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

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We are thankful to the publishers of SCC, MPLJ, JLJ, MPWN, MPHT & RN for using some of their material in this Journal. -

Editor

FROM THE PEN OF THE EDITOR

VED PRAKASH
Director

With this issue of JOTI Journal we are almost mid-way in the Year of Excellence in Judiciary – 2005. Attainment of excellence is eternal quest of a human being. It is a constitutional value enshrined in Part IV-A of the Constitution of India in Article 51-A (J) which commands every citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. It is only through excellence that the ultimate object of serving the nation, society or the institution can be achieved in an ideal manner. This applies with a little more precision for a Judicial Officer, who is required to accomplish the task of dispensation of justice which is a divine attribute.

The quality of justice depends upon the mode and manner of exercise of discretion by a Judge because barring few areas, law everywhere confers a wide degree of discretion upon a Judge so that the justice is real and substantial instead of technical. The dialectics of human mind is so intricate and complex that even the most intelligent and efficient person may sometimes not be able to fathom the depth of mischief which may be there, even the law makers? That is why law in almost every situation clothes the Judge with discretion and therefore, it has been rightly said that it is the discretion which converts pleasure of administration of justice into the charm of delivery of justice.

The exercise of discretion by a Judicial Officer, which happens to be the widest power, is not unregulated or boundless. In terms of classical exposition given by Justice Benjamin Cardozo of Supreme Court of U.S.A. –

> "He (The Judge) is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy disciplined by system and subordinated to the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains."

The parameters expounded and outlined by Justice Cordozo in the aforesaid exposition about the concept of discretion continue to hold the field as far as the exercise of discretion is concerned.

In the aforesaid context one of the important aspects is that the exercise of discretion should be informed by tradition. This can be inculcated and developed by social context education which should be in the form of self-educating programme of every Judicial Officer. It requires reading of literary works of eminent jurists and Judges who have put in all their experience in such works. This must follow with a consistent reading of developments which are taking place in the field of law.

The Institute is privileged to publish in the current issue the text of the lecture delivered by Hon'ble the Chief Justice of India on 22.2.2005 in M.C. Setalvad Memorial lecture series relating to "Canons of Judicial Ethics". It is going to be a path-finder for the Judicial Officers.

Part II of the Journal highlights about the new developments which have taken place in past few months in the legal field by way of judicial pronouncements. One of the land mark decisions included relates to the right of deserted wife to contest eviction suit in which husband the real landlord, is not contesting the suit (Note 188).

The pronouncement of the Apex Court that Courts are not helpless bystander to decide about transfer of a convict/under trial from one jail to another when the rule of law is challenged with impunity (Note-187), also explores new dimensions vis-à-vis the discretionary field of Judge in the administration of criminal justice.

We are living in the age where constant up-gradation by innovation and suggestion is the need of the hour. Hon'ble the High Court has called upon the Judicial Officers to suggest ways and means in writing to improve efficiency and output of the system. (See-pg. 14 Part III). Out of the articles, the three best shall be published in JOTI Journal. This is definitely an opportunity to the Judicial Officers to involve themselves in the paramount task of improving and upgrading the system of administration of justice, which I hope they shall shoulder with all seriousness. The Institute has prepared a detailed calendar for various training/ refresher courses and workshops scheduled to be organised in the remaining part of this year. The Calendar is being published in Part I of the Journal so as to bring it to the notice of all the Judicial Officers.

Part IV also reflects the trend of the developments and we are including the latest scheme published under Income Tax Act, 1961 which enables an individual to file his Income Tax Return via internet. How fast the things are moving in the age of I.T. ? Let us resolve to keep pace with the change.

Thank you.

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PART - I

CANONS OF JUDICIAL ETHICS

(Text of the lecture delivered by Hon'ble Shri Justice R.C. Lahoti, Chief Justice of India in M.C. Setalvad Memorial Lecture series at New Delhi on 22.02.2005)

CANONS VS. PRINCIPLES

I wonder why not 'Principles of Judicial Ethics' and why the 'Canons of Judicial Ethics.'

'Principles' are fundamental truth, the axioms, the code of right conduct. Much of these remain confined to theory or hidden in books. Canons are the type or the rules perfected by the principles put to practice. Principles may be a faculty of the mind, a source of action which are a pleasure to preach or read. 'Canons' are principles put into practice so as to be recognized as rules of conduct commanding acceptability akin to religion or firm faith, the departure wherefrom would not be a pardonable mistake but an unpardonable sin. Let us bear this distinction in our mind while embarking upon a voyage into the dreamland called the 'Canons of Judicial Ethics'.

Canons are the first verse of the first chapter of a book whose pages are infinite. The life of a Judge i.e. the judicial living is not an easy thing. Things in judicial life do not always run smoothly. Performing the functions of a judicial office, an occupant at times rises towards the heights and at times all will seem to reverse itself. Living by canons of judicial ethics enables the occupant of judicial office to draw a line of life with an upward trend traveling through the middle of peaks and valleys. In legal circles, people are often inclined to remember the past as glorious and describing the present as full of setbacks and reverses. There are dark periods of trial and fusion. History bears testimony to the fact that there has never been an age that did not applaud the past and lament the present. The thought process shall even continue. Henry George said - "Generations, succeeding to the gain of their predecessors, gradually elevate the status of mankind as coral polyps, building one generation upon the work of the other, gradually elevate themselves from the bottom of the sea". Progress is the law of nature. Setbacks and reverses are countered by courage, endurance and resolve. World always corrects itself and the mankind moves ahead again. "Life must be measured by thought and action, not by time"-said Sir John Lubbock.

Observance of Canons of Judicial Ethics enables the judiciary to struggle with confidence; to chasten oneself and be wise and to learn by themselves the true values of judicial life. The discharge of judicial function is an act of divinity. Perfection in performance of judicial functions is not achieved solely by logic or reason. There is a mystic power which drives the Earth and the Sun, every

breeze on a flower and every smile on a child and every breath which we take. It is this endurance and consciousness which enables the participation of the infinite forces which command us in our thought and action, which, expressed in simple terms and concisely put, is called the 'Canons of Judicial Ethics'.

JUDICIAL ETHICS - *A definition*

Judicial ethics is an expression which defies definition. In the literature, wherever there is a reference to judicial ethics, mostly it is not defined but attempted to be conceptualized. According to Mr. Justice Thomas of the Supreme Court of Queensland, there are two key issues that must be addressed : (i) the identification of standard to which members of the judiciary must be held; and (ii) a mechanism, formal or informal, to ensure that these standards are adhered to. A reference to various dictionaries would enable framing of a definition, if it must be framed. Simply put, it can be said that judicial ethics are the basic principles of right action of the judges. It consists of or relates to moral action, conduct, motive or character of judges; what is right or befitting for them. It can also be said that judicial ethics consist of such values as belong to the realm of judiciary without regard to the time or place and are referable to justice dispensation.

NEED FOR

In all democratic constitutions, or even those societies which are not necessarily democratic or not governed by any constitution, the need for competent, independent and impartial judiciary as an institution has been recognized and accepted. It will not be an exaggeration to say that in modern times the availability of such judiciary is synonymous with the existence of civilization in society. There are constitutional rights, statutory rights, human rights and natural rights which need to be protected and implemented. Such protection and implementation depends on the proper administration of justice which in its turn depends on the existence and availability of an independent judiciary. Courts of Law are essential to act and assume their role as guardians of the Rule of Law and a means of assuring good governance. Though it can be said that source of judicial power is the law but, in reality, the effective exercise of judicial power originates from two sources. Externally, the source is the public acceptance of the authority of the judiciary. Internally and more importantly, the source is the integrity of the judiciary. The very existence of justice-delivery system depends on the judges who, for the time being, constitute the system. The judges have to honour the judicial office which they hold as a public trust. Their every action and their every word – spoken or written — must show and reflect correctly that they hold the office as a public trust and they are determined to strive continuously to enhance and maintain the people's confidence in the judicial system.

Alexander Hamilton once said – "The judiciary ... has no influence over either the sword or the purse; no direction either or the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will but merely judgment..." The greatest strength of the judiciary

is the faith of the people in it. Faith, confidence and acceptability cannot be commanded; they have to be earned. And that can be done only by developing the inner strength of morality and ethics.

ATTEMPTED CODIFICATION OF CANONS OF JUDICIAL ETHICS

People are responsible for their opinions, but providence is responsible for their morals (W.B. Yeats in Christopher Hasall). The Constitution of India provides for an independent judiciary. It is insulated against any influence of any other wing of governance or any other agency or authority. Speaking in the Constituent Assembly of India, its President Dr. Rajendra Prasad emphasized the need for the Indian Judiciary to be independent of the Executive and competent in itself. There was a long discussion as to how the twin objects could be achieved. It has been unanimously accepted in all the civilized countries of the world that an independent judiciary is the backbone of civilized governance. It needs to be constantly guarded against external influences. Over the time, the framers of different constitutions have realized that independence of the judiciary and the protection of its constitutional position is the result of a continuous struggle - an ongoing and dynamic process. The constitutional safeguards provide external protection for independence and strength of the judiciary. At the same time, the judiciary itself and social-legal forces should believe in the independence of the judiciary. It is of paramount importance, that the judiciary to remain protected must be strong and independent from within, which can be achieved only by inculcating and imbibing canons of judicial ethics inseparably into the personality of the judges. Ethics and morality cannot be founded on authority thrust upon from outside. They are the matters of conscience which sprout from within. *Sukra Neeti* (IV-5-14-15) enumerates five vices which every judge should guard against to be impartial. They are: (i) *raga* (learning in favour of a party), (ii) *lobha* (greed), (iii) *bhaye* (fear) (iv) *dvesha* (ill-will against anyone) and (v) *vadinoscha rahashruthi* (the judge meeting and hearing a party to a case secretly, i.e. in the absence of the other party)[2]. Socrates counseled judges to hear courteously, answer wisely, consider soberly and decide impartially. Someone has commented that these four virtues are all aspects of judicial diligence. It is suggested that Socrates' list needs to be supplemented by adding the virtue of acting expeditiously. But diligence is not primarily concerned with expedition. Diligence, in the broad sense, is concerned with carrying out judicial duties with skill, care and attention, as well as with reasonable promptness.

I read a poem (the name of the poet unfortunately I will not be able to quote, as it was not there, where I read it) which describes the qualities of a judge. It reads:

"God give us men, a time like this demands;

Strong minds, great hearts, true faith and ready hands;

Men whom the lust of office does not kill;

Men whom the spoils of office cannot buy;

Men who possess opinions and a will;

Men who have honour; men who will not lie

Men who stand before a demagogue

And damn lies treacherous flatteries without talking;

Tall men, sun-crowned, who live without the fog;

In public duty and in private thinking.

However, they may be trained to strengthen

those who are weak and wronged."

Late Justice Shiv Dayal during his tenure as Chief Justice of the High Court of Madhya Pradesh brought out Judges' Diary as an official publication of the High Court. It included Judge's Prayer running into three stanzas. Invoking the mercy of the Supreme Lord, he described the Judges as "Thy servants whom thou sufferest to sit in earthly seats of judgement to administer Thy justice to Thy people". He begs for the infinite mercy of the Supreme Lord, so as to "direct and dispose my heart that I may this day fulfill all my duty in Thy fear and fall into no error of judgment." In the third stanza, he says – "Give me grace to hear patiently, to consider diligently, to understand rightly, and to decide justly! Grant me due sense or humility, that I may not be misled by my willfulness, vanity or egotism". Rightly, the Judges are something special in the democratic form of government governed by a Constitution and, therefore, the most exacting standards can be none too high."[3]

Speaking of Felix Frankfurter as a judge, New York Times called him great "not because of the results he reached but because of his attitude towards the process of decision. His guiding lights were detachment, rigorous integrity in dealing with the facts of a case, refusal to resort to unworthy means, no matter how noble the end, and dedication to the Court as an institution."[4] Long back, in 1852, Bacon wrote in one of his essays, "Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. Above all things, integrity is their portion and proper virtue."

The book 'Lives of the Chief Justices of England' (published, in 1858), reproduced the qualities of a Judge written in his own handwriting by Lord Hale which he had laid down for his own conduct as a Judge. He wrote,5---

"Things necessary to be continually had in remembrance.

"1. That in the administration of justice I am intrusted for God, the King, and country; and therefore,

"2. That it be done, 1. uprightly; 2. deliberately; 3. resolutely.

"3. That I rest not upon my own understanding or strength, but implore and rest upon the direction and strength of God.

"4. That in the execution of justice I carefully lay aside my own passions, and not give way to them, however provoked.

"5. That I be wholly intent upon the business I am about, remitting all other cards and thought as unseasonable and interruptions. "And, while on the Bench, not writing letters or reading newspapers."

"6. That I suffer not myself to be prepossessed with my judgment at all, till the whole business and both parties be heard.

"7. That I never engage myself in the beginning of any cause but reserve myself unprejudiced till the whole be heard.

"8. That in business capital, though my nature prompt me to pity, yet to consider there is a pity also due to the country.

"9. That I be not too rigid in matters purely conscientious, where all the harm is diversity of judgment.

"10. (Not reproduced)

"11. That popular or court applause or distaste have no influence in anything I do, in point of distribution of justice.

"12. Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rule of justice.

"13. (Not reproduced)

"14. (Not reproduced)

"15. (Not reproduced)

"16. To abhor all private solicitations, of what kind so ever, and by whomsoever, in matters depending.

"17. (Not reproduced)

"18. To be short and sparing at meals, that I may be the fitter for business."

THE CONCEPT OF JUDGESHIP IN GITA

According to Shrimad Bhagwad Gita, a Judge is a person bestowed with 'excellence'. This concept, I am inclined to mention in the context of the year 2005 being an 'Year of Excellence in Judiciary'. A judge ought to be bestowed with the sense of complete detachment and humility. He ought to remember that he is not himself an author of his deeds. He is only an actor who has to play his role conforming to the script which represents the Will of the Author – playwright and thus surrendering himself to the will of God. According to Islam, such surrender is the supreme act of religion. While the essence of Christian daily prayer is – "Thy will be done, O Lord; a judge, according to religious concepts whether of Hinduism, Islam or Christianity, would never be heard claiming with egotism that a particular judgment was written by him on a particular sentence or decree was pronounced by him. He would always feel and proclaim that all that he had done or he does is to carry out the will of God. His every action he would surrender to the God and thereby be a totally detached and humble per-

son. The seriousness of the function performed by him would never disturb or overtake him in his deeper mental state, just as an actor on the stage may fight, kill or love but he is the least affected one, as he never forgets it is a play after all. This detachment is an equilibrium born of knowledge. The Lord says – "He who is the same to foe and friend and also in honour and dishonour, who is the same in cold and heat, in pleasure and pain, who is free from attachment, to whom censure and praise are equal, who is silent – uncomplaining – content with anything, homeless, steady-minded, full of devotion – that man is dear to me."[6]

"The essence of the teaching of the *Gita* is to transform karma into karma yoga: to be active in body but detached in mind."[7]

Hindu philosophy beautifully compares a judge with a flower which would never wither and remains ever fresh. An anecdote very appropriately explains this concept – "A religious discussion was to take place between Adi Shankaracharya and Mandan Mishra. Sharda or Saraswati was judge. Both were offered similar *asanas* to sit on. Having plucked fresh flowers, Sharda strung two identical garlands. She put them round the necks of the two scholars and said, "During the discussion, the garlands will decide the winner and the loser. The wearer of the garland whose flowers fade first will be considered to have lost...." Sharda maintained that he who possessed intellectual clarity, power of thinking and self-confidence will be calm and peaceful. His voice will be like the cool spring. Therefore, the flowers will remain fresh for a longer time. On the other hand, one who does not have a clear intellect or a strong sense of logic or whose self-confidence staggers, will be frustrated. His voice will become harsh, the circulation of blood in his veins will become rapid and his breath will become hot. Hence the flowers around his neck will wither sooner."[8] The fragrance and freshness of flowers become a part of the personality of a judge if what he thinks and what he does are all based on such values as are the canons of judicial ethics.

THREE DOCUMENTS

Canons of judicial ethics have been attempted, time and again, to be drafted as a Code. Several documents of authority and authenticity are available as drafted or crafted by several fora at the national and international level. The fact remains that such a code is difficult to be framed and certainly cannot be consigned to a straitjacket. Mostly these canons have originated in and have been handed down by generation after generation of judges by tradition and conventions. If any reference is required to be made to documents, I would choose to confine myself by referring to three of them :-

i. Restatement of Values of Judicial Life adopted by the Chief Justices' Conference of India, 1999;

ii. The Bangalore Principles of Judicial Conduct, 2002;

iii. The Oath of a Judge as contained in the Third Schedule of the Constitution of India.

(i) Restatement of Values of Judicial Life (1999)

On May 7, 1997, the Supreme Court of India in its Full Court unanimously adopted a Charter called the *"Restatement of Values of Judicial Life"* to serve as a guide to be observed by Judges, essential for independent, strong and respected judiciary, indispensable in the impartial administration of justice. This Resolution was preceded by a draft statement circulated to all the High Courts of the country and suitably redrafted in the light of the suggestions received. It has been described as the 'restatement of the pre-existing and universally accepted norms, guidelines and conventions' observed by Judges. It is a complete code of the canons of judicial ethics. It reads as under:

"(1) Justice must not merely be done but it must also be seen to be done. The behaviour and conduct of members of the higher judiciary must reaffirm the people's faith in the impartiality of the judiciary. Accordingly, any act of a Judge of the Supreme Court or a High Court, whether in official or personal capacity which erodes the credibility of this perception has to be avoided .

(2) A judge should not contest the election to any office of a Club, society or other association; further he shall not hold such elective office except in a society or association connected with the law.

(3) Close association with individual members of the Bar, particularly those who practice in the same court, shall be eschewed.

(4) A judge should not permit any member of his immediate family, such as spouse, son, daughter, son-in-law or doughter-in-law or any other close relative, if a member of the Bar, to appear before him or even be associated in any manner with a cause to be dealt with by him.

(5) No member of his family, who is a member of the Bar, shall be permitted to use the residence in which the Judge actually resides or other facilities for professional work.

(6) A judge should practice a degree of aloofness consistent with the dignity of his office.

(7) A Judge shall not hear and decide a matter in which member of his family, a close relation or a friend is concerned.

(8) A Judge shall not enter into public debate or express his views in public on political matters or on matters that are pending or are likely to arise for judicial determination.

(9) A judge is expected to let his judgments speak for themselves. He shall not give interviews to the media.

(10) A judge shall not accept gifts or hospitality except from his family, close relations and friends.

(11) A Judge shall not hear and decide a matter in which a company in which he holds shares is concerned unless he has disclosed his interest and no objection to his hearing and deciding the matter is raised.

(12) A judge shall not speculate in shares, stocks or the like.

(13) A Judge should not engage directly or indirectly in trade or business, either by himself or in association with any other person. (Publication of a legal treatise or any activity in the nature of a hobby shall not be construed as trade or business.)

(14) A Judge should not ask for, accept contributions or otherwise actively associate himself with the raising of any fund for any purpose.

(15) A Judge should not seek any financial benefit in the form of a perquisite or privilege attached to his office unless it is clearly available. Any doubt in this behalf must be resolved and clarified through the Chief Justice.

(16) Every Judge must at all times be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of the high office he occupies and the public esteem in which that office is held.

These are only the "Restatement of the Values of Judicial Life" and are not meant to be exhaustive but illustrative of what is expected of a Judge".

The above "restatement" was ratified and adopted by Indian Judiciary in the Chief Justices' Conference 1999. All the High Courts in the country have also adopted the same in their respective Full Court Meetings.

(ii) The Bangalore Draft Principles

The values of judicial ethics which the Bangalore Principles crystallizes are : (i) independence, (ii) impartiality, (iii) integrity, (iv) Propriety (v) equality and (vi) competence & diligence.

The above values have been further developed in the Bangalore Principles as under :-

i. Judicial *independence* is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

ii. Im*partiality* is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

iii. *Integrity* is essential to the proper discharge of the judicial office.

iv. *Propriety*, and the appearance of propriety, are essential to the performance of all the activities of a judge.

v. Ensuring *equality* of treatment to all before the courts is essential to the due performance of the judicial office.

vi. *Competence and diligence* are prerequisites to the due performance of judicial office.

vii. *Implementation* – By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles, if such mechanisms are not already in existence in their jurisdictions.

The Preamble to the Bangalore Principles of Judicial Conduct states *inter alia* that the principles are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge. There are a few interesting facts relating to the Bangalore Principles. The first meeting to prepare the Draft Principles was held in Vienna in April 2000 on the invitation of the United Nations Centre for International Crime Prevention, and in conjugation with several other institutions concerned with justice administration. In preparing the draft Code of Judicial Conduct, the core considerations which recur in such codes were kept in view. Several existing codes and international instruments, more than three in number including the Restatement of Values of Judicial Life adopted by the Indian judiciary in 1999, were taken into consideration. At the second meeting held in Bangalore in February 2001, the draft was given a shape developed by judges drawn principally from Common Law countries. It was thought essential that it will be scrutinized by judges of all other legal traditions to enable it to assume the status of a duly authenticated international code of judicial conduct. The Bangalore Draft was widely disseminated amongst judges of both common law and civil law systems and discussed at several judicial conferences. The draft underwent a few revisions and was finally approved by a Round Table Meeting of Chief Justices (or their representatives) from several law systems, held in Peace Palace in the Hague, Netherlands, in November 2002. 'Accountability' as one of the principles which were included in the original draft was dropped in the final draft. It is apparently for two reasons. Firstly, it was thought that the principles enshrined in the Bangalore Principles presuppose the 'accountability' on the part of the judges and are inherent in those principles. Secondly, the mechanism and methodology of 'accountability' may differ from country to country and therefore left to be taken care of individually by the participating jurisdictions.

(iii) The oath or affirmation by Judge

The Constitution of India obligates the Indian Judiciary to reach the goal of securing to all its citizens – Justice, Liberty, Equality and Fraternity. How this goal is to be achieved is beautifully summed up in the form of oath or affirmation to be made by the Judges of the Supreme Court and High Courts while entering upon the office.

Swearing in the name of God or making a solemn affirmation a Judge ordains himself :-

i. that I will bear true faith and allegiance to the Constitution of India as by law established;

ii. that I will uphold the sovereignty and integrity of India;

iii. that I will truly and faithfully and to the best of my ability, knowledge and judgment perform the duties of office without fear or favour, affection or ill-will; and

iv. that I will uphold the Constitution and the laws.

In my humble opinion, the oath of a Judge is a complete Code of Conduct and incorporate therein all the canons of judicial ethics.

The judiciary has been trusted and hence entrusted with the task of upholding the Constitution and zealously and watchfully guarding the constitutional values.The oath administered to a judge ordains him to uphold the Office as a citadel of public justice and public security to fulfill the constitutional role assigned to the Judiciary.

"The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armoury of the law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers."[9] This is the principle of independence of judiciary which judges must keep in mind while upholding the Constitution and administering the laws.

Oath of a Judge - *analysed*

Every word and expression employed in the oath of a judge is potent with a message. The message has to be demystified by reading between the lines and looking beyond what meets the eyes.

An option to swear in the name of God or to make a solemn affirmation is suggestive of secular character of the oath.

A judge must bear not only faith but 'true faith' and 'allegiance' to the Constitution of India. The oath demands of a judge not only belief in constitutional principles but a loyalty and devotion akin to complete surrender to the constitutional beliefs. Why?

"Under our constitutional scheme, the judiciary has been assigned the onerous task of safeguarding the fundamental rights of our citizens and of upholding the rule of law. Since the Courts are entrusted the duty to uphold the Constitution and the laws, it very often comes in conflict with the State when it tries to enforce its orders by exacting obedience from recalcitrant or indifferent State agencies. Therefore, the need for an independent and impartial judiciary manned by persons of sterling quality and character, undaunting courage and determination and resolute impartiality and independence who would dispense justice without fear or favour, ill-will or affection. Justice without fear or favour, ill-will or affection is the cardinal creed of our Constitution and a solemn assurance of every Judge to the people of this great country..... and independent and impartial judiciary is the most essential characteristic of a free society."[10] The arch of the Constitution of India, pregnant from its Preamble III (Fundamental Rights) and Chapter IV (Directive Principles), is to establish an egalitarian social order guaranteeing fundamental freedoms and to secure justice – social, economic and political – to every citizen through rule of law. Existing social inequalities need to be removed and equality in fact is accorded to all people irrespective of caste, creed, sex, religion or region subject to protective discrimination only through rule of law. The Judge cannot retain his earlier passive judicial role when he administers the law under the Constitution to give effect to the constitutional ideals. The extraordinary complexity of modern litigation requires him not merely to declare the rights to citizens but also to mould the relief warranted under given facts and circumstances and often command the executive and other agencies to enforce and give effect to the order, writ or direction or prohibit them to do unconstitutional acts. In this ongoing complex of adjudicatory process, the role of the Judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario to make the ideals enshrined in the Constitution meaningful and a reality."[11]

The sovereignty and integrity of India has to be upheld. Constitution itself would cease to exist, if, God forbid, the sovereignty and integrity of India were lost.

The duties associated with the Office of a judge are too sacrosanct and hence demand the judicial functioning with 'the best of ability, knowledge and judgment' of the judges. It is not enough to be a law graduate or to have put in a number of years of practice or to have gained experience by serving as a judicial officer for a specified number of years. Their ability and knowledge associated with the

clarity of purpose and methods which the judges display enables the judicial system to perform to its optimum efficiency. The role of the judge obligates him to continue to invest in updating his knowledge of law and skills of justice dispensation. The holder of the Office if not able and knowledgeable would not have the confidence to function, much less with independence.

IT IS SAID:

Strange, how much you've got to know;

Before you know, how little you know.[12]

Independence and Impartiality

'Independence' and 'impartiality' are most crucial concepts. The two concepts are separate and distinct. 'Impartiality' refers to a state of mind and attitude of the court or tribunal in relation to the issues and the parties in a particular case, while 'independence' refers not only to the state of mind or attitude, but also to a status or relationship to others – particularly to the executive branch of Government – that rests on objective conditions or guarantees.[13]

According to Chief Justice Lamer: "The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a "means" to an end. If judges could be perceived as "impartial" without judicial "independence" the requirement of independence would be unnecessary. However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite for judicial impartiality."

The concept of judicial independence has been described in golden letters in one of the judgments of the Supreme Court of India. "To keep the stream of justice clean and pure, the Judge must be endowed with sterling character, impeccable integrity and upright behaviour. Erosion thereof would undermine the efficacy of the rule of law and the working of the Constitution itself. The Judges of higher echelons, therefore, should not be mere men of clay with all the frailties and foibles, human failings and weak character which may be found in those in other walks of life. They should be men of fighting faith with tough fibre not susceptible to any pressure, economic, political or of any sort. The actual as well as the apparent independence of judiciary would be transparent only when the office holders endow those qualities which would operate as impregnable fortress against surreptitious attempts to undermine the independence of the judiciary. In short, the behaviour of the Judge is the bastion for the people to reap the fruits of the democracy, liberty and justice and the antithesis rocks the bottom of the rule of law."[14] Unless the judges functions without fear and favour, the question of their being impartial or independent does not arise. "Judges owe their appointment to the Constitution and hold a position of privilege under it. They are required to 'uphold the Constitution and the laws', 'without fear' that is without fear of the executive; and 'without favour' that is without expecting a favour from the ex-

ecutive. There is thus a fundamental distinction between the master and servant relationship between the government and the Judges of High Courts and the Supreme Court."[15]

Independence and impartiality and objectivity would be tall claims hollow from within, unless the judges are honest - honest to their Office, honest to the society and honest to themselves. "...the society's demand for honesty in a judge is exacting and absolute. The standards of judicial behaviour, both on and off the Bench, are normally extremely high. For a judge, to deviate from such standards of honesty and impartiality is to betray the trust reposed in him. No excuse or no legal relativity can condone such betrayal. From the standpoint of justice, the size of the bribe or scope of corruption cannot be the scale for measuring a Judge's dishonour. A single dishonest Judge not only dishonours himself and disgraces his office but jeopardizes the integrity of the entire judicial system. A judicial scandal has always been regarded as far more deplorable than a scandal involving either the executive or a member of the legislature. The slightest hint of irregularity or impropriety in the court is a cause for great anxiety and alarm. 'A legislator or an administrator may be found guilty of corruption without apparently endangering the foundation of the State. But a Judge must keep himself absolutely above suspicion; to preserve the impartiality and independence of the judiciary and to have the public confidence thereof.'[16]

To perform the duties of judicial office without fear or favour, affection or ill-will is the same being as performing the duties with independence, impartiality and objectivity. In order to achieve this a certain degree of aloofness is required to be maintained by the judges. According to Justice P.B. Gajendragadkar - "Judges ordinarily must observe certain rules of decorum in their social behaviour. A little isolation and aloofness are the price which one has to pay for being a judge, because a judge can never know which case will come before him and who may be concerned in it. No hard and fast rule can be laid down in this matter, but some discretion must be exercised."[17] The concept is best demonstrated is a real life anecdote which I would like to reproduce in the words of Justice Gajendragadkar himself. He records -

"Another feature which I did not very much appreciate was that judges used to accept invitations for dinners from lawyers far too frequently. I consistently refused to join such dinners. When S.R. Das was due to retire, there were a number of dinners and S.K. Das found that I was not accepting any one of these invitations. He came to me and said. "Brother, accept at least one so that the Chief may not misunderstand you." So I did accept one and, when we met to dine in a hotel, I was amazed to see that we were not dining in an exclusive room but in the general hotel itself, which was otherwise crowded by other diners and it was a lawyer who was entertaining us as a host to the large number of visitors present in the hotel. With my Bombay background, I did not relish this prospect at all; and not feeling happy about such dinners I conveyed my views to S.R. Das. With his characteristic tact, he said, "Yes, I see your point."[18]

However, it is interesting to note that R.A. Jahagirdar (who has contributed a beautiful preface to the autobiography and, in fact, he is the one who was successful in persuading Justice Gajendragadkar to write his memoirs) has put an asterisk on the words 'Bombay background' and inserted a footnote which reads- "The Bombay background has considerably changed. Cases of judges being entertained in luxury hotels are not infrequent and have been discussed in the Press."

Justice Gajendragadkar goes on to record -

"The undesirable and perhaps intended motivation for such invitation for dinners became patent in another case. That was a dinner arranged ostensibly by a lawyer who was a *benamidar* of the proprietor of a hotel chain. So far as I know, I and K.C. Das Gupta did not attend. Most of others did. The dinner was held on a Saturday at a hotel. On Monday next, before the Bench over which B.P. Sinha presided and I and K.C. Das Gupta were his colleagues, we found that there was a matter pending admission between the management of the hotel chain and its workmen. I turned to Sinha and said: "Sinha, how can we take this case? The whole lot of supervisors and workmen in the hotel is sitting in front and they know that we have been fed in the hotel ostensibly by the lawyer but in truth at the cost of the hotel, because the very lawyer who invited the judges to the dinner is arguing in the hotel's appeal." Sinha, the great gentleman that he was, immediately saw the point and said: "This case would go before another Bench."[19]

A sad incident is quoted by Justice V.R. Krishna Iyer while describing how he refused to budge an inch though tremendous pressure was sought to be built upon him, by none else than the then Law Minister Late Shri Gokhale who himself has had a brief stint as a judge in Bombay, to pass an absolute order of stay on the judgment of Allahabad High Court in the case of *Indira Gandhi vs. Raj Narain.* The narrated incident has a lesson to learn. I may quote -

"By way of a distressing deviation, I may mention an anecdote of a few years ago. A vacation judge was telephoned by an advocate from a five star hotel in Delhi. He mentioned that he was the son of the then Chief Justice and wished to call on the vacation judge. Naturally, since the caller was an advocate, and on top of it, the son of the Chief Justice, the vacation judge allowed him to call on him. The 'gentleman' turned up with another person and unblushingly told the vacation judge that his companion had a case that day on the list of the vacation judge. He wanted a 'small' favour of an 'Interim stay'. The judge was stunned and politely told the two men to leave the house. Later when the Chief Justice came back to Delhi after the vacation, the victim judge reported to him about the visit of his son with a client and his 'prayer' for a stay in a pending case made at the home of the Judge. The Chief Justice was not disturbed but dismissed the matter as of little consequence. 'After all, he only wanted an interim stay', said the Chief Justice, 'and not a final decision'. This

incident reveals the grave dangers of personal visits to judges' residences under innocent pretexts. This is the way functional felony creeps into the judiciary. A swallow does not make a summer may be, but deviances once condoned become inundations resulting in credibility collapse of the institution."20

He say - "Judgeship has diamond-hard parameters".

A complete seclusion from society might result in judges becoming too removed from society and the realities of social life. Common knowledge of events and robust commonsense need knowledge of human behaviour but for which the judge may be incapacitated from doing complete justice or exercising discretion in the given facts of a case before him. An isolated judge runs the risk of viewing facts in a vacuum which in its turn may lead to an unjust decision.

To strike an equitous balance between the need for maintaining certain degree of aloofness and the necessity for moving in society to understand it so as to be a practical judge, he shall have to conscientiously keep vigil of his own movements and decide thoughtfully where to go and where not to go. Experience and caution would be the best guide of a judge in this regard. He ought to remember that what he thinks of himself is not so material as how people would perceive and interpret his movements and presence at a given place.

RANDOM THOUGHTS

Four Qualities in a Judge

A judge has to be possessed of excellence not only from within but he should also visibly display the functional excellence which is necessary to fulfil the constitutional promise of justice by the judiciary as a whole. Four qualities are needed in a judge which are symptomatic of functional excellence. They are: (i) Punctuality (ii) Probity (iii) Promptness; and (iv) Patience.

Justice Hidayatullah has placed observance by judges of the punctuality of time on a very high pedestal. According to him a judge who does not observe punctuality of time does not believe in rule of law.

Probity is uprightness; moral integrity; honesty.

According to Justice V.R. Krishna Iyer the judges who do not pronounce judgment in time commit turpitude. He notes with a sense of sorrow-

"It has become these days, for the highest to the lowest courts' judges, after the arguments are closed, take months and years to pronounce judgments even in interlocutory matters - a sin which cannot be forgiven, a practice which must be forbidden, a wrong which calls for censure or worse."[21]

Lord Denning puts it mildly by way of tendering good advice for a new judge. He says that when judgment was clear and obvious it was for the benefit of the parties and the judge himself that judgment should be delivered forthwith and without more *ado*. Though, the art is difficult and requires great skills but practice can enable perfection.[22] However, not all judgments can be delivered

ex tempore; there are cases in which doubts are to be cleared, law has to be settled and conflicts are to be resolved either by performing the difficult task of reconciling or the unpleasant task of overruling. Such judgments need calm and cool thinking and deep deliberations. Such judgments must be reserved but not for an unreasonable length of time.

