opportunity to contest the claim on merits.

When it appears to the Claims Tribunal to its satisfaction that there is collusion between the parties or that the person against whom the claim is made, has failed to contest the claim, the Claims Tribunal has to record well reasoned order

and on an application filed by the insurer the Tribunal can allow the insurer to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made without prejudice to the provisions contained in sub-section (2) of Section 149 of the Act. Here the emphasis is on well reasoned order. The Claims Tribunal cannot reject or allow the application without assigining any reasons. This principle is explained in *Shankarayya and another Vs. United India Insurance Co. Ltd. and another, (1998) 3 SCC 140* that while passing the order on the petition filed under Section 170 of the Act, the Tribunal shall record its reasons. The same principle has also been laid down in the case of *United India Insurance Co. Ltd. Vs. Jyotsnaben Subhirbhai Patel and others, (2003) 7 SCC 212.*

It has been held in catena of decisions that insurer's right of appeal is very much limited and until and unless the insurer has not been provided a chance to contest the claim on grounds other than those grounds provided under Section 149 (2) of the Act or on merits, the insurer cannot contest the appeal on other grounds. No doubt that the defences contained in Section 149 (2) have to be stated in pleadings and must be raised before the Claims Tribunal by the insurer otherwise the insurer would be barred from filing the appeal against such award on those grounds. In the case of *Chinnama George and others Vs. N.K. Raju and another, (2000) 4 SCC 130,* the Apex Court has laid down that :

> "The Court must give effect to the real purpose of the provisions of law in respect of award of compensation to accident victims and the insurer cannot be permitted to defend the case on the grounds not available to it under the law."

Thereafter, the case of *Chinnama George (supra)* was distinguished by the Apex Court in *United India Insurance Co. Ltd. Vs. Bhushan Sachdeva and others, (2002) 2 SCC 265* on the basis of the provisions enumerated under Section 170 (b) of the Act which provides that where the person against whom the claim is made has failed to contest the claim, the insurer will have a right to contest the claim on all or any other grounds that are available to other non-claimants. It is further held that the words "failed to contest" must be interpreted in a realistic manner and right to contest would include the right to contest by filing an appeal against the award of the Tribunal as well. But this point was again agitated in Civil Appeal No. 4292 of 2002 before a Bench of Apex Court and it was observed that two Benches of Apex Court comprising of two Hon'ble Judges in *Rita Devi's case [(2000) 5 SCC 113]* and *United India Insurance Co.'s case [(2002) 2 SCC 265]* have taken contrary view, so the matter was referred to a Bench of three Judges. In this appeal, the Apex Court in case of *National Insurance co. Ltd. Chandigarh Vs. Nicolletta Rohtagi and others, [(2002) 7 SCC 456]* has held in following paras as under :

> "22. In *Rita Devi v. New India Assurance Co. Ltd., (2000) 5 SCC 113* it was held that the insurar having not obtained permission under Section 170 of the 1988 Act, is not entitled to prefer any appeal to the High Court against the award given by the Tribunal no merits.
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> 23. However, in *United India Insurance Co. Ltd. v. Bhushan Sachdeva, (2002) 2 SCC 265* it was held that where the insured fails to file an

appeal to the High Court against the quantum of compensation awarded by the Tribunal, the insurer is entitled to file an appeal as the insured has failed to contest the claim and in that view of the matter, the insurer could be a person aggrived. This is the only decision which has taken a contrary view to the consistent view of this Court in regard to maintainability of appeal at the instance of an insurer. In our view the decision in United India Insurance does not lay down the correct view of law for the reasons stated hereinafter.

26. ..... Thus, unless an order is passed by the Tribunal permitting the insurer to avail the grounds avilable to an insured or any other person against whom a claim has been made on being satisfied of the two conditions specified in Section 170 of the Act, it is not permissible to the insurer to contest the claim on the grounds which are available to the insured or to a person against whom a claim has been made.

27. ..... The view taken in *United India Insurance Co. Ltd. v. Bhushan Sachdeva, (2002) 2 SCC 265* that a right to contest would also include the right to file an appeal is contrary to well- established law that creation of a right to appeal is an act which requires legislative authority and no court or tribunal can confer such right, it being one of limitation or extension of jurisdiction.

29. For the aforesaid reasons, as well as that the learned Judges in *United India Insurance Co. Ltd.* have failed to notice the limited grounds available to an insurer under Section 149 (2) of the Act, we are of the view that the decision in *United India Insurance* does not lay down the correct view of law."

It is very much clear from the aforesaid principles laid down by the Apex Court and various provisions of the Act that where it appears to the Claims Tribunal that there is a collusion between the claimants and non-claimants or the non-claimants have falied to contest the claim, the Claims Tribunal can implead the insurer and the insurer so impleaded will have to file an application to contest the claim petition on all or any of the grounds that are available to the person against whom the claim has been made. If the insurer fails to contest the claim petition on all or any of the grounds, the insurer will have no right to file an appeal other than those grounds which are provided under sub-section (2) of Section 149 of the Act.

A sufficient protective cover has been provided to the insurer so that the insurer may not be compelled to pay the amount of compensation in cases where collusion between the claimants and non-claimants exists or where the person against whom the claim is made, has failed to contest the claim. But there may be several other circumstances in which the claimants can play various type of frauds during trial of the claim cases in order to get compensation without any legal right. There is no need to explain various type of frauds here which can be played by the parties. Where it appears to the insurer that the claimants or non-claimants are playing fraud, the insurer can certainly agitate the matter before the Claims Tribunal. In so many cases the insurer might not be knowing the facts

of fraud and the claimants obtained the award in their favour. Since the matter of fraud has not be agitated during the trial by the insurer, the insurer cannot avail the opportunity provided under Section 170 of the Act for making an application to contest the claim on all or any of the grounds and in such a situation the insurer is precluded to file an appeal on those other grounds. There may be possibility where the owner or driver of the offending vehicle may not be in a position to know that the claimants are playing fraud with an intention to get compensation illegally. If the fact of fraud is not in the knowledge of the driver and owner of the offending vehicle, the question of collusion between the person making the claim and the person against whom the claim is made does not arise. The person against whom the claim is made might have contested the case seriously without knowing the fact of fraud played by the person who filed the claim petition. In these circumstances, the provisions of Section 170 will not come into play. Since the matter of fraud is not agitated in the Claims Tribunal, the insurer cannot file the appeal on the grounds of fraud played by the claimants even if the matter of fraud came in the knowledge of the insurer before filing the appeal.

The ground of fraud is not covered under Section 149 (2) or may not be available to insurer under Section 173 of the Act to agitate before appeallate authority. In such a situation the insurer will have a chance to go before the Tribunal who passed the award for rectification of award by disclosing various grounds of fraud played by the claimants or non-claimants with an intention to obtain the compensation illegally or unauthorisedly and the Claims Tribunal has the authority to rectify the award. This has been held in *National Insurance Company's case (supra)* in the following words:

> "So far as obtaining compensation by fraud by the claimant is concerned, it is no longer *res integra* that fraud vitiates the entire proceeding and in such cases it is open to an insurer to apply to the Tribunal for rectification of award."

It is a well established principle that fraud vitiates the entire proceeding. If a judgment is obtained by fraud or collusion, it can be challenged under Section 44 of Evidence Act and it is not necessary to bring an independent suit for setting aside the judgment. (Please see: *Gram Panchayat v. Ujagar Singh, [(2000) 7 SCC 543)].* Same principle will also be applicable to the awards obtained by fraud. In a situation where fraud has been played by the claimants and they obtained the award, the other party can approach the Claims Tribunal for rectification of award when it comes in their knowledge that the claimants obtained the award by fraud. In such cases where the insurer files an application before the Claims Tribunal for rectification of award, the Tribunal has to follow the general principles of natural justice and after hearing the parties of the case finds that the award was the result of fraud played by claimants, the Claims Tribunal is empowered to rectify the award so that no party can get the fruits of fraud played by him.

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COMPROMISE IN PROCEEDINGS UNDER SECTION 125 OF THE CODE OF CRIMINAL PROCEDURE

K.K. BHARADWAJ
Principal Judge, Family Court,
JABALPUR

To claim maintenance allowance under section 125 of the Code of Criminal Procedure is the speedy remedy available to the neglected wife besides regular matrimonial suit. The Magistrates usually come across compromise applications filed by the spouse at different stages of the proceedings u/s 125 Cr.P.C. This subject needs a close study as it relates to the rights of the weaker section of the society namely the neglected wife.

The Supreme Court had an occasion to deal with such a situation in the case of *Madhu Biswas and Swagat Biswas and others- (1998) 2 Supreme Court Cases 359.* The decision in the case is a landmark in respect of compromise between the spouse, and its failure. The factual situation in the above case was as under :-

1. There was a matrimonial dispute between the spouse wherein the wife was granted Rs. 1000/- interim maintenance for herself and equal amount for her minor daughter.

2. In proceeding under section 125 of Cr.P.C. taking into consideration the above orders, the C.J.M. awarded token amount of Rs. 100/- each to the wife and her daughter.

3. The wife moved in revision before the High Court to challenge the order passed by the C.J.M. It came to the notice of the High Court that the parties had compromised in the matrimonial dispute and started living together. But later on the spouse fell apart.

4. The High Court agreed with the argument advanced on behalf of the husband that in view of the compromise the orders of maintenance could not be revived and the wife was directed to again approach the criminal court for appropriate relief.

The Supreme Court held as under :-

> "3. The matter can be viewed from either angle. It can be viewed that there was a genuine effort by the wife to rehabilitate herself in her matrimonial home but in vain. The previous orders of maintenance in a manner of speaking could at best be taken to have been suspended but not wiped out altogether. The other view can be that the maintenance order stood exhausted and thus she be left to fight a new litigation on a fresh cause of action. Out of the two courses we would prefer

to adopt the first one, for if we were to resort to the second option, it would lead to injustice. In a given case the wife may then be reluctant to settle with her husband lest she lose the order of maintenance secured on his neglect or refusal. Her husband on the other side, would jump to impromptu devices to demolish the maintenance order in duping the wife to a temporary reconciliation. Thus, in order to do complete justice between the parties, we would in the facts and circumstances activate the wife's claim to maintenance and put her in the same position as before. Evidently, she has obtained a maintenance order at a figure which was taken into account by the Court of the C.J.M. Taking that into account, we order the husband to pay to his wife and the daughter a sum of Rs. 1000 each, effective from 1.10.1997. The sum of Rs. 12,000 which was earlier ordered by this Court to be paid to the wife and her daughter as arrears of maintenance shall be taken to have been duly paid uptil 30.9.1997, irrespective of the rate of maintenance. This streamlines the dispute between the parties. It is made clear that it is open to the parties to claim such other relief as may be due to him/her by raising matrimonial dispute before the Matrimonial Court.

4. The appeal is, thus, allowed in the manner aforementioned."

A similar question also arose before M.P. High Court in the case of *Ramsingh Vs. Somatbai* and others reported in 2003 (2) M.P.H.T. 180. In this case the question has been decided in much detail. The factual situation in this case was as under :-

1. The J.M.F.C. awarded maintenance allowance to the wife.
2. Husband challenged the order of maintenance in revision. On account of compromise between the spouse the husband got his revision dismissed.
3. Subsequently the wife enforced the order of maintenance before the Magistrate who ordered the husband to pay the arrears of Rs. 3500/- to the wife or else to undergo an imprisonment of 5 months.
4. The husband challenged this order in revision on the ground that in view of the compromise the parties started living together hence the order of maintenance has no force. The Addl. Sessions Judge turned down the objection of the husband.
5. The husband challenged the order of the Addl. Sessions Judge before the High Court under Section 482 of the Cr.P.C.

The High Court upheld order of the Magistrate as well as of the Revisional Court holding that the order of maintenance passed under Section 125 of the Cr.P.C. is not in any way modified, cancelled, varied or vacated under sub-section (4) or (5) of Section 125 of the Code or under Section 127 of the Code on

account of any compromise. Reliance is placed on *A.I.R. 1932 Lahore 115 and A.I.R. 1979 S.C. 442.* It is worth reproducing the dictum of the Supreme Court as reported in the case of *Bhupinder Singh Vs. Daljeet Kaur-A.I.R. 1979 S.C. 442- para 6 and 7;*

"6. A contrary position has found favour with the Lahore High Court reported in AIR 1932 Lah. 115. The facts of that case have close similarity to the present one and the head-note brings out the ratio with sufficient clarity. It reads :-

Shadi Lal, C.J. observed :-

"Now, in the present case the compromise, as pointed out above, was made out of Court and no order under Section 488, Criminal P.C. was made in pursuance of that compromise. Indeed, the order of the Magistrate allowing maintenance at the rate of Rs. 10 per mensem was neither rescinded nor modified, and no ground has been shown why that order should not be enforced. If the husband places his reliance upon the terms of the compromise, he may have recourse to such remedy in a Civil Court as may be open to him. The Criminal Court cannot however take cognizance of the compromise and refuse to enforce the order made by it."

This reasoning of the learned Chief Justice appeals to us.

7. We are concerned with a Code which is complete on the topic and any defence against an order passed under Section 125, Cr.P.C., must be founded on a provision in the code. Section 125 is a provision to protect the weaker of the two parties, namely, the neglected wife. If an order for maintenance has been made against the deserter it will operate until vacated or altered in terms of the provisions of the Code itself. If the husband has a case under Section 125 (4), (5) or Section 127 of the Code it is open to him to initiate appropriate proceedings. But until the original order for maintenance is modified or cancelled by a Higher Court or is varied or vacated in terms of Section 125 (4) or (5) or Section 127, its validity survives. It is enforceable and no plea that there has been cohabitation in the interregnum or that there has been a compromise between the parties can hold good as a valid defence."

On the basis of the above mentioned Precedents the following principles emerge for guidance of the lower Courts:-

1. The order of maintenance cannot be made ineffective on the basis of compromise between the parties unless it is cancelled by the court (who awarded this) in a duly instituted proceeding for cancellation.

2. The order of maintenance shall remain suspended during the period the parties live together.

3. On failure of compromise the order of maintenance is enforceable for the amount falling due thereafter.

4. The above legal position applies equally to execution of orders of maintenance awarded in matrimonial dispute or proceedings u/s 125 of Cr.P.C.

Practical hints :-

While allowing compromise applications the Magistrates/Family Courts should take precautions to incorporate the above principles in suitable terms in their orders so that there remains no ambiguity and in case of failure of compromise the wife may enforce the order of final maintenance again.

If, in any matrimonial dispute or a proceedings u/s 125 Cr.P.C. compromise takes place after the passing of the order of interim maintenance but before the final adjudication of the case, it is advisable (to protect the interest of the wife and children) to keep the 'lis' pending for a month or two. If after this period the parties report that they are leading harmonious conjugal life and do not want to contest the case on merits, the same may be disposed of with this noting. In such a situation the order of interim maintenance becomes non-existent.

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Judgment can be acquired only by acute observation; by actual experience in the school of life; by ceaseless alertness to learn from other; by study of the activities of men who have made notable marks; by striving to analyze the everyday play of causes and effects; by constant study of human nature; by the cultivation of a spirit of fairness, even generosity, to all.

– FORBES, B.C.

CIVIL COURT- JURISDICTIONAL ASPECTS

VED PRAKASH
Addl. Director

Term "jurisdiction", as applied to judicial proceedings, means the power to hear and determine controversies involving legal relations of parties. As explained by the Supreme Court, term "jurisdiction" means the authority, which a Court has to decide matters which are litigated before it or to take cognizance of a matter presented in a formal way for its decision; (See- *Official Trustee, West Bengal & others Vs. Sachindra Nath Chatterjee, AIR 1969 SC 823).* One is required to be careful to distinguish 'exercise of jurisdiction' from 'existence of jurisdiction'. The authority to decide a cause and not the decision rendered therein, is what makes up jurisdiction; and when there is jurisdiction over the persons and subject matter, the decision on all other questions arising in the case is but an exercise of jurisdiction.

It is common experience that objections regarding jurisdiction are frequently raised before the Courts. As the issue, with its inherent complexities, relates to the competence of the Court to adjudicate the lis pending before it, therefore, it has to be addressed with all seriousness, so that ultimately, the Court is not involved is passing a decree, which is suffering from jurisdictional defect. Simultaneously, a Court is also required to see that a party is not unjustly driven out of the Court, thus inviting the criticism that the justice has been crucified at the alter of procedural technicalities.

The enormity, importance and seriousness of the issue can well be visualized from the course of litigation in the case of *Avtar Singh Vs. Jagjit Singh, AIR 1979 SC 1911,* wherein the Civil Court taking the view that it had no jurisdiction to try the suit in question declined to exercise jurisdiction and directed the return of the plaint for presentation to the appropriate Revenue Court. When the claim was filed in the Revenue Court, the Court took the view that it had no jurisdiction to try the claim. Thereupon, a Suit was again instituted in the Civil Court for the same relief. The Suit failed throughout on the ground of res judicata. The High Court affirmed the dismissal and a Division Bench of the Apex Court took the view that the High Court was right in taking the view that the principles of res judicata were applicable to the issue of jurisdiction and therefore, the earlier decision of the Civil Court regarding lack of jurisdiction will operate as res judicata in the subsequent Suit. This ultimately deprived the poor plaintiff from having any forum to seek redress of his grievances.

The facet of jurisdiction of Civil Court encompasses within itself basically, three aspects- firstly, inherent jurisdiction, which has been dealt with in Section 9 of the Code of Civil Procedure (hereinafter referred to as the Code); secondly, territorial jurisdiction, regarding which provisions have been made in Section 16 to 20 of the Code, thirdly, pecuniary jurisdiction, which has been dealt with in Section 6 and 15 of the Code. Apart from the above one more aspect, which also needs to be taken cognizance of relates to the jurisdictional limitation imposed by District Judge under Section 15 of the M.P. Civil Courts Act, 1956 by way of distribution of civil work.

INHERENT JURISDICTION :

Jurisdiction with respect to subject matter of Suit is called "inherent jurisdiction". Lack of inherent jurisdiction means power or jurisdiction, which does not at all exist, or vest in the Court. Consent of the parties could not operate to confer jurisdiction on a Court, which is incompetent to try a suit. *(See-Hiralal Patni Vs. Shir Kali Nath, AIR 1962 SC 199).*

Section 9 of the Code, which is the fountain source of inherent jurisdiction of Civil Court, provides that Civil Courts have jurisdiction to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. A necessary corollary of this rule is that every person has an inherent right to bring a suit of a civil nature unless some statute bars the suit either expressly or impliedly. It also implies that a suit for its maintainability requires no authority of law and that it is enough if no Statute bars the suit. In this regard there is a patent distinction between a right to sue and right to appeal for whose maintainability authority of law is necessary.

It was in *Dhulabhai etc. Vs. State of Madhya Pradesh and another, AIR 1969 SC 78* that a Constitution Bench of the Apex Court considered the scope of Section 9 of the Code. The latest pronouncement in this respect has been made by the Apex Court *in Dhruv Green Field Ltd. Vs. Hukum Singh, (2002) 6 SCC 416* wherein the Court laid down following principles regarding scope of Section 9 of the Code.

(I) If there is express provision in any Special Act barring the jurisdiction of a Civil Court to deal with matters specified thereunder the jurisdiction of an ordinary Civil Court shall stand excluded.

(II) If there is no express provision in the Act but an examination of the provisions contained therein leads to a conclusion in regard to exclusion of jurisdiction of a Civil Court, the Court would then inquire whether any adequate and efficacious alternative remedy is provided under the Act; if the answer is in the affirmative, it can safely concluded that the jurisdiction of the Civil Court is barred. If however, no such adequate and effective alternative remedy is provided then exclusion of the jurisdiction of the Civil Court cannot be inferred.

(III) Even in cases where the jurisdiction of a Civil Court is barred expressly or impliedly the Court would nonetheless retain its jurisdiction to entertain and adjudicate the Suit provided the order complained of is a nullity.

The basic rule is that the bar of jurisdiction of the Civil Court is not to be readily inferred and a provision seeking to bar jurisdiction of Civil Court should be interpreted strictly. It is also a well-settled principle that a party seeking to oust jurisdiction of Civil Court shall establish the right to do so. *(See-Sri Vedagiri Lakshmi Narasimha Swami Temple Vs. Induru Pattabhirami Reddi, AIR 1967 SC* 781) Again it is trite law that a Civil Court has inherent power to decide the question of its own jurisdiction, although, as a result of its enquiry, it may turn out that it has no jurisdiction over the suit. *(See- Messers. Bhatia Co-operative Housing Society Limited Vs. D.C. Patel, AIR 1953 SC 16)*

Here the question arises whether such a decision by the Court about lack or the existence of inherent jurisdiction amounts to res judicata. In this respect it is noteworthy that the view expressed in *Avtar Singh's case (Supra)* that the Civil Court's decision regarding lack of jurisdiction shall operate as res judicata in a subsequent suit, was examined by the Apex Court *in M/s Raptakos Brett & Co. Ltd. Vs. Ganesh Property, AIR 1998 SC 3085,* and after referring to its earlier decision *in Mathura Prasad Sarjoo Jaiswal and others Vs. Dossibai N.B. Jeejeebhoy, AIR 1971 2355* (decided by a Bench of Three Judges), the Court observed that a decision on the question of the jurisdiction of the Court on a pure question of law unrelated to the right of the parties to a previous Suit is not res judicata in the subsequent Suit; and that the Division Bench delivering the judgment in *Avtar Singh's case (Supra)* has not noticed the law laid down in *Mathura Prasad's case (Supra)* therefore, to that extent the judgment in Avtar Singh's case is erroneous and cannot be regarded as good law. Here it would be apposite to refer to the relevant observations made by the Apex Court in *Mathura Prasad's case (Supra),* which are as under:

> "A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by a erroneous interpretation of the Statute the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as res judicata. Similarly, by an erroneous decision if the Court assumes jurisdiction which it does not possess under the Statute the question cannot operate as res judicata between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise."

Here two other important questions, which have a close bearing on the ultimate determination of the issue, also require consideration. These questions relate to the stage when the controversy regarding bar of inherent jurisdiction should be resolved and the material which should form the basis of such determination.

The question, as to at which stage such point should be decided, may be examined in this light of following two provisions of the Code i.e. O.7 R.11 (d) and O.14 R.5 (2) which are reproduced hereunder:

O.7 R.11 :

The plaint shall be rejected in the following cases :-

(a) .....

(b) .....

(c) .....

(d) Where the suit appears from the statement in the plaint to be barred by any law.

O.14 R.5 :

Court to pronounce judgment on all issues -

(1) .....

(2) "Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

(a) The jurisdiction of the Court or

(b) A bar to the suit created by any law for the time being in force, and for that purpose may, it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

Section 9 of the Code speaks about exclusion of jurisdiction of Civil Court in case of express or implied bar. O.7 R.11 (d) says that where the suit appears from the statement in the plaint to be barred by any law, the plaint shall be rejected.

Examining the provisions of O.7 R.11, the Apex Court *in Saleem Bhai and others Vs. State of Maharashtra, (2003) 1 SCC 557* laid down that for the purposes of deciding an application under clauses 9(a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial Court. From this pronouncement it is clear that written statement or the evidence, which may be adduced in the case, has nothing to do with the exercise of power under Order 7 Rule 11 of the Code and the question must be decided only on the basis of the averments made in the plaint.

As regards the stage at which the power under Order 7 Rule 11 (d) should be exercised, it may be pointed out that in Order 7 Rule 10, which relates to the power of Court to return the plaint, phrase "at any stage" has been used, which simply indicates that the power under Order 7 Rule 10 can be exercised at any stage of the suit. No such phrase is there in Order 7 Rule 11 (d) but with the pronouncement of Apex Court in *Saleem Bhai's case (Supra)* it is now well settled that the power under Order 7 Rule 11 (d) can also be exercised at any stage of the suit i.e. before registering the plaint or after issuing summons to the defendant or at any time before the conclusion of trial.

O.14 R.2 sub-rule (2) of the Code says that an issue of law relating to the jurisdiction of the Court or bar to the suit created by any law for the time being in force may be decided by the Court as a preliminary issue. This pre-supposes that such an issue should be decided on the basis of pleadings. Therefore, even after settlement of issues, the Court by way of deciding a preliminary issue under O.14 R.2, sub-rule (2) may come to the conclusion that there is a bar to the suit resulting in lack of inherent jurisdiction. In such an eventuality the proper course would be to reject the plaint under O.7 R.11 (d) instead of dismissing it because as per its own finding the Court would not be having jurisdiction to decide the case and thus to dismiss it.

The next point, which requires consideration is as to on what basis the question relating to lack of inherent jurisdiction, should be decided by the Court.

The Apex Court had an occasion to examine this issue in *Raizada Topandas and another Vs. M/s Gorakhram Gokalchand, AIR 1964 SC 1348.* In this case plaintiff sought declaration from City Civil Court regarding his possession and injunction against defendant regarding interference in possession on the ground that defendant was trying to interfere in the possession. The defendant pleaded the relationship of landlord and tenant between the parties to the suit and on that ground challenged the jurisdiction of the Court under Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 which provided for exclusive jurisdiction of small causes Court concerning disputes relating to tenancy between landlord and tenant.

Rejecting the plea the Apex Court observed that if the plaintiff in his plaint does not admit a relation which would attract any of the provisions of the Act on which the exclusive jurisdiction given under Section 28 depends, we do not think that the defendant by his plea can force the plaintiff to go to a forum where on his own averments he cannot go. The Court observed that the interpretation canvassed, if accepted will give rise to anomalous results, for example, the defendant may in every case force the plaintiff to go the Court of Small Causes and secondly, if the Court of Small Causes finds against the defendant's plea, the plaint may have to be returned for presentation to the proper Court for a second time.

Reiterating the aforesaid view it was held by the Apex *Court in Abdulla Bin Ali and others Vs. Galappa and others, AIR 1985 SC 577* that the allegations made in the plaint decide the forum and that the jurisdiction does not depend upon the defence taken by the defendants in the written statement. The same view was taken in *Sanwarlal Kejriwal Vs. Vishwa Co-operative Housing Society Ltd. and others, AIR 1990 SC 1563. (Para 23)*

PECUNIARY/TERRITORIAL JURISDICTION-

Section 6 and Section 15 of the Code read conjointly provide the rule that a Court shall not have jurisdiction over a suit exceeding the pecuniary limits of its ordinary jurisdiction and that every suit shall be instituted in the Court of lowest grade competent to try it. This implies that though the Court of District Judge has unlimited pecuniary jurisdiction still a suit valued at Rs. 40,000/- should be instituted in the Court of Civil Judge Class I. Section 6 of M.P. Civil Courts Act, 1958 provides in respect of limits of pecuniary jurisdiction of various grades of Civil Courts (Civil Judge Class II Rs. 25,000/-, Civil Judge Class I Rs. 50,000/- and District Judge unlimited).

The defect of jurisdiction relating to pecuniary or territorial limit of the Court, though does not go to the root of the matter still if such type of jurisdictional defect comes to the notice of the Court at any stage of the Suit then the Court, by resorting to the provisions of the Order 7 Rule 10 of the Code must return the plaint to be presented to the Court of competent pecuniary/territorial jurisdiction. *(See-Raizada Topandas and another Vs. M/s Gorakhram Gokalchand, Supra)* Section 21 of the Code may also be noticed here which provides that if objection regarding territorial or pecuniary incompetence of the Court is not taken before the trial Court at the earliest and at or before settlement of issues

and further a failure of justice has not occasioned to the parties then objection on that score cannot be allowed to be agitated at appellate or revisional stage. The aforesaid rule is in exception to the general rule that consent, waiver or acquiescence cannot confer jurisdiction upon a Court, which is otherwise incompetent to try the suit. Policy underlying Section 21 of C.P.C. is akin to the policy contained in Section 11 of the Suits Valuation Act, 1887, which provides that unless objections to over valuation or under valuation was taken in the Court of first instance at or before settlement of issues and the opposite party has been prejudicially affected thereby objections in that regard shall not be entertained at appellate stage.

DISTRIBUTION OF JUDICIAL BUSINESS:

The District Judge under Section 15 of the Civil Courts Act, 1958 has power to distribute civil business amongst Civil Courts of his District subject to their territorial/pecuniary limits. As laid down in *Bhanwar Singh Vs. Hira Lal, 1984 MPLJ Note 1,* the distribution memo issued by the District Judge in this respect is not merely a ministerial/administrative order but has the force of law. Where the distribution memo restricts the limit of pecuniary jurisdiction of the Additional District Judge, the Additional District Judge would have no jurisdiction to try any suits valued over that limit.

Though, Sub-section (2) of Section 15 makes it clear that a judicial act shall not be invalid simply because institution of the suit or appeal was not in accordance with the distribution memo, however Sub-section (3) of Section 15 in quite unequivocal terms mandates that whenever it appears to a Court that institution of suit or proceeding is not in conformity with the distribution memo, the Court should submit the record of such matter to the District Judge who may send it either to the proper Court as per distribution memo or to any other Court of Competent Jurisdiction but return of plaint in such situation to plaintiff is quite erroneous *(See- Genda bai Vs. Kunda Lal, 1985 JLJ 521).*

What can be culled out from the above is that while proceeding with the suit, the Court must examine it to determine as to whether the suit suffers from inherent, pecuniary or territorial lack of jurisdiction. In case of lack of inherent jurisdiction, the plaint must be rejected under O.7 R.11 (d). On the other hand, in case of lack of territorial/pecuniary jurisdiction, the plaint ought to be returned to the plaintiff for presentation before the Court of Competent Jurisdiction. This should be done irrespective of the stage at which such defect comes to the notice of the Court. But when Court assumes jurisdiction relating to subject matter on the basis of plaint allegations then the allegations made in the written statement or the evidence adduced in the case may not dislodge the jurisdiction. However, if ultimately, the plaintiff fails to prove the facts alleged in the plaints, which are the basis of assumption of inherent jurisdiction, then the suit must be dismissed in its entirety. In case of lack of jurisdiction due to work distribution order issued by the District Judge under Section 15 of the Civil Courts Act, 1958, the Court should send the record of the case to the District Judge who can send it back for trial either to the same Court or to the Court of Competent Jurisdiction.

