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न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान
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JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE
HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

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FROM THE PEN OF THE EDITOR

VED PRAKASH
Director, JOTRI

Esteemed Readers

By the time this issue reaches your hands you might have resumed the supreme duty of justice dispensation. Long back Pond outlined the role of law as a tool of social engineering. This exposition holds good even today. However, the role of Judge has undergone a major transformation. Traditionally, we see that the goddess of Justice is depicted by an image holding a balance in her hand with both eyes covered by a strip of black cloth. This simply implies that a Judge while dealing with a matter should remain uninfluenced by the personalities of the litigants and other extraneous factors which may have the potentiality of affecting his impartiality. Certainly, this does not mean that Judge should remain oblivious of what is happening in the society. With globalization, Economic liberalization, introduction of cyber technology and increasing consciousness among masses for justice, the task of justice dispensation is gradually becoming more and more complicated, therefore, continuous efforts to enrich the knowledge base and sharpen judicial skills are necessary on our part.

The new role of judge requires him to be proactive in the sense that there should be a conscious effort on the part of the Judge to explore the truth rather than to leave it to the parties and assume the role of a referee. We find this message not only in C.P.C and Cr.P.C but also in various pronouncements of the Apex Court.

Again there was a time when the sole duty of the Judge was to impart justice but now we find that under the Legal Literacy Mission a Judge is required to perform a vital role in spreading legal literacy to the masses so as to provide them a better environment to access justice. There is an undercurrent of resistance to this idea because the initial teaching has been not to mix with the public else it may hamper the independence and impartiality of a judge. However, with the changing times it has become necessary that we prepare ourselves to change our attitude so as to join hands with the pious mission of spreading legal literacy. Co-related phenomenon may be to develop the attitude of serviceability. Serviceability means that we consider ourselves as a service provider to the seekers of justice instead of being engrossed with the idea that

we are the ones having sovereign or divine power to do justice. The idea should be of duty to impart justice. An introspection on all these counts may ultimately pave the way for developing the requisite mind frame.

The Institute is going to organize a number of workshops and training programmes in the next semester (July-December, 2006). The detailed calendar in this respect is being included in Part I of this issue. The first programme is related with 'Mediation' (Foundation Training in Mediation Procedures on 8th & 9th July, 2006) which has been designed for lawyers and judicial officers with an idea that we may have a pool of mediators who are skilled in this technique of dispute resolution. Apart that, workshop on 'Consumer Protection Act, 1986' for Presidents of District Consumer Fora is proposed to be held in the third week of July (16th & 17th July, 2006). The idea behind organizing this workshop is to sensitize the Presiding Officers of District Consumer Fora about the importance of consumer protection movement and to motivate them regarding effective and expeditious redressal of consumer grievances so that the consumer protection movement can attain momentum.

The problem of trafficking in women and children and spreading of HIV AIDS is gradually assuming dangerous proportions. A sensitization programme under the aegis of National Legal Services Authority was organized in this respect at Kochi (Kerala) during May, in which I participated as representative of JOTRI. Looking to the gravity of the problem we have included in our programme a two days' workshop in this respect in the third week of August. In August, we are also going to organize a workshop on the 'Role of District Judiciary in Protection of Human Rights'. Apart that, proposal of organizing workshops and training programmes touching various other important areas of justice dispensation including Criminal Justice Administration and Economic offences, Emerging Cyber Jurisprudence, Legal issues in Accident Claim Cases under Motor Vehicles Act, Electricity Act, 2003, Application of Science and Technology in Judiciary, Expeditious Justice through Effective Judicial Administration and Expeditious Execution of Decrees also find place in our training calendar. The overall idea is to sensitize the judicial officers in these specific areas so that it may help in dispensation of quick, qualitative and inexpensive justice.

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APPOINTMENT OF ADDITIONAL JUDGES IN HIGH COURT OF MADHYA PRADESH

Hon'ble Shri Justice Anang Kumar Patnaik, Chief Justice, High Court of Madhya Pradesh administered the oath of office to Hon'ble Smt. Justice Sushma Shrivastava and Hon'ble Shri Justice S.C. Sinho on 15th May, 2006 in a Swearing-in-Ceremony held in the Conference Hall, South Block of High Court at Jabalpur.

Hon'ble Smt. Justice Sushma Shrivastava has been appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on 12.11.1949. Joined Judicial Service as Civil Judge Class II on 18.07.1972. Was promoted to the post of Additional District Judge on 18.07.1988. Also worked as Additional Welfare Commissioner, Bhopal Gas, Bhopal from 11.08.1995 to February 1996. Was District and Sessions Judge, Indore prior to her elevation. Took oath as Additional Judge, High Court of Madhya Pradesh on 15th May, 2006.

Hon'ble Shri Justice S.C. Sinho has been appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on 20.08.1950. Joined Judicial Service as Civil Judge Class II on 20.06.1975. Was promoted to the post of Additional District Judge on 22.06.1989. Worked as Registrar in Arbitration Tribunal, Bhopal from 08.09.1992. Worked as District and Sessions Judge in Satna and Indore. Also worked as Registrar (Vigilance), High Court of M.P. from 31.03.2005 to May, 2005. Was Registrar General, High Court of M.P., Jabalpur prior to his elevation. Took oath as Additional Judge, High Court of Madhya Pradesh on 15th May, 2006.

Hon'ble the Chief Justice Shri A.K. Patnaik delivering inaugural address in the workshop on 'P.C. & P.N.D.T. Act, 1994' held on 19th & 20th May, 2006 in Hotel Satya Ashoka, Jabalpur

Hon'ble Shri Justice Dipak Misra, Chairman, High Court Training Committee speaking in the workshop on - 'P.C. & P.N.D.T. Act, 1994' held on 19th & 20th May, 2006 in Hotel Satya Ashoka, Jabalpur

PART - I

ACCESS TO JUSTICE FOR ALL

JUSTICE DIPAK MISRA
Judge, High Court of M.P.