Conduct of Judge in private

When a judge sits on trial, he himself is on trial. The trust and confidence of 'we the people' in judiciary stands on the bedrock of its ability to dispense fearless and impartial justice. Any action which may shake that foundation is just not permitted. Once having assumed the judicial office, the judge is a judge for 24 hours. It is a mistaken assumption for any holder of judicial office to say that I am a judge from 10 to 5 and from 5 to 10 it is my private life. A judge is constantly under public gaze. "Judicial office is essentially a public trust. Society is, therefore, entitled to expect that a Judge must be a man of high integrity, honesty and required to have moral vigour, ethical firmness and impervious to corrupt or venial influences. He is required to keep most exacting standards of propriety in judicial conduct. Any conduct which tends to undermine public confidence in the integrity and impartiality of the court would be deleterious to the efficacy of judicial process. Society, therefore, expects higher standards of conduct and rectitude from a Judge. Unwritten code of conduct is writ large for judicial officers to emulate and imbibe high moral or ethical standards expected of a higher judicial functionary, as wholesome standard of conduct which would generate public confidence, accord dignity to the judicial office and enhance public image, not only of the Judge but the court itself. It is, therefore, a basic requirement that a Judge's official and personal conduct be free from impropriety; the same must be in tune with the highest standard of propriety and probity. The standard of conduct is higher than that expected of a layman and also higher that that expected of an advocate. In fact, even his private life must adhere to high standards of probity and propriety, higher than those deemed acceptable for others. Therefore, the Judge can ill-afford to seek shelter from the fallen standard in the society."[23]

Patience and Tolerance

The greatest quality of a Judge is to have patience which is sister value of calmness. Calmness is as essential as fearlessness and honesty to the exercise of good judgment in times of aroused feelings and excited passion.

Patience implies the quietness or self-possession of one's own spirit under sufferance and provocation. Since it has a tranquillizing effect, patience is the best remedy for every affliction. The Bible says that if patience or silence be good for the wise, how much the better for others - unwise or not so wise. Sometimes we turn our anger upon the person responsible for hurting us; we are also likely to blame someone for any kind of mishap. By learning to be

patient, one can cultivate the art of reigning in bad temper and hasty decision-making. Patience yields many good things. It is also a necessary ingredient of genius. Patience can solve problems, avert wars and disasters, and lead us to the path of truth.

The power of patience leads us to self-inspection, to the admission of errors and the capacity for forgiveness. A learned man tells us that misfortune can be turned into fortune through wisdom. The acquisition of wisdom needs five steps. The first is patience, the second is listening the third is understanding, the fourth is pondering and the fifth is practice - all qualities needed in a judge. To be patient one has to be humble. To cultivate patience, anger management plays a crucial role. "He who is slow to anger is better than the mighty and he that rules his spirit than he who takes a city." The world exists only because of self-restraint exercised by the mighty. Power coupled with impatience can be very dangerous. Leaders and Judges who are impulsive are greatly feared and are considered impractical. Anger begets violence and cannot be easily repressed. At times anger is provoked by misunderstanding and may actually have no basis in reason. Anger can be subverted with forgiveness.

One of the ways to be patient is through tolerance. Tolerance recognizes individuality and diversity; it removes divisiveness and diffuses tension created by ignorance. Tolerance is an inner strength, which enables the individual to face and overcome misunderstandings and difficulties. A tolerant person is like a tree with an abundance of fruits; even when pelted with sticks and stones, the tree gives its fruit in return. Without tolerance, patience is not possible. Tolerance is integral and essential to the realization of patience.[24]

Rational Utilisation of Time

On the day I was sworn in as a Judge of the High Court, Chief Justice (Retd.) G.G. Sohani, an illustrious Judge of the High Court of Madhya Pradesh, later the Chief Justice of Patna High Court very affectionately told me a few do's and don'ts for any judge. Amongst other things, he told me that working hours of the court are meant for discharging only judicial work. No part of judicial working hours should be diverted to administrative work. Full Court and Administrative Committee meetings should be invariably held on non-working days or, before or after court sitting hours. The judges are not supposed to proceed on leave unless and until the absence is unavoidable. The judges are also not supposed to participate in ceremonial functions like inaugurations or delivering lectures by abstaining themselves from the court. All this does not tantamount to saying that a judge should neither relax nor rejuvenate himself. Vacations are meant for rejuvenating the health of the judges so that they feel fit and also for reading so as to update their knowledge of law. They must also spend a fixed time every day and on weekends with their family members so as to concentrate on judicial work during working hours. I would treat this as a part of judicial ethics.

I am reminded of a Chief Justice, who speaking at a farewell function, marking the occasion of his demitting the office, made a witty remark -"After my retirement, I would like to interview the wives of the Judges and collect information from them as to what prevented them for not divorcing their husbands so far". Justice Devitt wrote in 'Ten Commandments for the New Judge' - "The greatest deterrent to a judge's taking himself too seriously in any respect is a wise and observing wife who periodically will remark, 'Darling! Don't be so Judgey'".[25]

EPILOGUE

An eminent jurist, Justice G.P. Singh, former Chief Justice and later Lokayukt of Madhya Pradesh, needs a mention here. He believes that canons of ethics cannot be learnt simply by listening or be taught only by being told. One must live by values to preach and emulating is the best way to learn. His life as lived is full of examples and he has never delivered any precepts. His brevity, lucidity and clarity in judgments is comparable with Privy Council decisions. He has always believed in simple living and high thinking. His principles of statutory interpretation (Nine Editions, published) and Law of Torts, both of international standards, speak aloud of the height of his learning.

Great persons live great lives and leave behind indelible imprints on the sand of time. The imprints are not faded though several foot-steps have crossed them. A very inspiring anecdote has been narrated by Fali S. Nariman, Senior Advocate.[26]

A Chief Justice of the New York State Court of Appeals on his appointment as Chief Judge proudly showed his wife the chair in the court-room of his illustrious predecessor-in-office of nearly half a century ago Chief Justice Benjamin Cardozo (a legend amongst Judges of the United States). And he said to his wife in a reverential whisper - "See - this is Cardozo's chair and this is where I will sit". His wife responded not very reverentially: "Yes - and after fifty years and five more Chief Justices it will still be Cardozo's chair"!

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ADVERSE POSSESSION - CONCEPT AND LAW

JUSTICE ARUN MISHRA
High Court of Madhya Pradesh

Adverse possession divests title out of the true owner. Adverse possession not only creates a bar to institute a suit for possession but is a method of acquiring title by prescribing for statutory period of limitation. Possession is root of title. Concept of acquisition of title by adverse possession is common law concept. Prescription is regulated by common law which initially adopted the prescriptive period from an analogy to Statute of limitation, while adverse possession is regulated by statutory provision. By mere acquiescence, laches, inaction no unfavourable inference should be drawn. Policy of law is not to punish who neglects but to protect who have continued to prescribe for requisite period.

ADVERSE POSSESSION IN INDIAN LAW

In India Section 27 of Limitation Act, 1963 and Art. 65 control the acquisition of title by adverse possession.

Sec. 27 provides exception to the general rule that limitation bars the remedy and does not extinguish the right itself. The section provides the bar to bring the suit for possession, shall operate to extinguish right of the owner. Right to obtain possession must have accrued before it is lost. The Apex Court in *Patel Narianbhai Marghabhai & Ors. v. Deceased Dulabhai Galbabhai & Ors, JT 1992 (4) SC 381 = (1992) 7 SCC 264 has* held That as there is no limitation prescribed for recovery of possession under Bombay Agricultural Debtors Relief Act there was no question of any determination of period of limitation and consequently Section 27 of Limitation Act would not be applicable. The word 'any person' in Section 27 includes a *math* also. 'Any property' includes corporeal or incorporeal property. Property is capable of being possessed adversely includes movable and immovable property, it is material thing. Possession is right in the nature of property. Section is not confined to immovable property. The extinguishment of title of the rightful owner will operate to good title to the wrong doer. Art. 65 prescribes period of limitation of 12 years to institute suit for possession from the date when the possession became adverse. When a remainder-man, reversionary, devisee fall in possession only then limitation of 12 years to institute suit for possession commences. Where right to obtain possession of property held by Hindu or Muslim female accrues to a person on her death, the possession can become adverse against such a person only after death of female. A purchaser at a sale in execution of decree shall be deemed to be representative of judgment - debtor who was out of possession.

OWNERSHIP

It is necessary to understand concept of ownership of property before dwelling into question of adverse possession. Ownership includes right to possess the property, its enjoyment, disposition and alienation. Ownership can be of different kinds viz. sole ownership, co-ownership, contingent ownership, corporeal ownership and legal equitable ownership etc. The kind of ownership is one of the necessary ingredients so as to construe the adverse possession in a given factual situation as nature of prescription of adverse possession may differ considering the nature of right held in the property by the person against whom it is prescribed.

Ownership includes legal right to claim possession. In case a person is in possession of the property without any title then that by itself confers an enforceable right under section 6 of Specific Relief Act.

Adverse possession is different from lawful possession. Person who is in possession lawfully cannot be said to be in adverse possession. Plea of *justertii* to set up right of a third party to recover possession, cannot be raised by bailey, he cannot take a plea of *justertii* and setup title in some one else to resist recovery of the possession. However, such a plea is permissible in other cases and can be set up resisting plaintiff's claim to recover the property, it can be contended that some one else has the right to recover the possession.

Owner has also the right of various kinds, which he can exercise. Such right includes right of re-entry, right to mesne profits, damages and injunctions.

In the case of co-sharer, co-landlord, co-mortgagee, co-tenant possession of one is deemed to be of all, it is a case of joint estate. Possession by Manager may be enough, alienee is not entitled to joint possession, and remedy of alienee is to obtain possession on partition. Alienation is further subject to the riders of the personal law as in the case of Banaras School of Mitakshara Hindu Law co-owner cannot sell even to the extent of his own share without consent of co-owner. Possession by co-owner is not presumed to be adverse, even exclusive possession of co-owner is not adverse. In the case of co-owner, co-tenant, there has to be express denial and repudiation of the owner's title.

POSSESSION

Possession is of various kinds. There can be de facto i.e. actual possession of the property. Possession can be in the eye of law, which is called 'dejure possession'. A person may be in 'constructive possession'. If two persons are in possession over small portion of the property that is called 'concurrent possession'. If the owner is in symbolic possession, there is no dispossession of the owner as he is deemed to be in possession. Person may be in formal possession of property, there can be exclusive possession which is in contradistinction to joint possession. Nature of possession is necessary to be ascertained before

dwelling into the question of adverse possession in the given factual scenario. In a suit for eviction a person having possessory title can maintain his possession in case he has better right to hold possession. In between two trespassers, prior possession is defense against the wrong doer, however it cannot be set up as defense against owner. Trespasser is entitled to protect the possession against another wrong doer as law respects possession to protect it action is permissible. Possession has to be recovered in lawful mode even by the owner.

In the case of waste land, which is not capable of enjoyment by owner, owner is deemed to be in possession as it is possible user which is enough to constitute possession of the owner. Vacant land is presumed to be in possession of the owner unless contrary is proved. Owner is deemed to be in possession if there is proof of symbolic possession.

When the parties are related, various factors have to be seen so as to find out the fact of possession such as condition of life, management of property and woman member's right. Personal law also becomes a relevant factor to construe the nature of the possession, mere non-participation in the profit is not discontinuance of the possession.

It is also settled law that possession follows title. Person with title is deemed to be in possession. Trespasser holds possession for the owner as such owner can take possession from him at any time.

In the case of diluvion land, owner is deemed to be in possession till the limit of diluviated portion. Possession of part of land is deemed to be possession of whole.

In case of attachment, if owner was in possession, his possession is deemed to be continued. A person who was in wrongful possession, his possession is discontinued on land being attached. Receiver's possession is deemed to be of the person who is having paramount title. As held by the Apex Court the person who is not in possession cannot 'tack' receiver's possession with his possession. (See- *P. Lakshmi Reddy v. L. Lakshmi Reddy, AIR 1957 SC 314.)* Possession of Court of Ward is deemed to be for the benefit and on behalf of rightful owner.

NECESSARY INGREDIENTS OF ADVERSE POSSESSION

Adverse possession may be innocent against the world, however it is wrongful against the owner, inconsistent with the title of the owner. It should be for 12 years. In case a person remains in possession adverse to the true owner for the period prescribed under the law of limitation, it extinguishes the right of the owner to recover the possession.

There has to be co-existence of three classic requirements of adverse possession (i) *nec-vi* i.e. adequate in continuity (ii) *nec-clam* i.e. adequate in publicity (iii) *nec-precario* i.e. adverse to competitor, in denial of title of owner, to his knowledge. Until and unless all the three requirements i.e. *nec-vi, nec-clam*

and nec-precario, coexist possession cannot be adverse. Possession to be adverse must be hostile under colour of title. It has to be actual, open uninterrupted, notorious, exclusive for the period of 12 years. There has to be intention to prescribe until unless animus accompanies the corpus, possession cannot be adverse. There has to be exercise of right coupled with the animus to do it.

In case of adverse possession, person possessing the property has no right to possess and he must possess it adverse to the true owner understanding it to be some one else's property which is one of the essential ingredients of adverse possession. Adverse possession is different from lawful possession. Person who is in lawful possession cannot be said to be in adverse possession.

Mere wrongful interference cannot constitute adverse possession. Remaining in wrongful possession is also not synonym with adverse possession, mere putting of material object or casual user of land also does not constitute adverse possession.

Adverse possession has to be physical possession, it can be through agent, servant, manager or tenant.

There has to be continuity of possession for the prescribed period so as to extinguish right of owner. There should not be discontinuity of possession. The person must be in physical possession and such person must have intention to acquire the property for himself. In case it is a permissive possession, it cannot be said to be adverse. Mere non-user of the property by owner cannot be called dispossession. There has to be unequivocal act constituting dispossession, coupled with inconsistent user of the property than the purpose for which it is held, in derogation to the owner's right.

KNOWLEDGE OF OWNER

Another necessary ingredient of adverse possession is that owner must have the knowledge or means of knowledge. Possession must be visible, notorious, peaceful and exclusive to raise presumption that owner would not be deceived in exercise of ordinary prudence as to the situation. If owner does not take care to know notorious fact, in the eyes of law knowledge is attributed to him and prescription by adverse possession runs against him. Inconsistent user of other's property is necessary. In case there is mere easement, it cannot be said to be adverse. Casual acts cannot constitute possession. Similarly putting up building material over some one else's property is also casual act. There has to be exclusion of owner from the possession indicating withdrawal by the owner. There has to be actual possession by the other so as to constitute adverse possession and discontinuance of the owner's possession.

TRESSPASSER'S POSSESSION

Possession can never be adverse in case it is traceable to lawful title. There has to be acts at the interval with respect to assertion. Mere user of the

property is not adverse possession. Few acts of trespass are also not enough to constitute the adverse possession. An assertion in the written statement which can be construed to be an open assertion of title, has to be considered as hostile act as held by the Apex Court in *Shambhu Prasad Singh v. Mst. Phool Kumari and others, AIR 1971 SC 1337.*

JOINT POSSESSION OR POSSESSION UNDER LEGAL RELATIONSHIP

Person entering possession under one and same title cannot claim adverse possession under a different title. Possession of a mortgagee, licensee and tenant cannot be adverse. In the case of co-sharer, co-landlord, co-mortgagee and co-tenant possession of one is for all. It is deemed to be joint possession. Merely non- participation by such a person who is in joint possession in rent or profit is not an ouster as held by the Apex Court in *Karbalai Begum v. Mohd. Sayeed and another, AIR 1981 SC 77.*

In the case of landlord and tenant, possession is not adverse as tenancy is traceable to lawful source.

EFFECT OF FILING OF SUIT FOR POSSESSION AND DECREE

Mere decree for possession which remains unexecuted for the prescribed period of limitation does not interrupt adverse possession if it is prescribed after passing of decree. Filing of suit for possession checks the running of prescription as held in *Babu Khan and others v. Nazim Khan (dead) by LRs and others (2001) 5 SCC 375.* If symbolic possession is given, it also checks running of adverse possession. In case dispossessed owner acquires possession under erroneous order, there is no break in continuity of adverse possession.

Mere entry in revenue papers does not amount to adverse possession, the burden to prove that possession is adverse is always on the person who asserts it, though they are of evidentiary value, there has to be rebuttal of the entries in revenue papers by the person who wants to prove contrary as statutory presumption of correctness is attached under section 117 of MPLRC, 1959.

PLEADING OF ADVERSE POSSESSION

In every case question of adverse possession is a mixed question of law and fact, the plea must be specific as held by the Apex Court in *Dr. Mahesh Chand Sharma v. Raj Kumari Sharma (Smt.) and others, (1996) 8 SCC 128.*

Title has to be pleaded for adverse possession; it is on the basis of the title which is pleaded that a declaration of the adverse possession can be made. It cannot be declared on different facts or title, which is not subject matter of the pleading, burden to prove is on the person who is setting up the plea of adverse possession.

Permissive possession when converted into adverse possession has to be clearly pleaded. Plea of adverse possession cannot be vague. Date of com-

mencement of adverse right has to be put forth specifically. A purchaser of the Govt. land has to disclaim the title of the state in order to possess it adversely.

There has to be specific overt act from which date possession became hostile and exclusive which has to be set up in pleadings as held by the Apex Court in *Abubakar Abdul Inamdar (dead) by LRs and others v. Harun Abdul Inamdar and others (1995) 5 SCC 612.*

Inaction by claimant is necessary. Limitation Act requires date of commencement of adverse possession to be specifically pleaded. Defense of adverse possession must also be specifically pleaded. It can be set up as general denial in action for possession. The extent and character of possession may be established by an admission in pleading. Elements constituting adverse possession must be pleaded. Payment of taxes or revenue may form part of pleading, colour of title has to be set forth. Disabilities precluding acquisition of title by adverse possession must also be pleaded. Description of property should be sufficient. Provisions of law need not be pleaded as only necessary facts are required to be pleaded. Plea can be put forth alternatively. Allegation and proof must correspond.

ADVERSE POSSESSION AGAINST STATE

A purchaser of the Govt. land has to disclaim the title of the state in order to possess it adversely. It has been held by Privy Council in *Madhavrao Waman Saundalgekar and others v. Raghunath Venkatesh Deshpande and others AIR 1923 PC 205* that a stranger to a *'watan'* property cannot acquire a title by adverse possession by remaining in possession for 12 years of land, alienation of which, in the interest of State was prohibited. Lands in Military area could not be acquired by adverse possession as held by the Privy Council in *1938 Indian Cases 204 (PC).* No adverse possession could be effectively pleaded against the Government for a period less than 60 years (now 30 years) as held in *Collector of Bombay v. Municipal Corporation of the City of Bombay and others , AIR 1951 SC 469.* There is no difference as regards requisite for adverse possession except much longer period has been prescribed against State. The Apex Court in *Kshitish Chandra Bose v. Commissioner of Ranchi, AIR 1981 SC 707* has held that right to even tank can be acquired if municipality fails to evict the trespassers. Adverse possession against state is not recognized in several countries as it is a matter of statutory policy.

ADVERSE POSSESSION AGAINST LIMITED OWNER

There may be a limited owner holding the land for reversioner. Adverse possession against the limited owner is not adverse against reversioner though same is adverse against the interest of the limited owner to the extent of his right. In case a woman assumes possession of the property though she was entitled for maintenance only, in case of assertion of ownership, her possession

shall be treated adverse as she was not entitled to possess the property. In case property is held till remarriage is performed however, estate is retained on remarriage and widow's animus changes from limited ownership to possess the property as owner, it would constitute adverse possession. In case a person is in adverse possession of property against widow who is only limited owner, possession is not adverse against the reversionary, cause of action arises to reversionary on death of the widow. Limited interest can be acquired by adverse possession to the extent held by limited owner that too only as against limited owner.

ADVERSE POSSESSION AGAINST MINOR AND OTHER DISABLED PERSONS

General rule of law of limitation is that prescription does not run against person unable to act on account of disability or inability to act or defend. As regards adverse possession against a minor and disabled person, there is divergence of opinion, in some cases view has been taken that during minority of the person adverse possession cannot originate. Knowledge must be attributed to the person sought to be excluded by adverse possession. Minor is not able to understand or to know assertion of hostile title against him. In *Lalit Kumar Das Choudhary and others v. Nogendra Lal Das and others, AIR 1940 Cal 589* Calcutta High Court opined that possession was not adverse until majority was attained. Contrary view was taken by Nagpur High Court in *Seth Narainbhai Ichharam Kurmi and another v. Narbada Prasad Sheosahai Pande, AIR 1941 Nag 357* that minority does not prevent running of adverse possession. The only privilege minor gets is another 3 years after attaining majority to recover possession. In *Keshavlal Sakhidas v. Amarchand Somchand, AIR 1933 Bom. 398,* it was held that if a person against whom adverse possession is claimed is still a minor when suit was filed, no question of adverse possession arises.

The Supreme Court in *Madhuker Biswas v Madhav Madhukar Vishwanath and others, (1999) 9 SCC 446* considering question of adverse possession and alienation made by defacto guardian of minor's property laid down that as alienation was challenged hence Art. 60 of Limitation Act not Art. 65 was applicable. It was contended that alienation by defacto guardian was void hence limitation would run only from date possession became adverse to plaintiff. The submission was negatived. Art. 60 was held to be applicable.

But Supreme Court in *State of Maharashtra v. Praveen Jethadar Kamdar, AIR 2000 SC 1099 = (2000) 3 SCC 460* had opined that when possession has been taken by the adverse possessor pursuant to void document ignoring them suit for possession simplicitor could be filed in case of nullity of document Art. 65 would apply, not Art. 58 of Limitation Act, even if relief of declaration that documents are nullity is sought along with possession that would be consequential. Correctness of decision in *Madhukar Vishwanath v. Madhao and oth-*

ers (supra) is clouded by later Supreme Court decision in *Praveen Jethadar Kamdar* (supra). Several High Courts have also opined that alienation by defacto guardian is void (See- *Iruppakkatt Veettil Viswanathan's wife Santha v. Deceased Kandan's LRs wife Cherukutty and others, AIR 1972 Ker 71; Talari Erappa v. Muthyalappa, AIR 1972 Mys 31; Daneyi Gurumurty v. Raghu Podhan and another, AIR 1967 Orissa 68; Tattya Mohyaji Dhomse v. Rabha Dadaji Dhomse, AIR 1953 Bom 273; Palaniappa Goundan v. Nallappa Goundan and others, AIR (38) 1951 Mad 817)* As per reasoning Art. 60 would not apply in case document is void.

ADVERSE POSSESSION IN THE CASE OF INVALID GRANT OR PROHIBITED PURCHASE

In case sale-deed is void, plea of adverse possession is necessary as held by the Apex Court in *Meethiyan Sidhiqu v. Muhammed Kunju Pareeth Kutty and others, 1996 (7) SCC 436*

The Apex Court in *State of West Bengal v. The Dalhousie Institute Society, AIR 1970 SC 1778* has held that if a person is in possession on the basis of invalid grant, possession is adverse. In case purchase is prohibited under the law, possession is not adverse.

The property which is not alienable is not capable of being possessed adversely. Land of tribal cannot be possessed adversely by non-tribes, such property cannot be alienated to a non-tribe, it cannot be allowed to be transferred/acquired by adverse possession was reiterated by the Apex Court in *Lincai Gangadhar v. Dayanidhi Jaina, AIR 2004 SC 3457.* The Apex court held in *Papaiah v. State of Karnataka, (1996) 10 SCC 533* that in case sale is void there is no estoppel and there is no adverse possession. In case adverse possession was perfected before commencement of prohibition such a plea has to be proved by the person asserting it.

When a person takes possession under colour of transfer which is inoperative, it was held to be without title and in contravention of title to the true owner. (See- *Collector of Bombay v. Municipal Corporation of the City of Bombay and others, AIR (38) 1951 SC 469* and *State of West Bengal v. The Dalhousie Institute Society, AIR 1970 SC 1778).* Possession under void gift was held to be adverse by the Privy Council in *N. Varada Pillai and another v. Jeevarathnammal, AIR 1919 PC 44.* Possession of mortgagee under a void usufructuary mortgage is permissible and not adverse to the mortgager. Full Bench of Patna High Court in *Bastacolla Colliery Co. Ltd. v. Bandhu Beldar and another, AIR 1960 Patna 344* held that where a person enters into possession under a void lease he can only acquire right of a lessee by prescription. Possession under void lease is not adverse, it is permissive. There has to be denial of title, adverse nature of possession has to be pleaded and proved as held in *Sarbeshwar Mohanty v.*

Chantamani Sahu (dead) by LRs, 1999 Cut. LT 433 (SC). The basic principle is adverse possessor gets title only to the interest he purports to prescribe.

Mortgagor's possession is not adverse possession. He holds property on behalf of mortgagee. In case he refuses to deliver the possession on redemption it becomes adverse.

ADVERSE POSSESSION WHEN POSSESSION IS UNDER PART PERFORMANCE

Plea of part performance under section 53-A of Transfer of Property Act is inconsistent with the plea of adverse possession as held by the Apex Court in *Roop Singh (dead) through LRs v. Ram Singh (dead) through LRs, 2000 (3) SCC 708.*

TACKING OF ADVERSE POSSESSION

Tacking is addition of the period of adverse possession by two different possessors of the property towards prescription.

There are instances of 'tacking' of adverse possession of two or more persons, as possession is heritable/transmissible right. It can be defeated by entering into possession by rightful owner. A person in adverse possession is entitled to tack the possession of his predecessor to the period for which he had remained in possession of the land on fulfillment of certain conditions. There can be tacking of adverse possession by purchaser, legatee or assignee etc. Other necessary requirements for tacking of adverse possession are that it has to be continuous and possession has to be through whom it is tacked. Successive trespasser should claim through each other and distinct trespasser cannot tack their possession. In addition property must be the same and possession must have commenced under same right, if possession is not continuous there can be no tacking of possession, as running of time against owner stops.

ADVERSE POSSESSION OF SERVICE LAND

In case land is held by Patel by virtue of his office, he cannot prescribe adversely as held by the Apex Court in *Bhagwant Rao v. Vishwas Rao and another, AIR 1960 SC 642.*

Thus determination of question of adverse possession requires going into the nature of property, possession, incidents of its enjoyment, the extent of right enjoyed by owner against whom it is prescribed, relationship of parties, personal law, other statutory provisions. All other relevant facts and circumstances also have to be delved upon so as to come to the conclusion whether the possession is adverse.

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AGRICULTURAL LAND, ITS SUCCESSION AND TRANSFER

JUSTICE SUBHASH SAMVATSAR
High Court of Madhya Pradesh

I have found that there is a confusion about the succession and transfer of agricultural land amongst many persons. Many senior judges have applied the principles of Hindu Law to the agricultural land for deciding the course of succession and even applied the principle of birth right to the agricultural land which is not correct.

Entry 2 of Schedule VII of the Constitution provides for a State list and entry no. 18 of the State list is as under :

> land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans : colonization.

Thus, the transfer and alienation of the agricultural land is a State subject while Personal law falls in entry no. 5 of the list III which is a Concurrent List. Entry no. 5 of the Concurrent List provides for making law on marriages and divorce; infants and minors; adoption; wills, intestacy, succession; joint family and partition.

Parliament has legislated Hindu Succession Act, 1956 due to the said entry in the Constitution. Section 4 (2) of the Hindu Succession Act specifically provides that the provisions of Hindu Succession Act, 1956 are not applicable to the agricultural holdings.

Agricultural holdings are governed by the provisions of Land Revenue and Tenancy Act. Before coming into force of M.P. Land Revenue Code, Madhya Bharat Land Revenue and Tenancy Act was in force in Madhya Pradesh. As regards Mahakaushal region, I frankly concede that I had no occasion to deal with the old laws prevailing in Mahakaushal region.

However, in Madhya Bharat region, the Madhya Bharat Land Revenue and Tenancy Act was in force and section 82 of the said Act provided for devolution of rights on the death of a male Pakka tenant. Thus, as per the said Act the rights of Pakka tenant would devolve in accordance with the order of succession given in the section. Thus, before 1959 also there was a provision of devolution of rights after the death of Pakka tenant which makes it clear that the sons of Pakka tenant had no right during the life time of Pakka tenant. Similarly, section 77 of the said Act created a bar against a Pakka tenant from transferring his rights in his holding by bequest or gift. Thus, Pakka tenant had no right to execute a Will or gift deed in respect of an agricultural land in those days.

Section 70 of the Act was providing for sale of holdings while section 72 was dealing with the rights of a Pakka tenant in mortgaging the property and section 73 was creating a bar to sub-let the property. Section 74 provided for exceptions from creating a sub-lease by a disabled person. Thus, only disabled persons were permitted to execute a lease in respect of agricultural holding.

On 2.10.1959 M.P. land Revenue Code, 1959 came into force and section 164 was incorporated for dealing with the devolution of interest of a Bhumiswami and it provided for order of succession after his death. Old section 164 which remained in force upto 8.12.61 provided that "notwithstanding any law, custom or usage to the contrary, the interest of a Bhumiswami shall on his death devolve in accordance with the order of succession given below. Further section 165 of the Act deals with the transfer of the agricultural land before the amendment on 8.21.61 which reads as under :

> **165. Rights of transfer.** – (i) Subject to the other provisions of this section and the provision of section 168 a Bhumiswami may transfer otherwise than by will any interest in his land.

Thus, upto 8.12.1961 the Bhumiswami had no right to transfer his interest in the land by way of will also. However, the words 'otherwise than by will' were omitted by the amendment on 8.12.61 and simultaneously section 164 was also amended which provided that "subject to his personal law the interest of Bhumiswami shall, on his death, pass by inheritance, survivorship or bequest, as the case may be."

Thus, the Personal Law was made applicable for the first time after 8.12.1961. However, the said law clearly provided that interest of Bhumiswami on his death shall pass. The words "on his death" makes it clear that his interest in the property could devolve only after his death. Due to the amendment the Bhumiswami got a right to bequest his interest in the suit property. Thus, Bhumiswami got a right to execute a will only after 8.12.1961.

By the amendment under section 164 though the provisions of Personal Law are made applicable to the agricultural land it is restricted only to devolution after the death of Bhumiswami and not in relation to other matters, Section 165 deals with the mortgage and other transfers and the powers of the Bhumsiwami are restricted in the matter of transfer by sale or mortgage by the said section. Similarly, the lease of agricultural land are governed by sections 168 and 169 of the Code.

Thus, from these provisions it is clear that the provisions of Hindu Succession Act or the Personal Law are not applicable in all the matters but are restricted only to devolution after the death of Bhumiswami. Hence, the question of birth right does not arise in the case of agricultural lands.

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APPRECIATION OF SCIENTIFIC/EXPERT EVIDENCE

VED PRAKASH
Director

The opinion of an expert is admissible as relevant fact under Section 45 of the Evidence Act. The rule incorporated in Section 45 is that the Court in order to form an opinion upon a point of foreign law, or science, or art, or as to identity of handwriting, or finger impressions can treat the opinion of persons specially skilled in such foreign law, science or art, or as to identity of handwriting, or finger impressions as relevant facts on that particular point. In other words, the opinion of persons, specially skilled in foreign law, science, or art, or as to the identity of handwriting or finger impression, called *experts,* are relevant facts.

The expression "science" or "art" as used in Section 45 is of wide import and should not be attributed a narrow meaning. Expressions "science" and "art" therefore, have to be construed widely to include within their ambit the opinion of an expert in each of such branch. [See - *State (through C.B.I. New Delhi) v. S.J. Choudhary, AIR 1996 SC 1491]*

EXPERT:

An expert is one, who has acquired special knowledge, skill or experience in any science, art, trade or profession. Therefore, in order to bring the evidence of a witness as opinion of an expert, it must be shown that he has made a *special study* of the subject or acquired a *special experience* therein or in other words he has skill and other knowledge in the subject. (See - *State of Himachal Pradesh v. Jai Lal and others, (1999) 7 SCC 280)*

In *State of A.P. v. Madiga Boosenna, AIR 1967 SC 1550* it has been held that an excise inspector deposing about the nature of liquor on the basis of examination conducted by him can be treated as opinion evidence of expert within section 45 of the Evidence Act.

An expert is not a witness of fact and his evidence is of advisory nature. Such opinion evidence must be examined in the light of following three parameters namely -

(i) The scientific criteria that has been applied;

(ii) The data and materials used; and

(iii) The reasons given in support of such opinion.

Therefore, the expert is required to furnish before the Court the necessary *scientific criteria* for testing and arriving at the conclusion so as to enable the judge to form his independent judgment by application of that criteria to given facts. The credibility of an expert witness basically depends on the *reasons* stated in support of conclusions and the *data and materials,* which form the basis of such conclusions. **[**See - *State of Himachal Pradesh v. Jai Lal (Supra)***]**

HANDWRITING:

The fact that a particular document has been signed or written by a particular person can be proved under *Section 47 of the Evidence Act* by a person who is *acquainted with the handwriting* of the person by whom it is supposed to be signed or written. Under *Section 73* of the Evidence Act, the Court is also empowered to *compare* the writing, signature or seal to ascertain whether a particular signature, writing or seal is that of a person by whom it purports to have been made. Lastly, the help of *handwriting expert* can also be taken as stipulated under *Section 45* of the Evidence Act.

Here it is apposite to mention that *Section 73* Evidence Act empowers the court conducting trial or inquiry to direct an accused person to give his *sample writing* to enable the same to be compared by a handwriting expert chosen or approved by the Court. [See - *State (Delhi Administration) v. Paliram, AIR 1979 SC 14]*

In the above context it is also noteworthy that Section 45 and 73 are complementary to each other and irrespective of an opinion of the handwriting expert the court can compare the admitted writing with the disputed writing and come to its own independent conclusion. Such exercise of comparison is permissible under Section 73 of the Evidence Act.[See - *Lalit Popli v. Canara Bank and others, (2003) 3 SCC 583]*

Whenever there is dispute regarding handwriting, both the parties to the case put before the Court their own experts, who make themselves available on hire to swear in favour of the party paying for them. This creates very confusing situation. In such a case the Court must examine the conflicting opinions in the light of objectivity and probability and should not abdicate its duty to decide which of the opinion is correct.

In *Paliram* (supra) it was laid down that apart from two direct modes of appreciation, the handwriting a person –

(1) By an admission of the person who wrote it.

(2) By the evidence of some witness who saw it written.

These are the best methods of proof. These apart, there are three other modes of proof by opinion –

Firstly, by the evidence of a handwriting expert.

Secondly, by the evidence of a witness acquainted with the handwriting of the person who is said to have written the writing in question

Thirdly, opinion formed by the Court on comparison made by itself.

The Apex Court held that the aforesaid three cognate modes of proof involve a process of comparison to be made by handwriting expert or by person familiar with the handwriting of the person concerned or by the Court.