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BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent to five groups of districts for discussion in the bi-monthly training meeting held in the month of February, 2004. The Institute has received various articles relating to these topics from most of the districts. Out of these articles, the articles on topic no. 3 and 4 were not found of requisite standards. Topic no. 4 shall be allotted to other group of districts for discussion in bi-monthly training to be held in the month of June, 2004. However, an article prepared by the Institute covering topic no. 3 shall be published in the August, 2004 issue of JOTI Journal. The articles on rest of the topics are being included in this issue of JOTI Journal.

Q.1 Whether a compromise can be lawfully recorded in terms of O.33 R.3 C.P.C. where the memo of compromise is signed by the counsels of the parties only ?

क्या ऐसे समझौते को आदेश 22 नियम 3 व्यवहार प्रक्रिया संहिता के अंतर्गत स्वीकार किया जा सकता है, जिसमें आवेदन केवल पक्षकारों के अधिवक्ताओं द्वारा हस्ताक्षरित है ?

Q.2 What is the nature and extent of defence available to the insurance company regarding breach of condition of policy u/s 149 (2) (a) (ii) of Motor Vehicles Act, 1988 in respect of driving license?

चालक अनुज्ञप्ति पत्र के संबंध में मो.या.अधि., 1988 की धारा 149 (2) (a) (ii) के अंतर्गत बीमाकर्ता को उपलब्ध प्रतिरक्षा का स्वरूप व विस्तार क्या है ?

Q.3 Whether a person coming within the definition of landlord u/s 23-J of the M.P. Accommodation Control Act, 1961 has right to continue a suit as legal representative of deceased plaintiff before the Civil Court on the ground of bona fide need of the family?

क्या मृत वादी के विधिक प्रतिनिधि के रूप में ऐसे व्यक्ति को, जो म.प्र. स्थान नियंत्रण अधिनियम, 1961 की धारा 23-J के अंतर्गत भूस्वामी की परिधि में आता है, परिवार की सद्भाविक आवश्यकता के आधार पर संस्थित निष्कासन वाद को आगे चलाने का अधिकार है ?

Q.4 What is the relevant date for deciding the juvenility of an accused?

किस दिनांक के आधार पर अभियुक्त की किशोरवयता निर्धारित की जानी चाहिये ?

Q.5 Whether Sec. 4 (1) and 4 (2) of the Benami Transactions (Prohibition) Act, 1988 are retrospective? How these provisions affect the past transactions?

क्या बेनामी संव्यवहार (प्रतिषेध) अधिनियम, 1988 की धारा 4 (1) व 4 (2) के प्राविधान भूतलक्षी प्रभाव रखते हैं ? ये प्राविधान पूर्व संव्यवहारों पर क्या प्रभाव रखते हैं ?

AUTHORITY OF COUNSEL TO COMPROMISE A SUIT UNDER 0.23 R 3 C.P.C.

JUDICIAL OFFICERS
District Chhindwara

It is said that, finest hour of the justice is the hour of compromise, when parties, after burying the hatchet, re-unite by a reasonable and just compromise.

Order 23 rule 3 of C.P.C. makes it clear that- "Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, *in writing and signed by the parties* or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith, so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit :

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question, but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

"Explanation :- An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule."

Here, the words "in writing and signed by the parties" have been inserted by C.P.C. (Amendment) Act No. 104 of 1976.

Before this amendment, if we go through the various decisions delivered by the Privy Council, Hon. Supreme Court and various High Courts, we find that the question arose, as early as, in the year 1930, when the Privy Council, by its Full Bench judgment, in the case of *Sourendra Nath Mitra & Others Vs. Tarubala Dasi, reported in A.I.R. 1930 P.C. 158,* regarded the power to compromise a suit, as inherent in the position of an advocate in India and it was said that, it is a power deemed to exist, because its existence is necessary to effectuate the relations between advocate and client and to make possible duties imposed upon the advocate by his acceptance of the cause of his client.

Again the issue was dealt with by the Nagpur High Court, in the case of *Jiwibai vs. Ram kumar Srinivas Murarka Agarwala, reported in A.I.R. 1947 Nagpur 17 (F.B.).* The Court laid down the principle that the Counsel in India have inherent powers both to compromise claims and also to refer dispute in court to arbitration, without the authority or consent of the client, unless their powers in this behalf have been expressly countermanded.

Again, in the case of *Chengan Souri Nayakam Vs. A.N. Menon, reported in A.I.R. 1968 Kerala 213, (F.B.)* the Kerala High Court in its Full Bench decision, while interpreting O.3 r. 4 of the C.P.C., has laid down the principle that, even

though the 'vakalatnama' does not expressly authorise a counsel to compromise the suit or confess judgment, if the Court is satisfied that there was no express prohibition in his doing so, it has to assume that Counsel had an implied authority to compromise the action or confess judgment.

In this regard, if we go through the case of *Employer in relation to Monoharbhal Colliery Calcutta Vs. K.N. Misra and others, A.I.R. 1975 S.C. 1632,* the same principle was applied by the Apex Court and it was said that where a compromise of appeal was being signed by the Counsel of the party, it was held to have binding effect on that party. Again, in the same year, the Apex Court, in the case of *Smt. Jamilabai Abdul Kadar Vs. Shankarlal Gulabchand and others, reported in A.I.R. 1975 S.C. 2202,* resolved the controversy by saying that, a pleader has the actual, though implied authority, to act by way of compromising a case in which he is engaged, even without specific consent from his client, subject undoubtedly to two overriding considerations :-

1. He must act in good faith and for the benefit of his client, otherwise the power fails; and
2. It is prudent and proper to consult his client and take his consent, if there is time and opportunity and in any case, if there is any instruction to the contrary or withdrawal of authority, the implicit power to compromise in the pleader will fall to the ground.

Then came the C.P.C. (Amendment) Act of 1976, by which the words "in writing and signed by parties" were inserted and after this amendment, Hon. Supreme Court, in the case of *Gurpreet Singh Vs. Chaturbhuj Goel, reported in A.I.R. 1988 S.C. 400,* has said that, where compromise entered into, during hearing of suit or appeal, Court must insist that compromise be reduced in writing and signed by the parties. Relying on this principle, the Calcutta High Court, in the case of *Molla Sirajul Haque and others Vs. Gorachand Mullick and others, reported in A.I.R. 1993 Calcutta. 58* has laid down the principle that, the application under O.23 R.3 C.P.C. will not succeed unless the same is contained in writing and signed by the parties, otherwise it is liable to be dismissed. With due regard, we fear that, the Hon. High Court has not gone through the facts and circumstances of *Gurpreet Singh's Case (Supra)*, because in that case, the statement (acceptance of the offer of Rs. 2,25,000/-) made by the respondent was "oral" and afterwards, he resiled from the compromise expressly in writing; hence in that case much stress was given on the word 'Writing' and in this context, the words 'Signed by the parties' were interpreted and for the proper appreciation of the contention advanced, the Apex Court found it necessary to setout the statement of objects and reasons which is in these terms : "Cl. 77-sub Cl. (iii)- it is provided that an agreement of compromise under R.3 should be in writing and signed by the parties. This is with a view to avoiding the setting-up of oral agreements or compromises to delay the progress of the suit."

In this regard, the famous case of *Byram Pestonji Gariwala Vs. Union Bank of India, A.I.R. 1991 S.C. 2234* must also be mentioned, in which, Hon. Supreme Court has laid down the principle that, the expression "in writing and signed by the parties" occurring in O.23, R.3 C.P.C. includes counsels representing the

parties, and a compromise, even though not signed by parties in person, but signed by the Counsels of the parties, is binding on the parties and a decree passed on this compromise application is executable, even if the compromise relates to matters concerning the parties, but extending beyond the subject-matter.

Hon'ble M.P. High Court has also laid down the principle, in the case of *Natwar Lal Damodar Lal Vs. Gunny and Salt Exporting Company, reported in 1981 (2) M.P.W.N. Note 135,* that under the provisions of O.23, R.3 of C.P.C., a compromise can be effected by the Counsels of the parties. Hon'ble Madras High Court in the Case of *Govinda Rajan Vs. K.A.N. Srinivas Chetty, A.I.R. 1977 Madras 402* has also expressed that, an advocate appearing for a party always has an implied authority to enter into a compromise on behalf of his party, the only limitation is-if there is any written prohibition or limitation, the advocate will have to act within that prohibition and limitation. Hon'ble Rajsthan High Court in the Case of *Mohan Bai Vs. Jai Kishan, A.I.R. 1983 Rajasthan 240* has interpreted that, the expression "signed by the parties" also includes "advocates of the parties" and has said that, even after 1976 amendment, the expression does not debar a Counsel from signing a compromise petition nor it interferes with his inherent right to enter into an agreement of compromise, on behalf of his client.

Recently, Hon'ble Supreme Court, in the Case of *Jineshwar Das (D) by L.R.S. and others Vs. Smt. Jagrani and another, reported in A.I.R. 2003 S.C. 4596,* has laid down the principle that, the words "in writing and signed by the parties" inserted by the C.P.C. (Amendment) Act 1976, must necessarily mean to borrow the language of O.3, r.1 C.P.C. :-

"Any appearance, application or act into any Court, required or authorised by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, *or by his recognized agent or by a pleader,* appearing, applying or acting, as the case may be on his behalf; Provided that any such appearance shall, if the Court so directs, be made by the party in person."

Ultimately, the satisfaction of the Court is paramount and the Court, using its judicial discretion, should dispose of the compromise application, taking into account the facts and surrounding circumstances of that very case; and gist is that, O.23, R.3 of C.P.C. should be read in the light of provisions enunciated in O.3, R.1 of C.P.C. and the principle is that, a Counsel has implied authority to act by way of compromising a case in which he is engaged, even without specific consent from his client, but subject to following two conditions:-

1. He must act in good faith and for the benefit of his client; and
2. It is prudent and proper to consult his client and take his consent, if there is time and opportunity.

So, under these circumstances, the law on the point is that, a compromise can be lawfully recorded in terms of O.23, r.3 of C.P.C., even though the memo of compromise is not signed by the parties in person and is signed by the Counsels of the parties.

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NATURE AND EXTENT OF DEFENCE AVAILABLE TO INSURANCE COMPANY U/S 149 (2) (a) (ii) OF MOTOR VEHICLES ACT, 1988

JUDICIAL OFFICERS
District Sehore

Section 146 of Motor Vehicle Act, 1988 (hereinafter referred to as the Act) requires the necessity for the insurance policy against third party risk by the owner of the vehicle before using the vehicle in a public place. The contravention of the provisions of Section 146 of the Act is made punishable u/s 196 of the Act.

Section 149 (2) of the Act provides the defence available to the insurance company in claim case proceedings. The various provisions of Section 149 (1) to (5) of the Act are as follows :-

> 149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.– (1) if, after a certificate of insurance has been issued under sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy) [or under the provisions of Section 163-A] is obtained against any person insured by the policy then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments (emphasis supplied).

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings; or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely :-

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely :-

(i) a condition excluding the use of the vehicle –

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqulified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

(3) Where any such judgment as is referred to in sub-section (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of Section 13 of the Code of Civil Procedure, 1908 (5 of 1908) conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act, 1938 (4 of 1938) and whether or not he is registered under the corresponding law of the reciprocating country) shall be liable to the person entitled to the benefit of the decree in the manner and to the extent specified in sub-section (1), as if the judgment were given by a Court in India:

Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in sub-section (2).

(4) Where a certificate of insurance has been issued under sub-section (3) of Section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditiong other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of Section 147, be of no effect:

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(5) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

Recently the Supreme Court in National Insurance Company Ltd. Vs. Swarnsingh, 2004 ACJ Part-1 Page 01 has laid down as follows :-

96. It is, therefore, evident from the discussions made hereinbefore that the liability of the insurance company to satisfy the decree at the first instance and to recover the awarded amount from the owner or driver thereof has been holding the field for a long time.

97. Apart from the reasons stated hereinbefore the doctring of *stare decisis* persuades us not to deviate from the said principle.

98. It is well settled rule of law and should not ordinarily be deviated from. [See *Bengal Immunity Co. Ltd. v. State of Bihar, (1955) 2 SCR 603 at 630-632 : Keshav Mills Co. Ltd. v. Commissioner of Income-Tax, Bombay North, (1965) 2 SCR 908 at 921-922 : Union of India v. Raghubir Singh, (1989) 3 SCR 316 at 323, 327, 334 : Gannon Dunkerley and Co. V. State of Rajasthan, (1993) 1 SCC 364 ; Belgaum Gardeners Co-Op. Production Supply and Sale Society Ltd. V. State of Karnataka, 1993 Supp (1) SCC 96 and Hanumantappa Krishnappa Mantur v. State of Karnataka, 1992 Supp (2) SCC 213].*

99. We may, however, hasten to add that the Tribunal and the Court must however, exercise their jurisdiction to issue such a direction upon consideration of the facts and circumstances of each case and in the event such a direction has been issued despite arriving at a finding of fact to the effect that the insurer has been able to establish that the insured has committed a breach of contract of insurance as envisaged under sub-clause (ii) of clause (a) of sub-section (2) of section 149 of the Act, the insurance company shall be entitled to realise the awarded amount from the owner or driver of the vehicle, as the case may be, in execution of the same award having regard to the provisions of Sections 165 and 168 of the Act. However, in the event, having regard to the limited scope of inquiry in the proceedings before the Claims Tribunal it had not been able to do so, the insurance company may initiate a separate action therefore against the owner or the driver of the vehicle or both, as the case may be. Those exceptional cases may arise when the evidence becomes available to or comes to the notice of the insurer at a subsequent stage or for one reason or the other, the insurer was not given opportunity to defend at all. Such a course of action may also be resorted when a fraud or collusion between the victim and the owner of the vehicle is detected or comes to knowledge of the insurer at a later stage.

100. Although, as noticed hereinbefore, there are certain special leave petitions where in the persons having (Sic. driving) the vehicles at the time when the accidents took place did not hold any licence at all, in the facts and circumstances of the cases we do not intend to set aside the said awards. Such awards may also be satisfied by the petitioners herein subject to their right to recover the same from the owners of the vehicles in the manner laid down therein. But this order may not be considered as a precedent.

The Summary of the findings of The Supreme Court to the various issues raised before the Court were as follows :

102 (i) Chapter XI of the *Motor Vehicles Act,* 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor

vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) Insurer is entitled to raise a defence in a claim petition filed under section 163-A or section 166 of the *Motor Vehicles Act,* 1988, inter alia, in terms of section 149 (2) (a) (ii) of the said Act.

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

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

(v) The court cannot lay down any criteria as to how said burden would be discharged, in as much as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches of the condition of driving licence is/are so fundamental as are fround to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply 'the rule of main purpose' and the concept of 'fundamental breach' to allow defences available to the insurer under section 149 (2) of the Act.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted under section 165 read with section 168 is empowered to adjudicate all claims in respect of the accidents involving death or bodily injury or damage to property of third party arising from use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims, *inter se,* between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the avilability of defence or defences to the insurer, the Tribunal has

necessarily the power and jurisdiction to decide disputes *inter se* between insurer and the insured. The decision rendered on the claims and disputes *inter se* between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149 (2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of the claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certification will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in sub-section (4) with proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims *inter se* might delay the adjudication of the claims of the victims.

CONCLUSION-

The defences available to the Insurance Companies regarding the breach of condition of policy in respect of the driving licence are limited. (1) If a person without driving licence drives the vehicle without permission of the owner, the Insurance Company is liable to pay the compensation to the third party. (2) Where the owner has satisfied himself that the driver has a licence, there would be no breach of the Section 149 (2) (a) (ii) of the Act. If the driving licence is fake, the Insurance Company would continue to be liable, unless they prove that the owner/ insured was aware of this fact that the licence was fake and still permitted the person to drive the vehicle. In such a case the insurance company would remain liable to the innocent third party, but it may be able to recover from the insured. (3) Section 149 (2) (a) (ii) of M.V. Act, 1988 empowers the insurance companies to repudiate a claim where if the vehicle in quesion is damaged due to an accident to which driver of vehicle who does not hold a valid driving licence is responsible in any claim for damages which has occurred due to acts to which the driver has not, in any manner, contributed i.e. damages incurred due to reasons other than the acts of the driver.

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APPLICABILITY OF SECTION 4 (1) & 4 (2) OF BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988

JUDICIAL OFFICERS
District Raisen

On 19 May 1988, the President of India promulgated the Benami Transactions (Prohibition of the Right to Recover Property) Ordinance, 1988 (No. 2 of 1988) to prohibit the right to recover property held benami and for matters connected therewith and incidental thereto. With this Ordinance the judicial acceptance of benami transactions was removed with a view to help people to keep property they were holding for others. It remedied the age-old doctrine of benami and made the benamidar the real owner in law, of course with few exceptions. This Ordinance was to come into force at once.

It was on July 22, 1988 the Ordinance was referred by the Central Government, to the Law Commission of India for detailed examination. The Law Commission submitted its 130th Report to the Government on 14th August, 1988. After the report, the Benami Transactions (Prohibition) Bill, 1988 was drafted. The Bill was introduced in the Rajya Sabha on August 31, 1988.

The Benami Transactions (Prohibition) Act, 1988 (Act No. 45 of 1988) received the assent of the President of India on September 5, 1988. The Provisions of Ss. 3, 5 and 8 of the Act came into force at once on that date and remaining provisions were deemed to have come into force on 19th day of May, 1988.

It is an Act to prohibit benami transactions and the right to recover property held benami and matters connected therewith or incidental thereto.

Section 3 of the Act prohibits benami transactions by providing: "(1) No person shall enter into any benami transaction". However, this Section had no application to the purchase of property by any person in the name of his wife or unmarried daughter.

Section 4 of the Act prohibits right to recover property held benami and provides as under:

"(1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

The questions whether the provisions of the Benami Transactions (Prohibition) Act, 1988 are prospective or retrospective and whether these provisions cover past benami transactions or not came before the Apex Court in *Civil Appeal No. 2311 of 1978, Mithilesh Kumāri and another Vs. Prem Behari Khare.* The important decision on this point came on 14/02/1989 reported in *A.I.R. 1989 SC 1247* in which provisions of this Act were interpreted.

The facts of the case in short were that plaintiff had filed a suit for declaration that he was the real owner of the suit house and the transaction was benami. The suit was decreed by the Trial Court and decree affirmed by the Appellate Court. The Act came into force during pendency of the appeal before the Supreme Court.

The Hon'ble Supreme Court held as under:

(a) The Act contains no specific provision making its operation retrospective. It cannot be said to be an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the Section which had to be construed. Intention of the legislature could be seen by necessary implication from the language employed. In all cases it is desirable to ascertain the intention of legislature

(b) In benami transactions, the real owner's right was hitherto protected and this Act has resulted in removal of that protection.

(c) The Act is a piece of prohibitory legislation and it prohibits benami transactions subject to stated exceptions. As a result of these provisions of the Act, all properties held benami at the moment of the Act coming into force may be affected irrespective of their beginning, duration and origin. This will be so even if the legislation is not retrospective but only retroactive.

(d) Section 4 naturally relates to past transactions as well. The expression "any property held benami is not limited to any particular time, date or duration. Once the property is found to have been held benami, no suit, claim or action to enforce any right in respect thereof shall lie.

(e) Similarly, Sub-section (2) of Section 4 nullifies the defence based on any right in respect of any property held benami. It means that once a property is found to have been held benami the real owner is bereft of any defence against the person in whose name the property is held or any other person. In other words in its sweep Section 4 envisages past benami transactions also, within its retroactivity.

(f) When the law nullifies the defences available to the real owner in recovering benami property, the law must apply irrespective of the time of benami transaction.

(g) The expression "shall lie" in Section 4 (1) and "shall be allowed" in Section 4 (2) are prospective and therefore shall apply to present (future stages) and future suits, claims or actions only. The only difference between a suit and an appeal is that an appeal only reviews and corrects the proceedings in a cause already constituted, but does not create the cause. At the appellate stage the note of commencement of the Act can be taken.

It was thus held that though Section 4 (1) is not expressly made retrospective, by the legislature, by necessary implication, it appears to be retrospective and would apply to all pending proceedings wherein right to property allegedly held benami is in dispute between parties and that Section 4 (1) will apply at whatever stage the litigation might be pending.

Thus, in Mithilesh Kumari Vs. Prem Behari, A.I.R. 1989 S.C. 1247 Division Bench of the Apex Court answered the question in affirmative and lay down that Section 4 (1) can be applied to proceeding initiated prior to commencement of the Act. The correctness of the view came up for consideration before another Division Bench of the Supreme Court; which directed the matter to be placed before three Judges Bench. Ultimately the matter has attained finality in a decision dated 31/01/1995 in *R. Rajagopal Reddy (dead) by L.Rs and others Vs. Padmini Chandra Shekharan (dead) by L.Rs., A.I.R. 1996 SC 238.*

The question before the Apex Court was whether the pending proceedings at various stages in the hierarchy could get encompassed by the sweep of Section 4 (1) and such suits would be liable to be dismissed as laid down by that Section.

The three Judges Bench of Apex Court replied that this question has to be answered in the negative and it must be held that the decision of the Division Bench taking a contrary view does not lay down correct law. The view expressed in *A.I.R. 1989 S.C. 1247* was thus overruled.

In this case the Apex Court has held as under:

(a) Under various legal provisions holding the filed prior to coming into operation of this Act, benami transactions were recognized species of legal transactions pertaining to immovable properties. Various Court in India over a century used to entertain such suits, and on proof of relevant facts, used to pass decree. The legislature, however, in its wisdom by enacting an appropriate legislation, has prohibited such benami transactions.

(b) The Act cannot be treated to be declaratory in nature. Declaratory enactment declares and clarifies the real intention of legislature regarding earlier enactment.

(c) Though the Law Commission recommended retrospective applicability of the proposed legislation, the Parliament did not make the Act or any of its Sections expressly retrospective in its wisdom.

(d) Appeals are continuation of suit, this is an aspect of procedural law and, therefore, when procedure is changed, it can be applied by necessary implication.

(e) The preamble of the Act itself states that it is an Act to prohibit benami transactions to efface the existing rights of real owner. Such an Act was not given any retrospective effect by the legislature.

(f) Legislature in its wisdom has not expressly made Section 4 retrospective. Then to imply by necessary implication that it would cover pending litigation, would run counter to legislative scheme and intent.

(g) Truly enough Section 4 (1) operates, even in those transactions, which have been entered into prior to coming into operation of Section 4 (1). This may be high lighted by the illustration. If a benami transaction has taken place in 1980 and suit is filed after 19th day of may 1988. The suit would not lie on account of the provisions of Section 4 (1), that is the only effect of retroactivity of Section 4 (1) and nothing more than that.

(h) Section 4 (2) is based on pre-existing right of defendant, as such this provision also cannot be said to be retrospective or retroactive.

(i) A Suit filed prior to 19/5/88 if before the stage of filing of defence is reached. Section 4 (2) becomes operative from 19/5/88 Section 4 (1) and 4 (2) on this score cannot be treated to be impliedly retrospective so as to cover all pending litigation.

The same view has been expressed by Hon'ble Apex Court again in *Prabodh Chandra Ghosh Vs. Urmila Dassi, A.I.R. 2000 SC 2534 and C. GangaCharan Vs. C. Narayanan, A.I.R. 2000 SC 589.*

On the same point matter has been decided by the Hon'ble M.P. High Court in *Abdul Hammed Khan Vs. Abdul Wahee Khan, 2001 (I) M.P.L.J. 341* and *RamGopal Kushwaha* and *others Vs. RamPratap, 2002 (2) M.P.L.J. 443.*

The ratio thus holds that Section 4 (1) and 4 (2) of the Act do not apply retrospectively to pending proceedings wherein such a right is sought to be exercised by the plaintiff or such a defence has already been taken by the concerned defendant, however, on or after 19th May 1988 no fresh plea by way of claim, suit or action or defence can be asserted on the basis of earlier benami transaction.

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PART - II

NOTES ON IMPORTANT JUDGMENTS

109. INDIAN PENAL CODE, 1860-Sections 302 and 304

Single injury- Death due to injury caused by single blow inflicted on head by butt of a pistol-Death by single blow not itself a ground to alter conviction from Section 302 to 304.

State of U.P. Vs. Premi and others

Judgment dt. 20.02.2003 by the Supreme Court in Criminal Appeal No. 486 of 1996, reported in (2003) 9 SCC 12

Held :

On the facts and circumstances of the case, it is also not possible to accept the contention that the respondents had no intention to kill and, therefore, their conviction deserves to be altered to be one falling under Section 304 IPC. As already noticed, at the dead of night the respondents and their father went to the house of PW 3 with a country-made pistol and with force inflicted such injuries on the head which resulted in death of the wife of PW 3. The mere fact that only a single blow was inflicted on the head by itself is not enough to alter the conviction from Section 302 to Section 304 IPC.

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110. INDIAN PENAL CODE, 1860- Sections 302 and 304

Single injury resulting in death- Every case of single injury not indicative of absence of intention to kill- Single gunshot injury in the abdomen- Held, case is covered under Section 302.

Hari Prasad Vs. State of U.P.

Judgment dt. 7.08.2002 by the Supreme Court in Criminal Appeal No. 422 of 2000, reported in (2003) 9 SCC 60

Held :

It is not possible to hold that every case of single injury would show the absence of intent to kill. It would depend on the facts of each case. The type of weapon used would also be one of the important aspects to be kept in view. The submission that is generally made in such cases that it is a case of a single injury resulting in death and, therefore, the offence deserves to be converted from one under Section 302 IPC to one under Section 304 IPC cannot be accepted as a broad proposition of law. One may sever the head of the deceased by a single injury or may kill him by a single gunshot on a vital part, as in the present. It cannot be said that because of a single injury the offence under Section 304 IPC is only made out and not under Section 302 IPC.

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111. CIVIL PROCEDURE CODE, 1908- O.8 R. 6-A and O.22 R.3

Death of plaintiff in a case where counter-claim was also filed-

Defendant's failure to take steps for substitution of plaintiff's L.Rs. inconsequential.
Organic Insulation Vs. Indian Rayon Corporation Ltd.
Judgment dt. 9.11.2000 by the Supreme Court in Civil Appeal No. 64 of 1992, reported in (2003) 9 SCC 187

Held :

Learned counsel appearing for the appellant referred to the provisions of Order 8 Rule 6-A and argued that in view of sub-rule (4) of Rule 6-A, the counter-claim is to be treated as a plaint and governed by the Rules applicable to the plaint and, therefore, unless the deceased defendant in the counter-claim is substituted counter-claim would abate. At the first glance the argument appeared attractive. However, on the consideration, we find that the similar situation arose in the case of *N. Jayaram Reddy v. Revenue Divisional Officer & Land Acquisition Officer, Kurnool, (1979) 3 SCC 578.* In the said case, under the land acquisition proceedings, the State of Andhra Pradesh preferred an appeal to the High Court and a cross-appeal was also filed by the claimants against the judgment of the court below. In the cross-appeal filed by the claimants, one of the claimants died. After his death, his heirs moved an application for substitution and the deceased claimant was substituted by the legal representatives. However, the State Government did not take any steps for substitution in cross-appeal. The question arose whether the omission to substitute the deceased respondent in the appeal, the appeal filed by the State would abate. Justice D.A. Desai who concurred with the judgment of Justice P.N. Shingal held as under: (SCC pp. 596-97, para 41)

> "Shorn of embellishment, when legal representatives of a deceased appellant are substituted and those very legal representatives as legal representatives of the same person occupying the position of respondent in cross-appeal are not substituted, the indisputable outcome would be that they were on record in the connected proceeding before the same court hearing both the matters, in one capacity though they were not described as such in their other capacity, namely, as legal representatives of the deceased respondent. To ignore his obvious position would be giving undue importance to form rather than substance. *The anxiety of the Court should be whether those likely to be affected by the decision in the proceeding were before the court having full opportunity to canvass their case."*
>
> (emphasis supplied)

Coming to the provisions of Order 8 Rule 6-A. although sub-rule (4) says that the counter-claim will be treated as a plaint, under sub-rule (2), such counter-claim has the same effect as a cross-suit so as to enable the court to pronounce a final judgment in the same suit, both on the original suit and on the counter-claim. As the substitution has been made by the plaintiff in the suit, the legal heirs of the plaintiff will have full opportunity to defend the counter-claim as

both the suit and the counter-claim will be tried in the same proceeding and therefore, no prejudice would be caused to the legal heirs of the plaintiff in the counter-claim. We, therefore, find that the contention of the learned counsel for the appellant has no force.

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112. INDIAN PENAL CODE, 1860- Section 304-A
PROBATION OF OFFENDERS ACT, 1958- Section 4

(i) Rash and negligent driving, death due to- Doctrine of re ipsa loquitur, applicability of.