INTRODUCTION

The Most important function of a Welfare and Socialistic State is the creation of conditions that assure social, economic and political justice. In a democratic set up liberty has its paramountcy but it has to be 'liberty plus'. It should in all its essentialness engulf easy justice, for, to quote, Alexander Hamilton. "the first duty of society is justice". Not for nothing the jurists, philosophers, statesmen, and political thinkers have gone on record to pronounce that justice is the heart of law and the same being a fact need not be scientifically proven. It is clear as the cloudless sky. Being a Welfare State, India is also taking its long strides towards social justice which is the foundation on which our entire constitutional edifice is built. Bentham's doctrine of utilitarianism- "greatest good for the greatest number" and Aristotelian concept of "common good" are insegregably embedded in the plinth of our legal philosophy. Equal justice for all is the cardinal principal on which our administration of justice is based. In order to mitigate economic inequalities and social disabilities, the incorporation of social justice is imperative. That increments the quality of justice. Our democratic commandment must not only be "thou shalt not commit injustice" but also "thou shalt not commit social injustice". Denial of justice on account of poverty amounts to negation of social justice and violation of the principle of fundamental tenet of democracy. Thus, legal aid is a vital limb of democracy and rule of law reflecting the desired fulfilment of the basic objectives of equality.

The concept of legal aid should not be considered as extraneous and foreign to our legal system. It is as an organic and essential part of it in order to establish social righteousness by mitigating and ameliorating legal incapacity and hardships of the weaker sections of the society. Justice P.N. Bhagwati in the Report of the Legal Aid Committee, 1971 stated that legal aid means "providing an arrangement in the society so that the machinery of the administration of justice becomes accessible and is not out of the reach of those, who have to resort to it for the enforcement of rights given to them by law". It was emphatically put by him that the poor and the illiterate should be able to approach the courts and their ignorance and provery should not be an impediment in the way of their obtaining justice from the courts. Legal aid has to keep company with Lok Adalats and Legal Literacy Mission in imparting justice to the underprivileged sections of the society, for the pyramid has to be scientifically structured.

FUNDAMENTAL BASES OF LEGAL AID

1. Constitutional Basis

(a) Preamble

The Preamble of our organic and sensitive constitution reads as under :-

"We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens:

"Justice, social economic and political;

Liberty of thought, expression, belief, faith and worship;

Equality of status and of opportunity;

and to promote among them all

Fraternity assuring the dignity of the individual and the unity and integrity of the Nation;

In our constituent assembly this twenty-sixth day of November, 1949, do hereby adopt, enact and give to ourselves this Constitution."

The aforesaid words lay a clear postulate which offer sufficient evidence that the constitutional philosophy recognizes the fact that the majority of the people in India who are the functional architects have to become the beneficiary of new socialistic order pronounced by the constitution. The Preamble contemplates of social, economic and political justice and equality of status and liberty. On a purposive reading of the Preamble it is clear as noon day that the constitutional goals can be achieved by providing legal aid to the poor, and it melts the need for upheaval of their social and economic status. To put it differently, legal aid in our country has a comprehensive constitutional status and working in furtherance of it, is a step in the ladder of concretisation of constitutional purpose. A negative thinking in this regard would be an anathema to the constitutional conception.

(b) Fundamental Rights

Part III of the Constitution contains certain fundamental rights which reflect and project the concept of legal aid. Article 14, *fon juris* of the Constitution, guarantees equality before law and equal protection of laws. It is worth noting that all modern systems of jurisprudence lay special emphasis on quality in the administration of justice. It forms the main plank. Equal justice makes it necessitous that all have access to law and attain a position to have quality justice. In this context, legal aid becomes, in a way, peremptory for maintaining the right to equality before law. Article 21 of the Constitution which guarantees right to life and personal liberty encompasses free legal assistance to meet the requirement of reasonable, fair and just procedure which is implicit in the vibrant words in which it is engrafted. The State, as has been held, in the case of *Khatri and others Vs. State of Bihar, AIR 1981 SC 928* is under constitutional obligation to provide free legal aid to an accused who is unable to secure legal service on account of his indigence and impecuniosity. Article 22(1) stipulates that no

person shall be denied to consult and to be defended by a legal practitioner of his choice. The said provision provides procedural safeguard. This right has been liberally construed by the Apex Court in the case of *Hussainara Khatoon Vs. Home Secretary, State of Bihar, AIR 1979 SC 1369* wherein it has been held that it is the duty of the State to provide a counsel to a person who cannot afford to engage a lawyer.

(c) Directive Principles of State Policy

Part IV of the Constitution contains the Directive Principles of State Policy which contain certain directives which are fundamental for the governance of the country. The Directive Principles of State Policy supplement the Fundamental Rights with a purpose to bring about a social revolution. In the case of *Jilubhai Nanbhai Khachar Vs. State of Gujarat, AIR 1995 SC 142* it has been laid down that the Fundamental Rights and the Directive Principles of State Policy are the two wheels of the Chariot and endeavour to fructify the social and economic democracy. They are complementary to each other. Article 39-A inserted by the Constitution (42nd Amendment) Act, 1976 purposefully emphasizes on equal justice and free legal aid. It provides that the State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. In the case of *Centre of Legal Research vs. State of Kerala, AIR 1986 SC 2195,* the obligation of the State to provide for comprehensive legal aid programmes with the cooperation and assistance of voluntary social organizations was recognized.

2. Statutory Basis

(a) Code of Civil Procedure, 1908

Order XXXIII of the Code of Civil Procedure, 1908 provides for legal aid to indigent persons by enabling persons who are too poor and cannot afford to pay the court fees to institute a suit without payment of court fees and thus to sue as "forma pauperis". Rule 9-A further makes provision by which the Court has the authority to assign a pleader to an unrepresented indigent person.