In regard to the opinion an expert, it has been held by the Apex Court in *The State of Maharashtra v. Sukhdeo Singh and another, (1992) 3 SCC 700* that before a Court can act on the opinion of the handwriting expert following two things must be proved beyond doubt:

(i) The genuineness of the specimen/admitted handwriting of the concerned accused, and

(ii) That the handwriting expert is a competent, reliable and dependable witness whose evidence inspires confidence.

EVIDENTIARY VALUE:

An expert is not a witness of fact. His evidence is of an advisory character. However, he is not an accomplice. Regarding evidentiary value of opinion evidence of handwriting expert it has been observed by the Apex Court in *Murari Lal v. State of M.P., AIR 1980 SC 531* that sometimes it is said that it is hazardous to base a conviction solely on the opinion of an expert. It is not because experts in general, are unreliable but because human judgment is fallible and one expert may go wrong because of some defect of observation, some error of premises or honest mistake or conclusion. However, it is unfair to view his opinion with an initial suspicion and to treat him as an inferior type of witness. Reiterating this view, the Apex Court in *Alamgir v. State (NCT Delhi), (2003) 1 SCC 21* observed that the science of identification of handwriting has attained more or less a state of perfection and the risk of an incorrect opinion is practically non-existent. The Court went on further to record that there is no rule of law, nor any rule of prudence which has crystallized into a rule of law that opinion evidence of a handwriting expert must never be acted upon, unless substantially corroborated.

There may be cases where both sides call experts and conflicting voices are heard on the same point. Again there may be cases where neither side calls an expert being unable to afford him. In all such cases it becomes a plain *duty of the Court* to compare the writings and give its own conclusions. The duty cannot be avoided by taking recourse to the reasoning that the Court is not an expert. Where there is opinion of expert, that will aid the Court, where there is none the Court will have to seek guidance from the authorities, text books and the Court's own experience and knowledge. But the Court should discharge its duty. *[See - Murarilal v. State of M.P. (supra)]*

IDENTIFICATION OF FINGER-PRINTS:

As held in *Murari Lal v. State of M.P. (supra)* the science of identification of finger-prints has attained near perfection and the risk of an incorrect opinion is practically non-existent.

The science of identification of finger-prints, no doubt, has developed to the state of exactitude but the main thing to be scrutinized by Court while appreciating evidence related thereto is whether the expert's examination is thorough, complete and scientific. If the finger-prints are clear, the Court must verify the evidence of the expert by applying its own mind to similarities and dissimilarities afforded by

the finger-prints before coming to the conclusion one way or other. As explained in *Mohan Lal and another v. Ajit Singh and another, AIR 1978 SC 1183* a majority of finger-prints found at crime scenes or on crime articles are partially smudged, and it is for the experienced and skilled finger-print expert to say whether a mark is useable as finger-print evidence. Similarly it is for a competent technician to examine and give his opinion whether the identity can be established, and if so whether that can be done on eight or even less identical characteristics in an appropriate case.

MEDICAL EVIDENCE:

Regarding appreciation of medical evidence two basic points as explained in *Anil Rai v. State of Bihar (2001) 7 SCC 318* should be kept in mind:

(i) If direct evidence is satisfactory and reliable, the same cannot be rejected on hypothetical medical evidence and

(ii) If medical evidence, when properly read, shows two alternative possibilities but not any inconsistency, the one consistent with the reliable and satisfactory statements of the eyewitness has to be accepted.

In *Bhagwan Das v. State of Rajasthan, AIR 1957 SC 589,* the Apex Court has deprecated the practice of drawing adverse conclusions against the opinion evidence of medical experts by relying upon particular passages in the medical books without drawing attention of expert, doctor, who has been examined as the witness to such passages. Therefore, whenever the Courts want to draw adverse conclusion on the basis of some opinion given in a medical book the portion should be brought to the notice of the concerned expert witness. Whenever opinion of a medical witness is contradicted by another medical witness both of whom are clearly competent, the opinion of such expert should be given weight, which supports the direct evidence of the case. (See - *Piara Singh v. State of Punjab, AIR 1997 SC 2247*)

Over dependence on expert opinion should be avoided and care should be taken that it is not used to checkmate the direct evidence which is found clear and trustworthy. In *State of U.P. v. Harban Sahai & others, JT 1998(3) SC 443* (three Judge Bench) it was observed by the Apex Court that medical evidence can be used to repel the testimony of eye-witnesses only if it is so conclusive as to rule out even the possibility of the eye witness's version to be true. A doctor who has conducted post-mortem examination or examined an injured person is usually confronted with such questions regarding *different possibilities or probabilities* of causing those injuries or post-mortem features which he noticed in the medical report. But the answers given by the witness to such questions need not become the last word on such possibilities. To discard the testimony of an eye-witness simply on the strength of such opinion expressed by the medical witness is not conducive to the administration of criminal justice.

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BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent by this Institute for discussion in the bi-monthly district level meeting of December, 2004. The Institute has received articles from various districts. Articles regarding topic no. 1 and 3 respectively, received from Tikamgarh and Sehore are being included in this issue. As the Institute has not received worth-publishing articles regarding topic no. 2, 4 and 5, the Institute is publishing its own articles relating to topic no. 2 and 4. Topic no. 5 will be allotted to other group of districts for discussion in future.

1. What is the nature of penal liability in cases relating to road accidents resulting in killing or maiming of cattle?

   सड़क दुर्घटना में विकलांग/मृत पशु के संबंध में आपराधिक दायित्व का स्वरूप क्या है ?

2. Whether an offence can lawfully be compounded under Section 320 Cr.P.C. after conviction but before imposition of sentence?

   क्या किसी आपराधिक मामले में दोषसिद्धि के पश्चात् लेकिन दण्ड अधिरोपित किये जाने से पूर्व किसी अपराध का शमन धारा 320 द.प्र.सं. के अन्तर्गत अनुज्ञेय है?

3. What is the evidentiary value of the evidence of handwriting expert?

   हस्तलेख विशेषज्ञ की साक्ष्य का साक्षिक मूल्य क्या है ?

4. Whether the trial Court can exercise the jurisdiction under Section 389 (3) Cr.P.C. after the sentence of imprisonment has commenced to run?

   क्या विचारण न्यायालय कारावासीय दण्ड का निष्पादन प्रारंभ होने के पश्चात् धारा 389 (3) द.प्र.सं. की अधिकारिता का प्रयोग कर सकता है ?

5. Nature and scope of jurisdiction exercisable by Human Rights Courts under Human Rights Protection Act, 1993?

   मानव अधिकार संरक्षण अधिनियम, 1993 के अन्तर्गत मानव अधिकार पर न्यायालय की अधिकारिता का स्वरूप एवं विस्तार क्या है?

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NATURE OF PENAL LIABILITY IN CASES RELATING TO ROAD ACCIDENTS RESULTING IN KILLING OR MAIMING OF CATTLE

Judicial Officers

District Tikamgarh (M.P.)

To understand the penal liability of killing or maiming of cattle in road accidents, we would have to first find out the meaning of road accident.

Road accident means the "accident" caused on the road. The word 'accident' is derived from the Latin verb *"accidere"* signifying "fall upon, befall, happen, chance". In an etymological sense anything that happens may be said to be an accident and in this sense, the word has been defined as befalling; a change, a happening; an accident; an occurrence or event.

Accident is defined in 'Encarta 2005' as – "unintended and unforeseen event, usually resulting in personal injury or property damage". In law, the term is usually limited to events not involving negligence, that is the carelessness or misconduct of a party involved, or to a loss caused by lightning, floods or other natural events (act of God). In popular uses, however, the term accident designates an unexpected event, specially, if it causes injury or damage without reference to negligence or fault of an individual. The basic cause of such accidents are in general, unsafe conditions of machinery, equipment, surroundings and unsafe actions of persons that are caused by ignorance or neglect of safety principles.

In legal glossary 1999, the word "accident" is described as a "sudden event occurring without intent or volition whether through negligence, carelessness, unawareness, ignorance or a combination of causes and producing unfortunate result; an unexpected happening causing loss or injury which is not due to fault of the person."

The Apex Court in *Union of India v. Sunil Kumar Ghos, AIR 1984 SC 1737* expressed that an accident is an occurrence or an event which is unforeseen and startles one when it takes place but does not startle one when it does not take place. It is happening of the unexpected, not the happening of the expected which is called an "accident". The happening of something which is not inherent in the normal course of events and which is not ordinarily expected to happen or occur is called a mishap or an accident.

In view of the above discussion it is clear that an accident is an occurrence, which human prescience and prudence cannot foresee or forestall. The usual meaning of the word accident does not necessarily exclude negligence. Accident also is such casualty, which could not be prevented by ordinary care and diligence. Accident is an event that takes place without one's foresight of expectation an undesigned, sudden and unexpected event. "Accident is the

happening by chance or unexpectedly taking place not according to the usual course of things."

Road accidents are ordinarily caused by motor vehicles, bicycles, bullock carts, tanga etc. Such accident may also result in killing or maining of a cattle which amounts is to an injury to the owner of such cattle because as defined in section 44 of IPC - the word "injury" denotes any harm whatsoever illegally caused to any person, in body, mind, reputation or property.

Section 279 of the Indian Penal Code, 1860, defines the offence of "Rash driving or riding on a public way as under -

Whoever drives any vehicle, or rides on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

The gist or essential ingredients of offence under section 279 IPC, are :

(i) rash and negligent driving or riding on a public way;

(ii) the act must be such as to endanger human life or likely to cause hurt or injury to any person.

Negligence is omission to do something which a reasonable person guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent or reasonable person would not do.

According to the legal glossary "cattle" means "beasts subject to ownership." So in a road accident, injury to a person's property includes the killing or maiming of cattle.

The word accident does not cover an act, which is done intentionally or knowingly, means any event, which took place intentionally or knowingly cannot be described.

Hence it is clear that if a person, in a road accident causes any injury to a cattle or kills a cattle by rashly or negligently driving any vehicles or riding on a public way.

In road accident cases in which cattle is injured or killed, more often than not police files the charge sheet under section 279 and 429 IPC. But it is wrong because offence under section 429 IPC includes the elements or intention or knowledge which is missing in the accidental act.

The provision of section 429 of IPC described the offence "mischief by killing or maiming cattle, etc., of any value or any animal of the value of fifty rupees" in these words - Whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox, whatever may be the value of fifty rupees or upwards.

The word "mischief" is defined under section 425 IPC in these words, "Whoever with intent to cause, or knowing that he likely to cause, wrongful loss or damage to the public or to any person, cause the destruction of any property or any such change in the property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief".

Intention or khowledge is the gist of offence. In *State of Rajasthan v. Nauratan Mal, 2002 Cri.L.J. 348 (Raj.)* it is held that merely because an accident took place on public highway it is not sufficient to prove charge of offence under section 429 IPC, in absence of *mens rea* of causing accident. But the accussed may be liable under section 279 IPC.

For an act to come within the ambit of "mischief", causing of loss or damage is not sufficient. The criminal intent to cause or the knowledge of the likelihood of causing such wrongful loss or damage is an essential element of the offence. (See – *Brojo Laxmi v. Shailendra, AIR 1959 Cal. 260 : 1959 Cr.L.J. 446; Ramchandra v. State, AIR 1969 Bom. 20 : 1969 Cr.L.J.112.)*

To bring home the guilt under section 429, prosecution must establish that the accused had intention or knowledge of likelihood to cause wrongful loss, damage. When the truck of the accused accidentally hit the bullock-cart resulting in the death of one of the buffalo, there was no offence under section 429 IPC. (See – *Pawan Kumaar v. State, 1996 Cr.L.J. 369 (All.); Arjun Singh v. State, AIR 1958 Raj. 347 : 1959 Cr.L.J. 87; Fida Husen v. State, 1962 Guj. 318 : (1962) 2 Cr.L.J. 760.)*

The Apex Court has also held in *Keshub Mahendra V. State, (1996) 6 SCC 129* that before section 429 of Indian Penal Code is pressed into service, the material relied upon by the prosecution must indicate even *prima facie* that the accused concerned has committed mischief as defined in section 425 of IPC. Once the applicability of section 425 is ruled out on such material, then section 429 IPC will have no application.

In view of above discussion, it is clear that for the offence under Section 429 IPC, offending act is required to be done either with the intention or with the knowledge to cause wrongful loss or damage to property. An act which harms or lessens the value of property if, committed by accident, or mistake and not willfully or with knowledge, does not make the doer an offender under this section, although he may be answerable in a civil suit for such damage. An act, done without any criminal intention or knowledge even if causes wrongful loss to any person or to the public or any community, is not an offence or mischief.

The conclusion of the above discussion is that the nature of penal liability in cases relating to road accident resulting in killing or maiming of cattle only covers the offence of rash or negligent driving under section 279 IPC and such accused would not be liable for penalty under section 429 IPC

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COMPOSITION OF A CRIMINAL CASE U/S 320 CR.P.C. AFTER CONVICTION BUT BEFORE IMPOSITION OF SENTENCE

Applicability of Section 320 of the Code of Criminal Procedure, 1973 (in short 'the code') which deals with compounding of certain offences provided therein, after conviction of the accused but before imposition of sentence, has long been a debatable issue in legal circles. If the accused has been charged with an offence coming under sub section (1) or (2) of Section 320 then composition of such offence with or without permission of the Court, as the case may be, before the stage of conviction is something quite usual. However, the problem arises where application for compounding the offence is moved to the Court after conviction has been recorded against the accused but before imposition of sentence. In such eventuality, sometimes it is argued before the Court that it has no jurisdiction to deal with the prayer because after recording conviction it cannot alter the judgment or result of the case. Provisions of Section 362 Cr.P.C. which bar review or alteration of a judgment or final order are also put forth in support of the aforesaid argument, with the result that many a times the Court is inclined to accept this plea and reject the application thus forcing the parties to approach the appellate court to have the application of composition of offence decided in appeal.

The controversial issue has invited attention of various scholars of legal field. Two articles almost taking contrary views on this issue have earlier been published in JOTI Journal. The first one in the issue of February 1996 (Part I page 18) wherein it has been opined that Court has no jurisdiction to entertain the prayer of composition after it has recorded conviction and before imposition of sentence. The other view found in the issue of JOTI October, 2000 (Part V page 565) is to the effect that till imposition of sentence the Court does not become functus officio and an offence covered by Section 320 (1) or (2) of the Code can be compounded before imposition of sentence.

The three fold reasoning assigned to advance the first view is:

Firstly - Referring to *Rama Narang v. Ramesh Narang, (1995) 2 SCC 513* (at page 527) it has been stated that judgment is practically complete when the order of conviction is passed because the order of sentence is only the consequential order. Main order is the order of conviction.

Secondly - The expression "appeal is pending" as used in Section 320 (5) not necessarily implies an appeal which is pending before the Court but also includes within its fold an awaited and impending appeal because the word 'pending' also means 'awaited' or 'impending'. Therefore, where after conviction an appeal is awaited u/s 374 Cr.P.C. no composition is permissible except with the permission of the appellate court.

Thirdly - It has been stated that in *Tanveer Aquil v. State of Madhya Pradesh and another, 1990 (Supp) SCC 63* and *P. Damodaran and others v. State, 1993*

Cr.L.J. (Ker) it has been laid down that no composition can be allowed after pronouncement of judgment of conviction.

Taking the last point first, the issue involved in *Tanveer Aquil's* case (supra) was whether High Court after disposal of appeal confirming the conviction and sentence recorded by the trial Court can permit composition of the offence. The High Court rejected the prayer made in this respect observing that it has no jurisdiction because appeal stands disposed of. The Apex Court endorsed this view and observed that - "the High Court did not and indeed could not take into consideration that application since it has disposed of the matter already". The relevant portion of the aforesaid judgment is as under:

> "The High Court while disposing of the appeal in the first instance did not have the assistance of the petitioner's counsel. After the pronouncement of the judgment, the counsel appeared and pleaded for an opportunity of hearing and at that stage the High Court again heard the matter and added the Post Script in the judgment confirming the conviction and the sentence. Thereafter, the petitioner moved the High Court for permission to compound the offence. He stated that he had paid a sum of Rs. 3500 to the complainant. The petitioner also filed an affidavit of the complainant in which it was stated that he was paid Rs. 3500 by the accused-petitioner. But the High Court did not and indeed could not take into consideration that application since it has disposed of the matter already."

From what has been quoted above, it is quite clear that the High Court or for that matter the Apex Court did not consider as to whether composition can be allowed by the Court recording conviction before imposition of sentence. Therefore, the aforesaid decision cannot be of any help to advance the view that the Court recording conviction cannot permit composition after conviction and before imposition of sentence.

The decision rendered by the Kerala High Court in *P. Damodaran's* case (supra) dealt with the specific issue as to whether the prayer for composition can be entertained by the High Court after it has dismissed the revision petition challenging the conviction and sentence recorded by trial Court and confirmed by the Sessions Court. The Court after referring to *Chhotey Singh v. State of U.P., 1980 Cr.L.J. 583* and *State v. Shivalingappa, 1983 Cr.L.J. (NOC) 223* observed that compounding of offence can be done during the pendency of the revision but it cannot be done at any time after the revision petition has been disposed of. This case no where lays down the proposition that compounding of offence is not permissible after conviction and before imposition of sentence. In fact no such issue was there before the Court in this case, hence, reliance thereupon is quite misplaced.

No doubt, in *Rama Narang's* case (supra) the Apex Court has held that judgment is practically complete when the order of conviction is passed because the order of sentence is only the consequential order but at the same time referring to Section 354 of the Code the Apex Court has stated in so many words that judgment can be complete only when conviction is followed by a sentence. The relevant portion of the judgment is as under:

> "Section 354 sets out the contents of judgment. It says that every judgment referred to in Section 353 shall, inter alia, specify the offence (if any) of which and the section of the Indian Penal Code or other law under which, the accused is convicted and the punishment to which he is sentenced. Thus a judgment is not complete unless the punishment to which he is sentenced is set out therein"

The relevant part of Section 354 which has been referred to by the Apex Court in the aforesaid judgment is as under:

> *"354. Language and contents of judgment.*- (1) Except as otherwise expressly provided by this Code, every judgment referred to in Section 353, —
>
> (a) ...
>
> (b) .....
>
> (c) shall specify the offence (if any) of which, and the section of the Indian Penal Code (45 of 1860) or other law under which, the accused is convicted and the punishment to which he is sentenced." (emphasis supplied).

Thus, the proposition of law laid down by the Apex Court in *Rama Narang's* case (supra) with reference to Section 354 of the Code is unmistakably to the effect that judgment of conviction to be complete must be a judgment in which conviction and sentence both have been recorded. The logical corollary of the above would be that till sentence is recorded the judgment cannot be said to be complete and the judge or the Court remains in cession of the case. At this juncture, a reference to *Asgarali Nasarali Singaporewalla v. State of Bombay, AIR 1957 SC 503* is quite apposite wherein the Apex Court has quoted with approval the definition of word 'trial' given in Stroud's Judicial Dictionary (Edition 3, Vol. 4 at page 3092) which runs as under:

> "Trial: (1) A "trial" is the conclusion, by a competent tribunal, of questions in issue in legal proceedings, whether civil or criminal. (2) The "trial" (Criminal Justice Act, 1948 (11 & 12 Geo. 6 C. 58) s. 23 (1) is not complete until sentence has been passed or the offender has been ordered to be discharged (R. v. Grant, [1951] 1 K.B. 500) (k)."

From the aforesaid it is abundantly clear that in case of conviction the trial of the case continues till sentence has been passed. It can therefore, legitimately be inferred that the Court which has recorded the conviction can deal

with an application for composition before imposition of sentence because the trial is still in progress

True import of Section 320 (5) in the background of expression "an appeal is pending" used therein also requires to be examined carefully because it has been said that this expression also includes an awaited or impending appeal. The provisions of Section 320 (5) of the Code are as under:

"320. Compounding of offences.- (1).....

(2) ....

(3) ....

(4) ....

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard."

In *Asgarali Nasaral's case* (supra) the Apex Court while examining the meaning of word 'pending' has quoted with approval the definition given in *Strouds's Law Dictionary (Edition 3 Vol. 3 page 2141)* the relevant portion is quoted below:

> "Pending: - (1) A legal proceeding is "pending" as soon as commenced and until it is concluded, i.e., so long as the Court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein. Similar are the observations in *Jessel, M.R. In re Clagett's Estate; Fordham v. Clagett, (1882) 20 ch. D. 637 at p. 653 (J),*
>
> "What is the meaning of the word "pending"? In my opinion, it includes every insolvency in which any proceedings can by any possibility be taken. That I think is the meaning of the words, "pending .... A cause is said to be pending in a Court of justice when any proceeding can be taken in it. That is the test."

Definition of expression "pending" as extracted hereinabove conveys the idea in quite unequivocal terms that a legal proceeding be it appeal, revision or anything else can be said to be pending only from the stage of its commencement. It implies that till an appeal or revision is filed before the appellate or revisional Court it cannot be said that an appeal or revision is pending because it is awaited or impending. The person who has been convicted may or may not go in appeal and therefore, it is ultimately on the filing of the appeal that proceedings in appeal can be said to have commenced and not otherwise. In ultimate analysis it would not be legally correct to say that simply because an appeal can be filed, it should be assumed after recording of conviction an appeal is pending for the purpose of Section 320 (5) of the Code and the Court which has recorded the conviction has been denuded of the jurisdiction to deal with the application for compounding the offence.

In the light of aforesaid analysis, in our humble opinion it is not possible to subscribe to the view taken in the article published the issue of JOTI February 1996 (Part I page 18) to the effect that Court has no jurisdiction to entertain the prayer of composition after it has recorded conviction and before imposition of sentence.

The other view to the effect that offence may be compounded after conviction and before imposition of sentence has been taken in the article published in the issue of JOTI October, 2000 (Part V) page 565. In this article the case of *Aslam Mena v. Emperor, AIR 1918 Cal 238 (2)* has been referred. The relevant portion of the judgment quoted in this article is reproduced herein under:

> "In this case the opposite party on whom the Rule was served, does not appear to show cause. In his explanation the Magistrate before whom the case was tried, states that he does not think that the compromise petition could be accepted at such a late stage, when the judgment was actually being written but **a case may be compromised under S. 345 Criminal.P.C. at anything before the sentence is pronounced. We accordingly make the rule absolute** and set aside the conviction and the sentence passed on the petitioner. The fines, if paid, will be refunded."

The aforesaid decision though not supported with so many reasonings can be said to be legal as well as logical in the light of analysis made herein before in the light of various authorities. Here, reference to *Gopal Tiwari & Anr. v. State of M.P., 2000 MPJR (I) 162* can also be made wherein referring to the decision of the Apex Court *Ram Shanker v. State of U.P. [(1982) 3 SCC 388]* it has been observed that when appellate Court alters an offence from non-compoundable to a compoundable offence then composition of such offence can be permitted by the appellate Court.

When an appellate Court alters the conviction, the situation may not be very different from the situation when the accused is convicted and thereafter sentence has to be imposed. In both the situations such stage is a post-conviction stage before imposition of sentence. If an appellate Court can entertain the prayer of composition in such situation then on similar analogy the court which has convicted the accused can also entertain the prayer for composition before imposition of sentence.

The sum and substance of the aforesaid analysis brings us to the conclusion that the Court which has recorded the conviction has jurisdictional competence to entertain the prayer for composition of an offence before imposition of sentence.

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हस्तलेख विशेषज्ञ की साक्ष्य का साक्ष्यिक मूल्य

न्यायिक अधिकारीगण

जिला सीहोर

साक्ष्य विधि का यह एक सामान्य नियम है कि एक व्यक्ति साक्षी के रूप में न्यायालय के समक्ष किसी तथ्य के बारे में सिर्फ वही कथन कर सकता है कि जिसके बारे में वह स्वयं कुछ जानकारी रखता है। किसी व्यक्ति की राय अथवा विश्वास को असंगत होने के कारण साक्ष्य में ग्राह्य नहीं किया जा सकता है लेकिन "भारतीय साक्ष्य अधिनियम" की धारा 45 से 51 तक में उपबंधित प्रावधान इस सामान्य नियम के अपवाद हैं।

कभी–कभी न्यायाधीश के समक्ष ऐसी परिस्थितियाँ उत्पन्न हो जाती हैं जब किसी वाद अंर्तग्रस्त विषय–वस्तु के दृष्टिगत सुसंगत तथ्य के बारे में निष्कर्ष निकालने से पूर्व न्यायाधीश को कतिपय ऐसे तकनीकी प्रश्नों का हल निकालना होता है, जो सामान्य ज्ञान तथा अनुभव के परे हैं । ऐसे तकनीकी प्रश्नों का हल निकालने के लिए न्यायाधीश ऐसे व्यक्तियों की सहायता लेता है जो संबंधित विषय के विशेषज्ञ होते हैं एवं ऐसे विशेषज्ञ व्यक्तियों की राय साक्ष्य अधिनियम में सुसंगत मानी गई है। धारा 45 साक्ष्य अधिनियमान्तर्गत हस्तलेख विशेषज्ञ की राय को सुसंगत मान्य किया गया है।

"हस्तलेख विशेषज्ञ" साक्षी वह है जिसने ज्ञान की विशिष्ट शाखा में अध्ययन में समय लगाया हो और उन विषयों में, जिनमें राय देना हो, निपुण या दक्ष हो गया हो, उन विषयों में उसकी साक्ष्य इसलिए ग्राह्य होगी कि उसकी साक्ष्य से न्यायालय सही निष्कर्ष निकालने में समर्थ हो सकता है । अतः यह प्रश्न पहले तय कर लेना चाहिए कि साक्षी विशेषज्ञ की कोटि में आता है अथवा नहीं अर्थात जिस विषय पर वह अपनी राय देता है, उसमें उसकी सक्षमता से संतुष्टि हो जाती है तब उसकी राय को समुचित मान्यता प्रदान की जा सकती है, जिसमें राय का स्वतंत्र रूप से दिया जाना आवश्यक होता है।

सामान्यतः एक व्यक्ति के विशेषज्ञ मान्य किये जाने हेतु दो बातें आवश्यक मानी जाती हैं :–

(1) विशिष्ट ज्ञान एवं,

(2) व्यवहारिक/प्रायोगिक अनुभव,

अर्थात् ऐसा व्यक्ति जिसने अभ्यास, निरीक्षण और सतत् अध्ययन द्वारा किसी भी विज्ञान, कला, व्यापार या व्यवसाय में विशिष्ट ज्ञान या अनुभव प्राप्त किया है, विशेषज्ञ होता है । "विशेषज्ञ" के बारे में उच्चतम न्यायालय ने यह मत व्यक्त किया है कि इस शब्द को सामान्य अर्थ में लेना चाहिये । एक आबकारी निरीक्षक जिसने 21 वर्ष तक नमूनों के परीक्षण का कार्य किया है, इस धारा के अंतर्गत "विशेषज्ञ" माना जायेगा। *(देखें– एस.सी. वात्रा विरूद्ध उ.प्र. राज्य, ए.आई.आर. 1974 एस.सी. 639)*

सभी युगों तथा सभ्य समाजों में हस्तलेख विशेषज्ञ रहे हैं तथा न्यायालयों द्वारा इनसे राय प्रस्तुत करने के लिये कहा जाता रहा है। रोमन लॉ के अंतर्गत न्यायाधीशों को ऐसे विशिष्ट कुशलता प्राप्त लोगों को न्यायालय में तलब करने की अधिकारिता प्राप्त थी । इंगलिश न्यायालयों में विशेषज्ञ साक्ष्य 16वीं शताब्दी से ग्राह्य की जाती रही है तथा 1774 में प्रस्तुत एक प्रसिद्ध मामले के विचारण में जहां किंग जार्ज तृतीय की वसीयत विवादग्रस्त थी, हस्तलेख विशेषज्ञ की सहायता से वसीयत में की गई कूट रचना को अन्वेषित किया गया तथा सिद्ध किया गया। भारत में यग्नवलक्य *(चैप्टर 11 वाल्यूम 92) के मयूखा (चैप्टर–11 एस–1)* में इसका उल्लेख किया गया है।

सिविल मामलों तथा आपराधिक मामलों, जैसे कूट रचना की विवेचना आदि, के संबंध में हस्तलेखन अथवा हस्ताक्षर को सिद्ध किया जाना दिन प्रतिदिन के कार्यों में सामने आता है। इससे संबंधित भारतीय साक्ष्य अधिनियम के सुसंगत उपबंध धारा 45, 47, 67 तथा 73 में दिये गये हैं। यद्यपि प्रत्येक व्यक्ति के हस्तलेख में एक निश्चित तथा विशिष्ट चरित्र रहता है जिससे उसे दूसरे व्यक्तियों के हस्तलेख से विभेदित किया जा सकता है परन्तु कुछ ही लोग रहते हैं जो अपने हस्तलेख का सामान्य अंतर बनाए रखते हैं। हस्तलेख एवं हस्ताक्षर के समय लेखन में जल्दबाजी, अस्थाई नर्वसनेस तथा इस्तेमाल किये जाने वाले पैन के प्रकार जैसे स्टील व फाउन्टेन पैन से बहुधा बदलते रहते हैं।

विशेषज्ञ साक्ष्य की कमियों को तीन शीर्षकों के अंतर्गत दर्शाया जा सकता है :–

(i) ज्ञान की कमी

(ii) अभिव्यक्ति की अपूर्णता तथा

(iii) पक्ष विशेष से लगाव।

किसी व्यक्ति के हस्तलेख को निम्नांकित रीतियों से साबित किया जा सकता है :–

(1) धारा 45 के अंतर्गत किसी हस्तलेख विशेषज्ञ की साक्ष्य द्वारा या,

(2) उस व्यक्ति की साक्ष्य द्वारा, जिसने उस दस्तावेज को स्वयं लिखा या हस्ताक्षरित किया है, या

(3) उस व्यक्ति की साक्ष्य द्वारा जिसने संबंधित व्यक्ति को लिखते या हस्ताक्षरित करते हुए देखा, या

(4) धारा 73 में उपबंधित रीति से न्यायालय द्वारा स्वयं हस्तलेख की तुलना करके या,

(5) उस व्यक्ति की स्वीकृति द्वारा, जिसके विरूद्ध दस्तावेज प्रस्तुत किया जाता है या,

(6) दस्तावेज में लिखी हुई बातों से निकले आंतरिक साक्ष्य द्वारा,

(7) यदि हस्ताक्षर अथवा हस्तलेख को परिस्थितिजन्य साक्ष्य द्वारा साबित किया जाता है तो न्यायालय का यह समाधान हो जाना चाहिए कि परिस्थितिजन्य साक्ष्य से पूर्ण रूप से यही निष्कर्ष निकलता है। *(देखें – बारूराम बनाम श्रीमती प्रसन्नी, ए.आई.आर. 1959 एस.सी. 93)*

किसी विशेषज्ञ के लिए निश्चित रूप से यह कहना संभव नहीं है कि कौन सा लेखन किस व्यक्ति द्वारा किया गया है । विशेषज्ञ दोनों के हस्तलेख में समानता एवं भिन्नता विषयक तथ्य प्रदर्शित कर सकता है। न्यायालय को विशेषज्ञ की राय का परीक्षण करते हुए अपना निर्णय लेना होता है। यद्यपि न्यायालय हस्तलेख विशेषज्ञ की भूमिका अभिनीत नहीं कर सकता है, फिर भी न्यायालय को हस्तलेख विशेषज्ञ की राय का अंधानुकरण नही करना चाहिए।

यद्यपि यह सही है कि विशेषज्ञ की साक्ष्य कमजोर अथवा असंतोषजनक प्रकृति की साक्ष्य है, न्यायालय सामान्यतया इस पर अमल नहीं करता है जब तक कि दूसरी साक्ष्य के माध्यम से उसकी संपुष्टि नहीं होती है। निश्चित रूप से यह प्रश्न कि न्यायालय विशेषज्ञ की राय को कितना वजन देता है, आवश्यक रूप से किसी प्रकरण विशेष के तथ्यों एवं परिस्थितियों पर निर्भर करता है। सामुद्रिक विज्ञान के संबंध में विशेषज्ञ राय देते हैं तो उनकी राय को स्वीकार किया जाना चाहिए और यदि इसे अस्वीकार किया जाता है तो अस्वीकृत किये जाने के कारणों को दर्शाना चाहिए। इस संबंध में न्यायालय का निर्णय सर्वमान्य रहता है तथा विशुद्ध रूप से सामुद्रिक मामलों में भी न्यायालय विशेषज्ञों की राय को मानने को बाध्य नहीं है। *(देखें – एशियाटिक स्टील नेविगेशन कंपनी बनाम अरविंद चक्रवर्ती, ए.आई.आर. 1959 एस.सी. 597)*

विशेषज्ञ की राय साक्ष्य का एक अंश है। अतः न्यायालय द्वारा इस साक्ष्य को दूसरी अन्य साक्ष्य के अंश के साथ विचार में लिया जाना चाहिए। कौन सी साक्ष्य मुख्य साक्ष्य है तथा कौन सी साक्ष्य संपुष्टकारक साक्ष्य है, यह प्रत्येक प्रकरण की परिस्थितियों पर निर्भर करता है। इस बारे में कोई विवाद नहीं किया जा सकता कि हस्तलेख विशेषज्ञ की राय विनिश्चयात्मक स्वरूप की नहीं होती है, फिर भी इसे मूल्यहीन कहकर अलग नहीं हटाया जा सकता है।

हस्तलेखन विशेषज्ञ की राय बहुत कम विनिश्चयात्मक स्वरूप की होती है। अतः ऐसे मामलों में जहाँ विशेषज्ञ की राय के विपरीत काफी दस्तावेजी साक्ष्य उपलब्ध है, हस्तलेख विशेषज्ञ की साक्ष्य को महत्व नहीं दिया जाना चाहिए। *(देखें– बनारसी स्टोर्स बनाम द प्रेसीडेंट ऑफ द यूनियन ऑफ इन्डियन रिपब्लिक, ए.आई. आर. 1953 इलाहाबाद 318)* ऐसे मामलों में जहां दोनों पक्षकारों द्वारा हस्तलेख विशेषज्ञ को प्रस्तुत किया गया है, तथा प्रत्येक हस्तलेख विशेषज्ञ उसे सहायता के लिए बुलाने वाले पक्ष को समर्थित करता है तथा उसकी राय के लिए तकनीकी कारण प्रदर्शित करता है, इस प्रकार की साक्ष्य को बहुत कम सहायता पहुँचाने वाली साक्ष्य के रूप में देख जाना चाहिए। *न्यायदृष्टांत हाजी मोहम्मद इकरामुलहक बनाम पश्चिम बंगाल राज्य, ए. आई.आर. 1959 एस.सी. 488* के मामले में माननीय उच्चतम न्यायालय द्वारा अभिनिर्धारित किया गया है कि न्यायालय विशेषज्ञ की रिपोर्ट पर, जो कारणों द्वारा समर्थित नहीं है, किसी प्रकार का अवलम्बन नहीं करेगा।

विशेषज्ञ की "सक्षमता" के संबंध में न्यायाधीश का यह कर्तव्य है कि वह अभिनिर्धारित करे कि प्रश्नगत मामले में एक व्यक्ति की कुशलता उस व्यक्ति को विशेषज्ञ की परिधिन्तर्गत लाए जाने हेतु पर्याप्त है अथवा नहीं। न्यायाधीश को इस बिन्दु का अभिनिर्धारण करना होताा है कि विशेषज्ञ सक्षम एवं योग्य है अथवा नहीं। आर. बनाम सिल्वर लॉक, 1884 क्यू.बी. 766 में जस्टिस डो द्वारा अभिनिर्धारित किया गया है कि जब एक साक्षी स्वयं को विशेषज्ञ की हैसियत से प्रस्तुत करता है तो तीन प्रश्न उत्पन्न होते हैं :–

(i) क्या संबंधित विषय ऐसा है कि जिस पर विशेषज्ञ की राय प्राप्त की जा सकती है?