(ii) Death due to rash and negligent act- Benefit of Probation of Offenders Act not to be extended.

Thakur Singh Vs. State of Punjab
Judgment dt. 15.09.2000 by the Supreme Court in (Crl.) MP No. 5636 of 2000, reported in (2003) 9 SCC 208

Held :

The petitioner is found to have committed the offence under Section 304-A of the Indian Penal Code on the allegation that he drove a bus rashly and negligently with 41 passengers therein and while crossing a bridge the bus fell into the nearby canal and all the passengers died. Learned counsel submits that prosecution has not proved the negligence on the part of the driver.

It is admitted that the petitioner himself was driving the vehicle at the relevant time. It is also admitted that bus was driven over a bridge and then it fell into canal. In such a situation the doctrine of *res ipsa loquitur* comes into play and the burden shifts on to the man who was in control of the automobile to establish that the accident did not happen on account of any negligence on his part. He did not succeed in showing that the accident happened due to causes other than negligence on his part.

Learned counsel lastly made an alternative plea that the Probation of Offenders Act may be applied to secure his job. This Court has held in *Dalbir Singh v. State of Haryana, (2000) 5 SCC 82* that the Probation of Offenders Act cannot be invoked in cases involving rash or negligent driving of the bus resulting in death of human beings. This is what this Court observed there : (SCC p. 87, para 13)

> "13. Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the Probation of Offenders Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or

inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles."

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113. EVIDENCE ACT, 1872- Section 27

Disclosure statement and recovery pursuant thereto- Disclosure statement and recovery memo not bearing the signature of accused- Effect- If otherwise proved still such evidence can be acted upon- Law explained.

Golakonda Venkateswara Rao Vs. State of A.P.

Judgment dt. 1.08.2003 by the Supreme Court in Criminal Appeal No. 838 of 2002, reported in (2003) 9 SCC 277

Held :

Section 27 of the Indian Evidence Act provides that only so much of the information as distinctly relates to the fact thereby discovered is admissible.

The counsel relied on the decision of this Court rendered in *Jaskaran Singh v. State of Punjab, AIR 1995 SC 2345 wherein in para 8, SC at p. 2347 (SCC p. 653),* it was pointed out that the disclosure statement inspires no confidence because none of the two punch witnesses Yash Pal and Sukhdev Singh have been examined at the trial and secondly, because the disclosure statement does not bear the signature or the thumb impression of the appellant and also the recovery memo does not bear the signature or thumb impression of the accused. Every case has to be decided on its own facts. The facts of that case do not fit in the facts of the case at hand. In the present case, as already noticed, PW 6 and PW 12 were examined to prove the disclosure as well as the recovery pursuant to the disclosure statement of the appellant. In the instant case, while it is true that neither the disclosure statement nor the recovery memo bear the signatures of the accused but the fact remains that pursuant to the disclosure statement MOs have been recovered from the well and dug out from a place which is pointed out by the appellant, leaves no manner of doubt that the recovery of MOs has been made on the basis of the voluntary disclosure statement. In *Jaskaran Singh case* the recovery memo Ext. P-9/A relates to revolver and cartridges. There the appellant had denied the ownership of the crime revolver and the prosecution had led no evidence to show that the crime weapon belonged to the appellant. The

observation of this Court was in that context. In the instant case, as already noticed, the recovery is pursuant to the disclosure statement offered by the appellant. The fact that the recovery is in consequence of the information given is fortified and confirmed by the discovery of wearing apparel and skeletal remains of the deceased which leads to believe that the information and the statement cannot be false.

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114. INDIAN PENAL CODE, 1860- Section 300
Exception 1 and Exception 4 of Section 300- Difference between the two provisions and their applicability- Expression "undue advantage", meaning of- Law explained.
Dhirajbhai Gorakhbhai Nayak Vs. State of Gujarat
Judgment dt. 25.07.2003 by the Supreme Court in Criminal Appeal No. 870 of 2002, reported in (2003) 9 SCC 322

Held :

The residuary plea is about applicability of Exception 4 to Section 300.

For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

The fourth exception of Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception I there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken

undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight, Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage"

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115. CRIMINAL PROCEDURE CODE, 1973- Section 319

Phrase "Any person not being the accused", as used in Section 319, Meaning and connotation of- It may include a person accused in some other case of same occurrence but with different version.

Jarnail Singh and another Vs. State of Haryana and another

Judgment dt. 9.04.2003 by the Supreme Court in SLP (Cri.) No. 2941 of 2002, reported in (2003) 9 SCC 328

Held :

The plain reading of Section 319 of the Code is that if a person is not before a court as an accused of the offence which from the evidence he appears to have committed, the court may summon such person to face the trial. Section 319 does not exclude from its purview a person who is not an accused before court in a case in which order for his summoning is passed despite the fact of such a person being an accused in another case though in respect of the same occurrence but with a different version. The words "any person not being the accused" in Section 319 would cover any person who is not already before the court in the case in which order under Section 319 is passed. It is the duty of the court to bring before it any person who appears to have committed an offence and to convict and pass an appropriate order of sentence on proof of such person having committed the offence.

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116. LIMITATION ACT, 1963- Section 12

Applicability of Section 12- No application required to seek benefit under Section 12- Mode of computing period of limitation with reference to Section 12- Law explained.

India House Vs. Kishan N. Lalwani

Judgment dt. 18.12.2002 by the Supreme Court in Civil Appeal No. 8548 of 2002, reported in (2003) 9 SCC 393

Held :

The period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed from for equitable considerations. At the same time full effect should also be given to those provisions which permit extension or relaxation in computing the period of limitation such as those contained in Section 12 of the Limitation Act. No application is required to be made seeking the benefit of Section 12 of the Limitation Act; it is the statutory obligation of the court to extend the benefit where available. Although the language of sub-section (2) of Section 12 is couched in a form mandating the time requisite for obtaining the copy being excluded from computing the period of limitation, the easier way of expressing the rule and applying it in practice is to find out the period of limitation prescribed and then add to it the time requisite for obtaining the copy—the date of application for copy, and the date of delivery, thereof both included—and treat the result of addition as the period of limitation. The underlying principle is that such copy may or may not be required to accompany the petition in the jurisdiction sought to be invoked yet to make up one's mind for pursuing the next remedy, for obtaining legal opinion and for appropriately drafting the petition by finding out the grounds therefor the litigant must be armed with such copy. Without the authentic copy being available the remedy in the higher forum or subsequent jurisdiction may be rendered a farce. All that sub-section (2) of Section 12 of the Limitation Act says is the time requisite for obtaining the copy being excluded from computing the period of limitation, or, in other words, as we have put it hereinabove, the time requisite for obtaining the copy being added to the prescribed period of limitation and treating the result of addition as the period prescribed. In adopting this methodology it does not make any difference whether the application for certified copy was made within the prescribed period of limitation or beyond it. Neither is it so provided in sub-section (2) of Section 12 of the Limitation Act nor in principle we find any reason or logic for taking such a view.

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117. CRIMINAL PROCEDURE CODE, 1973- Section 210
Cross-cases, procedure to be followed- Cross-cases should be heard and decided by the same Court- Law explained.
State of M.P. Vs. Mishrilal (Dead) and others
Judgment dt. 2.04.2003 by the Supreme Court in Criminal Appeal No. 489 of 1996, reported in (2003) 9 SCC 426

Held :

This Court in *Nathi Lal v. State of U.P., 1990 Supp. SCC 145* pointed out the procedure to be followed by the trial court in the event of cross-cases. It was observed thus: (SCC pp. 145-46, para 2)

> "2. We think that the fair procedure to adopt in a matter like the present where there are cross-cases, is to direct that the same learned Judge must try both the cross-cases one after the other. After the re-

cording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross-case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross-case cannot be looked into. Nor can the Judge be influenced by whatever is argued in the cross-case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross-case. But both the judgments must be pronounced by the same learned Judge one after the other".

In the instant case, it is undisputed, that the investigating officer submitted the challan on the basis of the complaint lodged by the accused Mishrilal in respect of the same incident. It would have been just, fair and proper to decide both the cases together by the same court in view of the guidelines devised by this Court in *Nathi Lal case.* The cross-cases should be tried together by the same court irrespective of the nature of the offence involved. The rational behind this is to avoid the conflicting judgments over the same incident because if cross-cases are allowed to be tried by two courts separately there is likelihood of conflicting judgments.

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118. CRIMINAL TRIAL :

Stomach contents, evidence as to-Value of, regarding determination of death of time- Law explained.

Moti and others Vs. State of U.P.

Judgment dt. 7.03.2003 by the Supreme Court in Criminal Appeal No. 388 of 2000, reported in (2003) 9 SCC 444

Held :

It is rather surprising that the High Court should find this part of the medical evidence as being of no consequence at all. The High Court referring to this part of the medical evidence has observed: "In our opinion the stomach contents are not very material to determine the time of incident." We are of the considered opinion that this view of the High Court is wholly erroneous. It may be possible to contend that contents of the stomach may not always be an indicator of the time of death. But in a case where stomach is empty and the prosecution evidence is that the murder had taken place shortly after the deceased had his last meal, to say that the contents of the stomach have no material bearing on the determination of the time, in our opinion, is not acceptable. In the instant case, time of death being a material factor to verify the presence of the eyewitnesses, it was obligatory for the prosecution to have clarified the discrepancy between the medical evidence and the oral evidence. The prosecution having failed to do so, in our

opinion, there is a serious doubt as to the time of incident and the presence of the eyewitnesses at the time of incident and their narration of the incident also becomes doubtful.

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119. PRACTICE & PROCEDURE :

Court proceedings-What transpired at the hearing recorded in the judgment of Court- Such judgment conclusive of the facts so stated- Party challenging such facts should challenge it before the same Judge.
Shankar K. Mandal and others Vs. State of Bihar and others
Judgment dt. 17.04.2003 by the Supreme Court in Civil Appeal No. 916 of 1999, reported in (2003) 9 SCC 519

Held :

In a recent decision *Bhavnagar University v. Palitana Sugar Mill (P) Ltd., (2003) 2 SCC 111* the view in the said case was reiterated by observing that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record. That is the only way to have the record corrected. If no such step is taken the matter must necessarily end there. It is not open to the appellant to contend before this Court to the contrary.

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120. SERVICE LAW :

Expression "Service Record", meaning of- Law explained.
Syed T.A. Naqshbandi and others Vs. State of Jammu & Kashmir and others
Judgment dt. 9.05.2003 by the Supreme Court in Writ Petition (C) No. 354 of 2002, reported in (2003) 9 SCC 592

Held :

The expression "service record" is so comprehensive and has a well-accepted meaning in service-law parlance, to leave nothing for being guessed or to admit of any doubts about the records that would have been actually considered. The grievance made about the provisions in the guidelines for taking into account even records for some years spread over the service as Subordinate Judge in a given case pales into insignificance when it is considered in the light of the object of such consideration. The consideration in question was not for the purpose of determining the *inter se* seniority among the members of the service in the cadre of District and Sessions Judges, but, on the other hand, for the purpose of adjudging the efficiency, aptitude, capability and general reputation and integrity for according selection grade. This Court, adverting to the relevant provisions contained in the Constitution of India in the decision reported in *Kumar Padma Prasad v. Union of India, (1992) 2 SCC 428* even observed that "judicial

office" would take within its fold even members of the judiciary other than those belonging to the higher judiciary in the State service and that though normally the High Court Judges are appointed from members of the Bar and from among the persons who have held judicial posts, there is no impediment in construing the expression "judicial service" as inclusive of a wide variety of offices connected with the administration of justice in one way or the other. Therefore, while looking into the performance of a District and Sessions Judge considering to some extent, when necessitated, even performance in the post of Subordinate Judge cannot be said to be altogether an irrelevant or impermissible consideration or exercise and the guidelines cannot be said to be vitiated on that account alone.

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121. MOTOR VEHICLES ACT, 1988- Section 149

Persons travelling in a goods carriage, liability of insurer regarding third party risk- Insurance Company not liable for such passengers- Law explained.

National Insurance Co. Ltd. Vs. Ajit Kumar and others

Judgment dt. 2.09.2003 by the Supreme Court in Civil Appeal No. 6915 of 2003, reported in (2003) 9 SCC 668=2004 (1) ANJ (SC) 33

Held :

Third-party risks in the background of vehicles which are the subject-matter of insurance are dealt with in Chapter VIII of the old Act and Chapter XI of the Act. Proviso to Section 147 needs to be juxtaposed with Section 95 of the old Act. Proviso to Section 147 of the Act reads as follows:

"Provided that a policy shall not be required-

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, any such employee—

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as a conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability".

It is of significance that the proviso appended to Section 95 of the old Act contained clause (ii) which does not find place in the new Act. The same reads as follows:

"(ii) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a

contract of employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises".

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 in "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 the 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 therefor.

Our view gets support from a decision of a three-Judge Bench in *New India Assurance Co. Ltd. v. Asha Rani, (2003) 2 SCC 223* and *Oriental Insurance Co. Ltd. v. Devireddy Konda Reddy, (2003) 2 SCC 339.*

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122. LIMITATION ACT, 1963- Article 62

Suit by Bank for recovery of borrowed money- Defendant executing continued guarantee and mortgage of immovable property by way of an equitable mortgage-Suit on the basis of such documents can be instituted within 12 years.

Biharilal Soni Vs. Bank of India and others

Reported in 2004 (1) MPLJ 247

Held :

From the oral and documentary evidence, it has been amply proved that the borrowers have taken the loan and the appellant had executed the deed of guarantee about the said loan which is continuing in nature. The appellant for the security had mortgaged his immovable property by way of equitable mortgage. Thus we find no error in the impugned judgment and decree.

The learned counsel for the appellant submitted that the suit was barred by limitation, and, therefore, the trial Court should have dismissed the suit against

the appellant. This point was not raised by the appellant in the trial Court. However, we find that this argument has got no force. The appellant had executed documents in the nature of continuing guarantee and has mortgaged the immovable property by way of equitable mortgage and, therefore, as the suit was filed on the basis of such document the same can be instituted within 12 years. Thus, the suit filed by the respondent was within limitation.

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123. CONTRACT ACT, 1872- Section 182

Term "agent", meaning and connotation of- Agency need not necessarily be established by a written document, may be inferred from circumstances.

Sardar Gurucharan Singh Vs. Mahendra Singh and others

Reported in 2004 (1) MPLJ 252

Held :

Section 182 of the Contract Act provides : An 'agent' is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such Act is done, or who is so represented, is called the 'principal'. Agency need not necessarily be established by a written document. It may be inferred from circumstances. It may also be inferred by the conduct of the parties and the course of dealings.

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124. WILDLIFE (PROTECTION) ACT, 1972- Sections 27 and 39 (1) (d)

Confiscation of property allegedly used in commission of offence- Unless competent Court records finding of commission of the offence, property cannot be confiscated.

Raghuveer Vs. Superintendent & Project Officer, National Chambal Sanctuary, Morena and others

Reported in 2004 (1) MPLJ 258= 2004 (1) MPHT 325

Held :

A bare reading of section 39 and in particular the provisions of sub-section (1) (d) indicates that every vehicle that has been used for committing an offence and has been seized under the provisions of the Act, shall become property of the State Government. That being so, it is only when a finding is recorded that the vehicle is used for committing an offence, that the same becomes property of the Government. So long as a competent court of law does not find that the vehicle has been used for the purpose of commission of the offence, the vehicle does not become property of the State Government. This view is taken by Orissa, High Court in the case of *Baikuntha Bihari Mohapatra vs. State of Orissa, 2001 Cri.L.J. 4151.* Where the judgment of the Full Bench in the case of *Madhukar Rao (supra)* is also considered. That apart, the Full Bench in the case of *Madhukar Rao (supra)* also by considering various provisions of the Wild Life (Protection) Act, in para 17 has interpreted the provisions of section 39 (1) (d) and it is observed as under in the aforesaid para :

"If the interpretation, as has been sought to be put on behalf of the State on Clause (d) of sub-section (1) of Section 39, is accepted, every property mentioned therein including a vehicle seized merely on accusation or suspicion would become property of the State and that would be the result even though in the trial ultimately the Magistrate finds that no offence has been committed and acquits the accused. *In our considered opinion the property seized under section 50 of the Act from an alleged offender cannot become property of the State under Clause (d) of section 39 (1) unless there is a trial and a finding reached by the competent Court that the property was used for committing an offence under the Act.* If the seizure of a property was enough to declare it as the property of the Government, there was no necessity to provide under sub-section (2) of section 51 that on proof of commission of the offence, the properties including vehicle, vessel, or weapon used in the commission of the offence would be forfeited to the State Government, we do not find any dichotomy conflict in the provisions under section 39 (1) (d) and section 51 (2) of the Act (Emphasis supplied)

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125. ACCOMMODATION CONTROL ACT, 1961 (M.P.) Section (12) (1) (f) Word "business" as used in Section 12 (1) (f), meaning of- Includes all the activities carried out for earning livelihood or profit.
Moorti Bhagwan Shri Laxmi Narayanji and Baba Shri Chandji Maharaj through President and Vice President Vs. Mool Chand Nandwani Reported in 2004 (1) MPLJ 363= 2004 (1) MPHT 276

Held :

Normally, the word 'business' is used in different shades at different places. As regards the meaning of word 'business' occurring in section 12 (1) (f) of the Act is concerned, this Court has interpreted the said word keeping in view the object of the Act. In the case of *Tarachand Gupta vs. Smt. Annapurna bai, 1968 MPLJ 751* the question involved was that whether a landlord is entitled to get decree under section 12 (1) (f) of the Act for starting the profession of a lawyer and this Court has held that the activity carried out for earning livelihood is included in the term of business occurring in section 12 (1) (f) of the Act and decreed the suit. This Court has further held that the meaning of word 'business' is not restricted only to the commercial activities. Thus, this judgment lays down that the word 'business' cannot be narrowly interpreted to include only commercial activities.

The next case is that of *Badrilal vs. Digambar Jain Panchayat, Sonkutch, 1973 MPLJ 690.* In this case Panchayat wanted to start a school in its building. Counsel for the appellant urged that the school run by the Panchayat is always for charitable purpose and not for earning livelihood. He submitted that in this case a decree of ejectment was passed in favour of Panchayat for starting a

school. Thus, according to him this Court has interpreted the word 'business' in the aforesaid case to include the activities for charitable purpose.

After going through the said judgment we find that there is nothing in the judgment to indicate that the school run by the Panchayat was for charitable purpose. The schools may also be run for earning monetary gains. Hence from the reading of the said judgment it cannot be said that this Court has laid down that the charitable purpose is included in the word 'business'. This case does not support the contention of the learned counsel for the appellant. The aforesaid case was considered by the Supreme Court in the case of *S. Mohanlal vs. R. Kondiah, AIR 1979 SC 1132.* While considering *Badrilal case (supra)* the Apex Court has stated that if the word 'business' is interpreted in broader sense then it is taken to be everything that occupies the time, attention and labour of a man for the purpose of livelihood or profit. In narrow sense it is confined to commercial activities. Apex Court further held that the meaning of word must be gleaned from the context in which it is used. Thus, from reading of the said judgment it appears that the Apex Court has laid down that if the word 'business' if widely interpreted then it will include any activity which is carried out for earning livelihood or profit.

In the case of *Taramal vs. Laxman Sewak Surey and others, 1971 MPLJ 888* this Court has held that the word 'business' must be interpreted narrowly and has come to the conclusion that there is fundamental difference between profession, trade or business. The Court came to the conclusion that the profession of a lawyer will not be covered by the term 'business'. As per the said judgment the strict meaning of the word 'business' has to be given.

After going through these judgments we find that though the object of section 12 (1) (f) is to project the tenant from eviction from non-residential accommodation and the said section is more protective to tenant still it confers a right on a landlord to evict a tenant if he requires the accommodation for his business purpose in such circumstances. The word 'business' cannot be interpreted only to include commercial transactions. On the other hand it will include all the activities carried on for earning livelihood or profit.

Thus, the view taken in the case of Taramal (supra) stating that the word 'business' will include commercial activity is not a correct law and the view taken in the case of Tarachand Gupta (supra) seems to be correct. Word 'business' has to be interpreted to include any activity carried out for earning livelihood or profit but it will not include any other non-residential activity.

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126. MOTOR VEHICLES ACT, 1988- Section 140

Grant of compensation under Section 140- Plea of breach of conditions of policy not to be entertained- No provision requiring the recipient to refund any part of the amount so received- Insurer if exonerated, Tribunal can direct the insurer to collect the amount from owner of the vehicle- Repealing and Amending Act, 2001 has not the effect of

reducing compensation from Rs. 50000/- to Rs. 25000/-
Geeta Devi Mishra and others Vs. Anil Kumar and others
Reported in 2004 (1) MPLJ 373= 2004 (1) MPHT 82

Held :

At the stage of decision of the application under section 140 of the Act the plea of breach of the conditions of insurance policy could not be entertained by the Tribunal. This legal position has been settled by the Division Bench of this Court in *National Insurance Company vs. Thaglu Singh, 1994 MPLJ 663.* It has been held the statutory scheme envisages that if there is a motor accident and death or permanent disablement results from such an accident, owner of the vehicle or vehicles involved shall be liable to pay the prescribed compensation without proof of negligence and irrespective of any contributory negligence of the deceased or injured and the amount so paid has to be adjusted out of the compensation found due under the final award. There is no provision requiring the recipient of compensation of no fault liability to refund any part of the amount received at any stage. The legislative intent is to ensure that some succour reaches the victim or the dependants without going into the question which may arise for consideration while passing the final award. If the vehicle is insured, naturally the liability would fall on the insurer; permitting the insurer at that stage to raise any defence other than that there is no insurance policy in force at the relevant time or to raise statutory defences contemplated in the succeeding Chapter would be to frustrate the legislative object in introducing the concept of no-fault liability. The insurer is duly protected inasmuch as if ultimately in the final award the insurer is exonerated, the Tribunal can issue appropriate direction enabling the insurer to collect the same from the owner of the vehicle. This could be the only legitimate conclusion to be drawn from the peremptory language of section 92A of the 1939 Act or section 140 of the 1988 Act.

The same view has been taken by the Full Bench of this Court in *Oriental Insurance Co. Ltd. vs. Annamma, 1995 MPLJ 699.* These decisions have been subsequently followed in a number of cases. One of them is the recent case of *Dinesh Kumar vs. Babulal, 2003 (2) MPLJ 153* in which it has been held that the question of conditions of the policy is "foreign to the scope of enquiry in a claim under section 140 of the Act". It has been further held that no fault liability is a statutory liability and defence under section 149 (2) of the Act is not available to the Insurance Company at the stage of interim compensation provided that the vehicle is insured with the Insurance Company.

The Tribunal has again under a wrong notion held that the Repealing and Amending Act, 2001 has deleted that provision in section 140 of the Act which enhanced the compensation from Rs. 25,000/- to Rs. 50,000/-. The Motor Vehicles (Amendment) Act. 1994 incorporated the amendment in section 140 of the original Act and thereafter the amending Act lost its utility and, therefore, it was repealed by Repealing and Amending Act, 2001. The amendment incorporated in section 140 of the Act has become a part of the original Act or parent Act and,

therefore, the Repealing and Amending Act, 2001 does not obliterate the amendment which has become a part of that Act. The Repealing and Amending Act, 2001 has only reduced the bulk of the statute book. This has been described as "legislative spring-cleaning". Section 4 of the Repealing and Amending Act, 2001 clearly saves the enactment in which the repealed enactment has been incorporated. The amended section 140 continues to retain its amended efficacy. This legal position has been made crystal clear by Chhattisgarh High Court in *Smt. Mukta Bai and others vs. Satyanarayan Gupta and others, 2003 (3) MPHT 28* and also by this Court in *Smt. Phoolmati Bai and others vs. Mohd. Azad and others, 2003 (3) MPHT 352.*

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127. ADVERSE POSSESSION

Permissive possession cannot be tagged with period of hostile possession- Law explained.

Kaloo and another Vs. Madanlal and others

Reported in 2004 (1) MPLJ 385

Held :

The learned counsel for both the sides have been heard. As stated above in the earlier suit the plea of the plaintiff of acquisition of title by adverse possession did not prevail for two reasons. Firstly, the possession of the plaintiff was held to be not "adverse" and secondly it was for 11 years only. The finding that the possession of the plaintiff was not "adverse" would operate as res-judicata. The possession of the plaintiff was not in denial of the title of defendant Madanlal. There was no hostile animus. In the fresh plaint filed in the year 1978 by the plaintiffs it is not shown when their possession became adverse. Once it was held that the possession of the plaintiffs' father was permissive and not adverse the same position would be presumed to continue. In case the possession of the plaintiff in the earlier suit had been held to be adverse then the possession for the period after the dismissal of the earlier suit could be tagged to the period of earlier possession. But the possession for ten years after the dismissal of the earlier suit cannot be tagged to the possession for 11 years before that suit as the earlier possession was held to be not 'adverse'. Permissive possession before the dismissal of the earlier suit cannot be clubbed with the possession of the plaintiff for 10 years after the dismissal of that suit even if the latter possession is held to be adverse. Thus, again it falls short of the statutory period of 12 years.

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128. SERVICE LAW :

Condonation of break in service - R.19 (v) of M.P. Civil Services Pension Rules, 1976 enables State Government to condone the break in service subject to prescribed period limit.

P.C. Basu Vs. State of M.P. and others

Reported in 2004 (1) MPLJ 435

Held :

Rule 19 (v) of the Rules clearly enables State Government to condone the break in service exceeding one year but not exceeding three years with rider that the period of break in service shall not be counted for pension. Therefore, the Tribunal has committed illegality in rejecting the claim of this period by holding that Rule 19(v) does not enable the Government servant to apply for condensation. Perusal of Rule 19(v) clearly shows that the State Government employee can apply for condonation of break in service and the State Government can also condone period if the same is more than one year but less than three years

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129. EVIDENCE ACT, 1872- Section 32

Dying-Declaration, evidential value of- Dying-Declaration not to be disbelieved on the grounds that it is not recorded in question answer form or that Doctor's certificate of mental fitness of the deceased not available- Evidential value of Dying Declaration depends on the facts and circumstances of each case- Law explained.

Idla Vs. State of M.P.

Reported in 2004 (1) MPLJ 438

Held :

The Dying-Declaration has been disbelieved by the trial Court mainly on the ground that it was not recorded in question and answer form as well as the doctor has not given the certificate of mental fitness of the deceased before commencement of recording of Dying-Declaration and after its completion. He has also not obtained the signature of any of the witnesses. The learned trial Court has wrongly held that the Dying-Declaration was recorded in an irresponsible and negligent manner.

Having heard learned counsel for the parties and after giving our anxious consideration to the facts and circumstances of the present case, as well as the law laid down the Supreme Court about appreciation of Dying Declaration, we are of the view that the learned trial Court has wrongly disbelieved the Dying-Declaration (Ex.P/4) recorded by Dr. Ramchandra Panika (PW-1). In the judgment of *Laxman (supra)*, the Constitutional Bench has held that : "mere absence of doctor's certification as to the fitness of the declarant's state of mind would not ipso facto render the Dying- Declaration unacceptable." The evidentiary value of such a declaration would depend upon the facts and circumstances of a particular case. The Apex Court has also held that "There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case."

In the judgment of *Rambai (supra)*, again the Supreme Court has reiterated the law that "Absence of doctor's certificate about mental fitness of deceased to

make the statement- Dying Declaration cannot be rejected solely on that ground if the person recording the statement is satisfied that declarant was in a fit mental condition to make the dying declaration the same can be relied upon".

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130. CRIMINAL PROCEDURE CODE, 1973- Section 174
Inquest under Section 174, ambit and scope of-The object is merely to ascertain the cause of death.
Hirdesh Kumar Patel and others Vs. State of M.P.
Reported in 2004 (1) MPLJ 442

Held :

The earlier statements were recorded by the policy under section 174 of the Criminal Procedure Code (hereafter referred to as 'Code' for short), this provision empowers a police officer to enquire on receipt of an 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 suspicion that some other person has committed an offence. The enquiry under section 174 of the Code has a very limited scope, the object is merely to ascertain whether a person has died in suspicious circumstances or an unnatural death and if so what is the apparent cause of death. The question regarding 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 enquiry under section 174 of the Code.

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131. ARBITRATION ACT, 1940- Section 30
Award, interference in- Interference can be only in the event the arbitrator has misconducted or there is an error apparent on the face of the award.
Continental Construction Ltd. Vs. State of U.P.
Reported in 2004 (1) MPLJ 450

Held :

It is trite that the court while exercising its jurisdiction under Section 30 of the Arbitration Act, 1940 can interfere with the award only in the event the arbitrator has misconducted himself or the proceeding or there exists an error apparent on the face of the award.

The question again came up for consideration before a three-Judge Bench of this Court recently in *State of U.P. vs. Allied Constructions, (2003) 7 SCC 396.* This Court held :

> "4. Any award made by an arbitrator can be set aside only if one or the other term specified in Sections 30 and 33 of the Arbitration Act, 1940 is attracted. It is not a case where it can be said that the arbitrator has misconducted the proceedings. It was within his jurisdiction to interpret clause 47 of the agreement having regard to the fact-situation

obtaining therein. (sic) It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for arbitrator to determine *(see Sudarsan Trading Co. vs. Govt. of Kerala, (1989) 2 SCC 38 : AIR 1989 SC 890).* Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a judge chosen by the parties and his decision is final. The court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. As error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from interfering".