(b) Code of Criminal Procedure, 1973

Section 304 of the Code of Criminal Procedure, 1973 provides that in a trial before the Court of Session, if the accused is not represented by a pleader and the Court finds that the accused does not have sufficient means to engage a pleader, then the Court shall assign a pleader of his defence at the expenses of the State. Thus, the right of the indigent accused to free legal aid has been recognized in numerous cases such as in *M.H.Hoskot Vs. State of Maharashtra, AIR 1978 SC 1548 and Suk Das vs. Union Territory of Arunachal Pradesh, AIR 1986 SC 991.*

(c) Legal Services Authorities Act, 1987

In order to give statutory basis to legal services in India taking into account the spirit of Article 39A of the Constitution, the Parliament enacted a legislation in 1987 Known as the Legal Services Authorities Act which is a watershed in the history of legal aid movement in India. The said Act has been amended by the Legal Services Authorities (Amendment) Act, 2002. The main object of the Act is to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities and to organize Lok Adalats to secure that the operation of the legal system promotes justice on the bedrock of equal opportunity. For the fulfilment of this purpose, the Act provides for the establishment of legal services authorities at the National, State and District levels as well as legal services committees at the Supreme Court, High Court and Taluk levels.

MEANS AND WAYS OF IMPARTING LEGAL AID

1. Lok Adalat

Lok Adalat is one of the alternative dispute redressal forums to provide qualitative easy and speedy justice to the common man. The concept of Lok Adalat implies resolution of the people's disputes by discussion, counselling, persuasion and conciliation which results in speedy and easy dispensation of justice with the mutual and free consent of the parties. It is an appropriate and well-known method of participatory justice. Lok Adalat is presently a crystallized phenomenon starting from insurance claims, matrimonial disputes, compoundable offences under the India Penal Code and many other penal enactments, money disputes with the Bank to bifurcation of a Board to various companies and introduction of voluntary retirement scheme, wages revision and certain other service disputes have been matters of fruitful conciliation in Lok Adalats.

Lok Adalats have been a successful medium for peaceful and amicable settlement of disputes as well as for pre-litigation conciliation and settlement achieved with the cooperation of lawyers, litigants, social service institutions, print and electronic media, social workers, judicial officers and practical conciliators. Lok Adalats aim at achieving fair compromise guided by the principles of equity, justice, fair play and good conscience without harbouring any ill-feelings towards others. It is based on humanitarian aspect and equitable principle of mutual compromise and settlement. The Lok Adalat Scheme has also been framed in the State in 1997 to provide for the procedure of organizing and functioning of Lok Adalats. It is alternative dispute resolution system. The participation from a different spectrum is its 'elan vital' and conceptually ostracizes in kind of ivory toweral approach. The social justice is its spine and the amicable settlement in a harmonious atmosphere is its marrow.

2. Legal Aid Camps

Legal Aid Camps are an important means to bring justice to the door steps of the common masses. Such camps are organized by the Legal Services Authorities with the dual purpose of imparting legal literacy and awareness to the backward classes at the spot. The significance of these camps cannot and should not be marginalized. Not only there is statutory command but also it is an obligation which forms the corner stone of rule of law. Any deviant thinking would be violative of rule of law which the law itself does not countenance.

3. Legal Literacy Mission

An important aspect of providing access to justice to all focuses on promotion of legal literacy and knowledge of legal rights and awareness of availability of legal assistance to the deprived and the disadvantaged. The Legal Literacy Mission aims to educate, spread consciousness and make the weaker sections of the society at the grass root levels aware of their constitutional and legal rights and obligations as well as of the benefits of the legal aid schemes and laws made by the Parliament and State Legislatures and policies of the Government. This is achieved by conducting various programmes at many a level. The help and assistance of trained advocates, students of law colleges, social service organizations are availed. The Legal Literacy Camp Scheme, 1999 has been enacted by the Madhya Pradesh State Legal Services Authority for the purpose of constitution of "Saksharata Dal" and organizing Legal Literacy Camps Known as "Vidhik Saksharata Shivir" to provide basic awareness regarding laws and legal process to the common man as an aid to equipping people for a meaningful participation in the process of development. The success of Legal Literacy Mission depends upon three 'C's, conviction, commitment and cooperation. No one should harbour the notion that oneself, in such a mission, has to maintain aloofness, for aloofness can always be maintained by an appropriate and dignified compartmentalization and accurate conceptualization of the philosophy behind the mission. Once one understands the term "mission", any kind of doubt would have no room. Doubts and confusion arise, it is unnecessary to emphasize, because of improper understanding of the terminology and a pedestal pulpit approach.

CONCLUSION

Access to justice is the truest realization of the homosapiens. Legal, economic, and social justice are organically related to the fundamental concept of our constitution. Equal justice is a corrective of inequality which creates a remora in social balance in the society. A concept to provide access to justice is not a charity. It is a constitutional mandate. It is a statutory obligation. It is not an archaic concept which has to be kept in an archaeological archive but it has to be treated as a 'monument' required to stand like a colossus to strive and ensure constitutional pledge. All should remember that every action cannot be in apple pie order, but an effort in that regard is never an exercise in futility.

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MARSHALLING AND APPRECIATION OF EVIDENCE

VED PRAKASH
Director, JOTRI

As a Judge happens to be the backbone of system of dispensation of justice, likewise marshalling and appreciation is the backbone of a judgment or order. A judgment or order lacking in proper marshalling and appreciation cannot stand on its legs. The quality of the order ultimately depends upon proper marshalling and appreciation of evidence. Though having pivotal importance, these two expressions have no where been defined either in Evidence Act or in CPC/Cr.P.C. A reference regarding marshalling and appreciation is found in Rules and Order (Civil) Rule 154 (6) and Rules and Order (Criminal) Rule 240 (4) The approach of the Judge while preparing a judgment or order should be to properly scan and appreciate the evidence which can be possible only when it is properly marshalled.