(ii) एक साक्षी द्वारा स्वयं को विशेषज्ञ कहलाने हेतु आवश्यक योग्यताएँ क्या हैं ?

(iii) क्या ऐसा साक्षी इन योग्यताओं को धारित करता है?

हस्तलेख विशेषज्ञ की साक्ष्य को बहुत सावधानीपूर्वक विश्लेषित किया जाना चाहिए। हस्तलेख विशेषज्ञों द्वारा पैन प्रेशर, पैन होल्डर, पैन पॉज, पैन प्रजेन्टेशन, पैन लिफ्ट, हैण्ड मूवमेंट, अनियमित मूवमेंट, एंगल ऑफ पैन, रीटचिंग, ज्वाइनिंग चेंज, ऑफ प्वाइन्ट, अंडर स्ट्रोक, क्रास बार, कई प्रकार के लूप्स, एम्बलेश्मेंटस, टर्मिनल एवं अन्य प्रकार की चीजें जो साधारण आदमी की समझ से बाहर की हैं, के संबंध में बात की जाती है और अधिकांश हस्तलेख विशेषज्ञ उनकी स्वयं की पसंदीदा थ्योरी रखते हैं, जिसका इस्तेमाल वे निष्कर्ष पर पहुंचने में करते हैं, हस्तलेख विशेषज्ञ धनराशि प्रदान किये जाने पर प्रस्तुत होने वाले साक्षी हैं एवं इस श्रेणी के अन्य दूसरे साक्षियों की तरह ये साक्षी भी जो पक्षकार उन्हें साक्ष्य हेतु बुलाता है उसके पक्ष में अचैतन्य झुकाव रखते हैं।

न्याय दृष्टांत *श्रीमती जयन्ती गोगोई एवं अन्य बनाम श्रीमती प्रणती दौरा एवं अन्य, ए.आई.आर. 2004 गोहाटी 23* वाले मामले में यह अभिनिर्धारित किया गया है कि किसी दस्तावेज पर हस्तलेख अथवा हस्ताक्षर को धारा 45 एवं 47 सहपठित धारा 73 भारतीय साक्ष्य अधिनियम के अंतर्गत सिद्ध किया जाना चाहिए। धारा 45 भारतीय साक्ष्य अधिनियम के अंतर्गत हस्तलेख अथवा हस्ताक्षर के संबंध में विशेषज्ञ की राय सुसंगत है। जहां तक धारा 47 का संबंध है यह धारा उपबंधित करती है कि जब न्यायालय को राय बनानी हो कि कोई दस्तावेज किस व्यक्ति ने लिखी या हस्ताक्षरित की थी, तब उस व्यक्ति के हस्तलेख से जिसके द्वारा वह लिखी

या हस्ताक्षरित की गयी अनुमानित की जाती है, परिचित किसी व्यक्ति की यह राय कि वह उस व्यक्ति द्वारा लिखी या हस्ताक्षरित की गयी थी अथवा लिखी या हस्ताक्षरित नहीं की गयी थी, सुसंगत तथ्य है। साधारणतया धारा 45 एवं 73 एक दूसरे के परिपूरक हैं।

हस्तलेख विशेषज्ञ स्थापित विशेषज्ञों से प्रशिक्षण लेते **हैं तथा प्रेक्टिस एवं अध्ययन** से अनुभव प्राप्त करते हैं। विशेषज्ञ की राय का मूल्य उसकी योग्यता पर निर्भर **नहीं करता है बल्कि** वह विशेषज्ञ द्वारा उसकी राय हेतु तर्कपूर्ण कारण के साथ उसकी रिपोर्ट प्रस्तुत किये जाने पर निर्भर करता है। यह तथ्य पूर्णतया स्थापित हो चुका है कि हस्तलेख विज्ञान एक पूर्ण विज्ञान नहीं है इसलिए हस्तलेख विशेषज्ञ की साक्ष्य को बहुत सावधानी के साथ प्राप्त करना चाहिए, *(देखें – प्यारासिंह बनाम जगतारसिंह, ए.आई.आर. 1987 पंजाब 93)*

न्याय दृष्टांत *कृष्णकुमार बनाम राज्य, ए.आई.आर. 1981 इलाहाबाद 287* वाले मामले में अभिनिर्धारित किया गया है कि न्यायालय को एकेडेमिक विशेषज्ञों द्वारा अभिव्यक्त की गई राय के संबंध में हल्के रूप में हस्तक्षेप नहीं करना चाहिए। उन मामलों में हस्तक्षेप करना चाहिए जिन मामलों में विशेषज्ञ द्वारा एक ऐसा दृष्टिकोण लिया गया हो जो कोई भी युक्तियुक्त बुद्धि वाला व्यक्ति नहीं लेगा।

फखरूद्दीन बनाम मध्यप्रदेश राज्य, ए.आई.आर. 1967 एस.सी. 1326 के मामले में विशेषज्ञ साक्ष्य के साक्ष्यिक मूल्य की विवेचना करते हुए स्पष्ट किया गया कि न्यायालय को स्वयं विशेषज्ञ द्वारा निकाले गये निष्कर्षों की सहायता से यह निश्चित करना चाहिए कि क्या विशेषज्ञ पर निर्भरता व्यक्त करनी चाहिए अथवा नहीं।

न्याय दृष्टांत *एम. दुर्गाप्रसाद बनाम आन्ध्रप्रदेश राज्य, क्रिमिनल लॉ जरनल 2004 पृष्ठ 242* वाले मामले में यह अभिनिर्धारित किया गया है कि विशेषज्ञ साक्ष्य को स्वतंत्र साक्ष्य से समर्थित होना चाहिए– यह मस्तिष्क में रखना चाहिए कि हस्तलेख विशेषज्ञ की राय कमजोर और अन्य से कम विश्वसनीय दर्जे की साक्ष्य है एवं किसी भी रूप में मात्र हस्तलेख विशेषज्ञ की राय के आधार पर दोषसिद्धि की जाना सुरक्षित नहीं है। न्यायालय विशेषज्ञ की साक्ष्य पर विचार करने से इन्कार कर सकता है जब तक कि यह साक्ष्य स्वतंत्र साक्ष्य से समर्थित न हो। माननीय उच्चतम न्यायालय द्वारा अनेकानेक मामलों में यह अभिनिर्धारित किया गया है कि यह अत्यन्त असुरक्षित होगा कि एक अभियुक्त को विशेषज्ञ की एकमात्र साक्ष्य के आधार पर दोषसिद्धि करके सजा दी जावे । विशेषज्ञ की राय के संबंध में न्याय दृष्टांत *आलमगीर बनाम राज्य एन.सी.टी. देहली, 2003 (1) एस.सी.सी. 21* वाले मामले में माननीय उच्चतम न्यायालय द्वारा अभिनिर्धारित किया गया है कि मानवीय निर्णय को गलती से परे होना नहीं कहा जा सकता है। ऐसे मामलों में सम्यक तत्परता तथा सावधानी बरतनी चाहिए तथा परीक्षण उपरांत इस प्रकार की साक्ष्य को स्वीकार किया जाना अथवा उसे विश्वसनीयता प्रदान की जाना चाहिए।

उपरोक्त कारणों से निष्कर्ष निकलता है कि एक हस्तलिपि विशेषज्ञ की साक्ष्य का मूल्य वैसा ही है जैसा कि संपुष्टिकारक साक्ष्य का होता है। दांडिक एवं सिविल प्रत्येक मामले में ऐसी राय का अपना पृथक महत्व है। ऐसी राय पूर्णतया विनिश्चयात्मक प्रकृति की साक्ष्य नहीं होने से भी बिना संपुष्टिकारक साक्ष्य के निष्कर्ष हेतु इस पर ही निर्भर नहीं रहा जा सकता है इसलिये ऐसी राय को स्वीकार करते समय सम्यक तत्परता व सावधानी रखना आवश्यक है।

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EXERCISE OF JURISDICTION BY TRIAL COURT U/S 389 (3) CR.P.C. AFTER COMMENCEMENT OF SENTENCE OF IMPRISONMENT

The issue relating to exercise of jurisdiction by Trial Court under Section 389 of the Code of Criminal Procedure, 1973 (for short 'the Code') after sentence of imprisonment has commenced to run has to be examined in the background of the scheme of Section 389 of the Code which finds place in Chapter XXIX (Appeals) of the Code.

Section 389 of the Code deals with suspension of sentence in cases where appeal is provided. Sub Section (1) of Section 389 contemplates such suspension during pendency of appeal and confers a discretionary power on appellate Court to suspend the execution of the sentence appealed against for reasons to be recorded in writing. Sub Section (2) thereof confers this power on the High Court in case of an appeal to a subordinate court by a convict. The power of suspension of sentence, though vested in appellate court, Sub Section (3) of Section 389 on fulfillment of conditions provided therein contemplates *'deemed suspension'* of the sentence of imprisonment by the Court which has passed the conviction. Provisions of Section 389 (3) empower a Court convicting a person to release him on bail if such person satisfies the Court that he intends to present an appeal provided either of the following two conditions is satisfied :

1. Where such person being on bail is sentenced to imprisonment for a term upto three years.
2. Where the offence in which such person has been convicted is bailable and such person is on bail.

The question whether Trial Court can exercise the jurisdiction to release the convict on bail under Section 389(3) after the sentence of imprisonment has commenced to run has arisen because in some legal quarters it has been the view that jurisdiction under Section 389 (3) can be exercised only before the accused person is sent to jail under warrant of sentence to suffer the sentence of imprisonment. The argument put forth to advance this view proceeds on the premises that subsequent to the dispatch of the accused person to jail under warrant of sentence, the Court passing the conviction becomes *functus officio* and therefore, cease to have jurisdiction to enlarge the convicted person on bail.

It is not uncommon that many a times a convicted person on the date of judgment is not having sureties to stand for his release. This may be because either such person was not anticipating conviction or was not properly advised in the matter by his counsel or else that he failed to arrange for the same despite being advised by the counsel, with the inevitable result of his being sent to jail

to suffer sentence of imprisonment. Adherence to the aforesaid view results in refusal by the Court to release such convict on bail u/s 389 (3) once he has been sent to jail though on the following day he has sureties to stand for his release.

The language of Section 389 (3) unmistakably shows that jurisdiction conferred under it is an independent jurisdiction to be exercised within the parameters setforth therein.

A bare look at the provisions of Section 389 (3) clearly reveals that there is nothing therein by way of a proviso to the effect that the jurisdiction contemplated thereunder can be exercised only before the convict is sent to jail to suffer imprisonment and not subsequent thereto. Had it been the intention of the legislature then nothing could have prevented it from explicitly providing to that effect in so many words in Section 389 (3) itself. To read anything extra in the provisions of Section 389 (3) so as to make it applicable only before the convict is sent to jail is bound to cause violence to the language, scheme and spirit of Section 389 (3) of the Code.

Again what would be the situation where a convict after having obtained orders u/s 389 (3) for his release on bail fails to furnish bail bonds and is consequently sent to jail? Whether the order for his release on bail shall cease to have effect from the following day? Clearly, that cannot be a logical consequence of failure of the accused to furnish bail post haste, and his right to be released on bail under such order will remain intact on following days also. If that happens to be the only logical course there may not be any illegality or impropriety if the accused is released on bail on the basis of application filed on any day subsequent to his conviction and sentence provided the conditions laid down in the Section are satisfied.

The plea that jurisdiction under Section 389 (3) cannot be exercised after the accused has been sent to jail because the sentence commences to run forthwith also requires to be probed. In fact commencement of sentence of imprisonment is not dependent on sending of convict to jail. Right after imposition of sentence, Court is required to prepare a warrant of sentence for sending the accused to jail. This task is required to be performed whether or not an application under Section 389 (3) has been filed by the accused. Here it is noteworthy that benefit of Section 389 (3) can be availed only by such accused who happens to be on bail. Conviction of such a person followed by imposition of sentence of imprisonment has the effect of automatic termination of the facility of bail. The convicted person forthwith is treated to be in the custody of the Court to be dealt with according to the law.

Section 418 of the Code dealing with execution of sentence of imprisonment, which has a bearing on the present discussion, provides that Court passing the

sentence shall forthwith forward a warrant to the jail or other place in which the accused is or is to be confined and unless the accused is already confined in jail or such place shall forward him to such jail or other place with a warrant. Elaborating upon the scope of Section 418, it has been laid down by the Orissa High Court in *Bhanja Naik v. Somnath Mohanty, AIR 1969 Orissa 268,* that as soon as the sentence is pronounced, the accused has to be taken into the custody on the strength of the warrant. The Court held that the time elapsed between the dispatch of the warrant and forwarding of the accused to the Officer-in-Charge of the prison and actual delivery of the accused to the said officer would obviously be a part of the term of the sentence of imprisonment.

Therefore, the sentence of imprisonment commences to run the moment a warrant is prepared for that purpose and not from the point of time of forwarding of the accused to jail or his entry into the jail. Because the sentence of imprisonment commences to run right after imposition of sentence and preparation of warrant therefore, the argument that there can be no suspension after the sentence of imprisonment commences to run become meaningless and loses all its force.

Section 389 (3) Cr.P.C. is an instance of benevolent legislation where an accused convicted for a minor offence or sentenced with imprisonment upto 3 years has been provided with special benefit making it obligatory upon Court to grant bail to him. If by some reason the accused is not able to exercise his right at the first instance, then it ought not to be assumed that the right has been lost nor it could have been the intention of the legislature.

In *Nazeeruddin vs. State Transport Appellate Tribunal, AIR 1976 SC 331,* the Apex Court has held that in selecting out different interpretations, the Court shall adopt one which is just, reasonable and sensible instead of one which is none of those things. There is nothing in Section 389 (3) Cr.P.C. to deprive the benefit of this Section to a person accused of offences mentioned in this Section if he, by some reason, has failed to exercise his right under this Section on the day of conviction and imposition of sentence in the first instance itself. A contrary interpretation would lead to inconvenience, injustice, absurdity, hardship and anomaly which has to be avoided at all costs (Excerpts from the book, *"Principles of Statutory Interpretation" by Justice G.P. Singh eighth edition at page 113).* Therefore, the question under consideration is answered in affirmative meaning thereby that a Trial Court can exercise the jurisdiction u/s 389 (3) Cr.P.C. even after the accused has been sent to jail to suffer sentence of imprisonment. The only limitation is that the Court would cease to have such jurisdiction under this Section as soon as the limitation prescribed for preferring an appeal expires.

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TRAINING CALENDAR FOR THE YEAR - 2005
(JUNE - DECEMBER)

The Institute is conducting various training courses in second half of year 2005. Second phase training for newly recruited Civil Judges is in progress. An advanced course for twenty one Fast Track Additional District Judges shall commence on 27th June, 2005. From 4th July, 2005, a condensed training course for forty two Judicial Officers of Civil Judge Class I cadre who require further institutional support shall be conducted. The Institute proposes to conduct advanced training course for about two hundred Judicial Officers of Additional District Judge cadre in four batches. The duration of training will be five days. The training of last batch shall conclude in the month of December, 2005.

The training for around two hundred Prosecution Officers shall be conducted by the Institute in four batches, each batch consisting of fifty officers. The duration of training will be six days. First batch shall commence in the month of September and the training of last batch shall conclude in the month of December.

Apart that the Institute proposes to organize four days Refresher Training Course for Presiding Judges of Family Court on Family Laws and Gender Justice in the month of August.

A number of workshops are also proposed to be organized relating to Electricity Act, 2003, Consumer Protection Act, 1986 and N.D.P.S. Act, 1985. Six workshops are proposed to be organized on Electricity Act, 2003 at regional level in which officers of Electricity Department, Special Judges, Chief Judicial Magistrates and Police Officers shall participate. A one day workshop for Special Judges under N.D.P.S. Act, 1985 is also proposed. A two days workshop for Presiding Officers of District Consumer Forum is also proposed in the month of November.

In total twenty training course/workshops are to be conducted and organized by the Institute, a tentative calendar whereof has been prepared by the Institute and is being published in this issue.

-Editor

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE, HIGH COURT OF M.P., JABALPUR
TRAINING CALENDAR - YEAR 2005 (JUNE - DECEMBER)

SL. NO.	NAME OF THE COURSE	TARGET GROUP	NO. OF PARTICIPANTS	DURATION	PERIOD	VENUE
1	*Basic Training Course (Second phase)*	Newly appointed Civil Judges Class II	4	1 month	20.06.2005 to 19.07.2005	JABALPUR
2	*Advance Course*	A.D.Js. (Fast Track)	21	6 days	27.06.2005 to 02.07.2005	JABALPUR
3	*Condensed Course*	Civil Judges Class I	42	16 days	04.07.2005 to 19.07.2005	JABALPUR
4	*Workshop on Indian Electricity Act, 2003 (1st)*	Officers of Electricity *Co./Spl. Judges, CJMs./ Police Officers of D.S.P. rank*	63	1 day	10.07.2005	JABALPUR
5	*Workshop on Indian Electricity Act, 2003 (2nd)*	Officers of Electricity Co./Spl. Judges, CJMs./ Police Officers of D.S.P. rank	60	1 day	17.07.2005	JABALPUR

SL. NO.	NAME OF THE COURSE	TARGET GROUP	NO. OF PARTICIPANTS	DURATION	PERIOD	VENUE
6	*Workshop on Indian Electricity Act, 2003 (3rd)*	Officers of Electricity Co./Spl. Judges, CJMs./ Police Officers of D.S.P. rank	60	1 day	24.07.2005	INDORE
7	*Workshop on Indian Electricity Act, 2003 (4th)*	Officers of Electricity Co./Spl. Judges, CJMs./ Police Officers of D.S.P. rank	60	1 day	07.08.2005	UJJAIN
8.	*Refresher Course on Family Laws and Gender Justice*	Presiding Judges, Family Court	11	4 days	15.08.2005 to 18.08.2005	JABALPUR
9	*Advance Course*	A.D.Js. (First Batch)	50	5 days	05.09.2005 to 09.09 2005	JABALPUR
10	*Workshop on Indian Electricity Act, 2003 (5th)*	Officers of Electricity Co./Spl. Judges, CJMs./ Police Officers of D.S.P. rank	60	1 day	17.09.2005	BHOPAL

SL. NO.	NAME OF THE COURSE	TARGET GROUP	NO. OF PARTICIPANTS	DURATION	PERIOD	VENUE
11	*Advance (Course) Training on Prosecution Methods & Skills*	Prosecution Officers (First Batch)	50	6 days	19.09.2005 to 24.09.2005	JABALPUR
12	*Advance (Course) Training on Prosecution Methods & Skills*	Prosecution Officers (Second Batch)	50	6 days	02.10.2005 to 07.10.2005	BHOPAL
13	*Workshop on Indian Electricity Act, 2003 (6th)*	Officers of Electricity Co./Spl. Judges, CJMs./ Police Officers of D.S.P. rank	60	1 day	09.10.2005	GWALIOR
14	*Advance Course*	A.D.Js. (Second Batch)	50	5 days	17.10.2005 to 21.10.2005	JABALPUR
15	*Advance Course*	A.D.Js. (Third Batch)	50	5 days	07.11.2005 to 11.11.2005	BHOPAL

SL. NO.	NAME OF THE COURSE	TARGET GROUP	NO. OF PARTICIPANTS	DURATION	PERIOD	VENUE
16	*Workshop on Consumer Protection Act. 1986*	Presiding Officers of District Consumer Forums	35	2 days	13.11.2005 & 14.11.2005	JABALPUR
17	*Advance (Course) Training on Prosecution*	Prosecution Officers *(Third Batch)*	50	6 days	21.11.2005 to 26.11.2005	JABALPUR
18	*Advance Course*	A.D.Js. (Fourth Batch)	50	5 days	05.12.2005 to 09.12.2005	JABALPUR
19	*Workshop on Procedural Aspects under N.D.P.S. Act, 1985*	Special Judges (N.D.P.S.)	43	1 day	17.12.2005	BHOPAL
20	*Advance (Course) Training on Prosecution Methods & Skills*	Prosecution Officers (Fourth Batch)	50	6 days	19.12.2005 to 24.12.2005	BHOPAL

BOOK REVIEW

Book entitled ***"Commentary on the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989"*** by Justice S.K. Chawla, former Judge of the High Court of Madhya Pradesh encapsulates the various facets relating to the Act. This book is priced at Rs. 500/- and is published by *Suvidha Law House Pvt. Ltd.* Bhopal (M.P.). It is an exhaustive, comprehensive and lucid commentary on the various provisions of the Act and is interspersed with relevant citations tending to explore underlying provisions as well as the philosophy and intent of the legislature. The citations explicitly lay down the applicability of principle of *mens rea* which expels the confusion as to whether the *actus reus per se* will attract the penal provisions of the Act. Confusion relating to applicability of the provisions relating to anticipatory bail has also been removed by apt and engrossing analysis. Effect of conduction of investigation by an officer not authorized as per the provisions of the Act has also been taken into account.

The book also contains the Constitution (Scheduled Caste & Tribe) Orders promulgated from time to time in respect of various regions throughout the country making the book a country specific publication rather than a region specific one.

Full text of milestone judgments are also provided in this book saving the trouble of the reader of fishing out the citations from the library. All in all a *"must have book"* for all those dealing with the provisions of the Act.

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In any moment of decision, the best thing you can do is the right thing, the next best thing is the wrong thing, and the worst thing you can do is nothing.

THEODORE ROOSEVELT

PART - II

NOTES ON IMPORTANT JUDGMENTS

131. TOWN PLANNING :

Exercise of administrative discretion regarding removal and dismantling of unauthorized constructions – Law explained.

Mahendra Baburao Mahadik and others v. Subhash Krishna Kanitkar and others

Judgment dt. 16.03.2005 by the Supreme Court in Civil Appeal No. 2733 of 2001, reported in (2005) 4 SCC 99

Held :

In *Friends Colony Development Committee v. State of Orissa, (2004) 8 SCC 733* this Court opined: (SCC p. 744, para 25)

> "25. Though the municipal laws permit deviations from sanctioned constructions being regularised by compounding but that is by way of exception. Unfortunately, the exception, with the lapse of time and frequent exercise of the discretionary power conferred by such exception, has become the rule. Only such deviations deserve to be condoned as are *bona fide* or are attributable to some misunderstanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered. Other than these, deliberate deviations do not deserve to be condoned and compounded. Compounding of deviations ought to be kept at a bare minimum. The cases of professional builders stand on a different footing from an individual constructing his own building. A professional builder is supposed to understand the laws better and deviations by such builders can safely be assumed to be deliverate and done with the intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent for future. It is common knowledge that the builders enter into underhand dealings. Be that as it may, the State Governments should think of levying heavy penalties on such builder and therefrom develop a welfare fund which can be utilied for compensating and rehabilitating such innocent or unwary buyers who are displaced on account of demolition of illegal constructions."

In *M.I. Builders (P) Ltd. v. Radhey Shyam Sahu, (1999) 6 SCC 464* this Court observed: (SCC p. 529, para 73)

> "73. The High Court has directed dismantling of the whole project and for restoration of the park to its original condition. This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to

exercise judicial discretion in moulding the relief. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispsositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles. As will be seen in moulding the relief in the present case and allowing one of the blocks meant for parking to stand we have been guided by the obligatory duties of the Mahapalika to construct and maintain parking lots."

A discretionary power must be exercised having regard to the larger public interest.

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132. N.D.P.S. ACT, 1985 – Sections 18, 22, 23 and 25
Contraband recovered from the truck – Registered owner of the truck pleading transfer of truck well before incident – However, registration not changed – No evidence of involvement of the registered. owner – Held, registered owner not liable.
Balwinder Singh v. Asstt. Commr. Customs and Central Excise
Judgment dt. 22.02.2005 by the Supreme Court in Criminal Appeal No. 547 of 2004, reported in (2005) 4 SCC 146

Held :

The present appellant has been found guilty on the ground that he was the registered owner of the vehicle PJA 8677. Counsel for the appellant contends that he purchased this lorry in 1982, along with one Kesar Singh but in 1986 he transferred the vehicle to a third party and the investigating officer, PW 13, who was examined, deposed that during the course of his investigation he came to know that though the present appellant was the original owner of vehicle bearing Registration No. PJA 8677, he had sold the vehicle to one Sucha Singh in 1986, however, the registration was not changed in his name. This appellant was convicted solely for the reason that he was the registered owner of the vehicle PJA 8677. There is no evidence to prove that he knowingly allowed any person to use the vehicle for any illegal purpose. There is also no evidence to prove the conspiracy set up by the prosecution. Therefore, it is clear that though the articles were recovered from the lorry, there is no evidence to show that the appellant had any control over the vehicle nor was he in possession of these drugs. In the result, we allow the appeal and acquit the appellant Balwinder Singh of all charges framed against him.

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133. SERVICE LAW :

Selection process – Criteria for selection cannot be altered after commencement of selection process.

Secretary, A.P. Public Service Commission v. B. Swapna and others
Judgment dt. 16.03.2005 by the Supreme Court in Civil Appeal No. 1775 of 2005, reported in (2005) 4 SCC 154

Held :

In *Maharashtra SRTC v. Rajendra Bhimrao Mandve, (2001) 10 SCC 51* it was held as under: (SCC pp. 55-56, para 5)

> "It has been repeatedly held by this Court that the rules of the game, meaning thereby, that the criteria for selection cannot be altered by the authorities concerned in the middle or after the process of slection has commenced. Therefore, the decision of the High Court, to the extent it pronounced upon the invalidity of the circular orders dated 24-6-1996, does not merit acceptance in our hand and the same are set aside."

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134. CRIMINAL TRIAL :

Death sentence, imposition of – Test to determine the rarest of rare case – Law explained.

Saibanna v. State of Karnataka
Judgment dt. 21.04.05 by the Supreme Court in Criminal Appeal No. 656 of 2004, reported in (2005) 4 SCC 165

Held :

In the case of *Bachan Singh v. State of Punjab, (1982) 2 SCC 684* the constitutional validity of the provision for death penalty was upheld. The Constitutional Bench pointed out that the present legislative policy discernible from Section 235 (2) read with Section 354 (3) of the Code of Criminal Procedure is that it is only when the culpability assumes the proportion of total deprevity that "special reasons" within the meaning of Section 354(3) for imposition of the death sentence can be said to exist (SCC p. 749, para 201).

Broad illustrative guidelines of such instances were also indicated therein. It was laid down that the legislative policy applied in Section 354 (3) of the Code of Criminal Procedure is that, if a person is convicted of murder, life imprisonment is the rule and death sentence an exception to be imposed in the "rarest of the rare" caes.

In *Machhi Singh v. State of Punjab, (1983) 3 SCC 470* it was observed that it was only in rarest of rare cases, when the collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty.

A reading of *Bachan Singh and Machhi Singh* indicates that it would be possible to take the view that the community may entertain such sentiment in the following illustrative circumstances.:

I. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

2. When the murder is committed for a motive which evinces total deparvity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course of betrayal of the motherland.

3. When murder of a member of a Scheduled Caste or minority community, etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of "bride-burding" or "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

4. When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community or locality are committed.

5. When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

In *Sevaka Perumal v. State of T.N., (1991) 3 SCC 471* this Court cautioned:

> "[U]ndue sympathy to impose inadequate sentence would do more harm to the justice [delivery] system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats. If the courts did not protect the injured, the injured would then resort to private vengeance. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc."

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135. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 141
Penal liability of officer of the company for dishonour of cheque – Burden is on the officer to prove that offence was committed without his knowledge or that he exercised all due diligence – Law explained.
S.V. Muzumdar and others v. Gujarat State Fertilizer Co. Ltd. and another
Judgment dt. 25.04.2005 by the Supreme Court in Criminal Appeal No. 609 of 2005, reported in (2005) 4 SCC 173

Held :

Under the scheme of the Act, if the person under Section 138 of the Act is a company, by application of Section 141 it is deemed that every person who is in charge of and responsible to the company for conduct of the business of the company as well as the company are guilty of the offence. A person who proves that the offence was committed without his knowledge or that he had exercised all due diligence is exempted from becoming liable by operation of the proviso to sub-section (1). The burden in this regard has to discharged by the accused.

The three categories of persons covered by Section 141 are as follows:

(1) The company who committed the offence.

(2) Everyone who was in charge of and was responsible for the business of the company.

(3) Any other person who is a Director or a manager or a secretary or officer of the company with whose connivance or due to whose neglect the company has committed the offence.

Whether or not the evidence to be led would establish the accusations is a matter for trial. It needs no reiteration that proviso to sub-section (1) of Section 141 enables the accused to prove his innocence by discharging the burden which lies on him.

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136. MOTOR VEHICLES ACT, 1988 – Section 166
Limitation for filing claim petition – Effect of omission of Section 166 (3) – Law explained.
Galiyabai (Smt.) v. Mohd. Saheed
Reported in 2005 (I) MPWN 116

Held :

Next question raised for consideration is whether the Tribunal was justified in dismissing the application for grant of compensation on the ground of limitation. In the case of *Dhannulal v. D.P. Vijayvargiya [1996 JLJ 528= AIR 1996 SC 2155]*, the two Judge Bench of the Apex Court in paragraph 7 and 8 expressed the view as under :

"7. In this background, now it has to be examined as to what is the effect of omission of sub-section (3) of section 166 of the Act. From the amending Act it does not appear that the said sub-section (3) has been deleted retrospectively. But at the same time, there is nothing in the amending Act to show that benefit of deletion of sub-section (3) of section 166 is not to be extended to pending claim petitions where a plea of limitation has been raised. The effect of deletion of sub-section (3) from section 166 of the Act can be tested by an illustration. Suppose an accident had taken place two years before 14.11.1994, when sub-section (3) was omitted from section 166. For

one reason or the other, no claim petition had been filed by the victim or the heirs of the victim till 14.11.1994. Can a claim petition be not filed after 14.11.1994, in respect of such accident? Whether a claim petition filed after 14.11.1994 can be rejected by the Tribunal on the ground of limitation saying that the period of twelve months which had been prescribed when sub-section (3) of section 166, was in force having expired, the right to prefer the claim petition had been extinguished and shall not be revived after deletion of sub-section (3) of section 166 with effect from 14.11.1994? According to us, the answer would be in negative. When sub-section (3) of section 166 has been omitted, then the Tribunal has to entertain a claim petition without taking note of the date on which such accident had taken place. The claim petitions cannot be thrown out on the ground that such claim petitions were barred by time when sub-section (3) of section 166 was in force.

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137. CRIMINAL PROCEDURE CODE, 1973 – Section 316
Section 316, nature of – Section 316 being mandatory in nature accused cannot be directed to furnish any information within his knowledge unless pardon tendered to him.
Hindustan Lever Ltd. v. State of M.P.
Reported in 2005 (1) MPWN 122

Held :

This petition under section 482, CrPC has been filed for quashing the part of the impugned order Annexure G dated 8.1.2005 whereby learned trial Court has allowed the application filed by the complainant and directed the applicant-accused No. 7 to furnish information in writing discolsing the names of the Directors and Managing Directors of the Company at the time of alleged incident.

Learned counsel for the applicant has submitted that abovementioned direction regarding discolsure of names of working Directors/and Managing Director of the Company on the relevant dates, is contrary to the provision under section 316 of the Code of Criminal Procedure, which reads as under :

> "S. 316. Except as provided in section 306 and 307, no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withold any matter within his knowledge."

Having heard learned counsel for the parties and after perusing the impugned order as well as relevant provisions under section 316 of the CrPC, which is strictly prohibiting putting any influence by means of any promise of threat or otherwise upon the accused to induce him to disclose or withold any matter within his knowledge, the order of the learned Court below is just contrary to the mandatory Provision under section 316 CrPC. This provision will not

apply when the accused is tendered pardon as per provision under sections 306 and 307, CrPC. In the present case in hand, learned trial Court has not tendered pardon to the applicant-accused. Therefore, provision under section 316, CrPC is applicable and the wordings of this provision are clearly showing its mandatory nature. Therefore, relevant portion of the order whereby learned trial Court has directed the applicant-accused No. 7 in the complaint to discolse the names of the working Directors and Managing Director of the Company on the date of the incident, is liable to be quashed and hence the same is hereby quashed.

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138. CRIMINAL PROCEDURE CODE, 1973 – Section 321
Withdrawal of prosecution – Exercise of discretion regarding withdrawal – Considerations to be kept in mind by Court – Law explained.
Rahul Agarwal v. Rakesh Jain and another
Reported in 2005 (2) MPHT 178 (SC)

Held :

From these decisions as well as other decisions on the same question, the law is very clear that the withdrawal of prosecution can be allowed only in the interest of justice. Even if the Government directs the Public Prosecutor to withdraw the prosecution and an application is filed to that effect, the Court must consider all relevant circumstances and find out whether the withdrawal of prosecution would advance the cause of justice. If the case is likely to end in an acquittal and the continuance of the case is only cousing severe harassment to the accused, the Court may permit withdrawal of the prosecution. If the withdrawal of prosecution is likely to bury the dispute and bring about harmony between the parties and it would be in the best interest of justice, the Court may allow the withdrawal of prosecution. The discretion under Section 321, Code of Criminal Procedure is to be carefully exercised by the Court having due regard to all the relevant facts and shall not be exercised to stifle the prosecution which is being done at the instance of the aggrieved parties or the States for redressing their grievance. Every crime is an offence against the society and if the accused committed an offence, society demands that he should be punished. Punishing the person who perpetrated the crime is an essential requirement for the maintenance of law and order and peace in the society. Therefore, the withdrawl of the prosecution shall be permitted only when valid reasons are made out for the same.

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139. CRIMINAL PROCEDURE CODE, 1973 – Section 389
Suspension of conviction not contemplated u/s 389 – Law explained.
Sheel Kumar v. State of M.P.
Reported in 2005 (2) MPHT 189

Held :

Vide order dated 20.8.2004, execution of sentence of imprisonment vide impugned judgment was suspended. As has been held in *Benzamin Khiro alias Kiro Vs. State of Orissa and another, 1995 Cr.LJ 1682, Ramesh Narang Vs. Rama Narang and other, 1995 Cr.LJ 1985,* expression order appealed against under Section 389 does not include conviction. Conviction of appellant can not be suspended under Section 389 or under any other provisions of Code.