●

132. CIVIL PROCEDURE CODE, 1908- Section 52
Suit for recovery of debt against legal representative of debtor- Plea by L.R. that deceased has not left any movable or immovable property- Such plea can be taken in the suit itself.
Oriental Bank of Commerce, Gwalior Vs. Rajrani
Reported in 2004 (1) MPLJ 470= 2004 (1) MPHT 462

Held :

Therefore, the only question that arises for determination is whether the plea that the defendant was not in possession of the assets of the deceased was available to the defendant in the suit or not? On a similar question in the case of Sheonarayan Harilal vs. Kanhaiyalal Devidin reported in *1948 NLJ 72= AIR 1948 Nagpur 168* following observations were made by Justice Bose, J. as he then was:

> "..... a difference of opinion emerges. Some Judges hold that in such a case the plaintiff is entitled to a decree the moment he proves that the defendant is an heir and that the correct stage at which to ascertain whether there are assets is in execution. Others hold that the existence of assets must be disclosed in the trial itself. I need not decide this matter in revision. All that is necessary to state in this case is that there is a difference of opinion on this point which has not been settled in this Province." But then it was further observed by him:
>
> "..... I think the plaintiff ought to have been told that he would be required to establish this in the suit and that it would not be enough to

leave the matter to the execution stage. I think this was all the more necessary in a case where the defendant did not appear."

In the present case a plea was taken by the respondent that she was not liable to pay the said debt because the deceased had left no assets to her. The appellant Bank had full knowledge of this plea and even evidence was adduced in the trial Court to that extent. The respondent had categorically averred that her son Shyam Behal has not left any movable or immovable property which remained uncontroverted. In such a circumstance agreeing by the opinion expressed by Hon'ble Bose, J. in the above referred case of *Sheonarayan Harlal* this Court is of the considered opinion that it would not be proper to grant any decree in favour of the appellant-Bank leaving the respondent to reagitate the matter in execution proceedings.

In the case of *Tamiz Bano vs. Nand Kishore reported in AIR 1927 Allahabad 459* Justice Ashworth after discussing the English Law on this very question observed:

> "Is this plea to be denied to a legal representative in India merely on the ground that while section 52 of the Civil Procedure Code specifically permits it to a legal representative in execution proceedings there is no section of any Indian Act which either specifically or by implication, provides for the plea being taken in the course of the suit on the debt ? To hold this would be straining beyond all measure maxim of "unius inclusio alterious exclusio est." The fact that the plea of "plene administrative" can be taken in execution proceedings when events justifying such a plea may have occurred subsequent to the decree is no reason why it cannot be taken in the suit as a reason for no decree being passed...."
>
> Indeed it would appear that a person sued for a debt as legal representative can resist the suit either on the plea that as the deceased left no assets, he can have no legal representative (since the expression has reference to some estate and does not mean merely a relation who would have been the heir if any property had been left) or again on the plea that he has duly applied all the assets available or proved to be available.

Agreeing with the above referred opinions for the reasons mentioned therein, it is held that the respondent was well within her rights to raise the plea that she has not inherited any property from her son, by way of defence in a suit for recovery of a debt of her deceased-son. The plea that the respondent was not in possession of any property left by the deceased was available to the respondent in the suit itself.

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133. CRIMINAL PROCEDURE CODE, 1973- Section 438
Anticipatory bail, grant of- Application can be considered even after Court of first instance has taken cognizance- Law explained-

Salauddin's case (1996) 1 SCC 667 distinguished.
Bharat Chaudhary and another Vs. State of Bihar and another
Reported in 2004 (1) MPLJ 490 (SC)

Held :

Learned counsel appearing for the respondent State, however, raised a legal objection. His contention was that since the court of first instance has taken cognizance of the offence in question, section 438 of Criminal Procedure Code cannot be used for granting anticipatory bail even by this Court and the only remedy available to the appellants is to approach the trial Court and surrender, thereafter apply for regular bail under section 439 of Criminal Procedure Code. In support of this contention the learned counsel relied on the judgment of this Court in the case of *Salauddin Abdulsamad Shaikh vs. State of Maharashtra, (1996) 1 SCC 667.*

If the arguments of the learned counsel for the respondent State are to be accepted then in each and every case, where a complaint is made of a non-bailable offence and cognizance is taken by the competent court then every court under the Code including this Court would be denuded of its power to grant anticipatory bail under section 438 of Criminal Procedure Code.

We do not think that was the intention of the legislature when it incorporated section 438 in Criminal Procedure Code which reads thus:

> "438. (1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail."

From the perusal of this part of section 438 of Criminal Procedure Code, we find no restriction in regard to exercise of this power in a suitable case either by the Court of Session, High Court or this Court even when cognizance is taken or a charge-sheet is filed. The object of section 438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The fact, that a court has either taken cognizance of the complaint or the investigating agency has filed a charge-sheet, would not by itself, in our opinion, prevent the courts concerned from granting anticipatory bail in appropriate cases. The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail so also the need for custodial interrogation, but these are only factors that must be borne in mind by the courts concerned while entertaining a petition for grant of anticipatory bail and the fact of taking cognizance or filing of a charge-sheet cannot by itself be construed as a prohibition against the grant of anticipatory bail. In our opinion, the courts i.e. the Court of Session, High Court or this Court has the necessary power vested in them to grant anticipatory bail in non-bailable offences under section 438 of Criminal Procedure Code even when cognizance is taken or a charge-sheet is filed provided the facts of the case require the court to do so.

The learned counsel, as stated above, has relied on the judgment of this Court referred to hereinabove. In that case i.e. namely *Salauddin Abdulsamad Shaikh (supra)* a three-Judge Bench of this Court stated thus:

> When the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration, the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted.
>
> Ordinarily the court granting anticipatory bail should not substitute itself for the original court, which is expected to deal with the offence. It is that court which has then to consider whether, having regard to the material placed before it, the accused person is entitled to bail.

From a careful reading of the said judgment we do not find any restriction or absolute bar on the court concerned granting anticipatory bail even in cases where either cognizance has been taken or a charge-sheet has been filed. This judgment only lays down a guideline that while considering the prima facie case against an accused the factum of cognizance having been taken and the laying of a charge-sheet would be of some assistance for coming to the conclusion whether the claimant for anticipatory bail is entitled to such bail or not. This is clear from the following observations of the Court in the above case:

> "It is, therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted."

From the above observations, we are unable to read any restriction on the power of the courts empowered to grant anticipatory bail under section 438 of Criminal Procedure Code.

We respectfully agree with the observations of this Court in the said case that the duration of anticipatory bail should be normally limited till the trial Court has the necessary material before it to pass such orders and it thinks fit on the material available before it. That is only a restriction in regard to blanket anticipatory bail for an unspecified period. This judgment in our opinion does not support the extreme argument addressed on behalf of the learned counsel for the respondent State that the courts specified in section 438 of Criminal Procedure Code are denuded of their power under the said section where either the cognizance is taken by the court concerned or a charge-sheet is filed before the ap-

propriate court. As stated above, this would only amount to defeat the very object for which section 438 was introduced in Criminal Procedure Code in the year 1973.

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134. SPECIFIC RELIEF ACT, 1963- Section 16 (c)
Specific performance of contract- Readiness and willingness, proof of- Law explained.
Godavari Bai Vs. Pandit and others
Reported in 2004 (1) MPLJ 502

Held :

From the case law cited by the counsel we find that it is well settled that the readiness and willingness to perform the contract have to be pleaded and proved and the conduct of the parties and attending circumstances have to be seen to infer readiness and willingness. In the present case we find that the plaintiffs have pleaded about their readiness and willingness to perform the contract. It is also proved by the plaintiffs that they served notices on 12-4-1988 and 30.4.1988 Ex. P-8 and Ex. P-9 and remained present with cash on 30.4.1988 in the office of Sub registrar, the presence is found to be proved by their objection dated 30.4.1988 Ex. P-16 filed in the said office. Thus, their conduct of remaining present with money for the execution of the sale deed in the office of Sub-Registrar proves their readiness and willingness to perform their part of contract. In *Sukhbir Singh vs. Brijpal Singh* (supra), the Supreme Court while dealing with somewhat identical situation has held as under :-

> "3. Shri Manoj Swarup, learned counsel for the petitioners contended that the suit is not in conformity with Forms 47 and 48 of the Appendix AA of the Code of Civil Procedure [Code] as amended by the High Court of Allahabad. The respondents have not pleaded, as enjoined in section 16 (1) (c) of the Specific Relief Act, 1963 (for short, the "Act") that the respondents had ready money for getting the sale deed executed. The decrees of the Appellate Court as well as of the High Court are, therefore, bad in law. We find no force in the contentions.
>
> 4. In paragraphs 5, 9 and 10 of the plaint the respondents have in substance pleaded that they had been and were still willing to perform their part of the agreement and the defendants did have notice in that behalf. It is seen that averments made in the above paragraphs are in substance as per Forms 47 and 48 prescribed in Appendix AA of the Code as amended by the High Court. What requires to be considered is whether the essential facts constituting the ingredients in section 16 (1) (c) of the Act were pleaded and that found mentioned in the said Forms do in substance point to those facts. The procedure is the handmaid to the substantive rights of the parties. It would, therefore, be clear from a perusal of the pleadings and the forms that the averments are consistent with the Forms. When the respondents had pleaded

and proved by the Sub-Registrar's endorsement as per paper No. 41/C that the respondents were present in the office of the Sub-Registrar for having the sale deed executed and registered by the petitioners, it would be explicit that the respondents were ready and willing to perform their part of the agreement. The facts that the petitioners did not attend the office would prove positively that the petitioners had avoided execution of the sale deed."

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135. INDIAN PENAL CODE, 1860- Section 149

Death due to injuries inflicted by five persons- No evidence that which particular person inflicted fatal injuries-The killing was in prosecution of the common object of the unlawful assembly- Section 149 attracted.
Jugru Vs. State of M.P.
Reported in 2004 (1) MPLJ 530

Held :

The learned counsel for the appellants submitted that in this case the author of the fatal injuries is not known and it is not possible to say who inflicted the fatal injuries, hence none of the appellants can be convicted for the murder. This contention also cannot be accepted. It is a case of joint attack with dangerous weapons by five persons on one man and the later died almost instantaneously on the spot as a result of the injuries inflicted on him, therefore, the mere fact that it is not possible to say who inflicted the fatal injuries would not be sufficient to support the contention that the offence of murder has not been committed. The killing was in the prosecution of the common object of the unlawful assembly, therefore, the members of the assembly cannot escape the liability under section 302, Indian Penal Code with the aid of section 149 thereof.

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136. CRIMINAL PROCEDURE CODE, 1973- Section 228

Framing of charge, principles of- Court cannot act as mouthpiece of the prosecution- But, roving inquiry not desirable at that stage.
Birendra Bahadur Singh and others Vs. State of M.P.
Reported in 2004 (1) MPLJ 565

Held :

Learned counsel for the petitioners, in support of his contention, has relied on *Century Spinning and Manufacturing Co. Ltd. vs. The State of Maharashtra, AIR 1972 SC 545 and State of Karnataka vs. L. Maniswamy and others, AIR 1977 SC 1489.* It is not necessary to deal with these cases for the simple reason that it is well settled that at the stage of framing of charge a Court is required to prima facie consider whether there are sufficient ground for proceeding against the accused. The Judge, while considering the question of framing of the charge, has power to shift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The

test regarding determination of prima faice case would depend upon the facts of each case. While exercising the jurisdiction at the stage of framing of the charge, a Judge cannot merely act as a mouth piece of the prosecution but has to consider the total effect of the evidence and the document produced before the Court. It is true that a Judge is not expected at the stage to make a roving enquiry in the pros and cons of the matter and weigh the evidence as if he was conducting a trial. The Court is required to evaluate the material and the documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence.

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137. INDIAN PENAL CODE, 1973- Section 376

Rape, commission of- Prosecutrix an illiterate tribal girl of weak mind, thus mentally deficient and incapable of giving consent-Failure to resist sexual intercourse would not amount to free consent.

Darbari Singh Vs. State of M.P.

Reported in 2004 (1) MPLJ 580

Held :

Next question for consideration is whether the act of the accused tantamounts the commission of the offence of rape within the purview of section 376, Indian Penal Code. Prosecutrix is of weak mind. She is illiterate and a tribal girl. Her IQ is extremely poor and she was unable to understand even the questions which were put by the Court. Thus, it is clear that prosecutrix was mentally deficient and in this context whether she gave her consent to the accused or was capable of giving consent to the accused and understood the consequence of the same: simply failure to resist sexual intercouce would not amount to free consent. Submission of her body under the influence of fear or terror is no consent. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to. Consent after the first act of rape does not absolve the accused, as it might purely be the result of sexual urge and would not affect the first act of coitus which has already taken place against her will, as held the reference in *re Anthony alias Bakthavatsalu vs. State of Madras, AIR 1960 Madras 308.* It is clear that accused has taken the advantage of situation in the instant case and continued to perform the sexual intercourse with dumb girl who is illiterate and of weak mind. The consent even if any given by the prosecutrix considering her total body and mind cannot be said to be a free consent.

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138. N.D.P.S. ACT, 1985- Section 55

Intermeddling of samples by police subsequent to seizure-Such Intermeddling should be in the presence of the accused.

Anand Bairagi Vs. State of M.P.

Reported in 2004 (1) JLJ 121= 2004 (1) MPHT 351

Held :

The Supreme Court, in many of its pronouncements, has cautioned Courts that the NDPS Act has stringent punishment and the proof of guilt must be clear

and cogent. Section 55 of the Act prescribes the method by which seized articles should be kept in safe custody. Section 55 of the Act reads as follows:

> *"55. Police to take charge of articles seized and delivered-* An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station".

It is not necessary to give a finding whether section 55 of the Act is mandatory or directory. Even assuming it to be directory, the minimum that is required would be that when samples are intermeddled by the Investigating Officer, for whatever reasons, the presence of the accused is necessary. This is particularly so when the original samples were sealed in accordance with section 55 of the Act in the presence of the accused. In this case, admittedly the samples were intermeddled with both on 16.3.2001 as well as on 22.3.2001 as admitted by the IO (PW13), without following any procedure and in the absence of the accused. This, I feel, is a minimum requirement to give sanctity to the meaning of section 55 of the Act. The evidence of PW 13 IO clearly indicates that the original samples were re-adjusted and the seals were broken without authority of law, twice. For all these reasons, the benefit of doubt must go to the accused.

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139. CIVIL PROCEDURE CODE, 1908- O.32 R. 15

Applicant praying for holding inquiry as to her alleged mental infirmity- Held, inquiry should be conducted to determine whether applicant was incapable in protecting her interest by reason of mental infirmity.

Kasturibai and others Vs. Anguri Chaudhary
Reported in 2004 (1) JLJ 153 (SC)

Held :

Order 32 Rule 15, CPC reads thus:

> "15. *Rules 1 to 14 (except Rule 2-A) to apply to persons of unsound mind-* Rules 1 to 14 (except Rule 2-A) shall, so far as may be, apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who, though not so adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being sued."

On a bare perusal of the said provision, it is evident that the Court is empowered to appoint a guardian in the event a person is adjudged to be of un-

sound mind. It further provides that even if a person is not so adjudged but is found by the Court on inquiry to be inapable of protecting his or her interest when suing or being sued by reason of any mental infirmity, an appropriate order thereunder can be passed. The respondent did not contend that appellant 1 herein is of unsound mind. As noticed hereinbefore, the respondent herself had filed an application before the trial Court for holding an inquiry to the effect that she suffers from mental infirmity.

The learned trial Court refused to do the same and in that view of the matter the High Court, in our opinion, while setting aside the said order could only issue a direction directing the learned trial Judge to hold an inquiry so as to enable it to arrive at a finding as to whether the respondent herein was incapable of protecting her interest by reason of any mental infirmity or not.

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140. ARBITRATION ACT, 1940- Sections 13 and 29

Pre-reference interest, grant of- Arbitrator has jurisdiction to award pre-reference interest.

B.L. Gupta Construction (P) Ltd. Vs. Bharat Cooperative Group Housing Society Ltd.

Judgment dt. 05.11.2003 by the Supreme Court in Civil Appeal No. 2902 of 2002, reported in (2004) 1 SCC 110

Held :

The learned counsel appearing for the appellant urged that the view taken by the High Court in deleting the pre-reference interest and pendent lite is contrary to the decision of this Court in the case of *Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj, (2001) 2 SCC 721.* In view of the decision of the Constitution Bench in N.C. Budharaj case the said argument has to be accepted.

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141. ADVOCATES :

Remuneration of Advocate -Remedy in case of non-payment- An advocate has no lien over the papers of his client.

New India Assurance Co. Ltd. Vs. A.K. Sexena

Judgment dt. 07.11.2003 by the Supreme Court in Civil Appeal No. 8957 of 2003, reported in (2004) 1 SCC 117

Held :

The learned counsel for the respondent insists that full fees for all the matters must be paid to him. The learned Senior Counsel for the appellants states that no fees are payable to the respondent. In our view, it is not for this Court, as it was not for the High Court, to adjudicate upon such a disputed question of fact. The High Court should not have given the directions it did also because at the time the High Court passed the impugned order, Writ Petition No. 27380 of 2001 was pending. In this writ petition the respondent had claimed payment of his fees.

This case is fully covered by a decision of this Court in *R.D. Saxena v. Balram Prasad Sharma, (2000) 7 SCC 264* wherein this Court has held that advocates have no lien over the papers of their clients. It is held that at the most the advocate may resort to legal remedies for unpaid remuneration. It has been held that the right of the litigant to have the files returned to him is a corresponding counterpart of the professional duty of the advocate and that dispute regarding fees would be a lis to be decided in an appropriate proceeding in court.

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142. SERVICE LAW :

Equal Pay for equal work, principle of- Principle not applicable between a part time employee and a full time employee.

Apangshu Mohan Lodh and others Vs. State of Tripura and others.

Judgment dt. 30.10.2003 by the Supreme Court in Civil Appeal No. 4086 of 1998, reported in (2004) 1 SCC 119

Held :

The learned counsel then urged that the appellants being part-time Lecturers were entitled to proportionate increase in the remuneration on the principle of "parity in pay". Before the High Court, no such plea was taken. The learned Single Judge of the High Court had applied the principle of "equal pay for equal work" as contradistinguished from the principle of "parity in pay" and in giving the directions strongly relied upon the decision of this Court in *Vijay Kumar v. State of Punjab, AIR 1994 SC 265.*

The appellants herein have been engaged on purely contractual basis. It is not the case of the appellants that they were appointed in terms of the extant rules for appointment of regular teachers. The question of determining the pay scale of a person serving the institute arises only in the event he is appointed in terms of the statute operating in the field and not by reason of the terms and conditions of a contract entered into by and between the State and the appellants. The appellants, therefore, in our opinion, had no legal right to obtain a writ of or in the nature of mandamus directing the respondents herein to grant the minimum scale of pay of the Assistant Professors. A direction to pay salary at the minimum of the pay scale of the post of Assistant Professor could not be given in favour of the appellants as they were not full-time employees.

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143. ADMINISTRATIVE LAW :

Promissory estoppel- Applicability of principle against Government- Retrospective revision of the terms of contract to the detriment of respondent- Principle applicable.

State of Orissa and others Vs. Manglam Timber Products Ltd.

Judgment dt. 11.11.2003 by the Supreme Court in Civil Appeal No. 10664 of 1996, reported in (2004) 1 SCC 139

Held :

The State Government having persuaded the respondent to establish an industry and the respondent having acted on the solemn promise of the State Government, purchased the raw material at a fixed price and also sold its products by pricing the same taking into consideration the price of the raw material fixed by the State Government and supplied; the State Government cannot be permitted to revise the terms for supply of raw material adversely to the interest of the respondent and effective from a back date and place the respondent in a situation which it will not be able to resolve. The respondent could not have revised its price from a back date and recovered it from innumerable consumers to whom its finished products were supplied at a fixed price.

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144. EVIDENCE ACT, 1872- Sections 145 and 134

(i) Applicability of Section 145- A witness can be contradicted by his own previous statement and not with the statements of any other person.

(ii) Proof of facts by a witness-Witness reliable and trustworthy- No other witness necessary.

Chaudhari Ramjibhai Narasangbhai Vs. State of Gujarat and others Judgment dt. 10.11.2003 by the Supreme Court in Criminal Appeal No. 183 of 1997, reported in (2004) 1 SCC 184

Held :

In appeal the High Court found that the trial Court's approach was erroneous. It was of the view that if a particular fact stands established by the evidence of trustworthy and reliable witnesses, the record is not to be burdened by examining other witnesses for proving the same fact as it would amount to multiplicity only. If the witness is otherwise reliable and trustworthy, the fact which is sought to be proved by that witness need not be further proved through other witnesses. Even if a witness is related to the deceased, there is no reason to discard his evidence if he is reliable and trustworthy. What is required is cautious and careful approach in appreciating the evidence because a part of the evidence might be tained owing to the relationship and the witnesses might be exaggerating the facts. In such an event, the court is to appreciate the evidence in the light of other evidence on record which may be either oral or documentary.

Coming to the plea that the contradictions noticed by the trial court were ocular vis-a-vis the medical evidence, we find on reading of the judgment it is not to be so. Section 145 of the Indian Evidence Act, 1872 (in short "the Evidence Act") applies when the same person makes two contradictory statements. It is not permissible in law to draw adverse inference because of alleged contradictions between one prosecution witness vis-a-vis statement of other witnesses. It is not open to the court to completely demolish the evidence of one witness by referring to the evidence of other witnesses. Witness can only be contradicted in

terms of Section 145 of the Evidence Act by his own previous statement and not with the statement of any other witness. *(See Mohanlal Gangaram Gehani v. State of Maharashtra, (1982) 1 SCC 700.)* As was held in the said case, Section 145 applies only to cases where the same person makes two contradictory statements either in different proceedings or in two different stages of a proceeding. If the maker of a statement is sought to be contradicted, his attention should be drawn to his previous statement under Section 145 of the Evidence Act only. Section 145 has no application where a witness is sought to be contradicted not by his own statment but by the statement of another witness.

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145. INDIAN PENAL CODE, 1860- Section 354
SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989- Section 3 (1) (xi)
Offence under Section 354, essential ingredients of- Difference between offence under Section 354, IPC and offence under Section 3 (1) (xi) SC/ST (Prevention of Atrocities) Act- Law explained
Vidyadharan Vs. State of Kerala
Judgment dt. 14.11.2003 by the Supreme Court in Criminal Appeal No. 278 of 1997, reported in (2004) 1 SCC 215

Held :

In order to constitute the offence under Section 354 mere knowledge that the modesty of a woman is likely to be outraged is sufficient without any deliberate intention of having such outrage alone for its object. There is no abstract conception of modesty that can apply to all cases. *(See State of Punjab v. Major Singh, AIR 1967 SC 63.)* A careful approach has to be adopted by the court while dealing with a case alleging outrage of modesty. The essential ingredients of the offence under Section 354 IPC are as under:

(i) that the person assaulted must be a woman;

(ii) that the accused must have used criminal force on her; and

(iii) that the criminal force must have been used on the woman intending thereby to outrage her modesty.

Intention is not the sole criterion of the offence punishable under Section 354 IPC, and it can be committed by a person assaulting or using criminal force to any woman, if he knows that by such act the modesty of the woman is likely to be affected. Knowledge and intention are essentially things of the mind and cannot be demonstrated like physical objects. The existence of intention or knowledge has to be culled out from various circumstances in which and upon whom the alleged offence is alleged to have been committed. A victim of molestation and indignation is in the same position as an injured witness and her testimony should receive the same weight. In the instant case after careful consideration of the evidence, the trial court and the High Court have found the accused guilty. As rightly observed by the courts below, Section 3 (1) (xi) of the Act which deals

with assaults or use of force to any woman belonging to a Scheduled Caste or Scheduled Tribe with the intent to dishonour or outrage her modesty is an aggtravated form of the offence under Section 354 IPC. The only difference between Section 3 (1) (xi) and Section 354 is essentially the caste or the tribe to which the victim belongs. If she belongs to a Scheduled Caste or Scheduled Tribe. Section 3 (1) (xi) applies. The other difference is that in Section 3 (1) (xi) dishonour of such victim is also made an offence.

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146. ESSENTIAL COMMODITIES ACT, 1955- Sections 2 (a), 3 and 5
"Foodstuff"- Tea is not a foodstuff.
S. Samuel, M.D. Harrisons Malayalam and another Vs. Union of India and others
Judgment dt. 6.11.2003 by the Supreme Court in Civil Appeal No. 12746 of 1996, reported in (2004) 1 SCC 256= AIR 2004 SC 218

Held :

We would first examine whether "tea" is a "foodstuff". The term "foodstuff" (including edible oilseeds and oils) is not defined by the EC Act. Resort shall have to be had to the meaning of the term "foodstuff" in common parlance, in the commercial world, and amongst the consumers- where tea is sold, purchased and consumed. "Foodstuffs" and "tea" are commonly sold and bought in the market and are consumer items. We will have to see whether "tea" is considered a "foodstuff" in the market frequented by its dealers and consumers.

As an upshot of the above discussion, also keeping in view the judicial exposition of the terms "foodstuffs" and "tea", we are definitely of the opinion that tea is not foodstuff. Even in a wider sense as dealt with in *Virkumar Gulabchand Shah case, AIR 1952 SC 335,* "foodstuffs" will not include tea as tea either in the form of leaves or in the form of beverage does not go into the preparation of food proper to make it more palatable and digestible. Tea leaves are not eaten. Tea is a beverage produced by steeping tea leaves or buds of the tea plants in boiled water, Such "tea" is consumed hot or cold for its flavour, teste and its quality as a stimulant. The stimulating effect is caused by the presence of caffeine therein. "Tea" neither nourishes the body nor sustains or promotes its growth. It does not have a nutritional value. It does not help formation of enzymes nor does it enable anabolism. Tea or its beverage do not go into the preparation of any foodstuff. In common parlance, anyone who has taken tea would not say that he has taken or eaten food. Thus, "tea" is not "food". It is not understood as "food" or "foodstuff" either in common parlance or by the opinion of lexicographers.

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147. LIMITATION ACT, 1963- Article 65
Adverse possession against co-sharer- Unless ouster pleaded and proved there can be no adverse possession.
Md. Mohammad Ali (Dead) by LRs. Vs. Jagadish Kalita and others
Judgment dt. 07.10.2003 by the Supreme Court in Civil Appeal No. 12450 of 1996, reported in (2004) 1 SCC 271=2004 (2) MPLJ 259

Held :

On the other hand, if no partition by metes and bounds took place, the respondents herein were bound to plead and prove ouster of the plaintiff and/or his predecessors-in-interest from the land in question. For the said purpose, it was obligatory on the part of the respondents herein to specifically plead and prove as to since when their possession became adverse to the other co-sharers. Moreover, if the possession of Prafulla Kalita was permissive or he obtained the same pursuant to some sort of arrangement as had been observed by the High Cout, the plea of adverse possession would fail.

Long and continuous possession by itself, it is trite, would not constitute adverse possession. Even non-participation in the rent and profits of the land to a co-sharer does not amount to ouster so as to give title by prescription. A co-sharer, as is well settled, becomes a construction trustee of other co-sharer and the right of the appellant and/or his predecessors-in-interest would, thus, be deemed to be protected by the trustees. As noticed hereinbefore, the respondents in their written statement raised a plea of adverse possession only against the third set of the defendants. A plea of adverse possession set up by the respondents, as reproduced hereinbefore, does not meet the requirements of law also in proving ouster of a co-sharer. But in the event, if the heirs and legal representatives of Gayaram Kalita and Kashiram Kalita partitioned their properties by metes and bounds, they would cease to be co-sharers in which event a plea of adverse possession as contradistinguished from the plea of ouster could be raised. The courts in a given situation may on reading of the written statement in its entirety come to the conclusion that a proper plea of adverse possession has been raised if requisite allegations therefor exist. In the event the plaintiff proves his title, he need not prove that he was in possession within 12 years from the date of filing of suit. If he fails to prove his title, the suit fails.

By reason of the Limitation Act, 1963 the legal position as was obtaining under the old Act underwent a change. In a suit governed by Article 65 of the 1963 Limitation Act, the plaintiff will succeed if he proves his title and it would no longer be necessary for him to prove, unlike in a suit governed by Articles 142 and 144 of the Limitation Act. 1908, that he was in possession within 12 years preceding the filing of the suit. On the contrary, it would be for the defendant so to prove if he wants to defeat the plaintiff's claim to establish his title by adverse possession.

For the purpose of proving adverse possession/ouster, the defendant must also prove animus possidendi.

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148. SERVICE LAW :

Subsistence allowance- Non-payment of, during suspension period- Effect- Law explained.

Indra Bhanu Gaur Vs. Committee, Management of M.M. Degree College and others

Judgment dt. 07.11.2003 by the Supreme Court in Civil Appeal No. 8663 of 2003, reported in (2004) 1 SCC 281

Held :

So far as the effect of not paying the subsistence allowance is concerned, before the authorities no stand was taken that because of non-payment of subsistence allowance, he was not in a position to participate in the proceedings, or that any other prejudice in effectively defending the proceedings was caused to him. The appellant could not plead or substantiate also that the non-payment was either deliberate or to spite him and not due to his own fault. It is ultimately a question of prejudice. Unless prejudice is shown and established, mere non-payment of subsistence allowance cannot ipso facto be a ground to vitiate the proceedings in every case. It has to be specifically pleaded and established as to in what way the affected employee is handicapped because of non-receipt of subsistence allowance. Unless that is done, it canot be held as absolute proposal in law that non-payment of subsistence allowance amounts to denial of opportunity and vitiates departmental proceedings.