The entire issue relating to appreciation and marshalling can be examined from the following four angles :

1. Concept of marshalling and appreciation
2. Relevant legal provisions.
3. Fundamental principles of Appreciation of evidence.
4. Specific Principles of appreciation of evidence.

1. CONCEPT OF MARSHALLING AND APPRECIATION :

A reference regarding marshalling is found under Rule 240 sub-rule 4 of Rules and Order (Criminal) to the effect that points that arise for decision should be dealt with one by one, marshalling the evidence for and against and considering the arguments. Rule 154 sub-rule 6 of Rules and Orders (Civil) in this respect provides that as far as possible each point that arises for decision should be taken consecutively and evidence for and again marshalled. Sub-rule 11 of Rule 154 makes it clear that marshalling of evidence is not the repetition of what the witness has said but the critical grouping together of the relevant statements of a particular witness for and against the particular fact.

In simplistic terms marshalling of evidence is the skill of picking up various pieces of evidence on a particular disputed point and putting them together so as to analyse them for arriving at a conclusion. Therefore, when proceeding to marshall evidence, a Judge must have clear picture of various disputed points regarding which the evidence has to be marshalled. Unless the Judge has a clear-cut idea about the points on which he has to appreciate the evidence, the exercise of marshalling of evidence can never be properly performed.

The skill of marshalling can be explained by way of an example. In a case relating to an offence u/s 376 IPC, i.e. rape, the issue relating to the age of

prosecutrix may be one of the important issues particularly when the defence proceeds on the basis of consent of the prosecutrix. In such a situation, the prosecutor may allege that at the time of incident the prosecutrix was of 14 years of age while the defence may come forward with a plea that she is 17 years of age. The evidence regarding age in such a situation may consist of oral testimony of prosecutrix, her parents, brother etc., scientific evidence based on ossification examination, documentary evidence in the shape of school leaving certificate and birth certificate and physical evidence on the basis of physical examination by a doctor.

In order to arrive at a conclusion about the age, all this evidence has to be picked up and put together and then appreciated systematically. This is one example. There may be numerous such examples. A Judge who is not well skilled in the art of marshalling may go to examine evidence on the aforesaid point not conjointly but in a casual manner in chronological order of the witnesses. The effort on the part of the Judge should always be to put together the evidence on a particular point because that helps in developing a proper and complete picture on that issue.

Appreciation of evidence, again, is a skill which has to be developed by gradual practice. The expression "appreciation" in the context of our present discussion means analysing and assessing the worth, value and quality of a particular piece of evidence. Basically it has nothing to do with admissibility. Once a piece of evidence is found to be relevant and admissible, the Judge is required to examine its quality by skillfully analyzing it. It is not bare reproduction of the evidence rather it is systematic, scientific and methodical evaluation of evidence.

The issue relating to appreciation of evidence though does not admit of any rule of universal application and there can be no empirical formula however, certain basic principles regarding appreciation of evidence which have evolved in course of time are well recognized. The four fold time tested criteria to evaluate the evidence is to examine :

firstly, whether the statement is inherently improbable or contrary to the course of nature;

secondly, whether the deposition is mutually contradictory or inconsistent on substantial points;

thirdly, whether the witness is found to be a bitter enemy of the opposite party and therefore, possesses ample motive for causing harm to him;

lastly, whether the demeanour of the witness whilst under examination was abnormal or unsatisfactory.

This four fold test should be preceded by the preliminary test as to whether the witness is really a witness of fact. If the presence of the witness at the

alleged time and place in the given situation is not established satisfactorily then his evidence has to be rejected.

In appreciating the evidence, the approach of the Court must be integrated and not truncated or isolated meaning thereby inferences should not be drawn by picking up an isolated statement from here or there; rather the evidence on a particular point should be examined in the background of remaining statement of the witness as well as other evidence, documentary or oral (See – *Harijana Thirupala v. Public Prosecutor, High Court of A.P., (2006) 6 SCC 470*). This implies that the finding should be based on objective assessment of the evidence and not on conjunctures and surmises. This is the sum and substance of the skill of appreciation.

The probability factor demands that a statement or a piece of evidence must fit in within the rule of probability which means that it should conform to the ordinary human or social behaviour. A statement that a child of 10 years picked up a suitcase from roof top of a bus while the same was moving at a speed of 25 kmph can be outrightly rejected for being totally improbable. Any amount of corroboration will not go to help in reaching a conclusion that the suitcase was really picked up by the boy. On the contrary, a statement to the effect that the suitcase was taken away from the roof top of a stationary bus by a young man cannot be so rejected because this statement is not improbable on its very face though it is another thing that it is found to be truthful or not. The Judge should always keep in mind that unless a piece of evidence confirms on the anvil of probability factor, it cannot be used to draw a particular conclusion because it is rather a qualifying test.

Once a piece of evidence passes the test of probability, the next step will be to examine its intrinsic value.

This involves an exercise of examining the evidence in the light of remaining evidence of the witness as well as that of other witnesses. Here comes the issue of contradictions, omissions, distortions, exaggeration and anomalies. It is not enough to say that there are serious anomalies or contradictions which discredit the witness on a particular point or that anomalies are of trivial nature and therefore, do not go to discredit the witness. The attempt should be to identify the anomalies or the contradictions which are there on a particular point and then to ascertain as to whether these anomalies or contradictions are of trivial nature or material ones. This is in fact the basic process involved in the exercise of appreciation of evidence and therefore, a Judge must observe utmost care and caution while undertaking this very exercise.

Once it is found that evidence adduced on a particular point is probable and qualifies the intrinsic value test then as of caution and prudence, the Judge must try to find out the animus of the witness in deposing before the Court on that point in favour of or against a particular party. Demeanour of the witness

should also be taken into consideration in this respect. If it appears that the witness has a particular animus then though it will not warrant outright rejection of the evidence but it will put the Court on guard and evidence will have to be examined a bit more carefully so as to obviate the risk of unmerited support to a particular party. Evidence which qualifies on the anvil of probability, which passes the test of intrinsic value and which comes from witness having no animus for or against the party can be treated as of highest quality. This is but the result of appreciation.