In *M. Srinivasulu Reddy Vs. State Inspector of Police, Anti Corruption Bureau, 1993 Cr.LJ 558,* also it has been held that suspension of conviction pending appeal is not contemplated by provisions of Cr.PC or any Rules or Regulations or other enactment.

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140. FAMILY COURTS ACT, 1984 – Section 10 (3)
CRIMINAL PROCEDURE CODE, 1973 – Section 125
Recording of evidence in a case u/s 125 – Evidence cannot be taken on affidavit by resorting to Section 10 (3) – Law explained.
Rama Prasanna Tiwari v. Smt. Ashima and another
Reported in 2005 (2) MPHT 192

Held :

Before the Family Court, an application under Section 125, Cr.PC has been filed by the respondents for maintenance. In the said proceeding, the respondents filed their affidavit in evidence and petitioner has been directed to cross-examine on the affidavit. At this stage, petitioner raised an objection in writing that in the proceedings, evidence can not be taken on affidavit, but the respondent should be examined in the Court in the presence of petitioner or his Counsel. Family Court relying on Section 10 (3) of the Family Court Act found that the Family Court is having jurisdiction to adopt its own procedure for recording evidence and relying on provisions of Code of Civil Procedure held that the affidavit can be received in evidence and rejected the application of the petitioner.

To consider the rival contentions of the parties, Section 10 of the Family Courts Act, 1984 may be seen :

> *"Section 10. Procedure generally.* – (1) Subject to the other provisions of this Act and the Rules, the provisions of the Code of Civil Procedure, 1908 and of any other law for the time being in force shall apply to the suit and procedings (other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973) before a Family Court and for the purpose of the said provisions of the Code, a Family Court shall be deemed to be a Civil Court and shall have all the powers of such Court.

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 or the Rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceedings or at the truth of the facts alleged by the one Party and denied by the other."

Aforesaid provisions specifically provide that in the proceedings under Chapter IX of Cr.PC before a Family Court, provisions of Code of Criminal Procedure and the rules made thereunder shall apply. This is specific provisions under the Act which provides the procedure for the proceedings under Chapter IX of the Cr.PC. Though Family Courts are vested with the powers to decide the matter under Hindu Marriage Act and other Acts, but so far as proceedings under Chapter IX of the Cr.PC are concerned, there is specific provisions to adopt same procedure as envisaged in the Cr.PC. For the proceedings under Section 125 of the Cr.PC. procedure is envisaged under Section 126 of the Cr.PC.

Sub-section (2) of Section 126, Cr.PC Specifically provides that all evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made. In the present case, respondents have sought an order against the petitioner for their maintenance. In these circumstances, evidence has to be recorded in the presence of the petitioner. Affidavit evidence as has been produced by the respondents can not be said to be evidence recorded in the presence of the petitioner. Provisions of Code of Civil Procedure are not applicable of the proceedings under Chapter IX of the Cr.PC In the circumstances, Family Court ought to have adopted the procedure envisaged under Section 126 of the Cr.PC In view of the aforesaid provision, until and unless provisions is made, the Family Court has to follow the procedure as envisaged under Section 126, Cr.PC for the proceedings under Chapter IX, Cr.PC The Family Court has committed an error in directing the parties to file affidavit in evidence and further in permitting the other party to cross-examine on affidavit. According to provisions under Section 126, Cr.PC, evidence has to be recorded in the presence of the person against whom an order of maintenance is proposed to be made.

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141. CRIMINAL PROCEDURE CODE, 1973 – Sections 437 and 439
Grant of bail – Material considerations to be kept in view while granting bail – Law explained.
Jayendra Saraswathi Swamigal v. State of T.N.
Judgment dt. 10.1.2005 by the Supreme Court in Criminal Appeal No. 44 of 2005, reported in (2005) 2 SCC 13

Held :

Shri Tulsi has lastly submitted that the prohibition contained in Section 437 (1) (i) CrPC that the class of persons mentioned therein shall not be released on bail, if there appears to be a reasonable ground for believing that such person is guilty of an offence punishable with death or imprisonment for life, is also applicable to the courts entertaining a bail petition under Section 439 CrPC. In support of this submission, strong reliance has been placed on a recent decision of this Court in *Kalyan Chandra Sarkar v. Rajesh Ranjan, (2004) 7 SCC 528.* The considerations which normally weigh with the court in granting bail in non-bailable offences have been explained by this Court in *State v. Capt. Jagjit Singh, AIR 1962 SC 253* and *Gurcharan Singh v. State (Delhi Admn), (1978) SCC 118* and basically they are – the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprechension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case. The case of Kalyan Chandra Sarkar (supra) was decided on its own peculiar facts where the accused had made seven applications for bail before the High Court, all of which were rejected except the fifth one which order was also set aside in appeal before this Court. The eighth bail application of the accused was granted by the High Court which order was the subject-matter of challenge before this Court. The observations made therein cannot have general application so as to apply in every case including the present one wherein the Court is hearing the matter for the first time.

Note : Attention of esteemed readers is invited to *Kalyan Chandra-Sarkar v. Rajesh Ranjan Alias Pappu Yadav* and *another, (2005) 2 SCC 42* wherein it has been held that the aforesaid observations have not overruled the view expressed in *Kalyan Chandra Sarkar v. Rajesh Ranjan, (2004) 7 SCC 528 (2005 JOTI Part II Note No. 35)*

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142. HINDU MARRIAGE ACT, 1955 – Section 13 (1) (i-a)
Cruelty as a ground for divorce – Expression "cruelty", meaning, connotation and expanse – Proof of cruelty – Rule of proof beyond the shadow of doubt not applicable – Acts subsequent to divorce petition can be taken note of to decide cruelty – Law explained.
A. Jayachandra v. Aneel Kaur
Judgment dt. 2.12.2004 by the Supreme Court in Civil Appeal No. 7763 of 2004, reported in (2005) 2 SCC 22

Held :

The expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger

to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of the spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.

The expression "cruelty" has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. Cruelty is a course or conduct of one, which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the court will have no problem in determining it. It is a question of fact and degree. If it is mental, the problem presents difficulties. First, the enquiry must begin as to the nature of cruel treatment, second the impact of such treatment in the mind of the spouse, whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. However, there may be a case where the conduct complained of itself is bad enough and per see unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. [See *Shobha Rani v. Madhukar Reddi, (1988) 1 SCC 105*]

To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct, taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the

matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

The matter can be looked at from another angle. If acts subsequent to the filing of the divorce petition can be looked into to infer condonation of the aberrations, acts subsequent to the filing of the petition can be taken note of to show a pattern in the behaviour and conduct.

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143. HINDU MARRIAGE ACT, 1955 – Section 25

Grant of permanent alimony u/s 25 – Such alimony can be granted even where marriage is declared null under Section 11 – Law explained.

Rameshchandra Rampratapji Daga v. Rameshwari Rameshchandra Daga

Judgment dt. 13.12.2004 by the Supreme Court in Civil Appeal No. 1774 of 2001, reported in (2005) 2 SCC 33

Held :

In interpreting the provision of Section 25 in the case of *Chand Dhawan v. Jawahar Lal Dhawan, (1993) 3 SCC 406* the Supreme Court categorically held that the expression "at the time of passing any decree", as has been used in Section 25, includes a decree of nullity of marriage. The relevant observations read thus: (SCC pp. 415-16, paras 23 & 25)

> "On the other hand, under the Hindu Marriage Act, in contrast, her claim for maintenance pendent lite is durated (sic) on the pendency of a litigation of the kind envisaged under Sections 9 to 14 of the Hindu Marriage Act, and her claim to permanent maintenance or alimony is based on the supposition that either her marital status has been strained or affected by passing a decree for restitution of conjugal rights or judicial separation in favour or against her, or her marriage stands dissolved by a decree of nullity or divorce, with or without her consent. *Thus when her marital status is to be affected or disrupted the court does so by passing a decree for or against her.* On

or at the time of the happening of that event, the court being seisin of the matter, invokes its ancillary or incidental power to grant permanent alimony. Not only that, the court retains the jurisdiction at subsequent stages to fulfil this incidental or ancillary obligation when moved by an application on that behalf by a party entitled to relief. The court further retains the power to change or alter the order in view of the changed circumstances. Thus the whole exercise is within the gammit (sic gamut) of a diseased or a broken marriage. And in order to avoid conflict of perceptions the legislature while condifying the Hindu Marriage Act *preserved the right of permanent maintenance in favour of the husband or the wife, as the case may be, dependent on the court passing a decree of the kind as envisaged under Sections 9 to 14 of the Act.* In other words without the marital status being affected or disrupted by the Matrimonial Court under the Hindu Marriage Act the claim of permanent alimony was not to be valid as ancillary or incidental to such affectation or disruption. The wife's claim to maintenance necessarily has then to be agitated under the Hindu Adoptions and Maintenance Act, 1956 which is a legislative measure later in point of time then the Hindu Marriage Act, 1955, though part of the same socio-legal scheme revolutionising the law applicable to Hindus.

We have thus, in this light, no hesitation, in coming to the view, that when by court intervention under the Hindu Marriage Act, affectation or disruption to the marital status has come by, at that juncture, while passing the decree, it undoubtedly has the power to grant permanent alimony or maintenance, if that power is invoked at that time. It also retains the power subsequently to the invoked on application by a party entitled to relief. And such order, in all events, remains within the jurisdiction of that court, to be altered or modified as future situations may warrant."

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144. CIVIL PROCEDURE CODE, 1908 – Section 10
Object, scope and applicability of Section 10 – Fundamental test to attract Section 10 – Law explained.
National Institute of Mental Health & Neuro Sciences v. C. Parameshwara
Judgment dt. 13.12.2004 by the Supreme Court in Civil Appeal No. 8038 of 2004, reported in (2005) 2 SCC 256

Held :

The object underlying Section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The object underlying Section 10 is to avoid two parallel trials on the same issue by two courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit.

The language of Section 10 suggests that it is referable to a suit instituted in the civil court and it cannot apply to proceedings of other nature instituted under any other statute. The object of Section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract Section 10 is, whether on final decision being reached in the previous suit, such decision would operate as *res judicata* in the subsequent suit. Section 10 applies only in cases where the whole of the subject-matter in both the suits is identical. The key words in Section 10 are "the matter in issue is directly and substantially in issue" in the previous instituted suit. The words "directly and substantially in issue" are used in contradistinction to the words "incidentally or collaterally in issue". Therefore, Section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject-matter in both the proceedings is identical.

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145. CRIMINAL PRECEDURE CODE, 1973 – Section 321
Withdrawal of prosecution u/s 321 – Parameters to be applied while considering withdrawal of the prosecution – Law explained.
Rahul Agarwal v. Rakesh Jain and another
Judgment dt. 18.1.2005 by the Supreme Court in Criminal Appeal No. 559 of 2003, reported in (2005) 2 SCC 377

Held :

From these decisions as well as other decisions on the same question, the law is very clear that the withdrawal of prosecution can be allowed only in the interest of justice. Even if the Government directs the Public Prosecutor to withdraw the prosecution and an application is filed to that effect, the court must consider all relevant circumstances and find out whether the withdrawal of prosecution would advance the cause of justice. If the case is likely to end in an acquittal and the continuance of the case is only causing severe harassment to the accused, the court may permit withdrawal of the prosecution. If the withdrawal of prosecution is likely to bury the dispute and bring about harmony between the parties and it would be in the best interest of justice, the court may allow the withdrawl of prosecution. The discretion under Section 321, Code of Criminal Procedure is to be carefully exercised by the court having due regard to all the relevant facts and shall not be exercised to stifle the prosecution which is being done at the instance of the aggrieved parties or the State for redressing their grievance. Every crime is an offence against the society and if the accused committed an offence, society demands that he should be punished. Punishing the person who perpetrated the crime is an essential requirement for the maintenance of law and order and peace in the society. Therefore, the withdrawl of the prosecution shall be permitted only when valid reasons are made out for the same.

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146. EVIDENCE ACT, 1872 – Section 113-B

Presumption u/s 113-B, nature of – On proof of requisite facts Court obliged to raise the presumption – Law explained.

Kamesh Panjiyar alias Kamlesh Panjiyar v. State of Bihar

Judgment dt. 1.2.2005 by the Supreme Court in Criminal Appeal No. 205 of 2005, reported in (2005) 2 SCC 388

Held :

Presumption under Section 113-B is a presumption of law. On proof of the essentials mentioned therein, it becomes obligatory for the court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials:

(1) The question before the court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304-B IPC.)

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(3) Such cruelty or harassment was for, or in connection with, any demand for dowry.

(4) Such cruelty or harassment was soon before her death.

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147. TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1987 – Section 12

Accused charged for an offence under TADA along with other offence committed with such offence – Acquittal in offence under TADA, Court can still convict the accused for offence under other law – Law explained.

Prakash Kumar alias Prakash Bhutto v. State of Gujarat

Judgment dt. 12.1.2005 by the Supreme Court in Criminal Appeal No. 526 of 2001, reported in (2005) 2 SCC 409

Held :

The legislative intendment underlying Sections 12 (1) and (2) is clearly discernible, to empower the Designated Court to try and convict the accused for offences committed under any other law along with offences committed under the Act, if the offence is connected with such other offence. The language "if the offence is connected with such other offence" employed in Section 12 (1) of the Act has great significance. The necessary corollary is that once the other offence is connected with the offence under TADA and if the accused is charged under the Code and tried together in the same trial, the Designated Court is empowered to convict the accused for the offence under any other law, notwithstanding the fact that no offence under TADA is made out. This could be the

only intendment of the legislature. To hold otherwise, would amount to rewrite or recast legislation and read something into it which is not there.

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148. RENT CONTROL AND EVICTION :

'Bona fide requirement', meaning and connotation of – It is a requirement based on sincere and honest desire in contradistinction with a mere pretext for eviction – Law explained.

Adil Jamshed Frenchman (Dead) by L.Rs. v. Sardar Dastur Schools Trust and others

Judgment dt. 14.2.2005 by the Supreme Court in Civil Appeal No. 1210 of 2005, reported in (2005) 2 SCC 476

Held :

In *Shiv Sarup Gupta v. Dr. Mahesh Chand Gupta, (1999) 6 SCC 222* this Court has held that a bona fide requirement must be an outcome of a sincere and honest desire in contradistinction with a mere pretext for evicting the tenant on the part of the landlord claiming to occupy the premises for himself or for any member of the family which would entitle the landlord to seek ejectment of the tenant. The question to be asked by a judge of facts by placing himself in the place of the landlord is whether in the given facts proved by the material on record the need to occupy the premises can be said to be natural, real, sincere and honest. The concept of *bona fide* need or genuine requirement needs a practical approach instructed by the realities of life. In *Deena Nath v. Pooran Lal, (2001) 5 SCC 705* this Court reiterated that *bona fide* requirement has to be distinguished from a mere whim or fanciful desire. The *bona fide* requirement is *in praesenti* and must be manifested in actual need so as to convince the court that it is not a mere fanciful or whimsical desire.

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149. CIVIL PROCEDURE CODE, 1908 – Section 100

Second appeal, nature of – Requirement concerning formulation of substantial question of Law – Expression 'substantial question of law', meaning of – Law explained.

Govindaraju v. Mariamman

Judgment dt. 4.2.2005 by the Supreme Court in Civil Appeal No. 2292 of 1999, reported in (2005) 2 SCC 500

Held :

Section 100 provides that the second appeal would lie to the High Court from a decree passed in appeal by any court subordinate to the High Court if the High Court is satisfied that the case *"involves a substantial question of law"*. It further provides that the memorandum of appeal shall precisely state the substantial question of law involved in the appeal and the High Court on being satisfied that the substantial question of law is involved in a case formulate the said question. Sub-section (5) provides that the *"appeal shall be heard on the*

question so formulated." It reserves the liberty with the respondent against whom the appeal was admitted ex parte and the questions of law had been framed in his absence to argue that the case did not involve the questions of law framed. Proviso to sub-section (5) states that the questions of law framed at the time of admission would not take away or abridge the power of the court to frame any other substantial question of law which was not formulated earlier, if the court is satisfied that the case involved such additional questions after recording reasons for doing so. It is abundantly clear from the analysis of Section 100 that if the appeal is entertained without framing the substantial questions of law, then it would be illegal and would amount to failure or abdication of the duty cast on the court. The existence of substantial questions of law is the *sine qua non* for the exercise of jurisdiction under Section 100 of the Code. [Refer to *Kshitish Chandra Purkait v. Santosh Kumar Purkait, (1997) 5 SCC 438, Panchugopal Barua v. Umesh Chandra Goswami, (1997) 4 SCC 713 and Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722*]

A three-Judge Bench of this Court in *Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179* after tracing the history of Section 100, the purpose which necessitated and persuaded the Law Commission of India to recommend for amendment of Section 100, concluded that scope of hearing of second appeal by the High Court is circumscribed by the questions formulated by the High Court at the time of admission of the appeal and the High Court has to hear the appeal on *substantial questions of law involved in the case only.* That the High Court would be at liberty to hear the appeal on any other substantial question of law, not earlier formulated by it, if the court is satisfied of two conditions i.e.

> "(i) the High Court feels satisfied that the case involves such question, and
>
> (ii) the High Court records reasons for its satisfaction".

As per settled law, the scope of exercise of the jurisdiction by the High Court in second appeal under Section 100 is limited to the substantial questions of law framed at the time of admission of the appeal or additional substantial questions of law framed at a later date after recording reasons for the same. It was observed in *Santosh Hazari case* (supra) that a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be a *"substantial"* question of law it must be debatable, not previously settled by the law of the land or a binding precedent and answer to the same will have a material bearing as to the rights of the parties before the court. As to what would be the question of law *"involving in the case"* it was observed that to be a question of law *"involving in the case"* there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by the court of fact and it must be necessary to decide that question of law for a just and proper decision between the parties.

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150. PRECEDENTS :

Law laid down by a Bench of Supreme Court is binding on the subsequent Bench of lesser or coequal strength – Course to be adopted in case of difference of opinion – Law explained.

Central Board of Dawoodi Bhora Community and another v. State of Maharashtra and another

Judgment dt. 17.12.2004 by the Supreme Court in IA No. 4 in WP (C) No. 740 of 1986, reported in (2005) 2 SCC 673

Held :

Having carefully considered the submissions made by the learned Senior Counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms:

(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.

(2) A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctnessof which is doubted.

(3) The above rules are subject to two exceptions : (i) the abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and (ii) in spite of the rules laid down hereinabove if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of the Chief Justice constituting the Bench and such listing. Such was the situation in *Union of India v. Raghubir Singh, (1989) 2 SCC 754* and *Union of India and another v. Hansoli Devi and others, (2002) 7 SCC 273*

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151. PRESS & MEDIA :

Publication of matter regarding a case pending judicial determination – Such publication amounts to interference with the course of administration of justice – Practice deprecated – Media advised not to indulge in such publication.

M.P. Lohia v. State of W.B. and another

Judgment dt. 4.2.2005 by the Supreme Court in Criminal Appeal No. 219 of 2005, reported in (2005) 2 SCC 686

Held :

Having gone through the records, we find one disturbing factor which we feel is necessary to comment upon in the interest of justice. The death of Chandni took place on 28-10-2003 and the complaint in this regard was registered and the investigation was in progress. The application for grant of anticipatory bail was disposed of by the High Court of Calcutta on 13-2-2004 and special leave petition was pending before this Court. Even then an article has appeared in a magazine called "Saga" titled "Doomed by Dowry" written by one Kakoli Poddar based on her interview of the family of the deceased, giving version of the tragedy and extensively quoting the father of the deceased as to his version of the case. The facts narrated therein are all materials that may be used in the forthcoming trial in this case and we have no hesitation that these type of articles appearing in the media would certainly interfere with the administration of justice. We deprecate this practice and caution the publisher, editor and the journalist who were responsible for the said article against indulging in such trial by media when the issue is sub judice. However, to prevent any further issue being raised in this regard, we treat this matter as closed and hope that the others concerned in journalism would take note of this displeasure expressed by us for interfering with the administration of justice.

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152. INDIAN PENAL CODE, 1860 – Section 376

SENTENCING :

(i) Proportionality in sentence – Proportion between crime and punishment still a respected goal.

(ii) Imposition of sentence less than prescribed minimum for adequate and special reasons – Mode of exercise of discretion for imposition of such sentence – Law explained.

State of M.P. v. Munna Choubey and another

Judgment dt. 24.1.2005 by the Supreme Court in Criminal Appeal No. 167 of 2005, reported in (2005) 2 SCC 710

Held :

(i) The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the judge in arriving at a sen-

tence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.

Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilised societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undersirable practical consequences.

(ii) In both sub-sections (1) and (2) of Section 376 minimum sentences are prescribed. Both in cases of sub-sections (1) and (2) the court has the discretion to impose a sentence of imprisonment less than the prescribed minimum for "adequate and special reasons". If the court does not mention such reasons in the judgment there is no scope for awarding a sentence lesser than the prescribed minimum.

In order to exercise the discretion of reducing the sentence the statutory requirement is that the court has to record "adequate and special reasons" in the judgment and not fanciful reasons which would permit the court to impose a sentence less than the prescribed minimum. The reason has not only to be adequate but also special. What is adequate and special would depend upon several factors and no straitjacket formula can be indicated. What is applicable to trial courts regarding recording reasons for a departure from minimum sentence is equally applicable to the High Court. The only reason indicated by the High Court is that the accused belonged to rural areas. The same can by no stretch of imagination be considered either adequate or special. The requirement in law is cumulative.

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153. INDIAN SUCCESSION ACT, 1925 – Section 63
Will, proof of – Standard of proof is that of prudent mind – Proof with mathematical precision not required – Law explained.
Sridevi and others v. Jayaraja Shetty and others

Judgment dt. 28.1.2005 by the Supreme Court in Civil Appeal No. 3749 of 1999, reported in (2005) 2 SCC 784

Held :

It is well settled proposition of law that mode of proving the Will does not differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act, 1925. The onus to prove the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and proof of the signature of the testator, as required by law, need be sufficient to discharge the onus. Where there are suspicious circumstances, the onus would again be on the propounder to explain them to the satisfaction of the court before the Will can be accepted as genuine. Proof in either case cannot be mathematically precise and certain and should be one of satisfaction of a prudent mind in such matters. In case the person contesting the Will alleges undue influence, fraud or coercion, the onus will be on him to prove the same. As to what are suspicious circumstances has to be judged in the facts and circumstances of each particular case.

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154. CONSTITUTION OF INDIA – Article 226/227

Resort to writ/supervisory jurisdiction under Article 226/227 – Remedy of revision available under statute – Resort to writ jurisdiction not permissible – Law explained.

Surya Prasad Shukla v. M.P. State Consumer Dispute Redressal Commission and others

Reported in 2005 (2) MPLJ 39

Held :

Now the question arises whether in the circumstances when the remedy of revision is available to the litigants, whether writ jurisdiction can be exercised at this stage without availing the remedy of revision. The Apex Court in *Swetambar Sthanakwasi Jain Samity and another vs. Alleged Committee or Management Shri R. J.I. College, Agra, (1996) 2 SCC 11* held thus :

> "We are of the view that the High Court not only fell into patent error but also exceeded its jurisdiction under Art. 226 of the Constitution of India. Though the jurisdiction of the High Court under 226 of the Constitution is not confined to issuing the prerogative writs, there is a consensus of opinion that the High Court will not permit this extra ordinary jurisdiction to be converted into a Civil Court under the ordinary law. When a suit is pending between the two parties, interim and miscellaneous orders passed by the trial Court - against which remedy of appeal or revision is available - cannot be challenged by way of a writ petition under 226 of the Constitution of India. Where the Civil Court has the jurisdiction to try a suit, the High Court cannot

convert itself into an appellate or Revisional Court and interfere with the interim/miscellaneous orders of the Civil Court. The writ jurisdiction is meant for doing justice between the parties where it cannot be done in any other forum."

Recently the Apex Court in *Surya Dev Rai vs. Ram Chander Rai and others, (2003) 6 SCC 675* considering the law held :-

"In order to safeguard against a mere appellate or revision jurisdiction being exercised in the garb of exercise of supervisory jurisdiction under Art. 227 of the Constitution, the courts have devised self-imposed rules of discipline on their power. Supervisory jurisdiction may be refused to be exercised when an alternative efficacious remedy by way of appeal or revision is available to the person aggrieved. The High Court may have regard to legislative policy formulated on experience and expressed by enactments where the legislature in exercise of its wisdom has deliberately chosen certain orders and proceedings to be kept away from exercise of appellate and revisional jurisdiction in the hope of accelerating the conclusion of the proceedings and avoiding delay and procrastination which is occasioned by subjecting every order at every stage of proceedings to judicial review by way of appeal or revision. So long as an error is capable of being corrected by a superior court in exercise of appellate or revisional jurisdiction, though available to be exercised only at the conclusion of the proceedings, it would be sound exercise of discretion on the part of the High Court to refuse to exercise the power of superintendence during the pendency of the proceedings. However, there may be cases where but for invoking the supervisory jurisdiction, the jurisdictional error committed by the inferior court or tribunal would be incapable of being remedied once the proceedings have concluded."

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155. CIVIL PROCEDURE CODE 1908 – Section 11

***Res Judicata*, bar of – Earlier suit for mesne profits and subsequent suit for possession of the same immovable property – Subsequent suit not barred by *res judicata* – Law explained.**

Lal Bihari and another v. Ram Ratan

Reported in 2005 (2) MPLJ 84

Held :

Learned counsel for the appellants vehemently argued that the matter directly and substantially in issue in the present suit has been directly and substantially in issue in the former suit between the same parties in a Court competent to try such subsequent suit and has been heard and finally decided by such Court, therefore, the present suit is barred by principles of *res judicata*. The appellants cannot be vexed twice for the same cause.

The contention is not acceptable. Earlier suit was for the mesne profit for the period prior to the filing of the earlier suit. In the present suit the cause of action is different. The present suit has been filed after the dismissal of the Second Appeal. A separate suit for mesne profit in respect of income received by the defendant subsequent to the institution of the prior suit for possession is not barred by *res judicata.* (See *AIR 1963 Madras 402 (V-50), Rasammal vs. K. Subbaroya Goundar and others*). Once the question of issue in two suits is found to be different, the principles of res *judicata* will not apply. If the matter in issue in the subsequent suit was not in issue at all in the former suit, there is no question of *res judicata.*

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156. CIVIL PROCEDURE CODE, 1908 – O.14 R. 2

Preliminary issue, framing of – Question of limitation if depends on proof of facts by evidence, cannot be decided as preliminary issue.
Shanti Shukla v. Shanti Bai and another
Reported in 2005 (2) MPLJ 114

Held :

The question of limitation if depends of proof of facts and evidence is required, then the issues cannot be decided as preliminary issues. The Division Bench of this Court in *Narendra Kumar and another vs. Firm Ram Narain and another, 1977 (II) MPWN Note 113* considering this question held thus :-

> "The suit was dismissed only on decision of issue of limitation i.e. issue No. 13. It appears that the allegations of fact made in the plaint were disputed in the written-statement and a number of issues were drawn up. It also appears from the judgment itself that issue of limitation also was such which could not be decided without going into the facts of the case; but it appears that the counsel appearing for the defendants made a concession by saying that for purpose of decision on the question of limitation it may be assumed that the facts alleged in the plaint are admitted although both the learned counsel appearing before the Court clearly state that the defendants did not withdraw the written statement challenging many of the facts alleged in the plaint nor give any written statement admitting the facts pertaining to the issue of limitation. But on an assumption the learned Court below went on to decide the question of limitation. Such a course, in the opinion of this court, was not proper as the facts remained in dispute and if the Court would have held that the suit is within limitation it was bound to go into all the questions which were disputed, even such questions as would have affected the decision on the question of limitation also. Apparently therefore the question of limitation was not a pure question of law but depended on various questions of fact which were in dispute between the parties. In such

a situation, the only course open to the learned Court below was to proceed with the trial on all the issues and decide them in accordance with law. Case remanded. Appeal allowed."

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157. CIVIL PROCEDURE CODE, 1908 – O.9 R.9

Expression 'sufficient cause' – The expression should receive liberal consideration to do substantive justice – Non-appearance not being mala fide, false or frivolous, motor accident claim ought to have been restored – Law explained.

Samotibai wd/o Shobharam v. Dhannalal s/o Devisingh and others
Reported in 2005 (2) MPLJ 142

Held :

The application for the restoration of the suit or petition should be allowed if the "sufficient cause" is shown and in each case it is a question of fact that what construed the sufficient cause. The word "sufficient cause" should receive liberal consideration in order to do substantial justice. It is observed in the case of *Union v. Ramcharan, AIR 1964 SC 215* that the Court in considering whether a party has established sufficient cause, need not be overtrict. In this case reason of the non-appearance does not smacks mala fide and does not seem to be false or frivolous. Consequently it will be necessary in the interests of justice to provide to the applicant claimant the opportunity to prove her case for the compensation.

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158. MOTOR VEHICLES ACT, 1988 – Section 147

Insurance policy, commencement of – If time of commencement not mentioned, policy commences at previous midnight, otherwise from the time mentioned – Law explained.

United India Insurance Co. Ltd., v. Smt. Mamta Gupta and others
Reported in 2005 (2) MPLJ 165

Held :

First we shall address ourselves with regard to the law relating to the mention of time in the policy. In the case of *National Insurance Company Ltd. v. Jikubhai Nathuji Dabhi and others, 1997 (1) SCC 66* the Apex Court while dealing with the concept that when policy becomes operative, expressed the view that when the time frame is mentioned it becomes a special contract and therefore, the liability of the insurer would become effective from that point of time.

In the aforesaid case the law laid down in the case of *New India Assurance Company Ltd. v. Ram Dayal, 1990 (2) SCC 680* was distinguished. In the aforesaid case there was absence of any specific time mentioned and in such a case the contract would be operative from the midnight of the day by operation of provisions of the General Clauses Act, 1897. Thus, in the aforesaid case em-

phasis was laid on the factum of special contract. The aforesaid decision was followed by a three Judge Bench in the case of *New India Assurance Company Ltd. v. Bhagwati Devi and others, (1998) 6 SCC 534.* In the aforesaid case their Lordships have expressed the view that if there would be no contract, to the contrary, the Insurance Policy would become operative from the previous midnight when brought during the day following. But when a specific time for its purchase is mentioned in the policy it becomes operative from the aforesaid specific time. Similar view was expressed in the case of *Oriental Insurance Company Ltd. v. Sunita Rathi and others, 1998 ACJ 121* wherein in paragraph 3 it has been held thus :

> "It follows that the insurer cannot be held liable on the basis of the above policy in the present case and, therefore, the liability has to be of the owner of the vehicle. However, we find that the High Court, without assigning any reason, has simply assumed that the owner of the vehicle was not liable and that the insurer alone was liable in the present case. This conclusion, reached by the High Court, is clearly erroneous. The liability of the insured has been upheld for the purpose of indemnifying the insured under the contract of insurance. There is, thus, a basic fallacy in the conclusion reached by the High Court on this point."

In the case of *National Insurance Company Ltd. vs. Chinto Devi and others, (2000) 7 SCC 50* the principle was reiterated and it was held that the time of issue would decide the consequential liability. We have referred to the aforesaid decisions only to appreciate the factum that once a time is mentioned in the policy that becomes paramount and the governing factor. The cavil in the present case is whether it was issued at 2.30 p.m. or 2.30 a.m. Mr. Patel appearing for the respondents would like us to concur with the finding arrived at by the Tribunal that the policy was issued at 2.30 a.m. Mr. Agrawal per contra would submit that it was issued at 2.30 p.m. and due to inadvertence it was not mentioned while obtaining the certified copy. As a matter of fact 2.30 is mentioned in Exhibit D-1 and D-1-A but neither a.m. nor p.m. is mentioned. It stands to prudence that it should be 2.30 p.m. and not 2.30 a.m. it is worth noting that it would be absolutely in the realm of inconceivability to construe that the insurer had issued the policy at 2.30 in the morning. Had it there be no mention of time in the policy by the Insurance Company it would have become operative from the midnight as per General Clauses Act, 1897. In the present case, it should be construed to be p.m. as the same is consonance with reasonability.

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159. MOTOR VEHICLES ACT, 1939 – Section 95 (2)
Concept of limited liability u/s 95 (2), nature of – Insurance Company limiting its liability regarding third party – Insurance Company cannot be held liable to pay beyond statutory limit – Law explained.
United India Insurance Company Ltd. v. Smt. V. Shobhana and others

Reported in 2005 (2) MPLJ 129

Held :

To appreciate the contention raised at the Bar, it is appropriate to reproduce section 95 (2) of the Motor Vehicles Act, 1939 as the provisions of the said Act were operating in the field of accident. It reads as under :

"95. xx xx xx

(1) xx xx xx

(2) Subject to the proviso to sub-section (1), a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely :

(a) where the vehicle is a goods vehicle, a limit of [one lakh and fifty thousand rupees] in all, including the liabilities, if any, arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, employees (other than the driver), not exceeding six in number, being carried in the vehicle.

(b) 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 –

(i) in respect of persons other than passengers carried for hire or reward, a limit of fifty thousand rupees in all;

[(ii) in respect of passengers- a limit of fifteen thousand rupees for each individual passenger;

(c) save as provided in clause (d), where the vehicle is a vehicle of any other class, the amount of liability incurred;

(d) irrespective of the class of the vehicle, a limit of rupees [six thousand] in all the respect of damage to any property of a third party.]"

In the case of *New India Assurance Company Limited v. C.M. Jaya and others, 2002 (1) MPLJ (S.C.) 578 = AIR 2002 SC 278* it has been held while dealing with the concept of limited liability under section 95 (2) of the 1939 Act, the Apex Court has ruled thus:

> "In the case of Insurance Company not taking any higher liability by accepting a higher premium for payment of compensation to a third party, the insurer would be liable to the extent limited under section 95(2) of the Act and would not be liable to pay the entire amount. The deceased was riding the pillion seat of a two-wheeler when it met with a truck insured by the appellant-Insurance Company by comprehensive insurance policy. It is not the case that any additional or higher premium was paid to cover unlimited or higher liability than the statutory liability.