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149. CIVIL PROCEDURE CODE, 1908-Sections 47 and 33

Decree, bindingness of- Distinction between "Illegal decree" and "Null/ Void Decree".

Rafique Babi (Dead) by LRs Vs. Sayed Waliuddin (Dead) by LRs and others.

Judgment dt. 28.08.2003 by the Supreme Court in Civil Appeal No. 6799 of 2003, reported in (2004) 1 SCC 287

Held :

A distinction exists between a decree passed by a court having no jurisdiction and consequently being a nullity and not executable and a decree of the court which is merely illegal or not passed in accordance with the procedure laid down by law. A decree suffering from illegality or irregularity of procedure, canot be termed inexecutable by the executing court; the remedy of a person aggrieved by such a decree is to have it set aside in a duly constituted legal proceedings or by a superior court failing which he must obey the command of the decree. A decree passed by a court of competent jurisdiction cannot be denuded of its efficacy by any collateral attack or in incidental proceedings.

In *Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman, (1970) 1 SCC 670 it has been held: (SCC pp. 672-73, para 7)*

> When the decree is made by a court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record. But where the objection as to jurisdiction of the court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decised at the trial or which could have been but have

not been raised, the executing court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.

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150. HINDU LAW :

Gift of ancestral immovable property by father to daughter at the time or after marriage- Gift can be made within reasonable limits for "pious purposes".

R. Kuppayee and another Vs. Raja Gounder

Judgment dt. 10.12.2003 by the Supreme Court in Civil Appeal No. 16757 of 1996, reported in (2004) 1 SCC 295

Held :

Combined reading of these paragraphs shows that the position in Hindu law is that whereas the father has the power to gift ancestral movables within reasonable limits, he has no such power with regard to the ancestral immovable property or coparcenary property. He can, however, make a gift within reasonable limits of ancestral immovable property for "pious purposes". However, the alienation must be by an act inter vivos, and not by will. This Court has extended the rule in paragraph 226 and held that the father was competent to make a gift of immovable property to a daughter, if the gift is of reasonable extent having regard to the properties held by the family.

This Court considered the question of extended meaning given in numerous decisions for "pious purposes" in *Kamla Devi v. Bachulal Gupta, AIR 1957 SC 434.* In the said case, a Hindu widow in fulfilment of an ante-nupital promise made on the occasion of the settlement of the terms of marriage of her daughter, executed a registered deed of gift in respect of four houses allotted to her share in a partition decree, in favour of her daughter as her marriage dowry, after two years of her marriage. The partition decree had given her the right to the income from property but she had no right to part with the corpus of the property to the prejudice of the reversioners. Her stepsons brought a suit for declaration that the deed of gift was void and inoperative and could not bind the reversioners. The trial court and the High Court dismissed the suit holding that the gift was not valid. This Court accepted the appeal and held that the gift made in favour of the daughter was valid in law and binding on the reversioners.

This point was again examined in depth by this Court in *Guramma Bhratar Chanbasappa Deshnukh v. Mallappa Chanbasappa Deshmukh, AIR 1964 SC 510 and it was held: (SCR pp. 516-17)*

> "18. The legal position may be summarized thus: The Hindu law texts conferred a right upon a daughter or a sister, as the case may be, to have a share in the family property at the time of partition. That right was lost by efflux of time. But it became crystallized into a moral obligation. *The father or his representative can make a valid gift, by way of*

reasonable provision for the maintenance of the daughter, regard being had to the financial and other relevant circumstances of the family. By custom or by convenience, such gifts are made at the time of marriage, but the right of the father or his representative to make such a gift is not confined to the marriage occasion. It is a moral obligation and it continues to subsist till it is discharged. Marriage is only a customary occasion for such a gift. But the obligation can be discharged at any time, either during the lifetime of the father or thereafter. It is not possible to lay down a hard-and-fast rule, prescribing the quantitative limits of such a gift as that would depend on the facts of each case and it can only be decided by courts, regard being had to the overall picture of the extent of the family estate, the number of daughters to be provided for and other paramount charges and other similar circumstances. If the father is within his rights to make a gift of a reasonable extent of the family property for the maintenance of a daughter, it cannot be said that the said gift must be made only by one document or only at a single point of time. The validity or the reasonableness of a gift does not depend upon the plurality of documents but on the power of the father to make a gift and the reasonableness of the gift so made. If once the power is granted and the reasonablenes of the gift is not disputed, the fact that two gift deeds were executed instead of one, cannot make the gift anytheless a valid one."

(emphasis supplied)

Extended meaning given to the words "pious purposes" enabling the father to make a gift of ancestral immovable property within reasonable limits to a daughter has not been extended to the gifts made in favour of other female members of the family. Rather, it has been held that a husband could not make any such gift of ancestral property to his wife out of affection on the principle of "pious purposes". Reference may be made to *Ammathayee v. Kumaresan, AIR 1967 SC 569. It was observed (at AIR p. 573, para 9)* "we see no reason to extend the scope of the words 'pious purposes' beyond what has already been done in the two decisions of this Court" and the contention rejected that a husband could make any such gift of ancestral property to his wife out of affection on the principle of pious purposes.

On the authority of the judgments referred to above, it can safely be held that a father can make a gift of ancestral immovable property within reasonable limits, keeping in view, the total extent of the property held by the family in favour of his daughter at the time of her marriage or even long after her marriage.

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151. CONSUMER PROTECTION ACT, 1986- Sections 3, 11 and 21 Jurisdiction of fora created under the Act of 1986 and jurisdiction under special enactments- Remedies available under the Act of 1986 are wider in addition to the remedies provided under the Special Act- Held,

Section 90 of T.N. Co-operative Societies Act, 1983 does not arrest jurisdiction of Consumer Forum to a dispute between members and co-operative society.
Secretary, Thirumurugan Co-operative Agricultural Credit Society Vs. M. Lalitha (Dead) through LRs. and others
Judgment dt. 11.12.2003 by the Supreme Court in Civil Appeal No. 92 of 1998, reported in (2004) 1 SCC 305

Held :

A Bench of three learned Judges of this Court in a recent decision in *State of Karnataka v. Vishwabharathi House Building Coop. Society, (2003) 2 SCC 412* expressed the view that the 1986 Act was brought into force in view of the long-felt necessity of protecting the common man from wrongs wherefor the ordinary law for all intent and purport had become illusory and that in terms of the said Act, a consumer is entitled to participate in the proceedings directly as a result whereof his helplessness against a powerful business house may be taken care of. Referring to Fair Air Engineers (p) Ltd. case, (1996) 6 SCC 385 (aforementioned) the Court stated that the provisions of the said Act are required to be interpreted as broadly as possible. On the question of jurisdiction it is stated that the forums under the Act have jurisdiction to entertain a complaint despite the fact that other forums/courts would also have jurisdiction to adjudicate upon the lis. It is also noticed that the Act provides for a further safeguard to the effect that in the event a complaint involves complicated issues requiring recording of evidence of experts, the complainant would be at liberty to approach the civil court for appropriate relief.

It follows that the remedies available under the 1986 Act for redressal of disputes are in addition to the available remedies under the Act. Under the 1986 Act we have to consider as regards the additional jurisdiction conferred on the forums and not their exclusion. In Dhulabhai case consideration was whether the jurisdiction of the civil court was excluded. Propositions (1) and (2) indicate that where the statute gives a finality to the orders of the Special Tribunals, the jurisdiction of civil courts must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Further, where there is an express bar on the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. The remedies that are available to an aggrieved party under the 1986 Act are wider. For instance, in addition to granting a specific relief the forums under the 1986 Act have jurisdiction to award compensation for the mental agony, suffering etc. which possibly could not be given under the Act in relation to dispute under Section 90 of the Act. Merely because the rights and liabilities are created between the members and the management of the society under the Act and forums are provided, it cannot take away or exclude the jurisdiction conferred on the forums under the 1986 Act expressly and intentionally to serve a definite

cause in terms of the objects and reasons of the Act, reference to which is already made above. When the decision of Dhulabhai case was rendered, the provisions similar to the 1986 Act providing additional remedies to parties were neither available nor considered. If the argument of the learned counsel for the appellant is accepted, it leads to taking away the additional remedies and forums expressly provided under the 1986 Act, which is not acceptable.

The question of conflict of decisions may not arise. If the parties approach both the forums created under the Act and the 1986 Act, as indicated in the case of *Fair Air Engineers (P) Ltd. it is for the forum under the 1986 Act to* leave the parties either to proceed or avail the remedies before the other forums, depending on the facts and circumstances of the case.

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152. CIVIL PROCEDURE CODE, 1908- Order 1 Rr. 9 and 10 (2)
Non-joinder of necessary party, effect- In such case order is a nullity and has no binding effect.
Khetrabasi Biswal Vs. Ajaya Kumar Baral and others
Judgment dt. 20.11.2003 by the Supreme Court in Civil Appeal No. 5984 of 1998, reported in (2004) 1 SCC 317

Held :

The procedural law as well as the substantive law both mandates that in the absence of a necessary party, the order passed is a nullity and does not have a binding effect.

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153. CIVIL PROCEDURE CODE, 1908-Section 152
Section 152, ambit and scope of- Law explained.
State of Punjab Vs. Darshan Singh
Judgment dt. 29.10.2003 by the Supreme Court in Civil Appeal No. 8479 of 2003, reported in (2004) 1 SCC 328

Held :

Section 152 provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the court of its ministerial actions and does not contemplate passing of effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, the same becomes final subject to any further avenues of remedies provided in respect of the same and the very court or the tribunal cannot and, on mere change of view, is not entitled to vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefor and subject to the conditions or limitations provided therein. The powers under Section 152 of the Code are neither to be equated with the power of review nor can be said be akin to review or even said to clothe the court concerned under the guise of invoking

after the result of the judgment earlier rendered, in its entirety or any portion or part of it. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 as if it is looking into it for the first time, for which the proper remedy for the aggrieved party, if at all, is to file an appeal or revision before the higher forum or review application before the very forum, subject to the limitations in respect of such review. It implies that the section cannot be pressed into service to correct an omission which is intentional, however erroneous that may be. It has been noticed that the courts below have been liberally construing and applying the provisions of Sections 151 and 152 of the Code even after passing of effective orders in the lis pending before them. No court can, under the cover of the aforesaid sections, modify, alter or add to the terms of its original judgment, decree or order. Similar view was expressed by this Court in *Dwaraka Das v. State of M.P., (1999) 3 SCC 500 and jayalakshmi Coelho v. Oswald Joseph Coelho, (2001) 4 SCC 181.*

The basis of the provision under Section 152 of the Code is founded on the maxim "actus curiae neminem gravabit" i.e. an act of court shall prejudice no man. The maxim "is founded upon justice and good sense; and affords a safe and certain guide for the administration of the law", *said Cresswell, J. in Freeman v. Tranah, 138 ER 964 (ER p. 967).* An unintentional mistake of the court which may prejudice the cause of any party must and alone could be rectified. In *Master Construction Co. (P) Ltd. v. State of Orissa, AIR 1966 SC 1047* it was observed that the arithmetical mistake is a mistake of calculation, a clerical mistake is a mistake in writing or typing whereas an error arising out of or occurring from accidental slip or omission is an error due to careless mistake on the part of the court, liable to be corrected. To illustrate this point it was said that in a case where the order contains something which is not mentioned in the decree, it would be a case of unintentional omission or mistake as the mistake or omission is attributable to the court which may say something or omit to say something which it did not intend to say or omit. No new arguments or reargruments on merits can be entertained to facilitate such rectification of mistakes. The provision cannot be invoked to modify, alter or add to the terms of the original order or decree so as to, in effect, pass an effective judicial order after the judgment in the case.

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154. CONTEMPT OF COURTS ACT, 1971- Section 2 (b)
Civil contempt- Wilful breach of undertaking given to a Court amounts to civil contempt.
Bank of Baroda Vs. Sadruddin Hasan Daya and another
Judgment dt. 12.12.2003 by the Supreme Court in Civil Appeal No. 4138 of 1999, reported in (2004) 1 SCC 360

Held :

The wilful breach of an undertaking given to a court amounts to "civil contempt" within the meaning of Section 2 (b) of the Contempt of Courts Act. The respondents having committed breach of the undertaking given to this Court in the consent terms filed on 28.7.1999, they are clearly liable for having committed contempt of court. The fact that the petitioner can execute the decree can have no bearing on the contempt committed by the respondents. The law in England on the subject of breach of undertaking given to court is same. In *Halsbury's Laws of England, Vol. 9 (1), para 482*, it has been stated as under:

> "An undertaking given to the court in pending proceedings by a person or corporation (or by a government department or Minister of the Crown acting in his official capacity) on the faith of which the court sanctions a particular course of action or inaction, has the same force as an injunction made by the court and a breach of the undertaking is misconduct amounting to contempt."

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155. ARBITRATION ACT, 1940- Section 2 (a)
Arbitration agreement, essentials of.
Mallikarjun Vs. Gulbarga University
Judgment dt. 05.11.2003 by the Supreme Court in Civil Appeal No. 2758 of 2002, reported in (2004) 1 SCC 372

Held :

In *Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd., (2003) 7 SCC 418* this Court laid down the essential elements of the arbitration agreement, which are as follows: (SCC p. 423, para 13)

(i) There must be a present or a future difference in connection with some contemplated affair;

(ii) there must be the intention of the parties to settle such difference by a private tribunal;

(iii) the parties must agree in writing to be bound by the decision of such tribunal; and

(iv) the parties must be *ad idem*.

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156. GUARDIANS AND WARDS ACT, 1890- Sections 7, 10 and 17
Adoption of Indian children by foreign couple- Right of biological parents to give child in adoption- Law explained- Effect of guidelines issued by Ministry of Welfare, Govt. of India stated.
Anokha (Smt.) Vs. State of Rajasthan and others
Judgment dt. 08.12.2003 by the Supreme Court in Civil Appeal No. 9631 of 2003, reported in (2004) 1 SCC 382

Held :

The appellant has approached this Court under Article 136 of the Constitution. She has reiterated the stand taken by her before the High Court and the District Judge, namely, that the Guidelines issued by the Ministry of Welfare relating to the adoption of Indian children did not apply in the case of adoption of children living with their biological parents and that the Guidelines only applied to cases where the child was destitute or abandoned or living in social or child welfare centres.

In our view, the High Court and the District Judge erred in not considering the material produced by Respondents 2 and 3 in support of their application and in rejecting the application under the Guardians and Wards Act, 1890 solely on the basis of the Guidelines. The background in which the Guidelines were issued was a number of decisions of this Court, the first of which is *Lakshmi Kant Pandey v. Union of India, (1984) 2 SCC 244.* This is borne out from the stated object of the Guidelines as set out in paragraph 1.1 thereof which

> "is to provide a sound basis for adoption *within the framework* of the norms and principles laid down by the Supreme Court of India in the series of judgments delivered in *L.K. Pandey v. Union of India between 1984 and 1991".*

The original decision of the Court was taken on the basis of a letter written by one Laxmi Kant Pandey complaining of malpractices indulged in by social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The judgment has considered the problem at great length after affidavits were filed not only by the Indian Council of Social Welfare but also by foreign organisations and Indian organisations which were engaged in offering and placing Indian children for adoption by foreign parents. The decision has referred to three classes of children: (i) children who are orphaned and destitute or whose biological parents cannot be traced; (ii) children whose biological parents are traceable but have relinquished or surrendered them for adoption; and (iii) children living with their biological parents. The third category has been expressly excluded from consideration as far as the decision was concerned "for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents. The reason is obvious. Normally, no parent with whom the child is living would agree to give a child in adoption unless he or she is satisfied that it would be in the best interest of the child. That is the greatest safeguard.

The directions which have been in the decision are limited to the first and second categories of children with more stringent requirements being laid down in respect of children in the first category of cases. As far as adoption of children falling within the second category is concerned, the requirements are not so stringent.

The Guidelines have formulated various directives as given by this Court in the several decisions and do not relate to regulation of the adoption procedure to

be followed in respect of the third category of children, namely, children with their biological parents who are sought to be given in adoption to a known couple as is the situation in this case. It is only where there is the impersonalized attention of a placement authority that there is a need to closely monitor the process including obtaining of a no-objection certificate from the Central Adoption Resource Agency (CARA), Ministry of Welfare, the sponsorship of the adoption by a recognised national agency and the scrutiny of the inter-country adoption by a recognised Voluntary Coordinating Agency (VCA). Indeed CARA has been set up under the Guidelines for the purpose of eliminating the malpractices indulged in by some unscrupulous placement agencies, particularly the trafficking in children.

Under the Guidelines, the Home Study Report to be enclosed with an application for adoption must be routed through a foreign and enlisted agency which must be an enlisted agency in India with a copy to CARA. The Home Study Report is required to contain the following particulars:

(a) Social status and family background.

(b) Description of home.

(c) Standard of living as it appears in the home.

(d) Current relationship between husband and wife.

(e) Current relationship between the parents and children (if any children).

(f) Development of already adopted children (if any).

(g) Current relationship between the couple and the members of each other's family.

(h) Employment status of the couple.

(i) Health details such as clinical test, heart condition, past illness etc. (medical certificate etc.)

(j) Economic status of the couple.

(k) Accommodation for the child.

(l) Schooling facilities.

(m) Amenities in the home.

(n) Reasons for wanting to adopt an Indian child.

(o) Attitude of grandparents and relatives towards adoption.

(p) Anticipated plans for the adoptive child.

(q) Legal status of the prospective adopting parents.

The report is required to be notarised which must in turn be attested either by an officer of the Ministry of External Affairs or in officer of the Justice or Social Welfare Department of the foreign country concerned or by an officer of the Indian Embassy or High Commission or Consulate in that country.

None of these provisions in the several decisions of this Court impinge upon the rights and choice of an individual to give his or her child in adoption to named persons, who way may be of foreign origin. The Court in such cases has to deal with the application under Section 7 of the Guardians and Wards Act, 1890 and dispose of the same after being satisfied that the child is being given in adoption voluntarily after being aware of the implication of adoption viz. that the child would legally belong to the adoptive parents' family, uninduced by any extraneous reasons such as the receipt of money etc.; that the adoptive parents have produced evidence in support of their suitability and finally that the arrangement would be in the best interest of the child.

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157. CRIMINAL PROCEDURE CODE, 1973- Sections 161 and 226

(i) Delay in examination of witness by police, effect- Law stated.

(ii) Duty of Public Prosecutor to examine witnesses- Public Prosecutor not obliged to examine all the witnesses- Law explained.

Banti @ Guddu Vs. State of M.P.

Judgment dt. 04.11.2003 by the Supreme Court in Criminal Appeal No. 713 of 2003, reported in (2004) 1 SCC 414

Held :

As regards the delayed examination of certain witnesses, this Court in several decisions has held that unless the investigating officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness, the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion (See *Ranbir v. State of Punjab, (1973) 2 SCC 444 and Bodhraj v. State of J & K, (2002) 8 SCC 45.*

The situation in a case where the prosecution cited two categories of witnesses to the occurrence, one consisting of persons closely related to the victim and the other, consisting of witnesses who have no such relation, the Public Prosecutor's duty to the court may require him to produce witnesses from the latter category, also subject to his discretion to limit to one or two among them. But if the Public Prosecutor got reliable information that any one among that category would not support the prosecution version he is free to state in court about that fact and skip the witness from being examined him as a prosecution witness. It is open to the defence to cite him and examine him as a defence witness. The decision in this regard has to be taken by the Public Prosecutor in a fair manner. He can interview the witness beforehand to enable him to know well in advance the stand which that particular person would be adopting when examined as a witness in court.

A four-Judge Bench of this Court had stated the above legal position thirty-five years ago in *Masalti v. State of U.P., AIR 1965 SC 202.* It is contextually apposite to extract the following observation of the Bench: (AIR p. 209, para 12)

> "It is not unknown that where serious offences like the present are committed and a large number of accused persons are tried, attempts are made either to terrorise or win over prosecution witnesses, and if the prosecutor honestly and bona fide believes that some of his witnesses have been won over, it would be unreasonable to insist that he must tender such witnesses before the court."

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158. INDIAN PENAL CODE, 1860- Section 376
Rape- Is violative of victim's fundamental right under Article 21 of Constitution of India- Victim of rape, not an accomplice- Courts required to deal with cases of sexual crimes with utmost sensitivity.
State of Punjab Vs. Ramdev Singh
Judgment dt. 17.12.2003 by the Supreme Court in Criminal Appeal No. 547 of 1997, reported in (2004) 1 SCC 421

Held :

Sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity- it degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person of a woman, it is a crime against the entire society. It destroys , as noted by this Court in *Bodhisattwa Gautam v. Subhra Chakraborty, (1996) 1 SCC 490* the entire psychology of a woman and pushes her into deep emotional crisis. It is crime against basic human rights, and is also votive of the victim's most cherished of the fundamental rights, namely, the right to life contained in Article 21 of the Constitution of India (in short "the Constitution"). The courts are, therefore, expected to deal with cases to sexual crime against woman with utmost sensitivity. Such cases need to be dealt with sternly armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.

It is well settled that a prosecurix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former, it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony.

Assurance, short of corroboration, as understood in the context of an accomplice would do.

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159. CIVIL PROCEDURE CODE, 1908- O.21 R. 89 and 92 (2)
Ambit, scope and applicability of O.21 Rr. 89 and 92 (2)- Law stated.
Challamane Huchha Gowda Vs. M.R. Tirumala and another
Judgment dt. 08.12.2003 by the Supreme Court in Civil Appeal No. 9614 of 2003, reported in (2004) 1 SCC 453

Held :

Under Order 21 Rule 89 (1) CPC an application to set aside sale under Rule 89 (1) can be filed. The said provision reads as under :

> *"89, Application to set aside sale on deposit.*- (1) Where immovable property has been sold in execution of a decree, any person claiming an interest in the property sold at the time of the sale or at the time of making the application, or acting for or in the interest of such person, may apply to have the sale set aside on his depositing in court,-
>
> (a) for payment to the purchaser, a sum equal to five percent of the purchase money, and
>
> (b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder."

The follow-up action to Rule 89 (1) is provided under Rule 92 (2) of Order 21, which reads as follows:

> "92. (1)
>
> (2) Where such application is made and allowed, and where, in the case of an application under Rule 89, the deposit required by that rule is made within thirty days from the date of sale, or in cases where the amount deposited under Rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within such time as may be fixed by the court, the court shall make on order setting aside the sale:
>
> Provided that no order shall be made unless notice of the application has been given to all persons affected thereby"

Execution is the enforcement by the process of the court of its orders and decrees. This is in furtherance of the inherent power of the court to carry out its orders or decrees. Order 21 CPC deals with the elaborate procedure pertaining to the execution of orders and decrees. Sale is one of the methods employed for execution. Rule 89 of Order 21 is the only means by which a judgment-debtor can escape from a sale that has been validly carried out. The object of the rule is

to provide a last opportunity to put an end to the dispute at the instance of the judgment-debtor before the sale is confirmed by the court and also to save his property from dispossession. Rule 89 postulates two conditions: they are depositing: (1) of sum equal to five per cent of the purchase money to be paid to the purchaser, (2) of the amount specified in the proclamation of sale less any amount received by the decree-holder since the date of such proclamation, in the court. If these two conditions are satisfied the court shall make an order for setting aside the sale under Rule 92 (2) of Order 21 CPC on an application made to it. In other words, then there will be compliance with the court's order or decree that is sought to be executed. Because the purpose of Rule 21 is to ensure the carrying out of the orders and decrees of the court, once the judgment-debtor carries out the order or decree of the court, the execution proceedings will correspondingly come to an end. It is to be noted that the Rule does not provide that the application in a particular form shall be filed to set aside the sale. Even a memo with prayer for setting aside sale is sufficient compliance with the said Rule. Therefore, upon the satisfaction of the compliance with conditions as provided under Rule 89, it is mandatory upon the court to set aside the sale under Rule 92. And the court shall set aside the sale after giving notice under Rule 92 (2) to all affected persons.

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160. CIVIL PROCEDURE CODE, 1908- Section 11
Res judicata- Withdrawal of appeal with liberty to file fresh suit- Principle of Res judicata not applicable.
K. Sivaramaiah Vs. Rukmani Ammal
Judgment dt. 20.11.2003 by the Supreme Court in Civil Appeal No. 7433 of 1997, reported in (2004) 1 SCC 471

Held :

So far as Original Suit No. 7359 of 1989 is concerned, the findings recorded in the judgment therein could have constituted res judicata but the fact remains that the appellate court permitted the withdrawal of the suit and once the suit has been permitted to be withdrawn all the proceedings taken therein including the judgment passed by the trial court have been wiped out. A judgment given in a suit which has been permitted to be withdrawn with the liberty of filing a fresh suit on the same cause of action cannot constitute res judicata in a subsequent suit filed pursuant to such permission of the court.

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161. PREVENTION OF CORPUTION ACT, 1988- Section 13 (i) (e)
Expressions "known sources of income" and "income"- Meaning and scope of.
State of M.P. Vs. Awadh Kishore Gupta and others
Judgment dt. 18.11.2003 by the Supreme Court in Criminal Appeal No. 292 of 1997, reported in (2004) 1 SCC 691

Held :

Section 13 deals with various situations when a public servant can be said to have committed criminal misconduct. Clause (e) of sub-section (1) of the section is pressed into service against the accused. The same is applicable when the public servant or any person on his behalf, is in possession or has, at any time during the period of his office, been in posssesion, for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income. Clause (e) of sub-section (1) of Section 13 corresponds to clause (e) of sub-section (1) of Section 5 of the Prevention of Corruption Act, 1947 (referred to as "the old Act"). But there have been drastic amendments. Under the new clause, the earlier concept of "known sources of income" has undergone a redical change. As per the Explanation appended, the prosecution is relieved of the burden of investigating into "source of income" of an accused to a large extent, as it is stated in the Explanation that "known sources of income"means income received from any lawful source, the receipt of which has been intimated in accordance with the provisions of any law, rules, orders for the time being applicable to a public servant. The expression "known sources of income" has reference to sources known to the prosecution after thorough investigation of the case. It is not, and cannot be contended that "known sources of income" means sources known to the accused. The prosecution cannot, in the very nature of things, be expected to know the affairs of an accused person. Those will be matters "specially within the knowledge" of the accused, within the meaning of Section 106 of the Indian Evidence Act, 1872 (in short "the Evidence Act").

The phrase "known sources of income" in Section 13 (1) (e) [old Section 5 (1) (e)] has clearly the emphasis on the word "income". It would be primary to observe that qua the public servant, the income would be what is attached to his office or post, commonly known as remuneration or salary. The term "income" by itself, is elastic and has a wide connotation. Whatever comes in or is received, is income. But, however wide the import and connotation of the term "income", it is incapable of being understood as meaning receipt having no nexus to one's labour, or expertise, or property, or investment, and having further a source which may or may not yield a regular revenue. These essential characteristics are vital in understanding the term "income". Therefore, it can be said that, though "income" is receipt in the hand of its recipient, every receipt would not partake the character of income. Qua the public servant, whatever return he gets from his service, will be the primary item of his income. Other incomes which conceivably are income qua the public servant, will be in the regular receipt from (a) his property, or (b) his investment. A receipt from windfall, or gains of graft, crime or immoral secretions by persons prima facie would not be receipt from the "known sources of income" of a public servant.

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162. N.D.P.S. ACT, 1985- Sections 8 and 20

Cultivation of ganja plants- Term "cultivation", meaning of- Plants sprouted by natural growth do not amount to cultivation.

Alakh Ram Vs. State of U.P.

Judgment dt. 08.01.2004 by the Supreme Court in Criminal Appeal No. 36 of 2004, reported in (2004) 1 SCC 766

Held :

Under Section 8(b) of the NDPS Act, cultivation of opium poppy or any cannabis plant is prohibited and under Section 20 of the NDPS Act, such cultivation of cannabis plant is made punishable with imprisonment and fine. In order to prove the guilt, it must be proved that the accused had cultivated this prohibited plant. There must be supporting evidence to prove that the accused cultivated the plant and it is not enough that few plants were found in the property of the accused. It is quite reasonable to assume that sometimes the plants may sprout up, if seeds happen to be embedded in earth due to natural process. If plants are sprouted by natural growth, it cannot be said that it amounts to cultivation.

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163. SPECIFIC RELIEF ACT, 1963- Section 6

Term "settled possession" as used in Section 6, meaning and connotation of- Settled possession of trespasser, protection of- Law explained.

Rame Gowda (Dead) by LRs. Vs. M. Varadappa Naidu (Dead) by LRs. and another

Judgment dt. 15.12.2003 by the Supreme Court in Civil Appeal No. 7662 of 1997, reported in (2004) 1 SCC 769

Held :

It is thus clear that so far as the Indian law is concerned, the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law : he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injuncting even a rightful owner from using force or taking the law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with the title unless rebutted. The owner of any property may prevent even by using reasonable force a treaspsser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character, or

recurring, intermittent, stray or casual in nature, or has just been committed, while the rightful owner did not have enough time to have recourse to law. In the last of the cases, the possession of the trespasser, just entered into would not be called as one acquiesced to by the true owner.