RELEVANT LEGAL PROVISIONS :

Though we do not as such find a particular provision in the Evidence Act directly providing in respect of appreciation of evidence but there are provisions in the Evidence Act which do have a close bearing on this issue. First and foremost provision being Section 3 which defines **"proved, "disproved"** and **"not proved"**. One significant feature of the definition of the expressions, "proved" and "disproved" is the factor of probability of a particular fact to the satisfaction of the prudent man. This signifies the importance of test of probability. Here it can be stated that Section 3 itself does not make any distinction between proof of a fact in a Civil and a Criminal case, rather basic principle regarding the proof of a fact is one and the same. In practice, however it is well settled that in civil cases facts are to be proved on the basis of preponderance of probabilities while in criminal matters the guilt of the accused has to be proved beyond reasonable doubt.

The next provision of Evidence Act which invites our attention in this connection is Section 114 which says that the Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common cause of natural events, human conduct and public and private business in relation to the facts of a particular case. This again goes to indicate that the Court has always to take into consideration the common course of natural events, human conduct and public and private business. Illustrations appended to the Section further go to indicate how the rule incorporated in Section 114 has to be applied while making certain inference on the basis of certain proved facts. This is but a method of appreciating a particular fact situation on the anvil of natural events, human conduct, public and private business.

Here reference to Illustration (b) of Section 114 of Evidence Act is apposite which says that an accomplice is unworthy of credit unless corroborated in material particulars. This rule however stands diluted by Section 133 which says that a conviction is not illegal merely because it proceeds from an uncorroborated testimony of an accomplice. If we can say so, Section 133 is the only provision in the Evidence Act which demands corroboration. In no other case corroboration is rule of law though in various situations corroboration is insisted upon by way of rule of caution or rule of prudence. The question arises

whether Section 114 Illus. (b) and Section 133 are mutually conflicting? Though it appears to be so on its very face but what can be deduced from the conjoint reading of these two provisions is that framers of the Act did repose more confidence in the wisdom and experience of a Judge rather than in the dead letters of law.

Section 118 is another provision which again has to be kept in view while appreciating the evidence because it envisages the twin conditions for a person to be a competent witnesses -

firstly, the person understands the questions put to him, and

secondly such person possesses faculty to give rational answers to such questions.

No general disqualification is stipulated in Section 118 and it is left to the discretion of the Judge to decide on the basis of the understanding of the witness about his competence. Therefore, to say that a particular witness being police officer may not be fully competent or reliable is something against the spirit of Section 118.

Next comes Section 134 which enacts the basic rule of evidence that no particular number of witnesses shall in any case be necessary for the proof of a fact. This rule must be seen in the background of pleas which are raised before the Courts that a particular witness cannot be relied upon because he/she has not been supported or corroborated by any other witness. Section 134 gives a clear cut message. It is the duty of Judge to record a finding on a disputed point by weighing evidence and not by counting the number of witnesses because it is the quality and not the quantity of the evidence which matters (See - *Maqsoodan and others v. State of U.P., AIR 1983 SC 126*). Long back it was observed by Rowland, J., in *ILR 21 Patna 854* that evidence need not be enumerated but weighed; the safe principle is to consider which story fits in with the admitted circumstances and resulting probabilities. The real test for either accepting or rejecting evidence is to see as to how consistent the story is with itself, how it stands the test of cross-examination and how far it fits with the rest of the evidence in the circumstances of the cases.

In *Masalti v. State of M.P., AIR 1965 SC 202* the Apex Court somehow expressed that where the criminal Court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be ascertained only after it is supported by two or three or more witnesses to provide a consistent account of the incident. However the Apex Court in *Krishna Mochi v. State of Bihar, (2002) 6 SCC 81* observed that the aforesaid desirability may be a matter of prudence but such a requirement can never be said to be inviolable.

AMBIT AND SCOPE OF SECTION 12 (1) (C) OF M.P. ACCOMMODATION CONTROL ACT

C.V. SIRPURKAR
Registrar (Judicial)

S. 12(1) (c) of the Accommodation Control Act (hereinafter referred to as 'Act') may be dissected as hereunder –

That the tenant or any person residing with him –

(1) has created a nuisance

or

(2) has done any act –

(a) which is inconsistent with the purpose for which he was admitted to the tenancy of the accommodation,

(b) which is likely or to affect adversely and substantially the interests of the landlord therein :

Provided that the use by a tenant of a portion of the accommodation as his office shall not be deemed to be an act inconsistent with the purpose for which he was admitted to the tenancy;

Thus in order to claim eviction under this clause a landlord has to plead and prove following facts :

(1) That the tenant or any person residing with him has created nuisance

or

(2) That the tenant or any person residing with him has done any act which is inconsistent with the purpose for which he was admitted to the tenancy of the accommodation,

or

(3) The tenant or any person residing with him has done any act which is likely to affect adversely and substantially the interest of the landlord in such accommodation.

It has been held by a Division Bench of our High Court in the case of *Badamilal Vs Chandraprakash, AIR 1997 MP 214* that the deployment of expression "or" which is disjunctive, instead expression "and", which is conjunctive and further use of expression "which" at two places in the language of S. 12 (1) (c), seems to delink the provision regarding inconsistent user from that regarding disclaimer of title and appears to be indicative of the desire of the legislature to impose liability to eviction on the proof of either of the two categories of the acts.