In the case at hand there is no material that any extra or special premium was paid to attract the liability of the Insurance Company beyond the staturoty limit. Reasons ascribed by the learned Single Judge, we are afraid, are not acceptable inasmuch as the matter hinges on premium and not at the estimated value. At this juncture, we think it appropriate to refer a passage from the decision rendered in the case of *New India Assurnace Co. Ltd. vs. Smt. Shanti Bai and others, AIR 1995 SC 1113* wherein two Judge Bench of the Apex Court has expressed the view as under :

> "Where there was no special contract between the insurance company and the owner of the vehicle to cover unlimited liability in respect of an accident to a passenger, and the premium which was paid by the owner was at the rate of Rs. 12/- per passenger and it was clearly referable to the statutory liability of fifteen thousand rupees per passenger under section 95(2)(b)(ii) of the Motor Vehicles Act, 1939, as it was stated in the tariff of insurance company that in respect of "legal Liability for Accidents to Passengers" if the limit of liability for any one passenger is fifteen thousand rupees, the rate of annual premium per passenger is Rs. 50/- it was held that the policy covered only the statutory liability of Rs. 15,000/- per passenger. In such a case, the mere fact that the insurance policy was a comprehensive policy would be irrelevant because comprehensive policy only entitled the owner to claim reimbursement of the entire amount of loss or damage suffered up to the estimated value of the vehicle. It does not mean that the limit of liability with regard to third party risk becomes unlimited or higher than the statutory liability. For this purpose, a specific agreement is necessary which was absent in the present case".

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160. INDIAN FOREST ACT, 1927 – Section 2 (6)

'Timber' as defined u/s 2 (6) includes even finished items like doors – Departmental notification excluding finished goods from the purview of timber may not override the provisions of law – Law explained.

Ashok v. Pandurang Pawar and another

Order dated 12.12.2004 by the High Court of M.P. in M.C.R. No. 4504 of 2004

Held :

Petitioner further submits that he has been falsely implicated. Accpeting the prosecution case to be true, the doors were finished articles and they are not covered under forest produce. He also submits that terms of circular मु.व.स. (उद्योग) 3456 dated 10.4.87, issued by the Chief Conservator of Forest, Madhya Pradesh, finished product cannot be treated as Timber.

Per contra, learned councel for State submits that a very vide inclusive definition of timber, has been given in sub section (6) of section 2 of the Forest

Act which includs all wood, whether cut up or fashioned or hollowed out for any purpose or not. He also submits that seizure memo reveals that the timber was fresh (Geeli). Simply because fresh timber brought from the forest and converted into doors, the same will not cease to be timber of forest produce.

Circular relied upon by the applicant is of no assistance while interpreling the provisions of law. Even otherwise, the circular does not speak about the finished goods which are made of fresh timber. Simply because the timber was converted into doors it did not cease to be forest produce.

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161. EVIDENCE ACT, 1872 – Sections 76 and 77
Copy of Khasra issued by Patwari, evidentiary value of – Such copy if not bearing seal as required u/s 76 not admissible u/s 77 – Such copy should be proved by examining Patwari – Law explained.
Koushalya Bai (Smt.) and others v. Radha and another
Reported in 2005 RN 92

Held :

If the Khasra Panchsala of the year 1979 to 1982 (Ex. P-2) is considered in its *stricto sensue*, it is perceivable that it is not a certified copy and is only a true copy signed by the Patwari. Section 76 of the Evidence Act speaks about certified copies of public documents. Under this section entire mode and procedure is prescribed that how and in what manner, a certified copy of a public document can be given. Under this section, a public officer having custody of public document, which can be inspected by any person as of his right, if makes a demand of copy of it, on payment of legal fees therefor, the same shall be given to it, together with a certificate written at the foot of such copy that it is true copy of such document or part thereof, as the case may be and such certificate shall be dated and subscribed by such officer with his name and his official title, whenever such officer is authorized by law to make use of seal, and such copies so certified shall be called as certified copies. Thereafter, section 77 of the Evidence Act speaks about proof of documents by production of certified copies. According to this section, the certified copies of public documents as delivered under section 76 of the Evidence Act, may be produced in proof of the contents of the public document which they purport to be copies. Thus, the khasra panchsala, which is a public document kept in the custody of public officer, and after obtaining certified copy of it, if it is produced in evidence, the mere production of it would be the proof of the contents of such documents. But, if it is not a certified copy given in the manner as prescribed under section 76 of the Evidence Act, then it is required to be proved like other document. Since Ex. P-2 is not a certified copy of the Khasra Panchsala, but is only a certificate issued by Patwari of the vaillage, the same could be proved only by examining the Patwari, who had issued it. Since, the plaintiff has failed to examine the Patwari to prove Ex. P-2, this document cannot be said to be a proved document and unless and until it it proved, it cannot be read in evidence.

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162. CRIMINAL TRIAL :

Subsequent bail petition – Judicial propriety demands that subsequent petition should be placed before the same judge, who decided the earlier petition – Law explained.

Gopal and others v. State of M.P. (FB)

Reported in 2005 (1) JLJ 269

Held :

Three decisions of the Supreme Court and two Full Bench decisions of this Court should be noticed which serve as a beacon beam and throw amber light to decide the questions referred to us.

In *Shahzad Hasan Khan v. Ishtiaq Hasan Khan [AIR 1987 SC 1613],* it has been held that long standing convention and judicial discipline required that the subsequent bail application should have been placed before the same Judge who had passed the earlier orders and who was available. The convention that subsequent bail application should be placed before the same Judge who may have passed earlier orders has "its roots in principle". It prevents abuse of process of Court inasmuch as an impression is not created that a litigant is shunning or selecting a Court depending on whether the Court is to his liking or not, and is encouraged to file successive applications without any new factor having cropped up. If successive bail applications on the same subject are permitted to be disposed of by different Judges there would be conflicting orders and a litigant would be pestering every Judge till he gets an order to his liking resulting in the credibility of the Court and the confidence of the other side being put in issue and there would be wastage of Courts' time. Judicial discipline requires that such matter must be placed before the same Judge, if he is available for orders.

Two years later in *State of Maharashtra v. Buddhikota Subha Rao [AIR 1989 SC 2292],* the Supreme Court reiterated that in such a situation the proper course is to direct that the matter be placed before the same learned Judge who disposed of the earlier applications. Such a practice or convention would prevent abuse of the process of the Court inasmuch as it will prevent an impression being created that a litigant is avoiding or selecting a Court to secure an order to his liking. Such a practice would also discourage the filing of successive bail applications without change of circumstances. Such a practice if adopted would be conducive to judicial discipline and would also save the Court's time as a Judge familiar with the facts would be able to dispose of the subsequent application with despatch. It will also result in consistency.

Recently in *Harjeet Singh v. State of Punjab [AIR 2002 SC 281],* also following the earlier precedents it has been held that an application for concellation of the bail should be placed before the same Judge who has granted the bail earlier.

A Full Bench of this Court in *Narayan Prasad v. State of M.P. [1993 JLJ 225 = 1993 MPLJ 1],* has observed that there is no law or any statutory rule making it obligatory that all subsequent bail applications should be placed before the same Bench or Judge who passed earlier orders but it is only a rule of convenience based on judicial discipline, developed by a long standing convention. The main purpose and object behind it is to prevent abuse of the process of Court, avoidance of an opportunity to an accused or appellant to select any Court or Bench of his choice to make successive application for bail, to avoid delay and conflicting orders by different Judges on the same subject-matter and to discourage a litigant from pestering every Judge till he gets an order of his liking affecting the credibility of the Court and the confidence of the other side. It is for these reasons that the judicial discipline demands that the subsequent bail application should be placed before the same Judge who passed the earlier orders provided he is available.

Another Full Bench of this Court in *Santosh v. State of M.P. [2000 (1) JLJ 240 = 2000 (1) MPLJ 354],* has held that the second or successive bail applications in a pending appeal or bail application under section 439 of the Criminal Procedure Code should be considered by the Bench which has considered the first bail application unless the Bench which decided the earlier application, is not available for a sufficient duration.

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163. MOTORYAN KARADHAN ADHINIYAM, 1991 (M.P.) – Sections 16 (6), 16 (7), 16(8), 20-A, 20-B and 20-C
Procedure for confiscation of vehicle u/s 16 (6) for an offence u/s 66 (1) r/w/s 192-A of the Motor Vehicles Act, 1988 – Constitutional validity of – These provisions being repugnant to Section 66 (1) r/w/s 192-A of the Motor Vehicles Act, 1988 are unconstitutional, hence quashed – Law explained.
M.P.A.I.T. Permit Owners Association and another v. State of M.P.
Reported in 2005 (1) JLJ 285 (SC)

Held :

Section 192-A of the MV Act provides that if a motor vehicle is driven in contravention of section 66 (1), that is, if a vehicle is driven or caused to be driven as a transport vehicle without permit, or in controvention of any condition thereof relating to the route on which or the area in which or the purpose for which the vehicle may be used, the user is punishable with fine for the first offence and imprisonment for the subsequent offence but this section does not provide for confiscation of the vehicle. Section 16(6) of the Act provides that subject to the provisions of sub-section (8), where upon receipt of report about the seizure of the vehicle under sub-section (3), the taxation authority is satisfied that the owner has committed offence under section 66 read with section 192-A of the MV Act of plying vehicle without permit and he may by order in writing and for reasons to be recorded confiscate the vehicle seized under the said provision.

Under section 16(3) of the Act, a vehicle seized for non-payment of tax or other dues is liable to be returned on showing that tax has been paid. Thus, if tax with regard to the seized vehicle is paid that vehicle has got to be released. So far as the link that is sought to be established with taxation procedures is concerned, it snaps the moment tax is paid and vehicle is released. In such an event also motor vehicle can be confiscated on a report that such vehicle has been seized. The cause or basis for confiscation of motor vehicle is driving such vehicle contrary to section 66 of the MV Act read with section 192-A of the MV Act and a report of seizure under section 16(3) of the Act.

Sub-section (3) of section 16 states that the taxation authority or any other officer authorised by the State Government in this behalf may, if it or he has reason to believe that a motor vehicle has been or is being used without payment of tax, penalty or interest due, seize and detain such motor vehicle and for this purpose take or cause to be taken any step as may be considered proper for the temporary safe custody of such motor vehicle and for the realisation of tax due. Sub-section (3) is only intended as a step for recovery of the tax, penalty or interest due and the vehicle is detained until such time as such tax or other liabilities are realised. The mere fact that such vehicle is seized for that purpose by itself will not result in confiscation of the vehicle. For confiscation of the vehicle the factor that weighs with the authority as provided under section 16(6) of the Act is that the owner of the vehicle should have committed an offence u/s 66 read with section 192-A of the MV Act for which provision has been made in the MV Act itself and that provision clearly sets out the nature and degree of punishment but does not include confiscation.

It is clear that confiscation would arise only in the event an offence is committed under section 66 read with section 192-A of the MV Act and, therefore, such provision could not have been enacted without the assent of the President as the same directly impinges upon Article 254 of the Constitution. Under Article 254 of the Constitution, the law made by Parliament will prevail in respect of subjects covered under List III of the Seventh Schedule to the Constitution. An exception is carved out in clause (2) of Article 254 of the Constitution whereby the law made by the State Legislature will prevail if the Presidential assent is received. But before this clause can be invoked there must be a repugnancy between the State Act and an earlier Act made by Parliament. In effect the scheme is that Article 254 (2) gives power to the State Legislature to enact a law with the assent of the President, on any subject covered under list III of the Seventh Schedule to the Constitution, even though the Central Act may be inconsistent in operating in that State relating to that subject.

In the case on hand, the prescription of punishment is for the same offence arising under section 66 read with section 192-A of the MV Act and further punishment is prescribed under the State MV Taxation Act for forfeiture of the vehicle. Thus, there is clear conflict between the two enactments. Therefore, we hold that the provision of section 16(6) of the Act and the consequen-

tial provisions thereto are repugnant to section 66 read with section 192A of the MV Act and hence, invalid as the State law has not complied with the requirements under Article 254 (2) of the Constitution of obtaining assent of the President to the State law.

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164. CIVIL PROCEDURE CODE, 1908 – O.7 R.14 (3)

Exercise of power of the Court to receive document not produced along with the plaint – Power should be exercised judicially – Law explained.

Mahavir Prasad Jain v. Shambhoo Kuchabandiya

Reported in 2005 (I) MPWN 76

Held :

Having heard learned counsel and perusal of the record, it is seen that under order 7 Rule 14 (3) power is vested in the Court to grant relief to receive in evidence any document which is not produced or filed by the plaintiff along with plaint. This power has to be exercised judicially for the purpose of advancing the course of justice, it is not to be used in such a manner so as to cause injustice to any of the parties. In the opinion of this Court the learned Court below has not exercised its power after considering the totality of the facts and circumstances of the case and merely on the ground that the document as available when written statement was filed by the defendant and on the ground of delay, application has been rejected. Immediately after issues were framed petitioner had filed application for taking document on record. The reason for not filing the same in the year 1966 along with plaint is also reasonably explained by the petitioner. The contention of the petitioner is that he could not produce the document earlier and was required to file the same in view of the objections raised by the respondent in his written statement at the time of filing of the suit.

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165. CRIMINAL PROCEDURE CODE, 1973 – Section 320

Compounding of offences-under Sub-section (1) or sub-section (2) of Section 320 non-compoundable offences cannot be compounded because of the embargo put by sub-section 320 (9) – Held, course adopted in *Y. Suresh Babu v. State of A.P. (JT 1987 (2) SC 361)* and *Mahesh Chand v. State of Rajasthan (1990 Supp. SCC 681)* was not in accordance with law.

Bankat v. State of Maharashtra

Reported in 2005 (1) MPWN 80 (SC)

Held :

It is vehemently contended by the learned counsel for the appellants that as the dispute was amicably settled and the matter was compromised, the High Court ought to have granted permission to compound the offences and ought not to have convicted the appellants and imposed the sentence. For this pur-

pose, reliance is placed upon the decisions of this Court in *Ram Pujan v. State of U.P. [(1973) 2 SCC 456]* and *Mahesh Chand v. State of Rajasthan [1990 Supp. SCC 681].* As against this, learned counsel for the respondent submitted that the offence under section 326, IPC is not compoundable and the High Court has rightly rejected the application for compounding the same. He, for this purpose, relied upon the judgment of this Court in *Ram Lal v. State of J & K [(1999) 2 SCC 213]* wherein, after referring to section 320 (9) of the Code, the Court observed that the decision in *Mahesh Chand's* case (supra) was rendered *per incuriam.*

In our view, the submission of the learned counsel for the respondent requires to the accepted. For compounding of the offences punishable under IPC, a complete scheme is provided under section 320 of the Code. Sub-section (1) of section 320 provides that the offences mentioned in the table provided thereunder can be compounded by the persons mentioned in column 3 of the said table. Further, sub-section (2) provides that the offences mentioned in the table could be compounded by the victim with the permission of the Court. As against this, sub-section (9) specifically provides that 'no offence shall be compounded except as provided by this section'. In view of the aforesaid legislative mandate, only the offences which are covered by table 1 or table 2 as stated above can be compunded and the rest of the offences punishable under IPC could not be compounded.

Further, the decision in *Ram Pujan's case* (supra) does not advance the contention raised by the appellants. In the said case, the Court held that the major offences for which the accused have been convicted were no doubt non-compoundable, but the fact of compromise can be taken into account in determining the quantum of sentence. In *Ram Lal's case* (supra), the Court referred to the decision of this Court in *Y. Suresh Babu v. State of A.P. [JT 1987 (2) SC 361]* and to the following observations made by the Supreme Court in *Mahesh Chand's case* (supra):

> "3. We gave our anxious consideration to the case and also the plea forward for seeking permission to compound the offence. After examining the nature of the case and the circumstances under which the offence was committed, it may be proper that the trial Court shall permit them to compound the offence".

and held as under :

> "We are unable to follow the said decision as a binding precedent. Section 320 which deals with 'compunding of offences' provides two tables therein, one containing descriptions of offences which can be compounded by the person mentioned in it, and the other containing descriptions of offences which can be compounded with the permission of the Court by the persons indicated therein. Only such offences as are included in the said two tables can be compounded and none else."

In *Y. Suresh Babu's case* (supra), the Court has specifically observed that the said case 'shall not be treated as a precedent'. The aforesaid two decisions are based on facts and in any set of circumstances, they can be treated as per incuriam as pointed attention of the Court to sub-section (9) of Section 320 was not drawn. Hence, the High Court rightly refused to grant permission to compound the offence punishable under section 326.

We reiterate that the course adopted in *Y. Suresh Babu's case* (supra) and *Mahesh Chand's case* (supra) was not in accordance with law.

The above position was elaborately indicated by a three-Judge Bench of this Court in *Surendra Nath Mohanty v. State of Orissa [(1999) 5 SCC 238].*

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166. CIVIL PROCEDURE CODE, 1908 – O.22 R.4
Suit filed against a dead person – O.22 R.4 not applicable to bring L.Rs. of such defendant on record – Law explained.
Balkishan Chaturvedi v. Ramsingh
Reported in 2005 (I) MPWN 87

Held :

It is not disputed by the respondents No. 1 and 2 that suit was filed on 5.12.1998 against the dead person. It is well settled law that Order 22 of Rule 4 of Code of Civil Procedure will not apply if death of the sole defendant will occur before the institution of the suit. The civil sit against the dead person cannot be deemed to be a proper suit. The Order 22 of Rule 4 of Code of Civil Procedure will be applicable only to those cases where one of the sole defendant died during the pendency of the proceeding. The learned counsel for petitioner relied a decision reported in *2000 (2) JLJ 401= 2001 (II) MPJR 307= 2000 (3) MPLJ 412 Smt. Agrawal Devi (widow of G.S. Agrawal) and others v. Arya Vidhya Sabha and another.* It was held that if a defendant dies before the institution of the suit, the provisions of Order 22 Rule 4 will not apply. The legal representatives of sole defendant cannot be brought on record by way of amendment. The entire proceedings is null and void. The suit filed against dead person cannot be deemed to be proper suit.

●

167. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 (1) (m) and 12 (10)
Scope and applicability of Section 12 (1) (m) while passing decree u/s 12 (10) – Law explained.
Bhanwaribai v. Sau. Kesharbai
Reported in 2005 (I) MPWN 96

Held :

The only mistake that both the Courts below have committed is that while passing decree u/s 12 (1) (m) ibid they did not take not of S. 12 (10) of the Act. Section 12 (10) of the Act reads as under :-

"No order for the eviction of a tenant shall be made on the ground specified in clause (m) of sub-section (1), if the tenant within such time as may be specified in this behalf by the Court restores the accommodation to its original condition or pays to the landlord such amount by way of compensation as it may direct."

Admittedly both the Courts below did not grant any time to the defendant i.e. tenant to restore the accommodation to its original condition nor awarded any compensation to the landlord for the illegal construction made by the tenant in the tenanted premises, which resulted in passing a decree u/s 12 (1) (m) *ibid.*

Be that as it may, once the decree is passed u/s 12 (1) (m) by the Courts below then it is obligatory upon the Court to pass appropriate orders depending upon the nature of the controversy and the construction made giving an opportunity to the tenant to restore the tenanted accommodation in its original condition as contemplated u/s 12 (10) of the Act.

●

168. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 94 and 138 Notice required to be given u/s 138 for demand – Notice need not necessarily be by registered post – Law explained.
Janak Gandhi v. State of M.P.
Reported in 2005 (I) MPWN 99

Held :

Counsel for the petitioner submits that in absence of notice by registered post the proceedings under section 138 of the Negotiable Instruments Act cannot continue against him. For this purpose counsel for the petitioner relied upon a decision of Bombay High in the case of *Baroda Ferro Alloys and Industries Ltd. & others v. Span Overseas Pvt. Ltd. & another (2000 DCR 331).* In that case Bombay High Court has held that service of notice by Fax is not sufficient to constitute demand under section 138 of the Negotiable Instruments Act and the demand must be in writing and by registered post. However, while deciding the aforesaid case Bombay High Court has not considered the effect of Section 94 of the Negotiable Instruments Act. Section 138 of the Negotiable Instruments Act no where provides the mode of service. Mode of service is provided in Section 94 of the Act. Section 94 of the Act provides that notice of dishonour may be given to a duly authorized agent of the person to whom it is required to be given, or, where he has died, to his legal representative, or, where he has been declared an insolvent, to his assignee, may be oral or written; may, if written, be sent by post, and may be in any form; but it must inform the party to whom it is given, either in express terms or by reasonable intendment that the instrument has been dishonoured, and in what way, and that he will be held liable thereon; and it must be given within a reasonable time after dishonour. Thus, as per this section it is not required that the notice must be given by registered post. The Bombay High Court has not considered impact of Section 94 of the Act, the said judgment is *per incuriam* and does not help the present petitioner.

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169. WORDS & PHRASES

CIVIL PRACTICE

The rule of rounding off – If part is half or more, the value shall be increased to one – Rule explained.

State of U.P. and another v. Pawan Kumar Tiwari and others

Judgment dt. 04.1.2005 by the Supreme Court in Civil Appeal No. 4079 of 2004, reported in (2005) 2 SCC 10

Held :

The rule of rounding off based on logic and common sense is: if part is one-half or more, its value shall be increased to one and if part is less then half its value shall be ignored. 46.50 should have been rounded off to 47 and not as has been done.

●

170. SERVICE LAW :

CIVIL SERVICES (PENSION) RULES, 1976 (M.P.) – R.45

Gratuity, payment of – On the death of Government servant, it should be paid to the nominee and in absence to legal heirs of the Government servant – Law explained.

Dhannalal v. Director, Department of Agricultural Engineering Workshop

Reported in 2005 (I) MPWN 57

Held :

Rule 45 of M.P. Civil Services (Pension) Rules, 1976 is as under :

45. Persons to whom gratuity is payable – (1) (a) The gratuity payable under clause (b) of sub-rule (1) or sub-rule (2) 44 shall be paid to the person or persons on whom the right to receive the gratuity is conferred by means of a nomination under rule 46.

(b) If there is no such nomination or if the nomination made does not subsist, the gratuity shall be paid to the legal heirs of the Government servant.

(2) If a Government servant dies after retirement without receiving the gratuity admissible under clause (a) of sub-rule (1) of rule 44 the gratuity *shall be disbursed to the legal heirs in the manner indicated in clause (b) of sub-rule (1).*

Rule 46 deals with the nomination by the Government servant. Admittedly, there had been no nomination by late Phoolchand. Therefore, with reference to rule 45, the petitioners being legal heirs of late Phoolchand are entitled to realize the dues from the respondents. The Civil Judge in MJC No. 304/98, *vide order* dated 25.9.1999, rightly directed issuance of succession certificate in their favour.

●

171. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 147
Offence u/s 138, composition of – Composition can be allowed even in cases emerging before Amending Act, 2002
Kanta (Smt.) v. State of M.P.
Reported in 2005 (I) MPWN 69

Held :

The counsel for parties as well as the learned Dy. A.G. Shri Desai have submitted that, though this case has arisen prior to the Negotiable Instruments (Amendment and Miscellaneious Provisions) Act, 2002 (No. 55 of 2002), according to section 147, every offence punishable under this Act is compoundable. Since these are procedural provisions, therefore same will have application in pending cases also. In the light of the principle of interpretation of statute, the submission of learned counsel for parties appears to be correct. Since the parties have settled their dispute amicably and compounded the offence, the applicant is hereby acquitted.

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172. CRIMINAL TRIAL :
Cross-examination – Object of cross-examination – Duty of the Court to control cross-examination – Court must ensure cross-examination is not made a means of harassment or humiliation to a witness/ victim of crime.
Govind v. State of M.P.
Reported in 2005 (1) MPLJ 549

Held :

Learned senior Advocate while arguing the case has agreed that lengthy and irrelevent cross-examination is never helpful to the accused persons. Many a times the defence lawyers are themselves getting clarified most of the discrepancies arising during the cross-examination in one paragraph and they are getting them contradicted in the other paragraph. We have seen that in most of the cases such a lengthy cross-examination is not helpful to the accused persons rathe damaging the case of defence and leads to conviction of the accused persons. It is true that the purpose of cross-examination is to bring the truth on record and to help the Court in knowing the truth of the case, but if the purpose of the cross-examination is to harass the witness and to ask irrelevant questions the purpose of cross-examination is defeated and frustrated. Such a lengthy cross-examination does neither helps the Court either in finding the truth or in evaluating the evidence, nor it helps the accused but damages the defence case and compete the Court to record conviction of the accused persons. In this case too while arguing the case learned senior Counsel Shri J.P. Gupta was unable to justify the lengthy cross-examination and to get any support from it in favour of the appellant Govind.

The main object of cross-examination is to find out the truth and detection of falsehood in human testimony. It is designed either to destroy or weaken the force of evidence a witness has already given in person or elicit something in favour of the party which he has not state or to discredit him by showing from his past history and present demeanour that he is unworthy of credit. It should be remembered that cross-examination is a duty, a lawyer owes to his clients and is not a matter of great personal glory and fame. It should always be remembered that justice must no be defeated by improper cross-examination. A lawyer owes a duty to himself that it is the most difficult art. However, he may fail in the result but fairness is one of the great elements of adyocacy. Telents and genious are not aimed at self-glirification but it should be to establish truth, to detect falsehood, to uphold right and just and to expose wrongdoings of a dishonest witness. It is the most efficacious test to discover the truth. Cross-examination exposes bias, falsehood and shows mental and moral condition of the witnesses and whether a witness is actuated by proper motive or whether he is actuated by enmity towards his adversaries. Cross-examination is commonly esteemed the severest test of an advocate's skill and perhaps it demands beyond any other of his duties exercise of his ingenuity. There is a great difficulty in conducting effort. Sometimes cross-examination assumes unnecessary length, the Court has power to control the cross-examination insuch cases. (See Wrottescey on cross-examination is not made a means of harassement or causing humilliation to the victim of crime [See State of Punjab vs. Gurmit Singh, 1996 SCC (Cri) 316.]

●

173. EVIDENCE ACT, 1872 – Sections 25 and 26
Confession before Customs Authorities, admissibility of – Customs Authorities not being a police officer, such confession is admissible – Law explained.
Union of India v. Munna
Reported in 2005 (I) MPWN 5 (SC)

Held :

The fact that there was admission of the accused before the Customs Authorities has not been dealt with by the High Court . Such admission is not hit by either section 25 or section 26 of the Indian Evidence Act, 1872 (in short 'the Evidence Act'). The effect of such admission was a relevant factor. Additionally, the effect of section 54 which raises presumption from possession has not been considered and on the contrary, burden has been placed on the prosecution and it has been held that the prosecution was to establish that the possession was conscious. The effect of the evidence relating to dispatch of information to the superior authorities has also not been considered.

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174. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (c) Disclaimer – When disclaimer available as a ground of eviction u/s 12 (1) (c) – Law explained.
Bajrangial v. Smt. Gyaso Bai
Reported in 2005 (I) MPWN 16

Held :

In the case of *Chandramonah v. Sengottaiyan and others,* reported in *(2000) 1 SCC 451,* it was held by the Apex Court that unless there is a notice of transfer of title in favour of successor landlord or an attornment of tenancy, tenant's assertion that such landlord is merely a co-owner does not amount to denial of title. It has been observed by the Apex Court in that case that to constitute denial of title of the landlord, a tenant should renounce his character as tenant and set up title or right inconsistent with the relationship of landlord and tenant either in himself or in a third person. In that case the defendant had even paid rent to a successor or his previous landlord and in a suit instituted by the plaintiff the defendant had asserted that though he had been paying rent, but plaintiff alone was not the absolute owner of the property because the original landlord from whom the plaintiff also claims, had left behind him a widow and three daughters also who were also his landlords. In the present case also the appellant has neither claimed title in himself nor has claimed title in any third person but has simply said that besides the sellers of the suit premises to the respondents, his original landlord, i.e., Manorama Devi had left some other heirs also.

Again in the case of *Sheela and others v. Firm Prahlad Rai Prem Prakash,* reported in 2002 (2) JLJ 312 = 2002 (2) MPHT 232 (SC) = (2002) 3 SCC 375, the Apex Court has observed as follows :-

> "In our opinion, denial of landlord's title or disclaimer of tenancy by tenant is an act which is likely to affect adversely and substaintially the interest of the landlord hence is a ground for eviction of tenant within the meaning of clause (c) of sub-section (I) of section 12 of the M.P. Accommodation Control Act, 1961. To amount to such denial or disclaimer, as would entail forfeiture of tenancy rights and incur the liability to be evicted, the tenant should have renounced his character as tenant and in clear and unequivocal terms set up title of the landlord in himself or in a third party."

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175. HINDU MARRIAGE ACT, 1955 – Section 13
Death of respondent/husband in appeal filed by wife against grant of decree of divorce – Proceedings does not abet – Law explained.
Uma Devi v. Beni Prasad (Dead) through LRs.
Reported in 2005 (1) MPLJ 536

Held :

Learned counsel for the respondent submits that since Beni Prasad, hus-

band of appellant has died during the pendency of appeal, therefore, the appeal becomes infructuous and deserves to be dismissed on that ground only.

Facing this, learned counsel for the appellant placed reliance on a decision reported in *AIR 1994 Andhra Pradesh 13, Vadalasetti Samrajyamma vs. Vadalasetti Nagamma,* wherein it has been held that by the death of husband, proceedings would not abate. High Court of Andhra Pradesh while disposing of the appeal of the wife has placed reliance on a decision reported in *(1991) I SCC 582, Maharani Kusumkumari vs. Kusumkumari Jadeja,* wherein it is held that a petition filed even after the death of the other spouse for declaration of nullity of marriage, is maintainable, relying on the report of the Law Commission relating to amendment of the Act in the year 1976, wherein it was mentioned that there is no general rule that where one of the parties to a divorce suit is dead, the suit abates, so that no further proceedings can be taken in it and that it is unhelpful to refer to abatement at all. One of the situations in which the further proceedings will continue, is the nature of the further proceeding sought to be taken. It is, therefore clear that where the wife has a right to claim succession to the estate of her deceased-husband, she will have a right to continue the proceedings in order to establish her marital status. High Court of Andhra Pradesh has further placed reliance on a case reported *AIR 1987 Karnataka 241, Iravya vs. Shivappa,* wherein the Court has observed that as under :-

> "While laying down these principles, the Court must also bear in must that the Indian community is rather male dominated and the ladies have got only a second role to play in the matters. The ladies might not come to know about the action of the males till they are seriously affected and till they are made known about it. Therefore, taking into consideration the peculiar position prevailing in our country also I am of the view that a wife is entitled to maintain an action known to law for avoiding a decree of dissolution of marriage obtai need by the husband ex-parte against her.

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176. CRIMINAL PROCEDURE CODE, 1973 – Section 407
Transfer of criminal case, application for – Filing of transfer application against judge insufficient to infer that he has become prejudiced against the applicant – Law explained.
Archana Gupta (Smt.) v. State of M.P.
Reported in 2005 (1) MPWN 19

Held :

An application for transfer of a case cannot be allowed on imaginary ground having no basis at all. It is true that it is of paramount importance that the parties arraigned before the Courts, should have confidence in the impartiality of the Courts but it is only where there is reasonable ground for apprehension

that this Court will transfer the case. In order to allow the transfer of the case, it must appear to the High Court and not to the party that fair and impartial trial shall not take place. In the facts and circumstances of this case, it does not appear to this Court that fair and impartial trial shall not take place.

The learned counsel for the applicant submitted that since the applicant moved a transfer application against judge, there is every likelihood of prejudice in the mind of the presiding judge.

The contention cannot be accepted. Merely because a transfer application has been moved against the judge, he cannot be said to be unnecessarily prejudiced and if transfer application were to succeed on this ground alone all transfer applications will have to be allowed. It is not sufficient for the applicant merely to allege that he/she will not get an impartial trial before the Court in which the case is pending. He/She must place before the High Court facts which give rise to such apprehension.

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177. MOTOR VEHICLES ACT, 1988 – Section 149 (2) (a) (ii)
Insurance Company, exoneration from liability – Vehicle driven by mechanic not having driving license but driver having valid license – Insurance Company not liable for exoneration – Law explained.
Anjani Prasad Tiwari v. Smt. Gayatri Gupta
Reported in 2005 (I) MPWN 24

Held :

Petitioner Anjani Prasad Tiwari is the registered owner of Jeep No. MP18-2567. The said jeep has been insured by the respondent, The New India Insurance Co. Ltd. On 24.7.1999, respondent Raju was driving the jeep and in an accident claimant/respondent Smt. Gayatri Gupta sustained injuries. Therefore, she filed an application under section 166 of M.V. Act claiming compensation. The application aforesaid has been resisted by the petitioner stating *inter alia* that he left his jeep in the garage for repairing and on the same day at about 4.30 p.m. respondent No. 2 Raju Prasad Dubey, who used to work as a mechanic in the garage, took the jeep for trial and carried some passengers.

The Apex Court in *United India Insurance Co. Ltd. v. Lehru and others 2003 (1) BLJ 145 = AIR 2003 SC 1292* held as under :

> "The Insurance company cannot avoid its liability towards third party on ground that the licence of the driver of the vehicle was a fake licence. In order to avoid liability under S. 149 (2) (a) (ii) it must be shown that there is a 'breach' on part of the insured. To hold otherwise would lead to absurd results. Suppose a vehicle is stolen, whilst it is being driven by the thief, there is an accident. The theif is caught and it is ascertained that he had no licence. Can the Insurance Company disown liability? The answer has to be an emphatic 'No.' To hold

otherwise would to be negate the very purpose of compulsory insurance. The injured or relatives of person killed in the accident may find that the decree obtained by them is only a paper decree as the owner is a man of straw. The owner himself would be an innocent sufferer. It is for this reason that the Legislature, in its wisdom, has made insurance, at least third party insurance, compulsory. The aim and purpose being that an insurance Company would be available to pay. The business of the company is to insurance. In all businesses there is an element of risk. All persons carrying on business must take risks associated with that business. Thus it is equitable that the business which is run for making profits also bears the risk associated with it. At the same time innocent parties must not be made to suffer or loss. These provisions meet these requirements.

Further, in *New India Assurance Co. Ltd. v. Shimla Devi and others, 2004 ACJ 77* while dealing with the liability of Insurance Company in respect of 3rd party, it has been held that the Insurance Co. is liable to pay awarded amount to the claimant and in the event of breach of policy upon making such payment, the Insurance Company can recover from the insured. Accordingly, the Tribunal below wrongly exonerated the respondent Insurance Company from liability against the 3rd party.