It is the settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner. The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions. Illustratively, we may refer to *Munshi Ram v. Delhi Admn, AIR 1968 SC 702, Puran Singh v. State of Punjab, (1975) 4 SCC 518* and *Ram Rattan v. State of U.P., (1977) 1 SCC 188.* The authorities need not be multiplied. In Munshi Ram case it was held that no one, including the true owner, has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case unless he is evicted in the due course of law, he is entitled to defend his possession even against the rightful owner. But merely stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend againt the rightful owner must be settled possession, extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and reinstate himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or a possession which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force. In Puran Singh case the Court clarified that it is difficult to lay down any hard-and-fast rule as to when the possession of a trespasser can mature into settled possession. The "settled possession" must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of the owner or without any attempt at concealment by the trespasser. The phrase "settled possession" does not carry any special charm or magic in it; nor is it a ritualistic formula which can be confined in a straitjacket. An occupation of the property by a person as an agent or a servant acting at the instance of the owner will not amount to actual physical possession. The Court laid down the following tests which may be adopted as a working rule for determining the attributes of "settled possession" (SCC p. 527, para 12):

> (i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;
>
> (ii) that the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of animus possidendi. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case:

(iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and

(iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner, has no right to destroy the crop grown by the trespasser and take forcible possession.

●

164. HINDU SUCCESSION ACT, 1956- Section 15
Succession- Heirs related by full blood be preferred to heirs related by half blood.
Jhugli Tekam (Smt.) Vs. Asstt. Commissioner
Reported in 2004 (I) MPWN 54

Held :

Section 15 of the Hindu Succession Act reads as under :-

(15) (1) The property of a female Hindu dying intestate shall devolve according to the rule set out in section 16,

(d) Fourthly, upon the heirs of the father;

With reference to section 15 (1) (d) of Hindu Succession Act, the Court below has ignored the claim of Sonarin and accepted the applicant/petitioner to be entitled to the extent 1/5th share only. Section 18 of the Hindu Succession Act is to the effect that heirs related to an intestate by full-blood shall be preferred to heirs related by half-blood, if the nature of the relationship is the same in every other respect. The rule laid down in section 18 is supplementary to the provisions in sections 15 to 17. The rule is not merely explanatory but lays down substantive rule involving legal principles. It is plain that full brother is preferred to half brother and full sister is preferred to half sister. In the judgment reported in *AIR 1963 Mysore 168* it has been made clear that full sister of deceased shall be the sole heir. The half sister-brother, therefore, would be excluded with reference to section 18 of the Hindu Succession Act. The instant case is covered under section 18 of the Hindu Succession Act. The applicant/ petitioner Jhugli is real sister (full blood) of late Savitri. Whereas Sonarin being step mother, the children born from her would be step brothers and sisters (half blood) of late Savitri, therefore applicant/petitioner alone is heir of late Savitri.

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165. ACCOMMODATION CONTROL ACT, 1961 (M.P.)- Section 23-A(b)
Bonafide requirement for non-residential purposes-Requirement for business of son-in-law, not covered by the provision.
Dheeraj Bahi Vs. Ushabai
Reported in 2004 (I) MPWN 61= 2004 (1) MPHT 456

Held :

Clause (b) of Sec. 23-A of the M.P. Act, under which applicant's eviction was sought, reads as follows:

> "(b) that the accommodation let for non-residential purposes is required *"bona fide"* by the landlord for the purpose of continuing or starting his business or that of any of his major sons or unmarried daughters, if he is the owner thereof or for any person for whose benefit the accommodation is held and that the landlord or such person has no other reasonably suitable non-residential accommodation of his own in his occupation in the city or town concerned."

It will be, thus, seen that eviction from a non-residential accommodation can be sought only when the accommodation is required by the landlord for the purpose of continuing or starting his own business or that of any of his major sons or unmarried daughters. The landlord is further required to establish his/ her ownership of the suit accommodation. In the instant case, neither of these two requirements is established. The need for starting business was not that of the respondent hereself or her son or unmarried daughter. The respondent has only two daughters and they both are married. It was for the need of her son-in law that the eviction of the applicant was sought. Such a need is not contemplates in clause (b) and no eviction could, therefore, legally be granted for any such need of the son-in-law of the respondent.

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166. MOTOR VEHICLES ACT, 1988- Sections 166, 140 and 163-A
Application submitted under Section 166/140- Such application cannot be converted into or treated as application under Section 163-A- Law explained.
Jugal Kishore Vs. Ramlesh Devi
Reported in 2004 (I) MPWN 64= 2004 (1) JLJ 110 (FB)

Held :

He further contended that this application cannot be converted into section 163 A as decided by this Court in the case of *Smt. Guddibai v. Mishiral Ahirwar [2003 (3) TAC 546].* This Court while considering the statutory provisions of section 163B the Act, has held that once an application under section 166 and 140 of the Act is filed thereafter application cannot be converted to section 163A.

We have heard the counsel for the parties. As regards the application for converting this application under section 166 to 163-A is concerned, this application cannot be allowed, as applicants had filed initially an application under section 166 read with section 140 of Motor Vehicles Act and that final award under section 140 of Motor Vehicle Act for no fault liability is passed, therefore in the light of decision in the case of Smt. Guddibai (supra) this application is not maintainable and is dismissed.

As regards the liability of Insurance Company is concerned, the matter is concluded by the Full Bench decision. Since the vehicle was driven for hire, therefore under section 149 (2) of the Act Insurance Company is not liable to pay compensation. Now the question about the liability of the owner of the tractor is concerned. The owner of the vehicle is not liable to pay compensation, as it is not established that the driver of the tractor was running the vehicle in a rash and negligent manner. From the evidence on record, it is apparent that the truck, which dashed against the tractor was driver in a rash and negligent manner. The owner and driver of the truck are not impleaded as partly. Therefore, appellant cannot get any compensation except compensation towards no fault liability under section 140 of the Motor Vehicle Act.

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167. LIMITATION ACT, 1963- Section 5
Expression "sufficient cause" as used in Section 5- Expression should receive a liberal construction.
State of M.P. Vs. Ramesh Prasad Verma
Reported in 2004 (1) MPWN 72

Held :

Condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases delay of a very long range can be condoned as the explanation thereof is satisfactory. In every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of *mala fides* or it is not put forth as part of a dilatory strategy, the Court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the part deliberately to gain time, then the Court should lean against acceptance of the explanation. A Court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the Court is always deliberate. The words "sufficient cause" under section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice.

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168. STAMP ACT, 1899- Sections 35 and 37
Impounding of document- Provisions of Sections 35 and 37 not applicable in case of copy of a document- Law explained.
Sugreeva Prasad Dubey and others Vs. Sitaram Dubey
Reported in 2004 (1) MPHT 488

Held :

From the perusal of Sections 35 and 37 of the Act, it is apparent that the aforesaid provisions are not applicable with the copy of document. A party can

only be allowed to rely on a document, which is an instrument for the purpose of Sections 35 and 37 of the Act. Section 35 and 37 does not apply to the copy of documents unstamped or insufficient stamp. The aforesaid document if is a copy of a document, original of which is insufficiently stamped, then in absence of rectification or impounding, said document can not be admitted and secondary evidence of it can not be permitted under Section 65 of the Evidence Act. The Apex Court in the case of *Jupudi Kesava Vs. Pulavarthi Venkata Subbarao and others (AIR 1971 SC 1070),* considered this question, held :-

> "The first limb of Section 35 clearly shuts out from evidence any instrument chargeable with duty unless it is duly stamped. The second limb of it which relates to acting upon the instrument will obviously shut out any secondary evidence of such instrument, for allowing such evidence to be let in when the original admittedly chargeable with duty was not stamped or insuffciently stamped, would be tantamout to the document being acted upon by the person having by law or authority to receive evidence. Proviso (a) is only applicable when the original instrument is actually before the Court of law and the deficiency in stamp with penalty is paid by the party seeking to rely upon the document. Clearly secondary evidence either by way of oral evidence of the contents of the unstamped document or the copy of it covered by Section 63 of the Indian Evidence Act would not fulfil the requirements of the proviso which enjoins upon the authority to receive nothing in evidence except the instrument itself. Section 35 is not concerned with any copy of an instrument and a party can only be allowed to rely on a document which is an instrument for the purpose of Section 35. 'Instrument' is defined in Section 2 (14) as including every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded. There is no scope for inclusion of a copy of a document as an instrument for the purpose of the Stamp Act.
>
> If Section 35 only deals with original instruments and not copies Section 36 can not be so interpreted as to allow secondary evidence of an instrument to have its benefit. The words "an instrument" in Section 36 must have the same meaning as that in Section 35. The legislature only relented from the strict provisions of Section 35 in cases where the original instrument was admitted in evidence without objection at the initial stage of a suit or proceeding. In other words although the objection is based on the insufficiency of the stamp affixed to the document, a party who has a right to object to the reception of it must do so when the document is first tendered. Once the time for raising objection to the admission of the documentary evidence is passed, no objection based on the same ground can be raised at a later stage. But this in no way extends the applicability of Section 36 to secondary evidence adduced or sought to be adduced in proof of the contents of a document which is unstamped or insufficiently stamped."

In view of aforesaid settled law by the Apex Court, secondary evidence of inadmissible document is not admissible under Sections 63 and 65 of the Evidence Act. The photo-copy of document, which has been filed by the petitioner, original of which was insufficiently stamped does not fall within the purview of Sections 35, 36 and 37 of the Act and can not be received in secondary evidence and the Trial Court has rightly rejected the aforesaid application.

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169. CRIMINAL PROCEDURE CODE, 1973- Section 161
Delay in recording statement by police- Opportunity should be given to the prosecution to explain delay- No opportunity given, defence cannot take advantage of the delay.
Kadudiya Vs. State of M.P.
Reported in 2004 (1) MPHT 526 (DB)

Held :

The learned Counsel has criticised the testimony of this witness on the ground of delay in recording his statement by the investigating agency. But we find no substance in this argument because the case diary statement of this witness has not been exhibited in Court and no question was put to the Investigating Officer about delay in recording the statement. Defence can not seek advantage of delay in recording statement without affording an opportunity to the prosecution to explain the same. Supreme Court in case of *Bodhraj Vs. State of Jammu and Kashmir (supra),* relying on the judgment passed by Supreme Court in *Ranbir Vs. State of Punjab, (1973) 2 SCC 444,* held that "the Investigating Officer has to be specifically asked as to the reasons for the delayed examination where the accused raised a plea that there was unusual delay in examination of the witnesses". In the present case, no question was put to the Investigation Officer regarding delay in recording the statement. The statement of this witness has not been exhibited to from the part of record of this case. Therefore, unexhibited statement of this witness recorded by the police under Section 161 of Cr. PC could not be looked into for any purpose.

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170. EVIDENCE ACT, 1871- Section 68
REGISTRATION ACT, 1908- Sections 52 and 58

(i) Codicil, meaning of- Codicil, part and parcel of the will- Proof of codicil- It should be proved like will according to Section 68 of the Act.

(ii) Attestation by Registrar of deeds- When Registrar can be treated as attesting witness-Law explained.

Bhagat Ram and another Vs. Suresh and others
Reported in 2004 (I) MPJR 100

Held :

Codicil, as defined, is an instrument made in relation to a Will. It has the effect of explaining, altering or adding to the dispositions made by a Will. By

fiction of law, the codicil, though it may have been executed separately and at a place or time different from the Will, forms part of the related Will. That being the nature and character of codicil, flowing from the definition itself, it would be anomalous to accept the contention that though a Will is required to be executed and proved as per the rules contained in the Succession Act and forming the Evidence. Act but a document explaining, altering or adding to the will and part of the Will is not required to be executed or proved in the same manner. Section 70 of the Succession Act re-enforces this proposition inasmuch as revocation of an unprivileged Will or codicil is placed at par in the matter of manner of execution.

We hold that the same rules of execution are applicable to a codicil which apply to a will to which the codicil relaltes. So also, the evidence adduced in proof of execution of a codicil must satisfy the same reqirements as apply to proof of execution of a Will.

The Registrar of Deeds who has registered a document in discharge of his statutory duty, does not become an attesting witness to the deed solely on account of his having discharged the statutory duties relating to the registration of a document. Registration of any will, and the endorsements made by the Registrar of Deeds in discharge of his statutory duties, do not elevate him to the status of a 'statutory attesting witness'. However, a registrar can be treated as having attested to a Will if his signature or mark appears on the document akin to the one placed by an attesting witness and he has seen the testator sign or affix his mark to the will or codicil or has received from the testator a personal acknowledgement of his signature or mark and he had also signed in the presence of the testator. In other words, to be an attesting witness, the registrar should have attested the signature of the testator in the manner contemplated by clause (c) of Section 63 of the Succession Act. No particular form of attestation is provided. It will all depend on the facts and circumstances of a case by reference to which it will have to be answered if the registrar of deeds fulfils the character of an attesting witness also by looking at the manner in which the events have actually taken place at the time of registration and the part played therein by the Registrar.

A Registrar of Deeds before he be termed an attesting witness, shall have to be called in the witness box. The court must feel satisfied by his testimony that what he did satisfies the requirement of being an attesting witness. This is the view taken by the High Court of Punjab in the several decisions cited by the learned counsel for the appellants and also in the Division Bench Decisions of the High Court of Calcutta in *Earnest Bento Souza Vs. Johan Francis Souza & Ors, AIR 1958 Calcutta 440,* and of the *Orissa High Court in Kotni R.N. Subudhi Vs. V.R. L. Murthy Raju, AIR 1961 Orissa 180.*

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171. CIVIL PROCEDURE CODE, 1908- O.6 R. 17
Amendment of pleadings-Normally delay no ground to reject the prayer-Law explained.
Kamta Prasad Vs. Sugriv Prasad and others
Reported in 2004 (I) MPJR 149= 2004 (1) MPHT 285

Held :

The Apex Court is *Estralla Rubber (supra)* considering the scope of amendment of pleading held that where the proposed amendment is elaborating the plea/additional pleadings in support of the case the aforesaid amendment cannot be denied merely on the ground of delay. If the amendment has been rejected by the trial Court, the order passed by the Court below may be interfered under Article 227 of the Constitution of India. The Apex Court held that :

> "5. We have considered the submissions made on behalf of either side. The High Court set aside the order passed by the learned District Judge stating that the proposed amendment will have the effect of displacing the plaintiff from admission made by the defendant in its petition filed under Section 17 (2) and 12 (2-A) of the Act and that such admission could not be permitted to be withdrawn. We have perused the relevant records including the original application and the proposed amendment. We are not able to see any admission made by the defendant as such, which was sought to be withdrawn. By the proposed amendment the defendant wanted to say that Ala Mohan Das was a permissive occupier instead of owner. The further amendment sought was based on the entries made in the revenue records. It is not shown how the proposed amendment prejudiced the case of the plaintiff. It is also not the case of the plaintiff that any accrued right to it was tried to be taken away by the proposed amendment. The proposed amendment is to elaborate the defence and to take additional plea in support of its case. Assuming that there was some admission indirectly, it is open to the defendant to explain the same. Looking to the proposed amendment, it is clear that is required for proper adjudication of the controversy between the parties and to avoid multiplicity of judicial proceedings. The High Court also found fault with the defendant on the ground that there was delay of three years in seeking amendment to introduce new defence. From the records, it cannot be said that any new defence was sought to be introduced. Even otherwise, it was open for the defendant to take alternative or additional defence. Merely because there was delay in making the amendment application, when no serious prejudice is shown to have been caused to plaintiff so as to take away any accured right, the application could not be rejected. At any rate, it cannot be said that allowing the amendment cause irretrievable prejudice to the plaintiff. Further, the plaintiff can file his reply to the amended written statement and fight the case on merits.

In *Estralla Rubber and Sampath Kumar (supra)*, the Apex Court has considered the law at length and the amendment which has been sought because of the change of the circumstances during the pendency of the suit may be allowed. Merely on the ground of delay, the application cannot be rejected. From the perusal of the amendment application, it is apparent that the basic structure of the suit is not changed.

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172. CIVIL PROCEDURE CODE, 1908- Section 11
Interim order passed in course of proceedings- It amounts to Res judicata at the subsequent stage of the same proceedings.
Anandi Lal Ahirwar Vs. Satya Vrat Chaturvedi
Reported in 2004 (I) MPJR 175

Held :

Thus, the earlier order, in my considered view, would operate as res judicata in view of the law laid down by the Apex Court in the decision rendered in the case of *Satyadhanc Ghosal and others v. Smt. Deorajan Debi and another, AIR 1960 SC 941* wherein their Lordships have held as under :

> "The principle of res judicata applies also as between two stages in the same litigation to this extent that a Court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings".

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173. PREVENTION OF FOOD ADULTERATION ACT, 1954- Sections 9 and 10
Food Inspector notified to a particular local area by the Local Authority- Specific notification by the State Government not necessary.
Shri Prasad Vs. State of M.P.
Reported in 2004 (I) (MPJR 190= 2004 (1) MPHT 362=2004 (1) MPLJ 572

Held :

The learned Single Judge has referred for opinion, on the following question:

> "Whether the complainant namely Hardayal Dubey, could act as Food Inspector in the local area where the accused was transacting business in the absence of specific notification assigning the local area by the State Government?"

The aforesaid question has been referred to us when before the learned Single Judge it was contended that the Food Inspector could not have set the criminal law in motion as he was not so authorised by the State Government. The Food Inspector was excercising the power purported to be one under Section 9 (1) of the Prevention of Food Adulteration Act. 1954 (in short 'the Act'). It was urged that the said person was not assigned any specific local area by the State Government and, therefore, he had no authority to act as Food Inspector in that area. On raising the aforesaid contention, the learned Single Judge has referred the question as stated hereinabove.

As the State Government has empowered the local authority under section 2 (viii-a) of the Act, to appoint Food Inspector for local area. In the circumstances, the notification Annexure A/3 empowers Food Inspector, Hardayal Dubey to act as Food Inspector in the local area of Jabalpur. The notification assigning the local area to Food Inspector was valid. If the local authority has empowered the

Food Inspector to act with the local area, then it is not necessary for the State Govt. to issue another notification and the notification issued by the local authority is valid and in accordance with law. But in the absence of any notification assigning local area to the Food Inspector either by the State Govt. or by local authority, the Food Inspector cannot transit his business under the provisions of Prevention of Food Adulteration Act, 1954 of the area. In view of aforesaid discussion, our answer to the referred question is that:

> "The complainant, nemaly, Hardayal Dubey could act as, Food Inspector in the local area where the accused was transacting business because he was duly authorized by the local authority for the local area, Jabalpur, empowering him to act as Food Inspector as such as assigning by the local authority is permissible in law."

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174. SERVICE LAW :

Compassionate ground cannot be claimed as a matter of right- Undue delay fatal to the claim for compassionate appointment.
State of Manipur Vs. Md. Rajaodin
Reported in 2004 (1) MPWN 75 (SC)

Held :

As was observed in *State of Haryana v. Rani Devei [JT (1996) 6 SC 646]* it need not be pointed out that the claim of the person concerned for appointment on compassionate ground is based on the premise that he was dependent on the deceased employee. Strictly, this claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of a sudden crisis occurring in the family of such employee who has served the State and dies while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16. Appointment on compassionate ground cannot be claimed as a matter of right. Die-in-Harness Scheme cannot be made applicable to all types of posts irrespective of the nature of service rendered by the deceased employee. In *Rani Devi* case (supra) it was held that the Scheme regarding appointment on compassionate ground if extended to all types of casual or *ad hoc* employees including those who worked as apprentices cannot be justified on constitutional grounds. In *LIC of India v. Asha Ramchhandra Ambekar [(1994) 27 ATC 174]* it was pointed out that High Courts and Administrative Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulations framed in respect thereof do not cover and contemplate such appointments. It was noted in *Umesh Kumar Nagpal v. State of Haryana [(1994) 27 ATC 537]* that as a rule public service appointments should be made strictly on the basis of open invitation of applications and merit. The appointment on compassionate ground is not another source of recruitments but merely an exception to the aforesaid requirement taking into consideration the

fact of the death of an employee while in service leaving his family without any means of livelihood. In such cases the object it to enable the family to get over sudden financial crisis. But such appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased.

In *Sushma Gosain v. Union of India [(1989) 11 ATC 878]* it was observed that in all claims of appointment on compassionate grounds, there should not be any delay in appointment. The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the breadwinner in the family. Such appointments should, therefore, be provided immediately to redeem the family in distress. The fact that the ward was a minor at the time of death of his father is no ground, unless the Scheme itself envisages specifically otherwise, to state that as and when such minor becomes a major he can be appointed without any time consciousness or limit. The above view was reiterated in *Phoolwati v. Union of India [(1991) 17 ATC 937] and Union of India v. Bhagwan Singh [(1995) 31 ATC 736].* In *Director of Education (Secondary) v. Pushpendra Kumar [(1998) 5 SCC 192]* it was observed that in the matter of compassionate appointment there cannot be insistence for a particular post.

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175. CIVIL PROCEDURE CODE, 1908- Section 11

Res Judicata, rule of - Pleading and proof- Foundation for the plea must be in the pleadings, then issue be framed and tried- Plea should be substantiated by producing the copies of the pleadings, issues and judgment in the previous case- Law explained.

Smt. V. Rajeshwari Vs. T.C. Saravanabava

Reported in 2004 (I) MPJR 214 (SC) = (2004) 1 SCC 551

Held :

The rule of *res judicata* does not strike at the root of the jurisdiction of the court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation and no one should be vexed twice for the same cause.

The plea of *res judicata* is founded on proof of certain facts and then by applying the law to the facts so found. It is, therefore necessary that the foundation for the plea must be laid in the pleadings and then an issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the stage of the trial, would not be permitted to be raised for the first time at the stage of appeal *(See: (Raja) Jagadish Chandra Deb Dhabal Deb Vs. Gour Hari Mahato & Ors.- AIR 1936 Privy Council 258, Medapati Surayya & Ors. Vs. Tondapu Bala Gangadhara Ramakrishna Reddi & Ors.- AIR 1948 Privy Council 3, Katragadda China Anjaneyulu & Anr. Vs. Kattragadda China Ramayya & Ors.- AIR 1965 A.P. 177 (Full Bench). The view taken by the Privy Council was cited with approval before this Court in The State of Punjab Vs. Bua Das Kaushal- (1970) 3 SCC 656.*

Howver, an exception was carved out by this Court and the plea was permitted to be raised, though not taken in the pleadings not covered by any issue, because the necessary facts were present to the mind of the parties and were gone into by the Trial Court. The opposite party had ample opportunity of leading the evidence in rebuttal of the plea. The Court concluded that the point of res judicata had through out been in consideration and discussion and so the want of pleadings or plea of walver of *res judicata* cannot be allowed to be urged.

Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. May be in a given case only copy of judgment in previous suit is filed in proof of plea or *res judicata* and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in *Syed Mohd. Salie Labbai (Dead) by Lrs. & Ors. Vs. Mohd. Hanifa (Dead) by Lrs. & Ors.- (1976) 4 SCC 780,* the basic method to decide the question of *res judicata* is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as *res judicata.* It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in *Gurbux Singh Vs. Bhooralal-(1964) 7 SCR 831,* pleacing on a par the plea of *res judicata* and the plea of estoppel under Order II Rule 2 of the Code of Civil Procedure, held that proof of the plaint in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings. Their Lordships of the Privy Concil in *Kali Krishna Tagore Vs. Secretary of State for India in Council & Anr.- (1887-88) 15 Indian Appeals 186,* pointed out that the plea of *res judicata* cannot be determined without ascertaining what were the matters in issues in the previous suit and what was heard and decided. Needless to say these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit.

That apart the plea, depending on the facts of a given case, is capable of being waived, if not properly raised at an appropriate stage and in an appropriate manner. The party adversely affected by the plea of *res judicata* may proceed on an assumption that his opponent has waived the plea by his failure to raise the same.

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176. JUDGES (PROTECTION) ACT, 1985- Sections 2 and 3

Tahsildar exercising jurisdication under M.P.L.R.C. in revenue case- Tahsildar is designated as a Revenue Court under Section 31, M.P.L.R.C.- Such Tahsildar is covered by the definition of 'Judge' as given in Section 2 hence, entitled to protection under the Act.

Om Prakash Vs. Surjan Singh
Reported in 2004 (I) MPJR 244= 2004 RN 31

Held :

Having heard the learned counsel for parties and after perusing the record, this Court is of the view that the criminal complaint filed by the non-applicant against the applicant who acted as a revenue Court and who has been fully protected as per provision u/ss 2 and 3 of the Act which reads as under :-

> 2. Definition- In this Act, "Judge" means not only every person who is officially designated as a Judge, but also every person :
>
> (a) who is empowered by law to give in any legal proceeding a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive; or
>
> (b) who is one of a body of persons which body of persons is empowered by law to give such a judgment as is referred to in Clause (a).
>
> **3. Additional Protection to Judges-** (1) Notwithstanding anything contained in any order law for the time being in force and subject to the provision of sub-section (2), no Court shall entertain or continue any civil or criminal proceeding against any person who is or was a Judge for any act, thing or word committed, done or spoken by him when, or in the course of acting or purporting to act in the discharge of his official or judicial duty or function.
>
> (2) Nothing in sub-section (1) shall debar or affect in any manner. the power of the Central Government or the State Government or the Supreme Court of India or any other authority under any law for the time being in force to take such action (whether by way of civil; criminal or departmental proceedings or otherwise) against any person who is or was a Judge.

Under Sec. 31 of the M.P.L.R. Code, the Tehsildar is designated as a revenue Court. The order dated 15.7.1999 is clearly spelling that the applicant passed the order as a revenue Court on review petition filed by the applicant and he acted in capacity of revenue Court. As per provision u/s 3 of the Act, his action is fully saved and learned JMFC has no jurisdiction to entertain or continue any civil or criminal proceeding against him. The action of the learned Magistrate issuing process against the applicant who acted as a 'Judge' is wholly misconceived and without jurisdiction.

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177. INDIAN PENAL CODE, 1860- SECTION 489-B and 489-C
Scope and applicability of Sections 489-B and 489-C- To fasten liability, it be proved that accused knew or had reason to believe that the currency note was forged or counter-feit.
Ganesh alias Karan Mali Vs. State of M.P.
Reported in 2004 (I) MPJR 263

Held :

In Order to prove the offence under Section 489- B IPC, the prosecution must prove by cogent evidence that :

(i) The currency note or bank note in question was forged or counterfeit;

(ii) the accused sold to, or brought or received from some person, or trafficked in, or used as genuine, such currency notes or bank note; and

(iii) When he did so the accused knew or had reason to believe that it was forged or counter-feit.

Where the accused is charged with using as genuine forged note, the burden is on the prosecution to prove that at the time when the accused was passing the note, he knew that it was a forged one, and the mere possession of it by him does not place the burden on him to account for its possession and to prove his innocent possession thereof.

In order to prove the charge under Section 489-C of the IPC, the prosecution must establish by placing reliable evidence that :

(i) the note must be currency note or bank note;

(ii) such note must have been forged or counter-feited.

(iii) the accused must be in its possession.

(iv) he at the time of his possession knew or had reason to belive, that it was forged or counter-feit; and

(v) that he intended to use it as a genuine or that it might be used as genuine.

In the case of *M.Mammutti Vs. State of Karnataka, AIR 1979 SC 1705,* the Apex Court while dealing the provision of Section 489-B and 489-C of the IPC has held as under :

> "Mr. Nettar submitted that once the appellant is found in possession of counterfeit notes, he must be presumed to know that the notes are counterfeit. If the notes were of such a nature that a mere look at them would convince anybody that it was counterfeit such a presumption could reasonably be drawn. But the difficulty is that the prosecution has not put any specific question to the appellant in order to find out whether the accused knew that the notes were of such a nature. No such evidence has been led by the prosecution to prove the nature of the notes also. In these circumstances, it is impossible for us to sustain the conviction of the appellant. For these reasons, therefore, the appeal is allowed, conviction and sentences passed on the appellant are set aside, and the appellant is acquitted of the charges framed against him"

●

178. ARBITRATION AND CONCILIATION ACT, 1996- Section 9
Ambit and scope of Section 9-A person not a party to arbitration agreement can't seek protection under Section 9-Law explained.
Firm Ashok Traders & Anr. etc. Vs. Gurumukh Das Saluja & Ors. etc.
Reported in 2004 (I) MPJR 268 (SC)

Held :

A & C Act, 1996 is a long/cap in the direction of alternate dispute resolution systems. It is based on UNCITRAL Model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act. An application under Section 9 under the scheme of A & C Act is not a suit. Undoubtedly, such application results in initiation of civil proceedings but can it be said that a party filing an application under Section 9 of the Act is enforcing a right arising from a cantract? "Party" is defined in Clause (h) of sub-section (1) of Section 2 of A & C Act to mean a party to an arbitration agreement. So, the right conferred by section 9 is on a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of Court under Section 9 can be (i) before, or (ii) during arbital proceedings, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. With the pronouncement of this Court in *M/s Sundaram Finance Ltd. Vs. M/s NEPC India Ltd.- AIR 1999 SC 565* the doubts stand cleared and set at rest and it is not necessary that arbitral proceedings must be pending or at least a notice invoking arbitration clause must have been issued before an application under Section 9 is filed. A little later we will revert again to this topic. For the moment suffice it to say that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the Court under Section 9 must possess is of being a 'party' to an arbitration agreement. A person not party to an arbitration agreement cannot enter the Court for protection under Section 9. This has relevance only to his locus standi as an applicant. This has nothing to do with the relief which is sought for from the Court or the right which is sought to be canvassed in support of the relief. The reliefs which the Court may allow to a party under clauses (i) and (ii) of Section 9 flow from the power vesting in the Court exercisable by reference to 'contemplated', 'pending' or 'completed' arbitral proceedings. The Court is conferred with the same power for making the specified orders as it has for the purpose of and in relation to any proceedings before it though the venue of the proceedings in relation to which the power under Section 9 is sought to be exercised is the arbitral tribunal. Under the scheme of A & C Act, the arbitration clause is separable from other clauses of the Partnership Deed. The arbitration clause constitutes an agreement by itself. In short, filing of an application by a party by virtue of its being a party to an arbitration agreement is for securing a relief which the Court has power to grant before, during or after arbitral proceedings by virtue of Section 9 of the A & C Act. The relief sought for in an application under Section 9 of A & C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is

being enforced in the arbitral tribunal ; the Court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the arbitral tribunal from being frustrated. Section 69 of the Partnership Act has no bearing on the right of a party to an arbitration clause to file an application under Section 9 of A & C Act.