Transfer of Property Act. Under S. 116 of the Evidence Act a tenant of immovable property is estopped, during the continuation of tenancy, from denying that the landlord, at the beginning of the tenancy, had title to such immovable property. Clause (g) of S. 111 of the Transfer of Property Act, in so far as it is relevant for the purpose of S.12 (1) (c) of the Act provides that a lease of immovable property is determined by forfeiture if the lessee renounces his character of such lessee by claiming the title in himself or setting it up in a third person. In either case the tenant has disputed the title of landlord as a title in a third person or title in him can not co-exist with the title in the landlord. It may be seen that both of these provisions are based on the principle of equity that a person can not approbate and reprobate.

In aforesaid case the Apex Court has unequivocally laid down that the denial of landlord's title or disclaimer of tenancy by tenant is an act which is likely to affect adversely and substantially the interest of landlord and hence is a ground for eviction of tenant within the meaning of S.12(1) (c) 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 a tenant and in clear and unequivocal terms set up the title of the landlord in himself or in a third party. The Supreme Court has clarified that a tenant bona fide calling upon the landlord to prove his ownership or putting the landlord to proof of his title so as to protect himself or to earn a protection made available to him under the rent control law but without disowning his character of possession over the tenancy premises as a tenant, can not be said to have denied the title of the landlord or disclaimed the tenancy. Such an act of the tenant does not attract applicability of S.12 (1) (c) of the Act. It is the intention of the tenant as culled from the nature of the plea raised by him which is determinative of its vulnerability. The Supreme Court has however sounded a note of caution in this regard, by observing that it is to be borne in mind that since the consequences of applying the rule of determination of tenancy by forfeiture as a result of denying landlord's title or disclaimer of tenancy by tenant are very serious, the denial must be in clear and unequivocal terms.

Sometimes difficulty arises in cases of denial of derivative title of landlord by the tenant. The Supreme Court has held in this regard, in the case of *C. Chandramohan Vs Sengottaiyan, (2000) 1 SCC 451* that unless there is notice of transfer of title in favour of successor landlord or attornment of tenancy (agreement to pay rent to successor landlord), tenant's assertion that such landlord is merely a co-owner, does not amount to denial of title, except where the tenant also renounces the character of his possession over the tenanted premises, as a tenant.

Now the question arises whether the event of denial of title of landlord or disclaimer of tenancy by tenant has to be anterior in point of time to initiation of eviction proceedings ? This question has been answered in the case of *Mataji Subbarao Vs. P.V.K. Krishanrao (AIR 1989 SC 2187)*, wherein it has been held that ground of denial of title of landlord can be taken in the proceeding in which the title was denied. To insist that denial of title in the Written Statement can not be taken advantage of in that suit but can be raised only in a subsequent suit, would only lead to unnecessary multiplicity of legal proceedings, as the landlord would be obliged to file a second suit for the ejectment of tenant on the ground of denial of tenancy. It may be noted here that this decision had upset the view consistently taken till then by our High Court.

INCONSISTENT USER

Any act on the part of the tenant or any person residing with him, which is inconsistent with the purpose for which the tenant was admitted to tenancy, can potentially constitute a ground for eviction of tenant from tenanted premises. The question to be asked in this regard is what exactly may amount to inconsistent user incurring liability for eviction ?

In a Single Bench decision (*Smt. B.P. Sethna Vs Shambhoo Prasad, 1972 MPLJ NOC 7*), our High Court has succinctly summarized the law applicable to the subject. According to that decision in order to constitute a ground for eviction of the tenant, switch-over of user imputed to the tenant must be inconsistent with the purpose for which the tenant was admitted to the tenancy. It is not enough merely to prove that subsequent user was different from the initial user. In other words the subsequent user must be incompatible with and not suitable to or agreeing with the initial purpose. Thus the tenant is not liable to be ejected under this clause, unless the subsequent user is intrinsically incompatible with or mutually repugnant or contradictory to the initial purpose. In another case (*Banshilal Vs Kanta Devi, 1980 MPRCJ 110*), meaning of expression "inconsistent" has been held to be discordant, incongruous or incompatible. The Apex Court has observed in a case (*Gurdial Vs Rajkumar, 1989 I MPWN Note 146*) that ordinarily, as long as interest of the landlord is not prejudiced, a small change in the user would not be actionable under this clause. However, it has been held in a recent decision of the Supreme Court in the case of *Goa Urban Co-operative Bank Ltd. Vs Noor Mohammed Sheikh Mussa, (2004) 6 SCC 166* that if it is specified in the lease deed that the premises be used for a particular commercial purpose, then the change of use of premises to one falling in another category of commercial purpose would amount to change of use. Thus, shifting of activity from office purpose to godown purpose would amount to change in the use of the premises and entail liability for eviction. Such a change

can not fall in the same category as shifting of business from one trade to another, which would normally not be termed as inconsistent user. Where the landlord has changed business in the accommodation let out for non-residential purpose, the new business should have some linkage with the original business or it should be allied with or ancillary to the original business (please see- *Jagdish Lal Vs Parmanand, AIR 2000 SC 1822*).

Dilating further on the topic, the Apex Court has observed in the case of *Sant ram Vs Rajinder, AIR 1978 SC 1601* that .... "the life style of the people shapes the profile of the law and not vice-versa. Law, not being an abstraction but a pragmatic exercise, the legal inference to be drawn from a lease-deed is conditioned by the prevailing circumstances. The intention of parties from which we spell out the purpose of the lease is to be garnered from the social milieu. Thus viewed, it is difficult to hold especially when the lease has not spelt it out precisely, that the purpose was exclusively commercial and incompatible with any residential use, even of a portion. It is impossible to hold that if a tenant who takes out petty premises for carrying on a small trade also stays in the rear portion, cooks and eats, he so disastrously perverts the purpose of the lease". Thus use of a portion of petty non-residential accommodation for residential needs does not alter the purpose of tenancy so grievously as to warrant eviction.