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178. MOTOR VEHICLES ACT, 1988 – Sections 149 and 166
Policy of insurance, filing of – Policy and its copy should be filed by the owner and/or insurer if insurance company wishes to take a defence of violation of personal policy – Law explained.
Suresh Kumar Gupta v. Oriental Fire and General Insurance Co.
Reported in 2005 (I) MPWN 29

Held :

Learned counsel has placed reliance on AIR 1988 SC page 719 – *National Insurance Co. Ltd. v. Jugal Kishore and others,* wherein, the Hon'ble Supreme Court has held that the attitude of not filing copy of policy of insurance is worth mentioning. In this connection what is of significance is that the claimants for compensation under the Act are invariably not possessed of either the policy or a copy thereof. It has been consistently emphasized that it is the duty of the party which is in possession of a document which would be helpful in doing justice in cause to produce the said document and such party should not be permitted do take shelter behind the abstract doctrine of burden of proof. It is further observed by the Hon'ble Apex Court that this duty is greater in the case the instrumentalities of the State such as the appellant Insurance Company who are under an obligation to act fairly. In many cases, even the owner of the vehicle for reasons known to him does not choose to produce the policy or a copy thereof. It has to be emphasized that in all such cases where the Insurance Company concerned wishes to take a defence in a claim petition that its

liability is not in excess of the statutory liability, it should file a copy of the insurance policy along with its defence. Similar view has been taken by Full Bench of this Court reported in 1988 JLJ 639= 1988 ACJ page 956 *United India Fire and Genl. Ins. Co Ltd. v. Natvarlal and others.*

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179. WORDS AND PHRASES

Expression 'that is to say', meaning of.

Castrol India Ltd. v. Commissioner of Central Excise, Calcutta-I

Judgment dt. 25.02.2005 by the Supreme Court in Civil Appeal No. 6289 of 1999, reported in (2005) 3 SCC 30

Held :

In *Stroud's Judicial Dictionary,* 4th Edn., Vol. 5 at p. 2753, we find:

> " 'That is to say' is the commencement of an ancillary clause which explains the meaning of the principal clause. It has the following properties : (1) it must not be contrary to the principal clause: (2) it must neither increase nor diminish it; (3) but where the principal clause is general in terms it may restrict it; see this explained with many examples, *Stukeley v. Butler, (1614) H.b.171*"

The quotation, given above, from *Stroud's Judicial Dictionary* shows that, ordinarily, the expression "that is to say" is employed to make clear and fix the meaning of what is to be explained or defined. Such words are not used as a rule, to amplify a meaning while removing a possible doubt for which purpose the word "includes" is generally employed. In unusual cases, depending upon the context of the words "that is to say", this expression may be followed by illustrative instances. (See *State of T.N. v. Pyare Lal Malhotra (1976) 1 SCC 834, Mahindra Engg.* and *Chemical Products Ltd. v. Union of India, (1992) 1 SCC 727, Sait Rikhaji Furtarnal v. State of A.P., 1991 Supp. (1) SCC 202* and *R. Dalmia v. CIT, (1977) 2 SCC 467.*

The expression "that is to say" is descriptive, enumerative and exhaustive and circumscribes to a great extent the scope of the entry. (See *CST v. Popular Trading Co., (2000) 5 SCC 511*)

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180. TRADEMARKS ACT, 1999 – Sections 27 and 39

Passing off – Neither party having registered trademark – Interim injunction can still be granted if plaintiff can establish *prima facie* case regarding prior use of its mark – Law explained.

Dhariwal Industries Ltd. and another v. M.S.S. Food Products

Judgment dt. 25.02.2005 by the Supreme Court in Civil Appeal No. 1407 of 2005, reported in (2005) 3 SCC 63

Held :

Section 27 of the Trade Marks Act, 1999 provides that nothing in that Act

shall be deemed to affect the right of action against any person for passing off goods or services as the goods of another person or as services by another person or the remedies in respect thereof. Therefore, the fact that neither party has a registered trade mark as on the date of the suit cannot stand in the way of entertaining the claim of the plaintiff and granting the plaintiff an injunction in case the plaintiff is in a position to show prima facie that it was the prior user of its mark, that it has a prima facie case and that the balance of convenience was in favour of the grant of an interim injunction. It is provided in Section 39 of the Act that an unregistered trade mark may be assigned or transmitted with or without goodwill of the business concerned. It is, therefore, possible for a plaintiff or a defendant to show that an unregistered trade mark that was being used by another person earlier had been assigned to it and it can tack on the prior user of its predecessor.

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181. CRIMINAL TRIAL :

Delayed examination of witnesses by I.O., effect of – No universal rule that delay makes the version of the witness suspect – No adverse inference to be drawn if delay satisfactorily explained by I.O. – Law explained.

State of U.P. v. Satish

Judgment dt. 08.02.2005 by the Supreme Court in Criminal Appeal No. 256 of 2005, reported in (2005) 3 SCC 114

Held :

As regards 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, (1993) 2 SCC 444, Bodhraj v. State of J&K (2002), 8 SCC 45* and *Banti v. State of M.P. (2004) 1 SCC 414*]

It is to be noted that the explanation when offered by the IO on being questioned on the aspect of delayed examination by the accused has to be tested by the court on the touchstone of credibility. If the explanation is plausible then no adverse inference can be drawn. On the other hand, if the explanation is found to be implausible, certainly the court can consider it to be one of the factors to affect credibility of the witnesses who were examined belatedly. It may not have any effect on the credibility of the prosecution's evidence tendered by the other witnesses.

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182. CRIMINAL PROCEDURE CODE, 1973 – Section 235 (2)
Hearing of the accused on the question of sentence – Accused represented by counsel can be heard through such counsel – Law explained.
Surendra Pal Shivbalakpal v. State of Gujarat
Judgment dt. 16.09.2004 by the Supreme Court in Criminal Appeal No. 259 of 2004, reported in (2005) 3 SCC 127

Held :

Therefore it is incorrect to contend that the appellant was not heard. The counsel submitted that as regards sentence, the appellant should have been heard in person and not through the counsel appointed by him. This contention cannot be accepted. If the accused had engaged a counsel the court can ask the counsel as to whether he had anything to say about the sentence. The appellant was also present in the court and he did not make any further statement regarding sentence to be imposed on him. He also had liberty to adduce evidence regarding the sentence but he did not avail that opportunity and the contention that the appellant was not questional before the sentence was imposed is not correct.

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183. CRIMINAL TRIAL :
Evidence obtained in illegal search, use of – Illegality in search does not *ipso facto* vitiate seizure of articles – Discretion lies with the Court to examine whether illegality has caused serious prejudice to the accused – Law explained.
State of M.P. and others v. Paltan Mallah and others
Judgment dt. 20.01.2005 by the Supreme Court in Criminal Appeal No. 98 of 1999, reported in (2005) 3 SCC 169

Held :

In India, the evidence obtained under illegal search is not completely excluded unless it has caused serious prejudice to the accused. The discretion has always been given to the court to decide whether such evidence is to be accepted or not. In *Radhakishan v. State of U.P., 1963 Supp (1) SCR 408* speaking for a three-Judge Bench, Justice Mudholkar held : (SCR pp. 411-12)

> "So far as the alleged illegality of the search is concerned it is sufficient to say that even assuming that the search was illegal the seizure of the articles is not vitiated. It may be that where the provisions of Sections 103 and 165 of the Code of Criminal Procedure are contravened the search could be resisted by the person whose premises are sought to be searched. It may also be that because of the illegality of the search the Court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences no further consequence ensues."

In a subsequent decision reported in *Pooran Mal v. Director of Inspection (1974) 1 SCC 345* this Court held : (SCC pp. 364-66, para 24)

> "24. So far as India is concerned its law of evidence is modelled on the rules of evidence which prevailed in English law, and courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure... It would thus be seen that in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out."

This decision was later followed in *Partap Singh (Dr.) v. Director of Enforcement, (1985) 3 SCC 72*

The provisions contained in the Criminal Procedure Code relating to search and seizure are safeguards to prevent the clandestine use of powers conferred on the law-enforcing authorities. They are powers incidental to the conduct of investigation and the legislature has imposed certain conditions for carrying out search and seizure in the Code. The courts have interpreted these provisions in different ways. One view is that disregard to the provisions of the Code of Criminal Procedure relating to the powers of search and seizures amounts to a default in doing what is enjoined by law and in order to prevent default in compliance with the provisions of the Code, the courts should take strict view of the matter and reject the evidence adduced on the basis of such illegal search. But often this creates a serious difficulty in the matter of proof. Though different High Court have taken different views, the decisions of this Court quoted above have settled the position and we have followed the English decisions in this regard. In the Privy Council decision in *Kuruma v. R, 1955 AC 197* Lord Goddard, C.J. was of the firm view that in a criminal case the Judge always has a discretion to disallow evidence if the strict rule of admissibility would operate unfairly against an accused. The trend of judicial pronouncements is to the effect that evidence illegally or improperly obtained is not *per se* inadmissible. If the violation committed by the investigating authority is of serious nature and causes serious prejudice to the accused, such evidence may be excluded.

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184. CIVIL PROCEDURE CODE, 1908 – Section 11

***Res judicata* – Principal of *res judicata* not attracted when question of jurisdiction is wrongly decided – Law explained.**

Sonepat Cooperative Sugar Mills Ltd. v. Ajit Singh

Judgment dt. 14.02.2005 by the Supreme Court in Civil Appeal No. 8453 of 2002, reported in (2005) 3 SCC 232

Held :

The principle of res judicata belongs to the domain of procedure. When the decision relates to the jurisdiction of a court to try an earlier proceeding, the principle of res judicata would not come into play. (See *Mathura Prasad Bajoo Jaiswal, (1970) 1 SCC 613*).

An identical question came up for consideration before this Court in *Ashok Leyland Ltd. v. State of T.N., (2004) 3 SCC 1* wherein it was observed (SCC p. 44, para 118).

> "118. The principle of res judicata is a procedural provision. A jurisdictional question, if wrongly decided, would not attract the principle of res judicata. When an order is passed without jurisdiction, the same becomes a nullity. When an order is a nullity, it cannot be supported by invoking the procedural principles like estoppel, waiver or res judicata."

It would, therefore, not be correct to contend that the decision of the learned Single Judge attained finality and, thus, the principle of res judicata shall be attracted in the instant case.

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185. LEGAL MAXIMS :

***"Res ipsa loquitur"*, doctrine of – It is an exception to the general rule requiring plaintiff to prove negligence – The doctrine shifts burden of proving lack of negligence on the defendant – Law explained.**

Cholan Roadways Ltd. v. G. Thirugnanasambandam

Judgment dt. 17.12.2004 by the Supreme Court in Civil Appeal No. 3392 of 2002, reported in (2005) 3 SCC 241

Held:

Res ipsa loquitur is a well-known principle which is applicable in the instant case. Once the said doctrine is found to be applicable the burden of proof would shift on the delinquent. As noticed hereinabove, the enquiry officer has categorically rejected the defence of the respondent that the bus was being driven at a slow speed.

In *Pushpabai Purshottam Udeshi v. Ranjit Ginning & Pressing Co. (P) Ltd., (1977) 2 SCC 745* this Court observed : (SCC pp. 750-51, para 6)

> "6. The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of *res ipsa loquitur*. The general purport of the words *res ipsa loquitur* is that the accident 'speaks

for itself' or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence."

The said principle was applied in *Sarla Dixit v. Balwant Yadav, (1996) 3 SCC 179*

In *A.T. Mane, (2004) 8 Scale 308* this Bench observed. *(SCC p. 257, paras 5-6)*

"5.... Learned counsel relied on a judgment of this Court in support of this contention of his in the case of *Karnataka SRTC v. B.S. Hullikatti, (2001) 2 SCC 574.* That was also a case where a conductor concerned had committed similar misconduct 36 times prior to the time he was found guilty and bearing that fact in mind this Court held thus : (SCC p. 576, para 5)

> 'Be that as it may, the principle of *res ipsa loquitur*, namely, the facts speak for themselves, is clearly applicable in the instant case. Charging 50 paise per ticket more from as many as 35 passengers could only be to get financial benefit, by the conductor. This act was either dishonest or was so grossly negligent that the respondent was not fit to be retained as a conductor because such action or inaction of his is bound to result in financial loss to the appellant Corporation.'

6. On the above basis, the Court came to the conclusion that the order of dismissal should have been set aside. In our opinion, the facts of the above case and the law laid down therein apply to the facts of the present case also".

In *Thakur Singh v. State of Punjab, (2003) 9 SCC 208* this Court observed : (SCC p. 209, para 4)

"4. 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 cannal. 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."

The burden of proof was, therefore, on the respondent to prove that the vehicle was not being driven by him rashly or negligently.

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186. INDIAN PENAL CODE, 1860 – Sections 320 and 326

Expressions "dangerous weapon" and "any instrument which, used as a weapon of offence, is likely to cause death" as used in Section 326, difference between – Whether particular article can cause serious wound/grievous hurt/injury has to be determined factually – Law explained.

Mathai v. State of Kerala

Judgment dt. 12.01.2005 by the Supreme Court in Criminal Appeal No. 89 of 2005, reported in (2005) 3 SCC 260

Held :

The expression "any instrument which, used as a weapon of offence, is likely to cause death" Ed : Section 326 has to be gauged taking note of the heading of the section. What would constitute a "dangerous weapon" would depend upon the facts of each case and no generalisation can be made.

The Heading of the section provides some insight into the factors to be considered. The essential ingredients to attract Section 326 are: (1) voluntarily causing a hurt; (2) hurt caused must be a grievous hurt; and (3) the grievous hurt must have been caused by dangerous weapons or means. As was noted by this Court in *State of U.P. v. Indrajeet, (2000) 7 SCC 249* there is no such thing as a regular or earmarked weapon for committing murder or for that matter a hurt. Whether a particular article can per se cause any serious wound or grievous hurt or injury has to be determined factually. As noted above, the evidence of the doctor (PW 5) clearly shows that the hurt or the injury that was caused was covered under the expression "grievous hurt" as defined under Section 320 IPC. The inevitable conclusion is that a grievous hurt was caused. It is not that in every case a stone would constitute a dangerous weapon. It would depend upon the facts of the case. At this juncture, it would be relevant to note that in some provisions e.g. Sections 324 and 326 the expression "dangerous weapon" is used. In some other more serious offences the expression used is "deadly weapon" (e.g. Sections 397 and 398). The facts involved in a particular case, depending upon various factors like size, sharpness, would throw light on the question whether the weapon was a dangerous or deadly weapon or not. That would determine whether in the case Section 325 or Section 326 would be applicable.

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187. CRIMINAL TRIAL :

Transfer of a convict/undertrial from one jail to another – Courts not helpless bystander when the rule of law is challenged with impunity – Power of the Courts – Law explained.

Kalyan Chandra Sarkar v. Rajesh Ranjan Alias Pappu Yadav and another

Judgment dt. 14.02.2005 by the Supreme Court in Criminal Appeal No. 1129 of 2004, reported in (2005) 3 SCC 284

Held :

Therefore, in our opinion a convict or an undertrial who disobeys the law of the land, cannot contend that it is not permissible to transfer him from one jail to another because the Jail Manual does not provide for it. If the factual situation requires the transfer of a prisoner from one prison to another, be he a convict or an undertrial, courts are not to be a helpless bystander when the rule of law is being challenged with impunity. The arms of law are long enough to remedy the situation even by transferring a prisoner from one prison to another, that is by assuming that the Jail Manual concerned does not provide such a transfer. In our opinion, the argument of the learned counsel, as noted above, undermines the authority and majesty of law. The facts narrated hereinabove clearly show that the respondent has time and again flouted the law even while he was in custody and sometimes even when he was on bail. We must note herein with all seriousness that the authorities manning Beur Jail and the doctors concerned of Patna Medical College Hospital, for their own reasons, either willingly or otherwise, have enabled the respondent to flout the law. In this process, we think the authorities concerned, especially the authorities at Beur Central Jail, Patna, are not in a position to control the illegal activities of the respondent. Therefore, it is imperative that the respondent be transferred outside Bihar.

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188. RENT CONTROL AND EVICTION :

Deserted wife, right of, to contest eviction suit filed against husband – Tenant/ husband not interested in contesting the suit or giving up the contest – The deserted wife residing in the premises can contest the suit – Case of divorced wife, however, stands on a different footing – Law explained.

B.P. Achala Anand v. S. Appi Reddy and another

Judgment dt. 11.02.2005 by the Supreme Court in Civil Appeal No. 4250 of 2000, reported in (2005) 3 SCC 313

Held :

The position of law which emerges on a conjoint reading of the rent control legislation and personal laws providing for right to maintenance – which will include the right to residence of a wife, including a deserted or divorced wife, may be examined. The rent control law makes provision for protection of the tenant not only for his own benefit but also for the benefit of all those residing or entitled to reside with him or for whose residence he must provide for. A decree or order for eviction would deprive not only the tenant of such protection but members of his family (including the spouse) will also suffer eviction. So long as the tenant defends himself, the interest of his family members merges with that of the tenant and they too are protected. The tenant cannot, by collusion or by deliberate prejudicial act, give up the protection of law to the detriment of his

family members. So long as a decree for eviction has not been passed the members of the family are entitled to come to the court and seek leave to defend and thereby contest the proceedings and such leave may be granted by the court if the court is satisfied that the tenant was not defending – by collusion, connivance or neglect – or was acting to the detriment of such persons. Such a situation would be rare and the court shall always be on its guard in entertaining any such prayer. But the existence of such a right flows from what has been stated hereinabove and must be recognised. Persons residing with the tenant as members of his family would obviously be aware of the litigation and, therefore, it will be for them to act diligently and approach the court promptly and in any case before the decree of eviction is passed as delay defeats equity. Such a prayer or any dispute sought to be raised post-decree by a member of the family of the tenant may not be entertained by the Court.

In our opinion, a deserted wife who has been or is entitled to be in occupation of the matrimonial home is entitled to contest the suit for eviction filed against her husband in his capacity as tenant subject to satisfying two conditions: first; that the tenant has given up the contest or is not interested in contesting the suit and such giving up by the tenant-husband shall prejudice the deserted wife who is residing in the premises; and secondly, the scope and ambit of the contest or defence by the wife would not be on a footing higher or larger than that of the tenant himself. In other words, such a wife would be entitled to raise all such pleas and claim trial thereon, as would have been available to the tenant himself and no more. So long as by availing the benefit of the provisions of the Transfer of Property Act and rent control legislation, the tenant would have been entitled to stay in the tenancy premises, the wife too can continue to stay exercising her right to residence as a part of right to maintenance subject to compliance with all such obligations including the payment of rent to which the tenant is subject. This right comes to an end with the wife losing her status as wife consequent upon decree of divorce and the right to occupy the house as part of right to maintenance coming to an end.

However, the case of a divorced wife stands on a little different footing. Divorce is termination of matrimonial relationship and brings to an end the status of wife as such. Whether or not she has the right of residence in the matrimonial home, would depend on the terms and conditions in which the decree of divorce has been granted and provision for maintenance (including residence) has been made. In the event of the provision for residence of a divorced wife having been made by the husband in the matrimonial home situated in the tenanted premises, such divorced wife too would be entitled to defend, in the eviction proceedings, the tenancy rights and rights of occupation thereunder in the same manner in which the tenant-husband could have done and certainly not higher or larger than that. She would be liable to be evicted in the same manner in which her husband as tenant would have been liable to be evicted.

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189. SPECIFIC RELIEF ACT, 1963 – Section 20

Exercise of discretion regarding grant of relief for specific performance of agreement of sale – It be so exercised that it is not unfair or inequitable – Defendant No. 2 in collusion with defendant No.1, to defeat plaintiff's claim, in a separate suit getting collusive decree by compromise for execution of sale deed by defendant No. 1 in his favour – Held, plaintiff entitled to the decree of specific performance. Devalsab (Dead) by LRS. v. Ibrahimsab F. Karajagi and another Judgment dt. 04.03.2005 by the Supreme Court in Civil Appeal No. 5628 of 1999, reported in (2005) 3 SCC 342

Held :

Learned counsel for the plaintiff-appellant submitted that in fact exercise of discretionary relief in favour of Defendant 2 is not correct as this kind of discretion if exercised in favour of Defendant 2 is likely to lay down a bad precedent. This will give premium to unethical transaction and a bona fide purchaser will be left high and dry. Learned counsel for the defendants submitted that it is true that Section 20 of the Specific Relief Act is a discretionary remedy that is not always necessary to grant a decree for specific relief if it appears to be inequitable and causes hardship to the other side. But looking to the facts of the present case we are of opinion that it will be unfair and inequitable not to grant a decree for specific relief in favour of the plaintiff-appellant not to grant a decree for specific relief in favour of the plaintiff-appellant herein because he is a bona fide purchaser and he has done everything which is possible, that he has purchased the stamp paper and was ready and willing to perform his part of the contract, that he went along with Defendant I to the Sub-Registrar's office for registration but somehow Defendant 1 sneaked away from that place as he had already entered into another agreement to sell the present premises, so much so that a sham suit was got filed by Defendant 2 against Defendant 1 and on the same day a compromise decree was obtained. These facts go to show that there is not much equity left in favour of Defendant 2 as it appears that the suit by Defendant 2 was a prearranged affair in connivance with Defendant 1. Otherwise the suit would not have been filed on the same day and a compromise decree would not have been obtained the very same day. This shows that there was a preconceived agreement between Defendants 1 and 2 in order to cheat the plaintiff-appellant herein. Therefore, we are of opinion that the discretionary power exercised by learned Single Judge of the High Court was not correct. In fact, it appears that Defendant 2 has purchased the litigation and therefore, there is no equity in his favour.

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190. MORTGAGE

Redemption of mortgage – Right of redemption does not accrue till period of mortgage expires – Law explained.

Mangal Prasad Tamoli (Dead) By LRS. v. Narvadeshwar Mishra (Dead) By LRS. and others

Judgment dt. 24.02.2005 by the Supreme Court in Civil Appeal No. 3902 of 1999, reported in (2005) 3 SCC 422

Held :

In *Ganga Dhar v. Shankar Lal, 1959 SCR 509 (SCR at p. 512) following the view taken by the Privy Council in Bakhtawar Begam v. Husaini Khanam (1913) 41 ZA 84,* it was held that :

> "Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period".

In *Ganga Dhar* (supra) the term of the mortgage was 85 years and there was no stipulation in the deed which entitled the mortgagor to redeem during the said term. The suit had been admittedly filed before the expiration of the term of the mortgage. After perusing the authorities cited at the Bar and after taking the view that the period of redemption of 85 years was neither oppressive nor so unreasonably long as to amount to a clog on redemption. It was then held: (SCR p. 520) "We then come to the conclusion that the suit was premature and must fail".

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191. CIVIL PROCEDURE CODE, 1908 – O.47 Rr. 1 and 4

Review – Appeal against decree challenged in review not maintainable during pendency of review – Effect of allowing an application for review of decree – Decree passed subsequent on review supersedes the original one – Law explained.

Rekha Mukherjee v. Ashis Kumar Das and others

Judgment dt. 03.03.2005 by the Supreme Court in Civil Appeal No. 1509 of 2005, reported in (2005) 3 SCC 427

Held :

Order 47 Rule 1 CPC postulates filing of an application by a person considering himself aggrieved, by a decree or order from which an appeal is allowed but from which no appeal has been preferred, to file an application if he desires to obtain a review from a decree passed against him. An appeal during the pendency of the review petition was, therefore, not maintainable. In terms of Order 47 Rule 4, the court may either reject or grant an application for review. In case a review is rejected, the order would not be appealable whereas an order granting an application may be objected to at once by an appeal from the order granting the application or in an appeal from the decree or order

finally passed or made in the suit. Rule 8 of Order 47 CPC postulates that when an application for review is granted, a note thereof shall be made in the register and the court may at once rehear the case or make such order in regard to the rehearing as it thinks fit.

In *Sushil Kumar Sen v. State of Bihar (1975) 1 SCC 774* Mathew, J. considered the effect of allowing an application for review of a decree holding that the same would amount to vacating the decree passed, stating : (SCC pp. 776-77, paras 2-3)

> "2. It is well settled that the effect of allowing an application for review of a decree is to vacate the decree passed. The decree that is subsequently passed on review, whether it modifies, reverses or confirms the decree originally passed, is a new decree superseding the original one (see *Nibaran Chandra Sikdar v. Abdul Hakim, AIR 1928 Cal 418, Kanhaiya Lal v. Baldeo Prasad, ILR (1906) 28 AII 240, Brijbasi Lal v. Salig Ram, ILR (1912) 344 AII 282* and *Pyari Mohan Kundu v. Kalu Khan, ILR (1917) 44 Cal 1011*).

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192. INDIAN PENAL CODE, 1860 – Section 498-A

Question of limitation and territorial jurisdiction regarding offence u/s 498-A – Limitation of three years as per section 468 (2) (c) Cr.P.C. commences from the date of last act of cruelty – Issue of territorial jurisdiction, if challenged should be decided first – Law explained. Ramesh and others v. State of T.N.

Judgment dt. 03.03.2005 by the Supreme Court in Criminal Appeal No. 372 of 2005, reported in (2005) 3 SCC 507

Held :

On the point of limitation, we are of the view that the prosecution cannot be nullified at the very threshold on the ground that the prescribed period of limitation had expired. According to the learned counsel for the appellants, the alleged acts of cruelty giving rise to the offence under Section 498-A ceased on the exit of the informant from the matrimonial home on 2-10-1997 and no further acts of cruelty continued thereafter. The outer limit of time for taking cognizance would therefore be 3-10-2000, it is contended. However, at this juncture, we may clarify that there is an allegation in the FIR that on 13-10-1998/14-10-1998, when the informant's close relations met her in-laws at a hotel in Chennai, they made it clear that she will not be allowed to live with her husband in Mumbai unless she brought the demanded money and jewellery. Even going by this statement, the taking of cognizance on 13-2-2002 pursuant to the charge-sheet filed on 28-12-2001 would be beyond the period of limitation. The commencement of limitation could be taken as 2-10-1997 or at the most 14-10-1998. As pointed out by this Court in *Arun Vyas v. Anita Vyas, (1999) 4 SCC 690* the last act of cruelty would be the starting point of limitation. The three-year period as

per Section 468 (2) (c) would expire by 14-10-2001 even if the latter date is taken into account. But that is not the end of the matter. We have to still consider whether the benefit of extended period of limitation could be given to the informant. True, the learned Magistrate should have paused to consider the question of limitation before taking cognizance and he should have addressed himself to the question whether there were grounds to extend the period of limitation. On account of failure to do so, we would have, in the normal course, queshed the order of the Magistrate taking cognizance and directed him to consider the question of applicability of Section 473. However, having regard to the facts and circumstances of the case, we are not inclined to exercise our jurisdiction under Article 136 of the Constitution to remit the matter to the trial court for taking a decision on this aspect. The fact remains that the complaint was lodged on 23-6-1999, that is to say, much before the expiry of the period of limitation and the FIR was registered by the All-Women Police Station, Tiruchirapalli on that day. A copy of the FIR was sent to the Magistrate's Court on the next day i.e. on 24-6-1999. However, the process of investigation and filing of charge-sheet took its own time. The process of taking cognizance was consequentially delayed. There is also the further fact that the appellants filed Writ Petition (Crl.) No. 1719 of 2000 in the Bombay High Court for quashing the FIR or in the alternative to direct its transfer to Mumbai. We are told that the High Court granted an exparte interim stay. On 20.8.2001, the writ petition was permitted to be withdrawn with liberty to file a fresh petition. The charge-sheet was filed four months thereafter. It is in this background that the delay has to be viewed. The approach the court has to adopt in considering the question of limitation in regard to the matrimonial offences was highlighted by this Court in the case of *Arun Vyas* (supra). While pointing out in effect that the two limbs of the enabling provision under Section 473 are independent, this Court observed thus: (SCC p. 696, para 14)

> "14.... The first limb confers power on every competent court to take cognizance of an offence after the period of limitation if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and the second limb empowers such a court to take cognizance of an offence, if it is satisfied on the facts and in the circumstances of the case that it is necessary so to do in the interests of justice. It is true that the expression 'in the interest of justice' in Section 473 cannot be interpreted to mean in the interest of prosecution. What the court has to see is 'interest of justice'. The interest of justice demands that the court should protect the oppressed and punish the oppressor/offender. In complaints under Section 498-A the wife will invariably be oppressed, having been subjected to cruelty by the husband and the in-laws. It is, therefore, appropriate for the courts, in case of deleyed complaints, to construe liberally Section 473 CrPC in favour of a wife who is subjected to cruelty if on the facts and in the circumstances of the case it is necessary so to do

in the interests of justice. When the conduct of the accused is such that applying the rule of limitation will give an unfair advantage to him or result in miscarriage of justice, the court may take cognizance of an offence after the expiry of the period of limitation in the interests of justice. This is only illustrative, not exhaustive."

The next controversy arising in the case is about the territorial jurisdiction of the Magistrate's Court at Tiruchirapalli to try the cases. As already noted, the High Court was of the view that the questions raised in the petition canot be decided before trial. It is contended by the learned counsel for the appellants that the issue relating to the place of trial can be decided even at this stage without going beyond the averments in the complaint filed by the respondents and the High Court should have, therefore, decided this point of jurisdiction, when it is raised before the trial has commenced. Our attention has been drawn to a recent decision of this Court in *Y. Abraham Ajith v. Inspector of Police, (2004) 8 SCC 100.* In that case, the Madras High Court refused to intefere under Section 482 CrPC when the issue of territorial jurisdiction of the Magistrate concerned to take cognizance of the offence was raised. This Court did not endorse the approach of the High Court for not recording the finding on the question of jurisdiction. On reading the allegations in the complaint, the Court came to the conclusion that no part of the cause of action arose in Chennai and therefore the Metropolitan Magistrate at Chennai could not have taken cognizance and issued summons. On this ground, the criminal proceedings were quashed and the complaint was directed to be returned to the respondent who was given liberty to file the same in an appropriate court. That was also a case of complaint for an offence under Sections 498-A and 406 CrPC filed by the wife against the appellant therein.

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193. INDIAN PENAL CODE, 1860 – Section 376
APPRECIATION OF EVIDENCE :
Testimony of prosecutrix, appreciation of – Prosecutrix found accustomed to sexual intercourse, not a determinative question – Victim of offence of rape not an accomplice – Her testimony stands at a higher pedestal than an injured witness – Law explained.
State of U.P. v. Pappu Alias Yunus and another
Judgment dt. 01.12.2004 by the Supreme Court in Criminal Appeal No. 1382 of 2004, reported in (2005) 3 SCC 594

Held :

Even assuming that the victim was previously accustomed to sexual intercourse, that is not a determinative question. On the contrary, the question which was required to be adjudicated was did the accused commit rape on the victim on the occasion complianed of. Even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law give licence to any person to rape her. It is the accused who was on trial and not the victim.

Even if the victim in a given case has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone.

It is well settled that a prosecutrix 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 at 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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194. CRIMINAL PROCEDURE CODE, 1973 – Section 125

Expression 'wife' as used in Section 125, meaning of – Marriage of a woman with a Hindu having a living spouse is completely a nullity – Such woman not a wife, hence not entitled to maintenance u/s 125 – Non-disclosure of previous marriage by husband not an estoppel against him – Law explained.

Savitaben Somabhai Bhatiya v. State of Gujarat and others

Judgment dt. 10.03.2005 by the Supreme Court in Criminal Appeal No. 399 of 2005, reported in (2005) 3 SCC 636

Held :

In *Yamunabai case (1888) 1 SCC 530* it was held that the expression "wife" used in Section 125 of the Code should be interpreted to mean only a legally wedded wife. The word "wife" is not defined in the Code except indicating in the Explanation to Section 125 its inclusive character so as to cover a divorce. A woman cannot be a divorce unless there was a marriage in the eye of the law preceding that status. The expression must therefore be given the meaning in which it is understood in law applicable to the parties. The marriage of a woman in accordance with HIndu rites with a man having a living spouse is a complete nullity in the eye of the law and she is therefore not entitled to the benefit of Section 125 of the Code or the Hindu Marriage Act, 1995 (in short "the Marriage Act"). Marriage with a person having a living spouse is null and void and not voidable. However, the attempt to exclude altogether the personal law applicable to the parties from consideration is improper. Section 125 of the Code has been enacted in the interest of a wife and one who intends to take benefit under Sub-section (1) (a) has to establish the necessary condition, namely, that she is the wife of the person concerned. The issue can be decided only by a reference to the law applicable to the parties. It is only where an applicant establishes such status or relationship with reference to the personal law that an

application for maintenance can be maintained. Once the right under the provision in Section 125 of the Code is established by proof of necessary conditions mentioned therein, it cannot be defeated by further reference to the personal law. The issue whether the section is attracted or not cannot be answered except by reference to the appropriate law governing the parties.

Even if it is accepted as stated by learned counsel for the appellant that the husband was treating her as his wife it is really inconsequential. It is the intention of the legislature which is relevant ad not the attitude of the party.

In *Yamunabai case* (supra) plea similar to the one advanced in the present case that the appellant was not informed about the respondent's earlier marriage when she married him was held to be of no avail. The principle of estoppel cannot be pressed into service to defeat the provision of Section 125 of the Code.

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195. CRIMINAL PROCEDURE CODE, 1973 – Section 151

Section 151, ambit and scope of – Person arrested under section 151 cannot be detained for more than 24 hours – Rights of arrested person – Law restated.

Commissioner of Central Excise, Jamshedpur v. Dabur (India) Ltd. Judgment dt. 01.04.2005 by the Supreme Court in Civil Appeal No. 1112 of 2003, reported in (2005) 3 SCC 646

Held :

So far as the challenge to Section 151 of the Code of Criminal Procedure is concerned the High Court has noticed the fact that the prayer for declaring the provision as unconstitutional is not supported by factual assertions and the writ petition lacked specific averments and allegations of fact on the basis of which it was contended that the provision was ultra viers and unconstitutional. However, the High Court considered the arguments addressed before it and rejected the same holding that the powers conferred upon the police authorities under Section 151 of the Code of Criminal Procedure were well defined, and guidelines for their exercise are also found in the provision so as to save it from the charge of being either arbitrary or unreasonable. The detention under Section 151 of the Code of Criminal Procedure was only for a limited period of 24 hours for the purpose mentioned therein and the said provision, therefore offended no provision of the Constitution.

In *Joginder Kumar v. State of U.P., (1994) 4 SCC 260* this Court observed: (SCC pp. 263-64, paras 8-9)

> "8. The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this Court has been receiving complaints about violation of human rights because of indeterminate arrests. How are we to strike a balance between the two?

9. A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first – the criminal or society, the law violator or the law abider; of meeting the challenge which Mr. Justice Cardozo so forthrightly met when he wrestled with a similar task of balancing individual rights against society's rights and wisely held that the exclusion rule was bad law, that society rights and wisely held that the exclusion rule was bad law, that society came first, and that the criminal should not go free because the constable blundered."

This Court laid down certain requirements in *Joginder Kumar* (supra) for effective enforcement of the fundamental rights inherent in Articles 21 and 22 (1) of the Constitution which require to be recognised and scrupulously protected. The requirements laid down are as follows: (SCC p. 268, para 21)

"1. An arrested person being held in custody is entitled, if he so requests to have one friend, relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where he is being detained.

2. The police officer shall inform the arrested person when he is brought to the police station of this right.

3. An entry shall be required to be made in the diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22 (1) and enforced strictly.

It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with."