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179. CIVIL PROCEDURE CODE, 1908- Order XXVI Rule 9
Issue of commission for spot inspection, meaning of- Commission may not be issued to collect evidence- Law explained.
Ashutosh Dubey and another Vs. Tilak Grih Nirman Sahakari Samiti Maryadit, Bhopal and another
Reported in 2004 (2) MPHT 14

Held :

The scope of Order 26 Rule 9, CPC is to ascertain the matter in dispute, market value of any property, mesne profit or damages etc. But issuing of commission for investigating the fact that which of the party is in possession of the property is beyond the scope of Order 26 Rule 9, CPC. This question has to be decided by the Court after adducing the evidence by the parties. The Court has to record findings in this regard and the aforesaid job of the Court can not be shifted to the Commissioner. In the circumstances the Trial Court has exceeded his jurisdiction in issuing such a commission ascertaining the fact that which party is in possession of the property.

Apart from this, it is settled law that no such commission may be issued for collecting the evidence in the case. If the aforesaid order allowed to remain in existence it will cause serious injustice to the other side. This Court in *Laxman vs. Ramsingh*, Civil Revision No. 18 of 1982, decided on 24.2.1982 (1992 MPWN 255) has considered similar question held:-

> "The prayer for appointment of a Commissioner was made on the ground that the Commissioner would be able to see on the spot the crop which is standing on the suit lands. This according to the defendant will bring out the truth of his case as according to him it was gram crop as sown by the applicant which was standing on it. Learned Counsel for the non-applicant plaintiff had submitted that the appointment of Commisioner as being sought on certain assumptions. He had in this connection pointed out certain pleadings in that behalf. The object of local investigation is not so much to collect evidence for either of the parties. It is within the discretion of the Court to order a local investigation or reject the prayer . The Court below has exercised that discretoin by rejecting that application. In view of the circumstances, it can not be said that the Court has committed any error on jurisdiction while rejecting the application in that behalf"

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180. SUCCESSION ACT, 1925- Section 372

Grant of family pension under M.P. New Family Pension Scheme, 1966- Succession certificate granted under Section 372 will not govern the grant of Family Pension under Scheme 1966.

Smt. Satyawati Sharma Vs. Krishna Sharma

Reported in 2004 (2) MPHT 34

Held :

The appeal was admitted on the following substantial questions of Law :-

(1) .....

(2) Whether the provisions of Section 372 of the Indian Succession Act can be overlooked in a suit for declaration for entitlement to get the family pension?

(3) .....

The contention of the learned Counsel for the appellant is that the succession certificate was granted in favour of the appellant in which it was directed that the appellant and the respondent are entitled to get the half-half share in the property left by late Omprakash and as such, the appellant is also entitled for the half share in the family pension. It is provided under Section 6 (2) of the M.P. New Family Pension Scheme, 1966, that in case of the death of the male Government servant, his wife will be entitled to get the family pension and the parents are excluded from getting the family pension. In view of the aforesaid provision of the family pension scheme, the appellant is not entitled to get the half of the amount of the family pension. The order passed in succession case under Section 372 of the Indian Succession Act will not be applicable in case of the entitlement of the pension to the appellant.

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181. N.D.P.S. ACT 1985- Section 50 (4)

Search of a female- A female should be searched only by a female- Section 50 (4) is mandatory.

Fatto @ Phoola @ Kamla Bee Vs. State of M.P.

Reported in 2004 (2) MPHT 67

Held :

Under Section 50 (4) of the Act a female shall be searched only by a female. This requirement of law is mandatory. On going through Section 50 (4) of the Act, which require that no female shall be searched by anyone except a female, has to be given effect fully, as this provision or law is mandatory and can not be ignored. Admittedly, the appellant who is lady, was not searched by any female, therefore, mandatory requirement of law was not followed and hence, the conviction of the appellant is bad in law. It shall ~be profitable to rely a decision of the Apex Court in the case of *State Punjab vs. Surinder Rani alias Chhiddi, 2001 SCC (Cr) 1487,* which was followed by this Court in the case of *Geeta Bai alias Portable Vs. State of M.P., 2002 (2) EFR 328.*

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PART - III

CIRCULARS/NOTIFICATIONS

Published in the Gazette of India, Extraordinary, Part II, Section 3 (i), No. 509, dated 21st October, 2003.

HEALTH AND FAMILY WELFARE

No. G.S.R. 831 (E), dated 21st October, 2003. — Whereas by notification of the Government of India in the Ministry of Health and Family Welfare (Department of Health) number GSR. 401 (E) dt. 14.5.2003, at pages 1 to 3, in the Gazette of India Extraordinary, Part II, Section 3 sub-section (i) dt. 14.5.2003, draft of certain rules further to amend the Prevention of Food Adulteration Rules, 1955 was published, as required by sub-section (i) of Section 23 of the Prevention of Food Adulteration Act, 1954, (37 of 1954), for inviting objections and suggestions from all persons likely to be affected thereby before the expiry of a period of sixty days from the date on which the copies of the Official Gazette containing the said notification, were made available to the public;

And whereas, the copies of the said Gazette were made available to the public on 19.5.2003.

And whereas, objections or suggestions received from the public within the specified period on the said draft rules have been duly considered by the Central Government;

Now, therefore, in exercise of the powers conferred by Section 23 of the **Prevention of Food Adulteration Act, 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 by called **the Prevention of Food Adulteration (5th Amendment) Rules, 2003.**

(2) They shall come into force on 1.1.2004.

2. In the Prevention of Food Adulteration Rules, 1955, in Rule 42,

(i) In sub-rule (ZZZ) (14), after the declaration,

"PACKAGED DRINKING WATER"

the following declaration shall be inserted,-

"One time usable plastic bottles of packaged drinking water shall carry the following declaration.

"CRUSH THE BOTTLE AFTER USE"

(ii) In sub rule (ZZZ)(15), after the declaration,-

"NATURAL MINERAL WATER"

the following declaration shall be inserted,-

"One time usable plastic bottles of mineral water shall carry the following declaration.

"CRUSH THE BOTTLE AFTER USE"

●

Notification F. No. 12-181-2002-B (1) II dated the 3rd June, 2003,— In exercise of the powers conferred by Section 2 of the **Public Gambling Act, 1867 (No. 3 of 1867)** and in supersession of all previous notifications issued on this subject, the State Government hereby extend the provisions of sections 3 and 4 of the said Act to the whole of the State of Madhya Pradesh.

(Published in M.P. Rajpatra (Asadharan) dated 3-6-2003 Page 609)

●

Ministry of Health and Family Welfare (Department of Health) Notification No. G.S.R. 656 (E) dated the 13th August, 2003. Published in the Gazette of India (Extraordinary) Part II Section 3 (i) dated 13-8-2003 Pages 5-7.

In exercise of the powers conferred by Section 23 of the **Prevention of Food Adulteration Act, 1954 (37 of 1954),** the Central Government, after consulation 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 (2nd Amendment) Rules, 2003.**

(2) They shall come into force on 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), after rule 48-D, the following shall be inserted, namely :—

"48E. Sale of Fresh Fruits and Vegetables.— The Fresh Fruits and Vegetables shall be free from rotting and free from coating of waxes, mineral oil and colours".

3. In appendix B of the said rules :—

(a) for item A.08.01, the following shall be substituted, namely :—

"A.08.01— (1) Coffee (green raw or unroasted) means the dried seeds of Coffea arabica, Coffea liberica, Coffee excelsa or Coffea canephora(robusta) with their husks (mesocrap and endocarp) removed.

(2) **Roasted coffee** means properly cleaned green coffee which has been roasted to a brown colour and has developed its characteristic aroma.

(3) **Ground coffee** mans the powdered products obtained from 'roasted coffee' only and shall be free from husk.

(4) **Coffee (green, raw or unroasted), 'roasted and ground coffee'** shall be free from any artificial colouring, flavouring, facing, extraneous matter or glazing substances and shall be in sound, dry and fresh condition, free from rancid or obnoxious flavour.

(5) **'Roasted coffee' and 'ground coffee'** shall conform to the following analytical standards :—

(i) Moisture (on dry basis m/m	Not more than 5.0 percent
(ii) Total Ash (on dry basis) m/m	3.0 to 6.0 percent
(iii) Acid insoluble ash (on dry basis) m/m	Not more than 0.1 percent
(iv) Wate soluble ash (on dry basis) m/m	Not less than 65 percent of total ash
(v) Alkainity of soluble ash in millilitres of 0.1 N hydrochloric acid per gram of material	Not less than 3.5 ml. & Not more than 5.0 ml. (on dry basis) m/m
(vi) Aqueous extracts (on dry basis) m/m	Not less than 26.0.& Not more than 35.0 percent
(vii) Caffeine (anhydrous) (on dry basis) m/m	Not less than 1.0 Percent";

(b) for item A. 08.02, the following shall be substituted, namely :—

"**A.08.02— Chicory** means the roasted chicory powder obtained by roasting and grinding of the cleaned and dried roots of Chicorium intybus Lin with or without the addition of edible fats and oils or sugar, like glucose or sucrose in proportion not exceeding 2.0 percent by weight in aggregate. It shall be free from dirt, extraneous matter, artificial colouring and flavouring agents.

It shall conform to the following standards, namely :-

(i) Total ash (on dry basis) m/m	Not less than 3.5 percent & Not more than 8.0 percent
(ii) Acid insoluble ash (on dry basis) m/m	Not more than 2.5 percent
(iii) Aqueous extracts (on dry basis) m/m	Not less than 55.0 percent"

(c) for item A.08.04, the following shall be substituted, namely :—

"A.08.04— Soluble Coffee Powder means coffee powder, obtained from freshly roasted and ground pure coffee beans. The product shall be in the form of a free flowing powder or shall be in the agglomerated form (granules) having colour, taste and flavour characteristic of coffee. It shall be free impurities and shall not contain chicory or any other added substances.

It shall conform to the following standards, namely :—

(i)	Moisture (on dry basis) m/m	Not more than 4.0 Percent
(ii)	Total ash (on dry basis) m/m	Not more than 12.0 percent
(iii)	Caffeine content (on dry basis) m/m	Note less than 2.8 percent
(iv)	Solubility in boiling water	Dissolves readily in 30 seconds with moderate stirring
(v)	Solubility in cold water at 16±2°c	Soluble with moderate stirring in 3 minutes";

●

Notification No. 60-F-B-4-7-2003-C.T.D.- V dated the 9th September, 2003. In exercise of the power conferred by clause (a) of sub-section (1) of Section 9 of the **Indian Stamp Act, 1899 (No. II of 1899),** the State Government hereby remits the stamp duty chargeable on the deeds of purchase of agricultural land upto 1 hectare, exempted in favour of landless persons belonging to the scheduled castes or scheduled tribes under the scheme formulated vide Government of Madhya Pradesh Revenue Department's circular No. F-4-10-2002-VII-2-A dated 26th June, 2003, subject to the condition that a certificate to this effect is produced from the Collector of the District concerned that the purchaser has been selected under the said Scheme.

[Published in M.P. Rajpatra (Asadharan) dated 9-9-2003 page 920]

●

Notification No. 6372-XIII-2003 dated the 8th October, 2003.— In exercise of the powers conferred by sub-clause (d) of Section 172 of the **Electricity Act, 2003 (No. 36 of 2003),** the State Government hereby declares that all provisions of the said Act shall not apply in the State of Madhya Pradesh for a period of 6 months from the appointed date 10th June, 2003.

[Published in M.P. Rajpatra (Asadharan) dated 8-10-2003 Page 940].

●

HIGH COURT OF MADHYA PRADESH : JABALPUR
MEMORANDUM

No. C/1580 / V-3-2-98 Jabalpur, dated the 31 /March, 2004

To,

The District & Sessions Judge,

_____ (M.P.)

High Court has allotted 4 'G' Type quarters of High Court pool to Madhya Pradesh Nyayadhish Sangh for the purpose of Sessions House opposite the High Court Jabalpur. The Judicial Officers who visit Jabalpur for training purposes and other official work, can stay in the Sessions House and their bill may be reimbursed upto the limit of Hotel or Motel run by Madhya Pradesh Tourism Development Corporation. Therefore, this is to request you that if Judicial Officers visit on official tour to Jabalpur and stay in Sessions House, their bills upto the charges of Hotel or Motel run by Madhya Pradesh Tourism Development Corporation may be reimbursed. The aforesaid information may be given to the Judicial Officers.

I am herewith forwarding a copy of the letter received from Deputy Secretary, Law Department, Govt. of Madhya Pradesh, Bhopal dated 30.01.2004 for your information. The aforesaid memo of the State Government and this memo of the Registry be brought to the notice of all Judicial Officers posted in your District for their information.

Registrar General

●

मध्यप्रदेश शासन, विधि और विधायी कार्य विभाग

क्रमांक 416/294/21-ब (एक), भोपाल, दिनांक 30 जनवरी, 2004

प्रति,

रजिस्ट्रार जनरल,
मध्यप्रदेश उच्च न्यायालय,
जबलपुर।

विषयः- जबलपुर स्थित सेशन्स हाउस में ठहरने वाले शासकीय अधिकारीगण/ न्यायाधीश गणों के व्ययों को प्रतिपूर्ति हेतु सेशन्स हाऊस को मान्यता प्रदान करने बाबद।

उपर्युक्त विषयक कृपया रजिस्ट्री के अर्धशासकीय पत्र क्रमांक 1371/एफ.247/ (ए.आर.ए.) दिनांक 20.10.2003 एवं पत्र क्रमांक 1423; एफ-263/ए.आर.ए. दिनांक 10.11.2003 का अवलोकन करने का कष्ट करें।

उपरोक्त संबंधित प्रस्ताव पर वित्त विभाग म.प्र. शासन ने दिनांक 7.7.03 से स्वीकृति इस टीप के साथ प्रदान की है कि यदि शासकीय कार्य से दौरे पर आने वाले शासकीय सेवक/न्यायाधीश सेशन्स हाउस में ठहरते हैं तो उसमें भुगतान किये गये किराये की प्रतिपूर्ति की पात्रता इस शर्त के अधीन होगी कि यह सीमा म.प्र. राज्य पर्यटन विकास निगम के होटल/ मोटल में ठहरने की सीमा से अधिक नहीं होगा।

उच्च न्यायालय पूल के दो जी टाइप आवासगृह मध्यप्रदेश न्यायाधीश संघ, जबलपुर को सेशन्स हाऊस हेतु दिये गये हैं उनका किराया न्यायाधीश संघ से बाजार दर से नियमित रूप से जमा कराया जाए।

उपरोक्त जानकारी माननीय मुख्य न्यायाधिपति महोदय की अनुमति से ऐसी कार्यवाही हेतु जैसी कि आवश्यक समझी जाए, सादर प्रेषित है।

सही/-

(रणजीत सिंह)

उप सचिव,

मध्यप्रदेश शासन, विधि और विधायी कार्य विभाग

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Ministry of Finance (Department of Revenue) Order No. S.O. 130 (E) dated the 28th January, 2004. Published in the Gazette of India (Extraordinary) Part II Section 3 (ii) dated 28.1.2004 Pages 8-14.

In exercise of the powers conferred by clause (a) of sub-section (1) of Section 9 of the **Indian Stamp Act, 1899 (2 of 1899)** and in supersession of the notifications of Government of India in the Ministry of Finance (Department of Revenue) published in the Gazette of India, Extraordinary, Part II, Section 3 vide numbers S.O. 198 (E) dated the 16th March, 1976 and S.O. 199 (E) dated the 16th March, 1976, except as respects things done or omitted to be done before such supersession, the Central Government hereby directs that with effect from 1st March, 2004, the proper stamp duty chargeable on instruments, mentioned under column (1) in Articles 13, 14, 27, 37, 47, 49, 52 and 62 (a) in the Schedule I of the Act, shall be reduced and stamp duty payable thereon, after such reduction, shall be as specified in the Table given below, namely :—

Table

Description of the Instrument (As specified in Schedule I to the Indian Stamp Act, 1899) (1)	Proper Stamp Duty (2)
13. Bill of Exchange as defined by Section 2 (2) not being a Bond, bank note, or currency note —	
(b) Where payable otherwise than on demand—	
(i) Where payable not more than three months after date or sight—	
if the amount of bill or note does not exceed Rs.500;	Thirty paise
if it exceeds Rs. 500 but does not exceed Rs. 1000;	Sixty paise
and for every additional Rs. 1000 or part thereof in excess of Rs. 1000;	Sixty paise
(ii) where payable more than three months but not more than six months after date or sight	
if the amount of the bill or note does not exceed Rs. 500;	Sixty paise

(1)	(2)
if it exceeds Rs. 500 but does not exceed Rs. 1000;	One rupee twenty paise
and for every additional Rs. 1000 or part thereof in excess of Rs. 1000;	One rupee twenty paise
(iii) where payable more than six months but not more than nine months after date or sight—	
if the amount of the bill or note does not exceed Rs. 500;	Ninety paise
if it exceeds Rs. 500 but does not exceed Rs. 1000;	One rupee eighty paise
and for every additional Rs. 1000 or part thereof in excess of Rs. 1000;	One rupee eighty paise
(iv) where payable more than nine months but not more than one year after date or sight—	
if the amount of the bill or note does not exceed Rs. 500;	One rupee twenty five paise
if it exceeds Rs. 500 but does not exceed Rs. 1000;	Two rupees fifty paise
and for every additional Rs. 1000 or part thereof in excess of Rs. 1000;	Two rupees fifty paise
(c) Where payable at more than one year after date or sight-	
if the amount of the bill or note does not exceed Rs. 500;	Two ruees fifty paise
if it exceeds Rs. 500 but does not exceed Rs. 1000;	Five rupees
and for every additional Rs. 1000 or part thereof in excees of Rs. 1000;	Five rupees
14. Bill of Lading (including a through bill of lading)	One rupee
Exemptions	N.B.— If a bill of lading drawn in parts, the proper stamp therefore must be borne by each one of the set.
(a) Bill of lading when the goods therein described are received at a place within the limits of any port of as defined under the Indian Ports Act, 1889 (10 of 1889), and are to be delivered at another place within the limits of the same port;	
(b) Bill of lading when executed out of India and relating to property to be delivered in India	
27. Debenture (whether a mortgage debenture or not), being a marketable security transferable—	
(a) by endorsement or by a separate instrument of transfer- where the amount or value does not exceed Rs. 10;	Ten paise

where it exceeds	Rs. 10	and does not exceed	Rs. 50	Twenty paise
Ditto	50	Ditto	100;	Thirty-five paise
Ditto	100	Ditto	200;	Seventy-five paise
Ditto	200	Ditto	300;	One rupee ten paise
Ditto	300	Ditto	400;	One rupee fifty paise

(1)				(2)
Ditto	400	Ditto	500;	One rupee eighty-five paise
Ditto	500	Ditto	600;	Two rupees twenty-five paise
Ditto	600	Ditto	700;	Two rupees sixty paise
Ditto	700	Ditto	800;	Three rupees
Ditto	800	Ditto	900;	Three rupees forty paise
Ditto	900	Ditto	1000;	Three rupees seventy-five paise
and for every Rs. 500 or part thereof in excess of Rs. 1000;				One rupee eighty-five paise
(b) by delivery— where the amount or value of the consideration for such debenture as set forth therein does not exceed Rs. 50;				Thirty-five paise
Where it exceeds	Rs. 50	but does not exceed	Rs.100	Seventy-five paise
Ditto	100	Ditto	200;	One rupee fifty paise
Ditto	200	Ditto	300;	Two rupees twenty-five paise
Ditto	300	Ditto	400;	Three rupees
Ditto	400	Ditto	500;	Three rupees seventy-five paise
Ditto	500	Ditto	600;	Four rupees fifty paise
Ditto	600	Ditto	700;	Five rupees twenty-five paise
Ditto	700	Ditto	800;	Six rupees
Ditto	800	Ditto	900;	Six rupees seventy-five paise
Ditto	900	Ditto	1000;	Seven rupees fifty paise
and for every Rs 500 or part thereof in excess of Rs. 1000;				Three rupees seventy-five paise

Explanation.—The term "Debenture" includes any interest coupons attached thereto but the amount of such coupons shall not be included in estimating the duty.

Exemption

A debenture issued by an incorporated company or other body corporate in terms of a registered mortgage-deed, duly stamped in respect of the full amount of debentures to be issued thereunder, whereby the company or body

(1)	(2)	
borrowing makes over, in whole or in part, their property to trustees for the benefit of the debenture holders : Provided that the debentures so issued are expressed to be issued in terms of the said mortgage-deed.		
37.Letter of Credit, that is to say, any instrument by which one person authorizes another to give credit to the person in whose favour it is drawn.	One rupee	
47. Policy of Insurance **A. Sea Insurance [See Section 7 of Indian Stamp Act, 1899 (2 of 1899)]**	If drawn singly	If drawn in duplicate for each part
(1) for or upon any voyage-		
(i) where the premium or consideration does not exceed the rate of one-eight per centum of the amount insured by the policy;	Five paise	Five paise
(ii) in any other case, in respect of every full sum of one thousand five hundred rupees and also any fractional part of one thousand five hundred rupees insured by policy;	Five paise	Five paise
(2) for time—		
(iii) in respect of every full sum of one thousand rupees and also any fractional part of one thousand rupees insured by the policy— where the insurance shall be made for any time not exceeding six months;	Ten paise	Five paise
where the insurance shall be made for any time exceeding six months and not exceeding twelve months;	Ten paise	Five paise
B. Fire Insurance and other classes of insurance, not elsewhere included in this article, covering goods, merchandise, personal effects, crops and other property against loss or damage—		
(1) in respect of an original policy—		
(i) when the sum insured does not exceed Rs. 5000;	Twenty-five paise	
(ii) in any other case; and	Fifty paise	
(2) in respect of each receipt for any payment of a premium on any renewal of an original policy	One-half of duty payable in respect of the original policy in addition to the amount, if any, chargeable under No. 53	

(1)	(2)	
C. Accident and Sickness Insurance		
(a) against railway accident, valid for a single journey only *Exemption* When issued to a passenger travelling by the intermediate or the third class in any railway;	Five paise	
(b) in any other case- for the maximum amount which may become payable in the case of any single accident or sickness where such amount does not exceed Rs. 1000 and also where such amount exceeds Rs. 1000, for every Rs. 1000 or part thereof.	Ten paise Provided that, in case of a policy of insurance against death by accident when the annual premium payable does not exceed Rs. 2.50 per Rs. 1000, the duty on such instrument shall be five paise for every Rs. 1000 or part thereof of the maximum amount which may become payable under it.	
C.C. Insurance by way of indemnity against liability to pay damages on account of accidents to workmen employed by or under the insurer or against liability to pay compensation under the Workmen's compensation Act, 1923 (8 of 1923), for every Rs. 100 or part thereof payable as premium.	Five paise	
D. Life insurance or group insurance or other insurance not specifically provided for, except such as re-insurance, as is described in Division-E of this article—	If drawn singly	If drawn in duplicate for each part
(i) for every sum insured not exceeding Rs. 250;	Ten paise	Five paise
(ii) for every sum insured exceeding Rs. 250 but not exceeding Rs. 500;	Ten paise	Five paise
(iii) for every sum insured exceeding Rs. 500 but not exceeding Rs. 1000 and also for every Rs. 1000 or part thereof in excess of Rs. 1000	Twenty paise	Ten paise
	N.B.- If a policy of group insurance is renewed or otherwise modified whereby the sum insured exceeds the sum previously insured on which stamp duty has been	

(1)	(2)
Exemption Policies of life insurance granted by the Director General of Post Offices in accordance with rules for Postal Life Insurance issued under the authority of the Central Government	paid, the proper stamp must be borne on the excess sum so insured.
E. Re-insurance by an insurance company, which has granted a policy of the nature specified in Division A or Division B of this article, with another company by way of indemnity or guarantee against the payment on the original insurance of a certain part of the sum insured thereby. paise *General Exemption* Letter of cover or engagement to issue a policy of insurance: Provided that, unless such letter of engagement bears the stamp prescribed by this Act for such policy, nothing shall be claimable thereunder, nor shall it be available for any purpose, except, to compel the delivery of the policy therein mentioned.	One-quarter of the duty payable in respect of the original insurance but not less than five or more than fifty paise: Provided that if the total amount of duty payable is not a multiple of five paise, the total amount shall be rounded off to the next higher multiple of five paise
49. Promissory Note (As defined by Section 2 (22)— (a) when payable on demand (i) when the amount or value does not exceed Rs.250; (ii) when the amount or value exceeds Rs. 250 but does not exceed Rs 1000; (iii) in any other case; (b) when payable otherwise than on demand	 Five paise Ten paise Fifteen paise The same duty as a Bill of Exchange (No.13) for same amount payable otherwise than on demand
52.Proxy empowering any person to vote at any one election of the members of a district or local board or of a body of municipal commissioners, or at any one meeting of (a) members of an incorporated company or other body corporate whose stock or funds is or are divided into shares	

(1)	(2)
and transferable, (b) a local authority, or (c) proprietors, members or contributors to the funds of any institution	
62. Transfer (Whether with or without consideration)-	
(a) of shares in an incorporated company or other body corporate;	Twenty-five paise for every hundred rupees or part thereof of the value of the share :

Provided that rates of stamp duty specified in column (2) on Bills of Exchange for items (b) and (c) in Article 13 and on promissory note for item (b) of Article 49 shall not apply to usance bills of exchange or promissory notes drawn or made for securing finance from Reserve Bank of India, Industrial Finance Corporation of India, Industrial Development Bank of India, State Financial Corporation, Commercial Bank and Cooperative Banks for (a) bona fide commercial or trade transactions, (b) seasonal agricultural operations or the marketing of crops, or (c) production or marketing activities of cottage and small scale industries and suh instrument shall bear the rate of stamp duty at one-fifth of the rate mentioned against items (b) and (c) in Article 13 and item (b) in Article 49 of Schedule I of the Indian Stamp Act, 1899 (2 of 1899).

Explanation 1.— For the purposes of the proviso—

(a) the expression "agricultural operations" includes animal husbandry and allied activities jointly undertaken with agricultural operations;

(b) "crops" include products of agricultural operations;

(c) the expression "marketing of crops" includes the processing of crops prior to marketing by agricultrual producers of any organization of such producers.

Explanation 2.— The duty chargeable shall, wherever necessary, be rounded off to the next five paise.

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मध्यप्रदेश शासन, वित्त विभाग

क्रमांक जी-3/2/89 नि-4/चार, भोपाल, दिनांक 26 अक्टूबर, 1989.