Accordingly in the case of *Jagdish Lal (Supra)* change of business from general merchandise to running a restaurant has been held to be inconsistent. Likewise in the case of *Banshilal (supra)* running of laundry in the accommodation let our for residential purpose was held to be inconsistent user. Our High Court has ruled in the case of *Gajanan Saw Mill Vs Gopal Prasad, 2001 (I) MPLJ 630* that where open plot was leased with express condition that no construction would be made thereon, construction of permanent structures alters the purpose for which it was let. In the same way running of a Kirana Shop in the accommodation let out for residential purpose has been held to be actionable under this clause (Please see- *Bhojraj Vs Suchint, 1991 (II) MPWN 22*).

Thus determination of initial purpose for which the tenant was admitted to the accommodation is essential. Thereafter the Court has to see whether subsequent user is inconsistent or incompatible or incongruous or repugnant with the initial user. However the tenant does not incur liability for eviction merely because the user has been changed somewhat.

●

STRIKING OUT DEFENCE U/S 13 (4) AND (6) OF THE M.P. ACCOMMODATION CONTROL ACT, 1961

KAPIL MEHTA
Dy. Director, JOTRI

According to S.13 (6) of the M.P. Accommodation Control Act, (hereinafter called as "the Act") if a tenant fails to deposit or pay any amount as required by that Section, the Court may order the defence against eviction to be struck out.

As per sub-section 4 of the Act, where the Court is satisfied that any dispute referred to in sub-section (3) has been raised by a tenant for reasons which are false or frivolous, the Court may order the defence against eviction to be struck out.

Such defence can be struck out not only in a suit for eviction on ground of non-payment of rent u/s 12 (1) (a) of the Act but also in suits for eviction on one or more grounds u/Ss 12 (1) (b) to 12 (1) (p) of the Act (See. *Jamna Lal v. Radhesyam, 2000 (2) MPLJ SC 385*).

Therefore, if a tenant fails to deposit in the Court or pay to the landlord arrears of rent within one month of the service of summons or within such further time as the Court may allow or if a tenant commits such default further, the Court may order the defence against eviction to be struck out.

Sub-section (2) of the Act, makes it obligatory for the Courts to fix a reasonable provisional rent of the suit property if there is any dispute as to the amount of rent payable by the tenant and sub-section (3) of the Act provides that if there is any dispute as to the person to whom the rent is payable, the Court may direct the tenant to deposit with the Court the amount payable by him under sub-section (1) or (2) of the Act.

In this regard in the matter of *Jamnalal v. Radhay Shyam* (supra) the Apex Court has opined that where the dispute as to the amount of rent payable by the tenant has no nexus with the rate of rent, the determination of such dispute in a summary inquiry is not contemplated under sub section (2) of section 13. Such a dispute has to be resolved after trial of the case. (Consequently, it is only when the obligations imposed in section 13 (1) cannot be complied with without resolving the dispute under sub-section (2) of that section, that section 13 (1) will become inoperative till such time the dispute is resolved by the court by fixing a reasonable provisional rent in relation to the accommodation. It follows that where the rate of rent and the quantum of arrears of rent are disputed the whole of section 13 (1) becomes inoperative till provisional fixation of monthly rent by the court under sub-section (2) of section 13, which will govern compliance of section 13 (1) of the Act. But where rate of rent is admitted and the quantum of the arrears of rent is disputed, (on the plea that the rent for the period in question or part thereof has been paid or otherwise adjusted), sub-section (2) of section 13 is not attracted as determination of such a dispute is not postulated thereunder. Therefore, the obligation to pay/deposit the rent for the second and the third period aforementioned, referred to in section 13 (1),

namely, to deposit rent for the period-subsequent to the notice of demand and for the period in which the suit/proceedings will be pending (that is future rent) does not become inoperative for the simple reason that section 13 (2) does not contemplate provisional determination of amount of rent payable by the tenant. As resolution of that category of dispute does not fall under section 13 (2), the tenant has to take the consequence of non-payment/deposit of rents for the said periods. If he fails in his plea that no arrears are due and the court finds that the arrears of rent for the period in question were not paid, it has to pass an order of eviction against the tenant as no provision of section 13 of the Act protects him.

Striking out the defence for non payment of rent is permissible even though the tenant disputes relationship of land lord and tenant (See-*Smt. Sona Bai and others v. Khoob Chand, AIR 1993 M.P. 173*). In *Jagdish and another v. Omprakash and another, 2001 (1) MPLJ 568*, it has been held by the M.P. High Court that the provisions of Section 13 (6) of the Act are applicable to appeal also (Also see-*Rajesh Omprakash v. Mullo and others, 2000 (2) MPLJ 445*).

The M.P. High Court has, in the matter of *Jagdish Kapoor v. Education Society, AIR 1968 M.P. 1,* made it clear that provisions of Section 13 (6) of the Act are not mandatory and under that Sections, a discretion is conferred upon the Court which has to be exercised judicially having regard to the facts and circumstances of each case. In *Rajesh Omprakash Goel v. Smt. Mullo* (supra), similar view has been expressed by the M.P. High Court that the discretion available under Section 13 (6) of the Act has to be exercised not in an arbitrary manner but on sound judicial principles keeping in mind that though the Act is a beneficent piece of legislation to protect the interest of the tenant, sufficient case has been taken under the provisions of the Act to protect the interest of the landlord as well.

In the matter of *Sankata Devi Verma v. Jagdish Singh Chandel, 1999 (1) MPLJ 497* the M.P. High Court has opined that in a case where an application under Section 13 (6) is moved, it is bounden duty of the Court/RCA to see whether a dispute under Section 13 (2) or 13 (3) has been raised either in the pleading or by a separate application. If there is any dispute raised either under Section 13 (2) or Section 13 (3) of the Act, the Court is duty bound to decide the said dispute. If the Court decides the dispute and directs the tenant to make the payment or deposit the amount in the Court, then the tenant would be obliged to observe the spirit of the order passed by the Court. It is only on failure of the defendant to comply with the orders passed under Section 13 (2) or 13 (3) of the Act, he can be visited with the penalty under Section 13 (6) of the Act.