In *D.K. Basu v. State of W.B., (1997) 1 SCC 416* this Court has issued requirements to be followed in all cases of arrest and detention till legal provisions are made in that behalf as preventive measures. The requirements laid down are: (SCC pp. 435-36, para 35)

"35. (1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of

the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the district and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The 'inspection memo' must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a penal for all tehsils and districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place

of custody of the arrestee shall be common acted by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicupus notice board."

These requirements are in addition to the constitutional and statutory safeguards and do not detract from various directions given by the courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee. This Court has also cautioned that failure to comply with the requirements aforesaid, shall apart from rendering the official concerned liable for departmental action, also render him liable to be punished for contempt of court.

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196. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 – Sections 20 & 64

Requisite conditions for applicability of Section 20 – A person facing trial under Act of 1986, if below 18 years on 01.04.2001, for the purpose of sentencing, shall be dealt under Act of 2000 – Law explained.

Bijender Singh v. State of Haryana and another

Judgment dt. 28.03.2005 by the Supreme Court in Criminal Appeal No. 448 of 2005, reported in (2005) 3 SCC 685

Held :

In terms of the 1986 Act, a person who was not juvenile could be tried in any court. Section 20 of the 2000 Act takes care of such a situation stating that despite the same the trial shall continue in that court as if that Act has not been passed and in the event, he is found to be guilty of commission of an offence, a finding to that effect shall be recorded in the judgment of conviction, if any, but instead of passing any sentence in relation to the juvenile, he would be forwarded to the Juvenile Justice Board (in Short "the Board") which shall pass orders in accordance with the provisions of the Act as if it has been satisfied on inquiry that a juvenile has committed the offence. A legal fiction has, thus, been created in the said provision. A legal fiction as is well known must be given its full effect although it has its limitations. [See *Bhavnagar University v. Palitana Sugar Mill (P) Ltd., (2003) 2 SCC 111, ITW Signode India Ltd. v. CCE, (2004) 3 SCC 48* and *Ashok Leylend Ltd. v. State of T.N., (2004) 3 SCC* 1

In interpreting a provision creating a legal fiction, the court has to ascertain for what purpose te fiction is created. (See *Levy. Re. ex p Walton (1881) 17 Ch D 746.*) After ascertaining the purpose the court ha to assume all those facts and consequences which are incidental or inevitable corollaries for giving effect to the fiction. (See *East End Dwellings Co. Ltd., v. Finsbury Borough Council, (1951) 2 411 ER 587* and *Chief Inspector of Mines v. Karam Chand Thapar, (1962) 1 SCR 9*) But in so construing the fiction it is not to be extended beyond the purpose for which it is created, or beyond the language of the provision by

which it is created. (See *State of Maharashtra v. Laljit Rajshi Shah, (2000) 2 SCC 699, Coal Economising Gas Co. In re (1875) 1 ChD 182* and *Hill v. East and West Dock Co., (1884) 9 AC 448*)

Thus, by reason of legal fiction, a person, although not a juvenile, has to be treated to be one by the Board for the purpose of sentencing which takes care of a situation that the person although not a juvenile in terms of the 1986 Act but still would be treated as such under the 2000 Act for the said limited purpose.

Section 20 of the 2000 Act would, therefore, be applicable when a person is below the age of 18 years as on 1.4.2001. For the purpose of attracting Section 20 of the said Act, it must be established that: (i) on the date of coming into force the proceedings in which the petitioner was accused was pending, and (ii) on that day he was below the age of 18 years. For the purpose of the said Act, both the aforementioned conditions are required to be fulfilled. By reason of the provisions of the 2000 Act, the protection granted to a juvenile has only been extended but such extension is not absolute but only a limited one. It would apply strictly when the conditions precedent therefore as contained in Section 20 or Section 64 are fulfilled.

The embargo of giving a retrospective effect to a statute arises only when if takes away vested right a person. By reasons of Section 20 of the 2000 Act no vested right in a person has been taken away, but thereby only an additional protection had been provided to a juvenile.

Provisions of the 2000 Act would be applicable to those cases initiated and pending trial/inquiry for the offences committed under the 1986 Act provided that the person had not completed 18 years of age as on 1.4.2001. In the instant case undisputedly Respendent 2 accused had completed 18 years of age before 1-4-2001.

The Constitution Bench in *Pratap Singh* case has held as under (SCC p. 591, para 112)

(i) In terms of the 1986 Act, the age of the offender must be reckoned from the date when the alleged offence was committed.

(ii) The 2000 Act will have a limited application in the cases pending under the 1986 Act.

(iii) The court would be entitled to apply the ordinary rules of evidence for the purpose of determining the age of the juvenile taking into consideration the provisions of Section 35 of the Indian Evidence Act, 1872 as the Model Rules framed by the Central Government have no statutory force.

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197. EVIDENCE ACT, 1872 – Section 32 (5)

Proof of age – Horoscope, evidence of – It is of very weak nature – Entries in school register/admission form constitute good proof of age – Law explained.

State of Punjab v. Mohinder Singh

Judgment dt. 14.03.2005 by the Supreme Court in Civil Appeal No. 1730 of 2005, reported in (2005) 3 SCC 702

Held :

Horoscope is a very weak piece of material to prove age of a person. In most cases, the maker of it may not be available to prove that it was made immediately after the birth. A heavy onus lies on the person who wants to press it into service to prove its authenticity. In fact a horoscope to be treated as evidence in terms of Section 32 clause (5) must be proved to have been made by a person having special means of knowledge as regards authenticity of a date, time, etc. mentioned therein. In that context horoscopes have been held to be inadmissible in proof of age. (See *Ramnarain Kallia v. Monee Bibee, ILR (1883) 9 Cal 613, Biro v. Atma Ram, AIR 1937 PC 101* and *Satish Chandra Mukhopadhya v. Mohendra Lal Pathak, ILR 97 Cal 849.*)

On the contrary, the statement contained in the admission register of the school as to the age of an individual on information supplied to the school authorities by the father, guardian or a close relative is more authentic evidence under Section 32 clause (5) unless it is established by unimpeachable contrary material to show that it is inherently improbable. The time of one's birth relates to the commencement of one's relationship by blood and a statement therefore of one's age made by a person having special means of knowledge, relates to the existence of such relationship as that referred to in Section 32 clause (5)

As observed by this Court in *Umesh Chandra v. State of Rajasthan, (1982) 2 SCC 202* ordinarily oral evidence can hardly be useful to determine the correct age of a person, and the question, therefore, would largely depend on the documents and the nature of their authenticity. Oral evidence may have utility if no documentary evidence is forthcoming. Even the horoscope cannot be reliable because it can be prepared at any time to suit the needs of a particular situation. Entries in the school register and admission form regarding date of birth constitute good proof of age. There is no legal requirement that the public or other official book should be kept only by a public officer and all that is required under Section 35 of the Evidence Act is that it should be regularly kept in discharge of official duty. In the instant case the entries in the school register were made *ante litem motam.*

Therefore, the school records have more probative value than a horoscope. Where no other material is available, the horoscope may be considered but subject to its authenticity being established.

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198. CIVIL PROCEDURE CODE, 1908 – O.41 R. 22

Cross objections, maintainability of on withdrawal of appeal – Held, cross objections being nothing but appeal are maintainable even on withdrawal of appeal – Law explained.

Hari Shankar Rastogi v. Sham Manohar and others

Judgment dt. 16.03.2005 by the Supreme Court in Civil Appeal No. 1787 of 2005, reported in (2005) 3 SCC 761

Held :

By the impugned judgment, it has been held that as the appeal has been withdrawn the cross-objections emanating from the regular second appeal automatically cease to survive. On this reasoning, the cross-objection has been dismissed.

The question whether the cross-objections are maintainable, even when the appeal has been withdrawn was considered by this Court in *Superintending Engineer v. B. Subba Reddy, (1999) 4 SCC 423.* After considering various judgments, it was held as follows: (SCC pp. 433-34, para 23)

> "23. From the examination of these judgments and the provisions of Section 41 of the Act and Order 41 Rule 22 of the Code, in our view, the following principle emerge:
>
> (1) Appeal is a substantive right. It is a creation of the statute. Right to appeal does not exist unless it is specifically conferred.
>
> (2) Cross-objection is like an appeal. It has all the trappings of an appeal. It is filed in the form of memorandum and the provisions of Rule 1 of Order 41 of the Code, so far as these relate to the form and contents of the memorandum of appeal apply to cross-objection as well.
>
> (3) Court fee is payable on cross-objection like that on the memorandum of appeal. Provisions relating to appeals by an indigent person also apply to cross-objection.
>
> (4) Even where the appeal is withdrawn or is dimissed for default, cross objection may nevertheless be heard and determined.
>
> (5) The respondent even though he has not appealed may support the decree on any other ground but if he wants to modify it, he has to file cross-objection to the decree which objections he could have taken earlier by filing an appeal. Time for filing objection which is in the nature of appeal is extended by one month after service of notice on him of the day fixed for

hearing the appeal. This time could also be extended by the court like in appeal.

(6) Cross-objection is nothing but an appeal, a cross-appeal at that. It may be that the respondent wanted to give a quietus to the whole litigation by his accepting the judgment and decree or order even if it was partly against his interest. When, however, the other party challenged the same by filing an appeal the statute gave the respondent a second chance to file an appeal by way of cross-objection if he still felt aggrieved by the judgment and decree or order."

Thus, it is clear that cross-objection is like an appeal. It has all the trappings of an appeal. Even when the appeal is withdrawn or is dismissed, cross-objection can still be heard and determined.

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199. CIVIL PROCEDURE CODE, 1908 – O.41 Rr. 1 (3) & 5 (5)
Stay of money decree by appellate Court – Discretion as to imposing pre-condition for deposit of disputed amount or furnishing security therefor, exercise of – Law explained.
Sihor Nagar Palika Bureau v. Bhabhlubhai Virabhai & Co.
Judgment dt.,21.04.2005 by the Supreme Court in Civil Appeal No. 2799 of 2005, reported in (2005) 4 SCC 1

Held :

Order 41 Rule 1(3) CPC provides that in an appeal against a decree for payment of amount, the appellant shall, within the time permitted by the appellate court, deposit the amount disputed in the appeal or furnish such security in respect thereof as the court may think fit. Under Order 41 Rule 5(5), a deposit or security, as abovesaid, is a condition precedent for an order by the appellate court staying the execution of the decree. A bare reading of the two provisions referred to hereinabove, shows a discretion having been conferred on the appellate court to direct either deposit of the amount disputed in the appeal or to permit such security in respect thereof being furnished as the appellate court may think fit. Needless to say that the discretion is to be exercised judicially and not arbitrarily depending on the facts and circumstances of a given case. Ordinarily, execution of a money decree is not stayed inasmuch as satisfaction of money decree does not amount to irrepatable injury and in the event of the appeal being allowed, the remedy of restitution is always available to the successful party. Still the power is there, of course a discretionary power, and is meant to be exercised in appropriate cases.

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200. PREVENTION OF CORRUPTION ACT, 1947 – Section 6 (1)
Sanction required u/s 6, proof and validity of – Facts constituting the offences referred to in the sanction – Prosecution not required to prove that all material was placed before sanctioning authority – Law explained.
C.S. Krishnamurthy v. State of Karnataka
Judgment dt. 29.03.2005 by the Supreme Court in Criminal Appeal No. 462 of 2005, reported in (2005) 4 SCC 81

Held :

In this connection, a reference was made to a decision of the Constitution Bench in the case of *R.S. Pandit v. State of Bihar, 1963 Supp (2) SCR 652* wherein Their Lordships after referring to a decision of the Privy Council in the case of *Gokulchand Dwarkadas Morarka v. R., AIR 1948 PC 82* observed as under : (SCR pp. 662-63)

> "Section 6 of the Act also does not require the sanction to be given in a particular form. The principle expressed by the Privy Council, namely that the sanction should be given in respect of the facts constituting the offence charged equally applies to the sanction under Section 6 of the Act. In the present case all the facts constituting the offence of misconduct with which the appellant was charged were placed before the Government. The second principle, namely, that the facts should be referred to on the face of the sanction and if they do not so appear, the prosecution must prove them by extraneous evidence, is certainly sound having regard to the purpose of the requirments of a sanction."

Therefore, the ratio is sanction order should speak for itself and in case the facts do not so appear, it should be proved by leading evidence that all the particulars were placed before the sanctioning authority for due application of mind. In case the sanction speaks for itself then the satisfaction of the sanctioning authority is apparent by reading the order. In the present case, the sanction order speaks for itself that the incumbent has to account for the assets disproportionate to his known source of income.

●

Think big, believe big and act big. To this, add work and struggle. That is the formula for gaining victory over your difficulties.

NORMAN VINCENT PEACE

PART - III

CIRCULARS/NOTIFICATIONS

HIGH COURT OF MADHYA PRADESH : JABALPUR

MEMO

No. C/1968/ Jabalpur, dated 13th / 15th April, 2005

To,

The Controller,
Govt. Central Press, Bhopal.

.....

Sub :- Regarding amending the column in Registration registers having No.V-71 / CRJ (F),

With reference to the subject mentioned above, I am to inform you that at present, subordinate Courts are using the Registration register having No. V-71/CRJ (E) for the registration of Criminal cases. Now, High Court has changed the columns of this register.

Therefore, you are requested to print the Registration registers having No. V-71/CRJ (E) for the registration of Criminal cases of subordinate Courts with amended columns in prescribed proforma in future. Prescribed proforma with amended columns of the Register is attached herewith.

Sd/-
(A.K. SELOT)
Registrar General

●

उच्च न्यायालय मध्यप्रदेश, जबलपुर

ज्ञापन

क्रमाँक – A/1316 जबलपुर, दिनांक 2.4.2005
तीन–2–9/40– एक (फा.न.4)

प्रति,

जिला एवं सत्र न्यायाधीश

..... (म.प्र.)

विषय– न्यायिक मजिस्ट्रेट के न्यायालय द्वारा परीक्षण योग्य प्रकरणों के केन्द्रीय पंजीयन के लिये आवश्यक मार्गदर्शन ।

.....

माननीय उच्च न्यायालय द्वारा नियम एवं आदेश (आपराधिक) के नियम 570 में न्यायिक मजिस्ट्रेट द्वारा परीक्षण योग्य आपराधिक प्रकरणों के केन्द्रीयकृत पंजीयन से संबंधित संशोधित नियम दिनांक 1 जनवरी

2006 से प्रभावशील किये गये हैं। इस हेतु आवश्यक प्रक्रिया के लिये निम्न मार्गदर्शन दिये जा रहे हैं, इनके अनुसार केन्द्रीय पंजीयन के कार्य में यदि कोई असुविधा या बाधा इस स्वरूप की प्रकट होती हो जिसका कि निदान न्यायिक कार्य की आवश्यकता के अनुरूप आवश्यक हो तो उन्हें सूचित करने का कष्ट करें जिससे कि आवश्यक सुधार किया जा सके :–

1. प्रत्येक जिला न्यायाधीश जिला मुख्यालय पर आपराधिक प्रकरणों के केन्द्रीय पंजीयन हेतु मुख्य न्यायिक मजिस्ट्रेट के न्यायालय में या अन्य उपलब्ध सुविधाजनक स्थान निश्चित करते हुए पंजीकरण कार्य के लिये केन्द्रीय पंजीयन कार्य हेतु लिपिक वर्ग का कर्मचारी/कर्मचारीगण पदस्थ करें ।

2. मुख्य न्यायिक मजिस्ट्रेट के प्रभार के अधीन केन्द्रीय पंजीयन लिपिक निर्धारित प्रारूप पंजी में पंजीयन का कार्य सम्पादित करेगा जहाँ पर कम्प्यूटर की सुविधा उपलब्ध हो वहाँ पंजीयन का कार्य कम्प्यूटर के माध्यम से प्रारंभ कराया जावेगा।

3. केन्द्रीय पंजीकरण लिपिक द्वारा संबंधित न्यायालय से प्रकरण संलग्न प्रपत्र क्रमाँक–1 में जानकारी के साथ प्राप्त होने पर तत्काल पंजीयन क्रमाँक अंकित कर संबंधित न्यायालय को तत्काल वापिस किया जावेगा एवं न्यायालय द्वारा भेजे गये प्रपत्र क्रमाँक–1 में उपलब्ध जानकारी के आधार पर केन्द्रीय पंजीयन से संबंधित पंजी में उसी दिन समस्त जानकारी अंकित करेगा।

4. अ.– मुख्य न्यायिक मजिस्ट्रेट द्वारा जारी किये गये कार्य विभाजन पत्रक के अनुसार प्रत्येक आपराधिक प्रकरण संबंधित न्यायिक मजिस्ट्रेट के न्यायालय में सर्वप्रथम प्रस्तुत होगा।

   ब.– अभियोग पत्र/परिवाद पत्र के साथ संलग्न प्रारूप फार्म क्रमांक–1 दो प्रतियों में सम्पूर्ण जानकारी के साथ संबंधित पक्षकार द्वारा प्रस्तुत किया जावेगा । संलग्न प्रारूप में दी गई जानकारी का सत्यापन संबंधित न्यायालय द्वारा किया जावेगा ।

5. संबंधित न्यायिक मजिस्ट्रेट द्वारा दण्ड प्रक्रिया संहिता के प्रावधानों या अन्य किन्हीं विधिक प्रावधानों के अन्तर्गत विचारण या जाँच हेतु मामला संस्थित किये जाने का आदेश देने के उपरान्त उसी दिन प्रत्येक प्रकरण उक्त दोनों संलग्न प्रपत्रों सहित केन्द्रीय पंजीयन लिपिक के पास भेजा जावेगा।

6. केन्द्रीय पंजीयन लिपिक संलग्न प्रपत्र की दोनों प्रतियों पर, पंजीयन नंबर अंकित करने के उपरान्त, एक प्रति पर पावती देकर संबंधित प्रकरण के साथ न्यायालय को तत्काल वापस भेजेगा।

7. प्रत्येक न्यायिक मजिस्ट्रेट का न्यायालय पंजीयन नंबर प्राप्त होने पर पंजीयन नंबर का उल्लेख प्रथम आदेश पत्रिका के शीर्ष पर करेगा ।

8. एक मजिस्ट्रेट के न्यायालय से दूसरे मजिस्ट्रेट के न्यायालय में केन्द्रीय पंजीकृत प्रकरण अंतरित होने की दशा में प्रकरण अंतरण की सूचना उस न्यायालय के मजिस्ट्रेट द्वारा जिसके न्यायालय से प्रकरण अंतरित हो रहा है, केन्द्रीय पंजीयन लिपिक को दी जावेगी, जिसके आधार पर पंजीयन लिपिक केन्द्रीय रजिस्टर में पूर्व नंबर पर ही प्रकरण स्थानांतरण की जानकारी अभिलिखित करेगा । इन परिस्थितियों में मूल पंजीकृत नंबर ही प्रकरण का रहेगा अर्थात् प्रकरण पुनः पंजीकृत नहीं किया जावेगा ।

9. तहसील मुख्यालय पर जहां एक ही न्यायिक मजिस्ट्रेट का न्यायालय स्थित है उस न्यायालय में ही नवीन प्रारूप के पंजीयन रजिस्टर पर आपराधिक प्रकरणों के प्रभारी लिपिक द्वारा पंजीयन किया जावेगा ।

10. जिन तहसील मुख्यालयों पर एक से अधिक न्यायिक मजिस्ट्रेट के पद हैं ऐसे स्थानों पर वरिष्ठ न्यायिक मजिस्ट्रेट के न्यायालय के लिपिक के पास पंजीयन रजिस्टर रखा जावेगा और वही जिला स्तर पर पंजीयन के संबंध में दिये गये, मार्गदर्शन अनुरूप पंजीयन की कार्यवाही करेगा।

11. केन्द्रीय पंजीकृत प्रकरणों का निर्णय सार/सम्पत्ति **प्रकरणों के निर्णय सार आदि** विवरण पंजीयन पंजी में जिला मुख्यालयों पर केन्द्रीय पंजीयन लिपिक के कक्ष **में संबंधित न्यायिक मजिस्ट्रेट** के न्यायालय के प्रस्तुतकार द्वारा यथाशीघ्र अधिकतम तीन दिवस की अवधि में आवश्यक रूप स अंकित किया जावेगा।

12. निराकृत प्रकरणों के अभिलेखागार में जमा करने के समय एक सूची पर संबंधित न्यायालय के पीठासीन अधिकारी द्वारा यह प्रमाणीकरण किया जावेगा कि अभिलेखागार में प्रविष्ट कराये जाने वाले प्रकरणों का निर्णय सार व सम्पत्ति निराकरण के निर्देश केन्द्रीय पंजीयन पंजी में अंकित करा दिये गये हैं।

13. अ. यदि कोई प्रकरण तहसील मुख्यालय के न्यायिक मजिस्ट्रेट के न्यायालय से जिला मुख्यालय पर स्थित किसी न्यायालय में अंतरित होता है अथवा जिला मुख्यालय पर स्थित किसी न्यायालय से तहसील मुख्यालय पर स्थित न्यायालय में अंतरित होता है और यदि ऐसा प्रकरण दिनांक 1.1.2006 को या उसके बाद तहसील मुख्यालय अथवा जिला मुख्यालय पर केन्द्रीय पंजीयन की पंजी में पंजीबद्ध हुआ है तब वह पुनः अंतरित होने वाले स्थान की केन्द्रीय पंजीयन पंजी में पुनः दर्ज नहीं किया जावेगा। साथ ही प्रकरण जिस स्थान की पंजी में पंजीकृत है उस स्थान पर निर्णय उपरान्त उक्त निर्देश क्रमांक 11 के अनुसार कार्यवाही हेतु भेजा जावेगा।

ब. दिनांक 1.1.2006 से पूर्व के पंजीकृत आपराधिक प्रकरण एक आपराधिक न्यायालय से दूसरे आपराधिक न्यायालय में अंतरित होने पर केन्द्रीय पंजीयन पंजी में दर्ज किये जावेंगे। पंजी में पूर्व पंजीयन नंबर एवं पूर्व न्यायालय का नाम भी दर्ज किया जावेगा।

14. दिनांक 1.1.2006 से पूर्व के संस्थित मामले सभी न्यायिक मजिस्ट्रेट के न्यायालयों में पूर्व से दर्ज पंजियों में पंजीकृत रहेंगे एवं भविष्य में उनका उल्लेख "पुराने आपराधिक प्रकरण क्रमांक" शीर्षक के रूप में तब तक किया जावेगा जब तक कि उनका अंतिम निपटारा नहीं हो जाता।

15. अभिलेखागार प्रभारी अधिकारी एवं जिला न्यायाधीश समय–समय पर जमा होने वाले निराकृत प्रकरणों के अभिलेख का आकस्मिक निरीक्षण कर इसकी संतुष्टि करेंगे कि केन्द्रीय पंजीयन पंजी में निराकृत प्रकरणों का निर्णय सार/सम्पत्ति निराकरण निर्देश सही अंकित किये गये हैं।

16. सभी जिला न्यायाधीश (मानीटरिंग सेल) की मीटिंग में पुलिस अधीक्षक का आपराधिक प्रकरणों का केन्द्रीय पंजीयन किये जाने की व्यवस्था से अवगत कराते हुए दो प्रतियों में प्रारूप क्र.1 की जानकारी के साथ प्रत्येक अभियोग पत्र पेश किये जाने के लिये थाना प्रभारियों को निर्देश जारी कराएं।

(ए.के. सेलट)

रजिस्ट्रार जनरल

●

न्यायालय का नाम :–

अभियोग पत्र/परिवाद पत्र

प्रस्तुतीकरण की दिनांक	पुलिस स्टेशन का नाम	अपराध क्रमांक	अधिनियम एवं धारा

पक्षकारों की जानकारी

अभियोजक	अभियुक्त/अभियुक्तगण	सही/गलत का निशान लगायें				
परिवादी का नाम, पिता/पति का नाम, उम्र, जाति, निवास	नाम,पिता/पति का नाम, उम्र, जाति, व्यवसाय, निवास	अनु. जाति	अनु. जन जाति	पिछड़ा वर्ग	सीनियर सिटीजन	विकलांग
	1.					
	2.					
सही/गलत का निशान लगायें	3.					
अनु.जाति, अनु.जनजाति, पिछड़ा वर्ग, सीनियर सिटीजन, विकलांग	4.					
	5.					
	6.					
	7.					

हस्ताक्षर

थाना प्रभारी/परिवादी

REGISTER OF ORIGINAL CRIMINAL CASES

Serial Number	Date of Institution	Name of Complainant with Parentage, caste (with SC/ST/ OBC, if applicable) profession and residence.	Name of accused with parentage caste (SC/ST/OBC, if applicable) profession and residence.	Offence charged with section of Penal Code or other law.
(1)	(2)	(3)	(4)	(5)

NAME OF DISTRICT HEADQUARTER/OUTLYING STATIONS

Details of Transfer with date and name of transferee Court.	Date of final order	Particulars of sentence of Final order with section of Penal Code or other law.	Result of appeal or revision with date.	Malkhana No. of case property and particulars of disposal order	Remarks.
(6)	(7)	(8)	(9)	(10)	(11)

SUGGESTION FROM JUDICIAL OFFICERS IN "YEAR OF EXCELLENCE".

The Year 2005 has been declared as "The Year of Excellence in Judiciary" by Hon'ble the Chief Justice of India. The total pendency in subordinate Courts is reducing during the year but these figures cannot be said to be very encouraging as still there is much scope for improvement. Hence under the prevailing infrastructure, the Judicial Officers of the State are requested to give their practical suggestions to reduce pendency, without making compromise with the quality.

In the same manner, all District Judges facing problems in reducing pendency, may also send their suggestions pertaining to their districts. They may also send their suggestions about their respective district in respect of holding Link Courts by Judicial Officers or holding Court exclusively to deal with civil work in order to reduce pendency of cases.

The District Judges and Judicial Officers of the State are requested to send their suggestions directly to Director, Judicial Officers Training & Research Institute, Jabalpur, in about 300 (Three Hundred) words before 30th July, 2005. Three best suggestions of District Judges and Judicial Officers will be published in the J.O.T.R.I. journal mentioning the name of the officer.

Sd/-

(S.C. SINHO)
Registrar General
17.06.2005

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Creative thinking is today's most prized, profit-producing possession for any individual, corporation, or country.

ROBERT CRAWFORD

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE MADHYA PRADESH ADHIVAKTA KALYANA NIDHI (SANSHODHAN) ADHINIYAM, 2004

The following Act received the assent of the Governor on the 24th December, 2004 and was published in the Madhya Pradesh Gazette, Extraordinary, dated the 29th December, 2004.

MADHYA PRADESH ACT NO. 18 OF 2004

An Act further to amend the Madhya Pradesh Adhivakta Kalyan Nidhi Adhiniyam, 1982.

Be it enacted by the Madhya Pradesh Legislature in the Fifty-fifth year of the Republic of India as follows :-

1. Short title. – This Act may be called **the Madhya Pradesh Adhivakta Kalyan Nidhi (Sanshodhan) Adhiniyam, 2004.**

2. Amendment of Section 19.– In Section 19 of the Madhya Pradesh Adhivakta Kalyan Nidhi Adhiniyam, 1982 (No. 9 of 1982),

(i) in sub-section (1), for the words "four rupees", the words "ten rupees" shall be substituted.

(ii) in sub-section (2), for the words "ten rupees", the words "twenty rupees" shall be substituted.

3. Repeal. – (1) The Madhya Pradesh Adhivakta Kalyan Nidhi (Sanshodhan) Adhyadesh, 2004.

(2) Notwithstanding the repeal of the said Ordinance, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provision of this Act.

●

MINISTRY OF FINANCE

No. S.O. 1074 (E), dated 30th September, 2004. – In exercise of the powers conferred by sub-section (1B) of section 139 of the Income Tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby specifies the following scheme, namely :-

1. Short title, commencement and application.– (1) This scheme may be called the **Furnishing of Return of Income on Internet Scheme, 2004.**

(2) It shall come into force on the date of its publication in the Official Gazette.

(3) It applies to an individual who has been allotted Permanent Account Number and who has income under the head "Salaries" but does not have any

income under the head "Profits and gains of business or profession", who is assessed or assessable to tax in any of the cities specified in Schedule 'A' of this scheme.

2. Definitions.- In this scheme, unless the context otherwise requires-

(a) "Act" means the Income Tax Act, 1961 (43 of 1961);

(b) "Board" means the Central Board of Direct Taxes constituted under the Central Board of Revenues Act, 1963 (54 of 1963);

(c) "digital signature" means a digital signature issued by any Certifying Authority, authorised to issue such certificates by the Controller of Certifying Authorities of India;

(d) "eligible person" means an individual who has been allotted Permanent Account Number and who has income under the head 'Salaries' but does not have any income under the head "Profits and gains of business or profession", and who is assessed or assessable to tax in any of the cities specified in schedule 'A' of this scheme;

(e) "e-Return Administrator" means an officer, not below the rank of the Commissioner of Income-tax, disignated by the Board for the purpose of administration of this scheme;

(f) "Internet retrun" means electronically transmitted data of return and its enclosures under digital signature, furnished under this scheme;

(g) words and expressions used herein and not defined but defined in the Act shall have the meanings respectively assigned to them in the Act.

3. Filing of returns on internet. – An eligible person may, at his option, furnish under this scheme his return of income which he is required to furnish under sub-section (1) of section 139 of the Act, for the assessment year 2004-2005 and any subsequent assessment year, on or before the due date for filing such return of income.

4. Revised Return of Income.– An eligible person may furnish under this scheme a revised return of income for any assessment year under sub-section (5) of section 139 of the Act if he has furnished a return of income for that assessment year under this scheme.

5. Procedure for filing return on internet. – (1) The eligible person shall register himself on the website as designated by the e-Return Administrator for this purpose. On registration, the eligible person shall be allotted a user identincation number and a password.

(2) The eligible person shall, using his user identification number and password, logon to the designated website and prepare his return of income in the specified electronic format, using the authorised return preparation software provided on the website. The eligible person shall also –

(i) give particulars of the bank account in which he wishes to receive his refund, if any; and

(ii) attach electronically the Tax Deduction at Sourse certificate, if any, duly signed digitally by the issuer.

(3) The eligible person shall sign his return of income and its enclosures, using his digital signature.

(4) The eligible person shall upload (submit) the return of income alongwith its enclosures and attachments as per instructions available on the website.

(5) Before accepting the return so filed and issuing the acknowledgement for accepting such return, automated validation checks as may be decided by the e-Return Administrator shall be carried out to ensure that the return so filed is a valid return. Such validation checks may include-

(a) whether permanent account number has been correctly quoted;

(b) whether the digital signatures have not been revoked or suspended and are valid at the time of receipt of the return;

(c) whether the income shown in the tax deduction at source (TDS) certificate has been correctly declared in the return; and

(d) whether the credit for tax deduction at source (TDS) has been correctly claimed in the return.

(6) In case any validation checks fail, an appropriate error message will be generated and sent to the eligible person. The eligible person shall correct the data on the basis of the error message and resubmit the return of income as above.

(7) On successful validation an on-line acknowledgement would be generated giving the acknowledgement number, date and time of filing the return of income, total income returned, and the particulars of the assessing officer.

(8) Date of generation of on-line acknowledgement shall be deemed to be the date of filing of return of income.

6. Processing internet return of income. – (1) The internet return of income shall be processed on priority basis.

(2) The refund, if any, due to the assessee shall be either credited by the assessing officer directly to his bank account, using the Electronic Clearing Services (ECS) of the Reserve Bank of India or directly sent to the assessee.

7. e-Return Administrator. – The e-Return Administrator shall specify the procedures, formats and standards for ensuring secure capture and transmission of data and will also be responsible for the day to day administration of the scheme.

SCHEDULE 'A'

[See sub-paragraph (3) of Paragraph 1]

Sl. No.	City	Sl. No.	City
(1)	(2)	(1)	(2)
1.	Agra	31.	Kohlapur
2.	Ahmedabad	32.	Kolkata
3.	Allahabad	33.	Lucknow
4.	Amritsar	34.	Ludhiana
5.	Bangalore	35.	Madurai
6.	Bareily	36.	Meerut
7.	Baroda	37.	Mumbai
8.	Bhopal	38.	Muzaffarpur
9.	Bhubanseshwar	39.	Mysore
10.	Bikaner	40.	Nagpur
11.	Calicut	41.	Nashik
12.	Chandigarh	42.	Panaji
13.	Chennai	43.	Panchkula
14.	Cochin	44.	Patiala
15.	Coimbatore	45.	Patna
16.	Delhi	46.	Pune
17.	Dhanbad	47.	Raipur
18.	Gandhinagar	48.	Rajkot
19.	Thane	49.	Ranchi
20.	Guwahati	50.	Rohtak
21.	Gwalior	51.	Sambalpur
22.	Hubli	52.	Shilong
23.	Hyderabad	53.	Shimla
24.	Indore	54.	Surat
25.	Jabalpur	55.	Trichy
26.	Jaipur	56.	Trivandrum
27.	Jalandhar	57.	Udaipur
28.	Jalpaiguri	58.	Varanasi
29.	Jodhpur	59.	Vijaywada
30.	Kanpur	60.	Vishakhapatnam

Published in the Gazette of India, Extraordinary, Part II, Section 3 (i), No. 453, dated 14th October, 2004.

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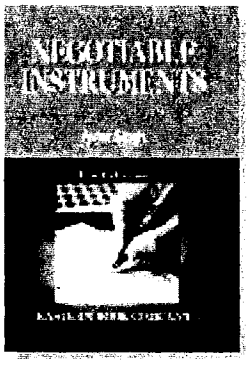

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The work gives a detailed commentary on the three kinds of negotiable instruments recognised by the Indian Negotiable Instruments Act, 1882, viz., promissory note, bill of exchange and cheque. A comprehensive introduction, discusses the definition of a Negotiable Instrument and the kinds of negotiable instruments, the rights and duties of the parties as well as the legal conditions to complete the negotiable instrument, all explained in an unambiguous language. A large number of cases relating to cheques, including dishonour of cheques, have been discussed.

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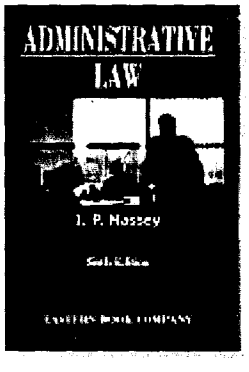

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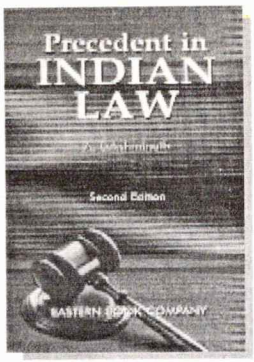

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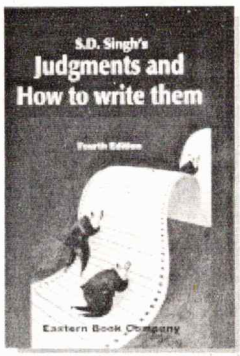

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