प्रति,

शासन के समस्त विभाग,
समस्त विभागाध्यक्ष,
मध्यप्रदेश।

विषयः- शासकीय अधिकारियों एवं कर्मचारियों को चिकित्सा अग्रिम/ऋण हेतु नियमों तथा मानदंड का निर्धारण।

अधिकारियों/कर्मचारियों को उनकी स्वयं की या उनके परिवार के सदस्यों की गंभीर बीमारी के उपचार हेतु चिकित्सा अग्रिम (ऋण) स्वीकृत करने के विषय पर पात्रता/मापदंड एवं नियम निर्धारित करने के विषय पर राज्य शासन विचार करता रहा है। तदनुसार/निम्नांकित नियम निर्धारित किए जाते हैं :-

(1) चिकित्सा व्यय की अनुमानित राशि प्रथम एवं द्वितीय श्रेणी अधिकारियों के मामलों में रु. 15000/- से कम व तृतीय एवं चतुर्थ श्रेणी कर्मचारियों के मामलों में रु. 7,500/- से कम होने पर, चिकित्सा अग्रिम स्वीकृत नहीं किए जावेंगे।

(2) प्रकरण में संचालक, चिकित्सा शिक्षा की उपचार संबंधी सिफारिश होना अनिवार्य होगा। संबंधित चिकित्सक/चिकित्सालय का चिकित्सा के लिए निर्धारित व्यय का पत्रक भी प्रस्तुत करना होगा।

(3) चिकित्सा अग्रिम का पूरा समायोजन, अग्रिम प्राप्तकर्ता शासकीय सेवक के द्वारा उन्हें भुगतान की तिथि से 3 माह की समयावधि में करा लिया जावेगा। इस अवधि के बाद जो राशि असमायोजित रहेगी, उसकी वसूली उनके मासिक वेतन से नियमानुसार मासिक किश्तों में काटी जावेगी। जो चिकित्सा देयक नियमानुसार बाद में प्रस्तुत होंगे, उनकी प्रतिपूर्ति की राशि भी इसी पेटे जमा की जावेगी। तत्पश्चात् यदि चिकित्सा अग्रिम की कोई राशि वसूल होना शेष रही, तो उसका शासकीय सेवक को देय अन्य भुगतानों से समायोजन किया जावेगा। उपचार पर वास्तविक व्यय यदि चिकित्सा अग्रिम की स्वीकृत कुल राशि से कम रहा हो, तो अग्रिम की शेष राशि उन्हें एकमुश्त वापिस जमा करना होगी।

(4) भुगतान की तिथि से तीन माह के पश्चात, असमायोजित राशि पर आहरण की तिथि से 6% की दर से, ब्याज लिया जावेगा। आहरण की तिथि से यदि एक वर्ष पश्चात् भी अग्रिम की कोई राशि असमायोजित रहेगी, तो उस पर आहरण की तिथि से 9% की दर से ब्याज देय होगा।

(5) (अ) आहरण से 3 माह के भीतर यदि अग्रिम की राशि का कोई भी उपयोग वर्णित चिकित्सा/उपचार के लिए नहीं किया जाता है, तो अग्रिम की सम्पूर्ण राशि, अग्रिमग्रहिता को एकमुश्त वापिस शासन को जमा करना होगी, तथा उस राशि पर आहरण की तिथि से जमा करने की तिथि तक 12% की दर से ब्याज भी लिया जावेगा।

(ब) आहरण की तिथि से 3 माह के भीतर राशि के उपयोग बाबत् आवश्यक जानकारी प्रशासकीय विभाग को एवं आहरणकर्ता अधिकारी को देने की जिम्मेदारी अग्रिमग्रहिता शासकीय सेवक की होगी।

(स) यदि किन्हीं परिस्थितियों में, अपरिहार्य कारणों से अग्रिम की पूर्ण राशि का उपयोग 3 माह के भीतर संभव न हो पा रहा हो, या आंशिक राशि का उपयोग ही संभव हो पा रहा हो, तो अग्रिमग्रहीता शासकीय सेवक का यह उत्तरदायित्व होगा कि वह 3 माह की अवधि पूर्ण होने के पहिले ही सारी परिस्थितियां स्पष्ट करते हुए, प्रमाण-सहित प्रशासकीय विभाग को अपना आवेदन पत्र भेजें तथा अग्रिम के समायोजन हेतु अवधि बढ़ाने हेतु अनुरोध करें। प्रशासकीय विभाग तत्काल ही अपनी राय अंकित करते हुए प्रकरण आवश्यक निर्णय हेतु वित्त विभाग को भेजेगा।

(6) राशि की आवश्यकता से 15 दिन अधिक पहिले अग्रिम का आहरण नहीं किया जावेगा।

(7) अग्रिम की राशि भुगतान संबंधित शासकीय सेवक को किया जावेगा, उसके स्वयं के रोगी होने व उस कारण उपस्थित न हो सकने की दशा में, उसके द्वारा विधिवत् अधिकृत व्यक्ति को किया जा सकेगा।

(8) ऊपर शर्त क्रमांक (3), (4) एवं (5) के मुताबिक अग्रिम की वसूली की पूर्ण जिम्मेदारी प्रशासकीय विभाग की होगी।

(9) रोगी की चिकित्सा पर नियमानुसार देय व्यय के अलावा, अन्य अनुशंगिक व्यय आवेदक को स्वयं ही वहन करना होगा। केवल नियमों के अन्तर्गत देय व्यय की ही प्रतिपूर्ति एवं अग्रिम की ओर उसका समायोजन हो सकेगा।

नोटः- पूर्व में स्वीकृत सभी असमायोजित चिकित्सा अग्रिमों पर अब यही नियम तत्काल प्रभाव से लागू होंगे, पूर्व में लागू की गई शर्तें, तदनुसार संशोधित/परिवर्तित मानी जावें।

सही/-

सचिव, वित्त

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मध्यप्रदेश शासन
वित्त विभाग
मंत्रालय

क्रमांक 434/1255/चार/ब-6/95 भोपाल, दिनांक 23-5-95

प्रति,

शासन के समस्त विभाग,
अध्यक्ष, राजस्व मंडल, ग्वालियर,
समस्त संभागीय आयुक्त,
समस्त विभागाध्यक्ष,
समस्त जिलाध्यक्ष,
मध्यप्रदेश।

विषयः- शासकीय सेवकों को चिकित्सा अग्रिम स्वीकृत करने बाबत्।

संदर्भः- वित्त विभाग का ज्ञापन क्र. जी. 3/2/94/सी/चार, दिनांक 8-12-94

राज्य शासन ने संदर्भित ज्ञापन द्वारा शासकीय सेवकों को चिकित्सा अग्रिम स्वीकृत करने के अधिकार विभागाध्यक्षों को प्रत्यायोजित करते हुए उसकी प्रक्रिया एवं निर्देश जारी किए हैं। उक्त प्रसारित परिपत्र की कंडिका 1 के अनुसार अग्रिम की राशि 80% से अधिक नहीं होनी चाहिए तथा कंडिका 4 के अनुसार रुपये 25,000/- से अधिक के अग्रिम के मामले में, संचालक, चिकित्सा शिक्षा की अनुशंसा एवं व्यय का आकलन पत्र (Estimate) प्रस्तुत किए जाने चाहिए। परन्तु प्रायः यह देखने में आ रहा है कि विभागाध्यक्षों द्वारा उक्त निर्देशों का समुचित रूप से पालन नहीं किया जा रहा है तथा वित्त विभाग से आबंटन प्राप्त किए बगैर ही स्वीकृति आदेश जारी किये जा रहे हैं।

2. राज्य शासन अपेक्षा करता है कि विद्यमान् निर्देशों का कड़ाई से पालन किया जाय तथा आबंटन हेतु वित्त विभाग को मांग पत्र भेजते समय प्रत्येक मामले में, यदि अग्रिम की राशि रुपये 25,000/- से अधिक हो तो संचालक, चिकित्सा शिक्षा की अनुशंसा एवं व्यय का आकलन पत्र अनिवार्य रूप से प्रस्तुत किए जाय। प्रत्येक मामले में 80% राशि की ही मांग की जाय तथा वित्त विभाग से आबंटन प्राप्त होने के बाद ही स्वीकृति आदेश जारी किए जायें।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार
उपसचिव
मध्यप्रदेश शासन, वित्त विभाग

●

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE ELECTRICITY (AMENDMENT) ACT, 2003

The following Act of Parliament received the assent of the President on 30th December, 2003 and was published in the Gazette of India, Extraordinary, Part II Section 1, No. 71, dated 31st December, 2003.

INDIAN PARLIAMENT ACT NO. 57 OF 2003

An Act to amend the Electricity Act, 2003.

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

1. Short title and commencement.— (1) This Act may be called the **Electricity (Amendment) Act, 2003.**

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

2. Amendment of Section 14.— In Section 14 of the Electricity Act, 2003 (36 of 2003) (hereinafter referred to as the principal Act), in the sixth proviso, for the brackets and words "(including the capital adequacy, creditworthiness, or code of conduct)", the words "relating to the capital adequacy, creditworthiness, or code of conduct" shall be substituted.

3. Amendment of Section 42.— In Section 42 of the principal Act, in sub-section (2), after the fourth proviso, the following proviso shall be inserted, namely:-

"Provided also that the State Government shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulation provide such open access to all consumers who require a supply of electricity whem the maximum power to be made available to any time exceeds one megawatt.".

4. Substitution of new section for Section 121.— For Section 121 of the principal Act, the following section shall be substituted, namely :-

"121. Power of Appellate Tribunal.— The Appellate Tribunal may, after hearing the Appropriate Commission or other interested party, if any, from time to time, issue such orders, instructions or directions as it may deem fit, to any Appropriate Commission for the performance of its statutory functions under this Act".

5. Amendment of Section 135.— In Section 135 of the principal Act, in sub-section (2),-

(i) in clause (a), for the words "has been, is being, or is likely to be,", the words "has been or is being" shall be substituted;

(ii) in clause (b), for the words "has been, is being, or is likely to be,", the words "has been or is being" shall be substituted.

6. Substitution of new sections for Section 139 and 140.— For Sections 139 and 140 of the principal Act, the following sections shall be substituted, namely :-

"139. Negligently breaking or damaging works.— Whoever, negligently breaks, injures, throws down or damages any material connected with the supply of electricity, shall be punishable with fine which may extent to ten thousand rupees.

140. Penalty for intentionally injuring works.— Whoever, with intent to cut off the supply of electricity, cuts or injures, or attempts to cut or injure, any electric supply line or works, shall be punishable with fine which may extend to ten thousand rupees.".

7. Amendment of Section 146.— In Section 146 of the Principal Act, the following proviso shall be inserted, namely :-

"Provided that nothing contained in this section shall apply to the orders, instructions or directions issued under Section 121.".

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THE MARRIAGE LAWS (AMENDMENT) ACT, 2003

The following Act of Parliament received the assent of the President on 23rd December, 2003 and was published in the Gazette of India, Extraordinary, Part II, Section 1, No. 64, dated 23rd December, 2003.

INDIAN PARLIAMENT ACT NO. 50 OF 2003

An Act further to amend the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955.

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

CHAPTER 1
PRELIMINARY

1. Short title.— These Act may be called the Marriage Laws (Amendment) Act, 2003.

CHAPTER II
AMENDMENTS OF THE SPECIAL MARRIAGE ACT, 1954

2. Amendment of section 31.— In the Special Marriage Act, 1954 (43 of 1954) (hereinafter referred to as the Special Marriage Act), in section 31, in sub-section (1), after clause (iii), the following clause shall be inserted, namely :-

"(iiia) in case the wife is the petitioner, where she is residing on the date of presentation of the petition; or".

3. Amendment of section 39.— In section 39 of the Special Marriage Act, in sub-section (4), for the words "period of thirty days", the words "period of ninety days" shall be substituted.

CHAPTER III
AMENDMENT TO THE HINDU MARRIAGE ACT, 1955

4. Amendment of section 19.— In the Hindu Marriage Act, 1955 (25 of 1955) (hereinafter referred to as the Hindu Marriage Act), in section 19, in sub-section (1), after clause (iii), the following clause shall be inserted, namely :-

"(iiia) in case the wife is the petitioner, where she is residing on the date of presentation of the petition, or".

5. Amendment of section 28.— In section 28 of the Hindu Marriage Act, in sub-section (4), for the words "period of thirty days", the words "period of ninety days" shall be substituted.

CHAPTER IV
MISCELLANEOUS

6. Transitory provision.— All decrees and orders made by the court in any proceedings under the Special Marriage Act or the Hindu Marriage Act shall be governed under the provisions contained in section 3 or section 5, as the case may be, as if this Act came into operation at the time of the institution of the suit:

Provided that nothing in this sector shall apply to a decree or order in which the time for appearing has expired under the Special Marriage Act or the Hindu Marriage Act at the commencement of this Act.

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Ministry of Road Transport and Highways Notification No. G.S.R. 885 (E) dated the 12th November, 2003. Published in the Gazette of India (Extraordinary) Part II Section 3 (i) dated 12.11.2003 Pages 16-23.

In exercise of the powers conferred by sub-section (1) of section 50 of the **Control of National Highways (Land and Traffic) Act, 2002 (13 of 2003),** the Central Government hereby makes the following rules, namely :—

1. Short title and commencement. — (1) These rules may be called the **National Highways Tribunal (Procedure) Rules, 2003.**

(2) They shall come into force on the date on which the Act comes into force.

2. Definitions.— In these rules, unless the context otherwise requires,—

(a) "Act" means the Control of National Highways (Land and Traffic) Act, 2002 (13 of 2003);

(b) "appellant" means a person making an appeal to the Tribunal under section 14;

(c) "appeal" means an appeal made to the Tribunal under section 14;

(d) "legal practitioner" shall have the meaning assigned to it in the Advocates Act, 1961 (25 of 1961);

(e) "Presiding Officer" means the Presiding Officer of a Tribunal;

(f) "Registrar" means the Registrar of a Tribunal ;

(g) "Registry" means the Registry of a Tribunal;

(h) "section" means a section of the Act;

(i) "Tribunal" means the National Highways Tribunal established under sub-section (1) of section 5;

(j) the words and expressions used and not defined in these rules but are defined in the Act shall have the same meaning as respectively assigned to them in the Act.

3. Sittings of the Tribunal.— A Tribunal shall hold its sittings either at its headquarters or at such other place falling within its jurisdiction as it may consider convenient.

4. Language of the Tribunal.— (1) The proceeding of the Tribunal shall be conducted in English or Hindi.

(2) No appeal, reference, application, representation, document or other matters shall be accepted by the Tribunal unless the same is accompanied by a true copy of translation thereof in English or Hindi.

5. Procedure for filing appeals.— (1) A memorandum of appeal shall be presented in the Form annexed to these rules by the appellant either in person, or by a legal practitioner authorised by him for such purpose to the Registrar or shall be sent by registered post addressed to such Registrar.

(2) An appeal sent by post under sub-rule (1) shall be deemed to have been presented to the Registrar on the day on which it is received in the office of the Registrar.

(3) The appeal under sub-rule (1) shall be presented in three complete sets in a paper book along with an empty file size envelope bearing full address of the respondent and where the number of respondent is more than one the sufficient number of extra paper book together with empty file size envelopes bearing full address of each respondent shall be furnished by the appellant.

6. Presentation and scrutiny of memorandum of appeal.— (1) The Registrar shall endorse on every appeal the date on which it is presented under rule 5 or deemed to have been presented under that rule and shall sign endorsement.

(2) If, on scrutiny, the appeal is found to be in order, it shall be duly registered and given a serial number.

(3) If an appeal, on scrutiny, is found to be defective, and the defect noticed is formal in nature, the Registrar may allow the appellant to rectify the same in his presence and if the same defect is not formal in nature, the Registrar may allow the appellant such time to rectify the defect as he may deem fit.

(4) If the appellant fails to rectify the defect within the time allowed in sub-rule (3), the Registrar may, by order and for reasons to be recorded in writing, decline to register such memorandum of appeal.

(5) An appeal against the order the Registrar under sub-rule (4) shall be made within fifteen days of making of such order to the Presiding Officer, whose decision shall be final.

7. Place of filing memorandum of appeal.— The memorandum of appeal shall be filed by appellant with the Registrar having jurisdiction in the matter.

8. Contents of memorandum of appeal.— (1) Every memorandum of appeal filed under rule 5 shall set forth concisely under distinct head, the grounds of such appeal without any argument or narration, and such grounds shall be numbered consecutively and shall be typed in double line space on one side of the paper.

(2) It shall not be necessary to present separate application to seek interim order or direction if the memorandum of appeal contains a prayer seeking an interim order pending final disposal of the appeal.

9. Documents to accompany memorandum of appeal.— (1) Every memorandum of appeal shall be in triplicate and shall be accompanied with two copies of the order served attested by a notary or brief description of the action taken by the Highway Administration or an officer authorised on its behalf, as the case may be, against which the appeal is filed.

(2) The memorandum of appeal shall also be accompanied with an affidavit of the appellant stating therein that the facts stated in the memorandum of appeal and the documents relied upon and accompanied therewith are true to his knowledge and belief.

(3) Where the appellant is being represented by a legal practitioner, a duly executed Vakalatnama authorising him to act as such shall also be appended to the memorandum of appeal.

10. Plural remedies.— A memorandum of appeal shall seek relief or reliefs based on more than a single cause of action in one single memorandum of appeal unless the reliefs prayed for are consequential to one another.

11. Endorsing copy of appeal to the respondents.— (1) A copy of the memorandum of appeal and the paper book shall be served on each of the respondents as soon as they are filed by the Registrar by the registered post.

(2) For the purpose of service by registered post under sub-rule (1), the appellant shall deposit the required envelopes and postal stamps with the registry or deposit required expenditure with the registry for such purpose and obtain a receipt for such deposit from the registry.

12. Filing of reply to the appeal and other documents by the respondents.— (1) The respondent may file three complete sets containing the reply to the appeal along with documents in a paper book form with the registry within one month of the service of the notice on him of the filing of the memorandum of appeal.

(2) The respondent shall also endorse one copy of the reply to the appeal along with documents as mentioned in sub-rule (1) to the appellant.

(3) The Tribunal may, in its discretion on application by the respondent, allow the filing of reply referred to in sub-rule (1), after the expiry of the period referred to therein.

13. Date and place of hearing to be notified.— The Registrar shall notify the parties, the date and place of hearing of the appeal in such manner as the Presiding Officer may, by general or special order, direct.

14. Dress regulations for the Presiding Officer, etc.— (1) Summer dress for the Presiding Officer shall be white pant with black coat and a black tie or a buttoned up black coat. In winter, striped or black trousers may be worn in place of white trousers. In the case of female Presiding Officer, the dress shall be black coat over white saree.

(2) The legal practitioner appearing before the Tribunal shall wear their professional dress.

(3) The dress for the members of the staff of the Tribunal shall be such as may be specified by the Central Government.

15. Order to be signed and dated.— (1) Every order of the Tribunal shall be in writing and shall be signed and dated by the Presiding Officer of the Tribunal.

(2) The order shall be pronounced in the open Tribunal.

16. Publication of orders.— The orders of the Tribunal as are deemed fit for publication in any authoritative report or the press may be released for such publication on such terms and conditions as the Tribunal may lay down.

17. Inspection of records and certified copies of orders.— (1) Any person who is a party in an appeal or a legal practitioner authorised by such person may make application for inspecting the records or such appeal to the Registrar and the Registrar may on satisfying that such person is a party in such appeal allow the inspection of the documents relating to such appeal by such person or the legal practitioner, as the case may be.

(2) Any person or a legal practitioner authorised by such person may make application to the Registrar for obtaining a certified copy of any order or the Tribunal for such person and the Registrar shall direct on such application that the certified copy of such order may be given to such person or the legal practitioner, as the case may be, on payment of the expenditure for preparing such certified copy to the registry at the rate of five rupees for a folio or part thereof not involving typing and rupees ten for a folio or part thereof involving typing of statement and figures.

(3) Every certified copy of the order of the Tribunal shall be prepared in the registry and shall be authenticated by the Registrar or an officer authorised in this behalf under his hand and seal.

18. Working hours of the Tribunal.— (1) Except on Saturdays, Sundays and other public holidays, the office of the Tribunal shall, subject to any other order, made by the Presiding Officer remain open daily from 9.30 A.M. to 6.00 P.M. but no work unless of an urgent nature shall be admitted after 4.30 P.M. on any working day.

(2) The sitting hours of the Tribunal shall ordinarily be from 10.30 A.M. to 1.30 P.M. and 2.30 P.M. to 5.00 P.M. subject to any general or special order made by the Presiding Officer.

19. Holidays.— Where the last day for doing any act falls on a day on which the office of the Tribunal is closed and by reason thereof, the act cannot be done on that day, it may be done on the next day on which that office opens.

20. Powers and functions of the Registrar.— (1) The Registrar shall have the custody of the records of the Tribunal and shall exercise such other functions as are assigned to him under these rules or by the Presiding Officer by a separate order in writing.

(2) The official seal shall be kept in the custody of the Registrar.

(3) Subject to any general or special direction by the Presiding Officer, the seal of the Tribunal shall not affixed to any order, notice or other process save under the authority in writing of the Registrar.

(4) The seal of the Tribunal shall not be affixed to any certified copy issued by the Tribunal save under the authority in writing of the Registrar.

21. Additional powers and duties of the Registrar.— In addition to the powers conferred elsewhere in these rules, the Registrar shall have the following powers and duties subject to any general or special orders of the Presiding Officer, namely:—

(i) to receive all appeals and other documents;

(ii) to decide all questions arising out of the scrutiny of the appeals before they are registered;

(iii) to require any appeal presented to the Tribunal to be amended in accordance with the rules;

(iv) subject to the directions of the Presiding Officer to fix date of hearing of the appeals or other proceedings and issue notices thereof;

(v) direct any formal amendment of records;

(vi) to order grant of copies of documents to parties of the proceedings;

(vii) to grant leave to inspect the record of Tribunal;

(viii) to dispose of all matters relating to the service of notices of other processes, application for the issue of fresh notice or for extending the time for or ordering a particular method of service on a respondent including a substituted service by publication of the notice by way of advertisements in the newspapers;

(ix) to requisition records from the study of any court or other authority.

22. Seal and emblem.— The official seal and emblem of the Tribunal shall be such as the Central Government may specify.

Form

[See rule 5 (1)]

Memorandum of Appeal under section 14 of the Control of National Highway (Land and Traffic) Act, 2002 (13 of 2003)

For use of Tribunal's office

Date of filing.....

Date of receipt by post.....

Registration No.....

Signature

Registrar

In the National Highways Tribunal

..... Appellant

..... Respondent(s)

Details of appeal :

1. Particulars of the appellant :

(i) Name of the appellant

(ii) Name of father/husband

(iii) Address of appellant

(iv) Address for service of all notices.

2. Particulars of the respondent or respondents including address of service:

3. Particulars of the order against which the appeal is filed. The appeal is against the following order :—

(i) Order No.

(ii) Date

(iii) Passed by

4. Jurisdiction of the Tribunal.— The appellant declares that the matter of the appeal falls within the jurisdiction of the Tribunal.

5. Limitation.— The appellant further declares that the appeal is within the limitation prescribed under section 19 of the Control of National Highways (Land and Traffic) Act, 2002 (13 of 2003).

6. Facts of the case and orders passed or actions taken by Highway Administrations or the Officer authorized on its behalf, as the case may be.— The facts of the case are given below :

(Give here a concise statement of facts and grounds of appeal against the specific order passed or action taken by the Highway Administration or an officer authorized on its behalf, as the case may be, in a chronological order, each paragraph containing as nearly as possible a separate issue, fact or otherwise)

7. Reliefs sought.— In view of the facts mentioned in paragraph five above, the appellant prays for the following reliefs (specify below the relief sought explaining the grounds for relief(s) and the legal provisions (if any) relief upon.

8. Interim order, if prayed.— Pending final decision of the appeal, the appellant seeks issue of the following interim order:

(Give here the nature of the interim order prayed for with reasons)

9. Matter not pending with any other court, etc.— The appellant further declares that the matter regarding which this appeal has been made is not pending before any court of law or any other authority or any other tribunal.

10. Details of index.— An index in duplicate containing the details of the documents to be relied upon is enclosed.

11. List of enclosures :

Verification

I..... (name in full in block letters) son/daughter/wife of Shri ..... do hereby verify that the contents of para 1 to 11 are true to my personal knowledge and belief and that I have not suppressed any material facts.

Place :

Date : Signature of the applicant

To,

The Registrar,

.....

.....

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THE PREVENTION OF TERRORISM (AMENDMENT) ACT, 2003

No. 4 of 2004*

[2nd January, 2004]

An Act to amend the Prevention of Terrorism Act, 2002.

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

1. Short title and commencement.— (1) This Act may be called the Prevention of Terrorism (Amendment) Act, 2003.

(2) It shall be deemed to have come into force on the 27th day of October, 2003.

2. Amendment of section 60.— In Section 60 of the Prevention of Terrorism Act, 2002 (15 of 2002), after sub-section (3), the following sub-sections shall be inserted, namely :—

"(4) Without prejudice to the other provisions of this Act, any Review Committee constituted under sub-section (1) shall, on an application by any aggrieved person, review whether there is a *prima facie* case for proceeding against the accused under this Act and issue directions accordingly.

(5) Any direction issued under sub-section (4),—

(i) by the Review Committee constituted by the Central Government, shall be binding on the Central Government, the State Government and the police officer investigating the offence; and

(ii) by the Review Committee constituted by the State Government, shall be binding on the State Government and the police officer investigating the offence.

(6) Where the reviews under sub-section (4) relating to the same offence under this Act, have been made by a Review Committee constituted by the Central Government and a Review Committee constituted by the State Government, under sub-section (1), any direction issued by the Review Committee constituted by the Central Government shall prevail.

(7) Where any Review Committee constituted under sub-section (1) is of opinion that there is no *prima facie* case for proceeding against the accused and issues directions under sub-section (4), then, the proceedings pending against the accused shall be deemed to have been withdrawn from the date of suc direction.".

3. Repeal and saving.— (1) The Prevention of Terrorism (Amendment) Ordinance, 2003 (Ord. 4 of 2003), is hereby repealed.

(2) Notwithstanding such repeal, any thing done or any action taken under the Prevention of Terrorism Act, 2002 (15 of 2002), as amended by the said

Ordinance, shall be deemed to have been done or taken under the said Act, as amended by this Act.

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THE CONSTITUTION (NINETY-FIRST AMENDMENT) ACT, 2003

The following Act of Parliament received the assent of the President on January 1, 2004 and was published in the Gazette of India, Extraordinary, Part II, Section 1, No. 1, dated 2nd January, 2004.

An Act further to amend the Constitution of India.

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

1. Short title.— this Act may be called the Constitution (Ninety-first Amendment) Act, 2003.

2. Amendment of article 75.— In article 75 of the Constitution, after clause (1), the following clauses shall be inserted, namely :-

"(1A) the total number of Ministers, including the Prime Minister, in the Council of Ministers shall not exceed fifteen per cent. of the total number of members of the House of the People.

(1B) A member of either House of Parliament belonging to any political party who is disqualified for being a member of that House under paragraph 2 of the Tenth Schedule shall also be disqualified to be appointed as a Minister under clause (1) for duration of the period commencing from the date of his disqualification till the date on which the term of his office as such member would expire or where he contests any election to either House of Parliament before the expiry of such period, till the date on which he is declared elected, whichever is earlier.".

3. Amendment of article 164.— In article 164 of the Constitution, after clause (1), the following clauses shall be inserted, namely :-

"(1A) The total number of Ministers, including the Chief Minister, in the Council of MInisters in a State shall not exceed fifteen per cent. of the total number of members of the Legislative Assembly of that State:

Provided that the number of Ministers, including the Chief Minister, in a State shall not be less than twelve:

Proided further that where the total number of Ministers, including the Chief Minister, in the Council of Ministers in any State at the commencement of the Constitution (Ninety-first Amendment) Act, 2003 exceeds the said fifteen per cent, or the number specified in the first proviso, as the case may be, then, the total number of Ministers in that State shall be brought in conformity with the provisions of this clause within six months from such date as the President may by public notification appoint.

(1B) A member of the Legislative Assembly of a State or either House of the

Legislature of a State having Legislative Council belonging to any political party who is disqualified for being a member of that House under paragraph 2 of the Tenth Schedule shall also be disqualified to be appointed as a Minister under clause (1) for duration of the period commencing from the date of his disqualification till the date on which the term of his office as such member would expire or where he contests any election to the legislative Assembly of a State or either House of the Legislature of a State having Legislative Council, as the case may be, before the expiry of such period, till the date on which he is declared elected, whichever is earlier.".

4. Insertion of new article 361B.— After article 361A of the Constitution, the following article shall be inserted, namely :-

'361B. Disqualification for appointment on remunerative political post.— A member of a House belonging to any political party who is disqualified for being a member of the House under paragraph 2 of the Tenth Schedule shall also be disqualifed to hold any remunerative political post for duration of the period commencing from the date of his disqualification till the date on which the term of his office as such member would expire or till the date on which he contests an election to a House and is declared elected, whichever is earlier.

Explanation.— For the purposes of this article,-

(a) The expression "House" has the meaning assigned to it in clause (a) of paragraph 1 of the Tenth Schedule;

(b) the expression "remunerative political post" means any office-

(i) under the Government of India or the Government of a State where the salary or remuneration for such office is paid out of the public revenue of the Government of India or the Government of the State, as the case may be; or

(ii) under a body, whether incorporated or not, which is wholly or partially owned by the Government of India or the Government of a State and the salary or remuneration for such office is paid by such body,

except where such salary or remuneration paid is compensatory in nature.'.

5. Amendment of the Tenth Schedule.— In the Tenth Schedule to the Constitution,-

(a) in paragraph 1, in clause (b), the words and figure "paragraph 3 or, as the case may be," shall be omitted;

(b) in paragraph 2, in sub-paragraph (1), for the words and figures "paragraphs 3, 4 and 5", the words and figures "paragraphs 4 and 5" shall be substituted;

(c) paragraph 3 shall be omitted.

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THE CONSTITUTION (NINETY SECOND AMENDMENT) ACT, 2003

The following Act of Parliament received the assent of the President on January 7, 2004 and was published in the Gazette of India, Extraordinary, Part II, Section 1, No. 8, dated 8th January, 2004.

An Act further to amend the Constitution of India.

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

1. Short title.— This Act may be called the Constitution (Ninety-second Amendment) Act, 2003.

2. Amendment of Eight Schedule. — In the Eight Schedule to the Constitution,-

(a) existing entry 3 shall be re-numbered as entry 5, and before entry 5 as so re-numbered, the following entries shall be inserted, namely :-

"3. Bodo

4. Dogri.";

(b) existing entries 4 to 7 shall respectively be re-numbered as entries 6 to 9;

(c) existing entry 8 shall be re-numbered as entry 11 and before entry 11 as so re-numbered, the following entry shall be inserted, namely :-

"10. Maithili.";

(d) existing entries 9 to 14 shall respectively be re-numbered as entries 12 to 17;

(e) existing entry 15 shall be re-numbered as entry 19 and before entry 19 as so re-numbered, the following entry shall be inserted, namely :-

"18. Santhali.";

(f) existing entries 16 to 18 shall respectively be re-numbered as entries 20 to 22.

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> Everybody talks of the constitution, but all sides forget that the constitution is extremely well, and would do very well, if they would but let it alone.
>
> **WALPOLE, Horace**