Now we will see that what may be the consequence of striking out of defence under Section 13 (4) and (6) of the Act.

Although such consequences have nowhere been expressly explained in the Act, but it is clear from the wording of the Section that if defence is struck out of the tenant, he would then be precluded from leading any evidence in respect of defence against eviction available to a tenant under Sections 12 (1) (a) to 12 (1) (p) of the Act.

However it does not mean that the defendant would not be able to lead evidence at all or he would not be entitled to cross-examine plaintiff or his witnesses altogether. He will still be entitled to lead evidence in respect of facts on which his defence is based generally except in respect of defence against eviction available under Section 12 (1) (a) to (p). Again he will also be entitled to cross-examine the plaintiff's witnesses to shake their credibility and to point out the defects of the plaintiff's case.

For example if in any case the defence of the tenant is that plaintiff is not the owner of the disputed property or that there exist no relationship of landlord and tenant between plaintiff and himself and therefore, he is not under liability to pay rent to plaintiff, then in that case the defendant would be at liberty to put evidence in respect of title of the disputed property or in respect of landlord tenant relationship.

The issue relating to effect of the striking out the defence against eviction was considered by Division Bench of M.P. High Court in the case of *Premdas v. Laxmi Narayan Pande, 1964 MPLJ 87* and it was held that, expression 'defence against eviction used in sub-section (4) or sub-section (6) of Section 13 of the Act, means the defence against eviction resting on Section 12 of the Act and where an order under those sub-section is made, striking out the tenants defence against eviction the tenant does not lose his right of putting up a defence to ejectment suit, which does not fall under Section 12. The Court further stated that the issues other than those relating to eviction based on the grounds under Section 12 (1) of the Act can all be tried and even if the defence against eviction is struck out, the tenant shall have a right to contest all other issues.

In this regard another Division Bench of the M.P. High Court in the matter of *Kewal Kumar Sharma v. Satish Chandra Gothi and another, 1991 MPLJ 458=1991 JLJ 86* after considering the law laid down in *Modula India v. Kamakshaya Deo, AIR 1989 SC 162 and in Premdas v. Laxminarayana Pande* (supra) has opined that even where the defence against eviction in a suit, also based on the ground under Section 12 (1) (a) of the Act is struck out in terms of Section 13 (6) for non payment of reasonable provisional rent, as fixed under Section 13 (2) of the Act, the tenant shall still be entitled to contest the issue as regards the quantum of rent, which is different from the ground under which eviction may be sought under Section 12 (1) of the Act. The Court further clarified that he can contest any other issue in the suit (not relating to defence available u/s 12 (1) of the Act) and can get the suit dismissed for any other relief, which may include the claim as to the arrears of rent.

Again in *Mohammad Nasir v. Rabiya Bai, 1998 (1) MPLJ 249* the M.P. High Court observed in para 12 that "As to the consequence of striking out the defence, the Section itself envisages the loss of "defence against eviction". It is unconcerned with any other plea or defence of the defendant, unrelated to ground of eviction, and permissible in law. (Also see *Manorama Devi v. Suresh, 1999 (1) MPLJ 436 and Shyamlal v. S. Guru Bachan Singh, 1999 (2) MPLJ 288.*

The Apex Court while considering the issue relating to consequences of striking out the defence against eviction has held in *Modula India v. Kamakshaya Singh Deo* (supra) that in a case where the defence against delivery of possession of a tenant is struck off, the defendant tenant, subject to the exercise of an appropriate discretion by the Court on the facts of a particular case, would generally be entitled- (a) to cross-examine the plaintiff's witnesses and (b) to address argument on the basis of the plaintiff's case. However, when the defendant is afforded the aforesaid right he would not be entitled to lead any evidence of his own nor can his cross-examination be permitted to travel beyond the very limited objective of pointing out the falsity or weaknesses of the plaintiff's case. In no circumstances should the cross-examination be permitted to travel beyond this legislative scope and to convert itself virtually into a presentation of the defendant's case either directly or in the form of suggestions put to the plaintiff's witnesses.

In *Mohd. Mehmood Hussain v. Asad Ulla Usmani, 1997 (II) MPJR 145,* the M.P. High Court has opined that the consequences of striking out of defence will be – (a) written statement has to be over looked,

(b) Tenant cannot cross-examine the witness on the parts struck off from the written statement.

(c) Defendant can cross-examine to a limited extent and

(d) Tenant can put forth arguments.

Again in the matter of *Manorama Devi v. Suresh* (supra), the M.P. High Court has observed that the obvious effect of the order striking out the defence against eviction as contemplated under Section 13 (6) of the Act, is that the defendant stands restricted from raising any plea which could affect the pleadings of the plaintiff as set out in the plaint in regard to the matter relating to the default, which is a ground envisaged under Section 12 (1) of the Act, for the grant of the decree.

Thus, on the basis of aforesaid analysis it is clear that in a eviction suit on one or more of the grounds of eviction u/Ss 12 (1) (a) to (p) of the M.P. Accommodation Control Act, 1961 on failure of the tenant (defendant) to deposit or pay any amount as required by section 13 of the Act, or to comply with the orders passed by the Court under Section 13 (2) or 13 (3) of the Act, or on satisfaction of the Court that any dispute referred to in Section 13 (3) of the Act, has falsely or frivolously raised by the tenant (defendant), the Court may, in its discretion, order the defence against eviction to be struck down.

In view of the above it is also amply clear that in a case where the defence against eviction of the tenant/defendant is struck off/ under Section 13 (4) or 13 (6) of the Act, the defendant would not be entitled to lead any evidence in respect of defence against eviction available under Section 12 (1) of the Act. However, his general defence would not liable to be struck off.

BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent by this Institute for discussion in the bi-monthly district level meeting of December, 2005. The Institute has received articles from various districts. Articles regarding topic no. 1,3 & 5 received from Satna, Indore and Bhind respectively, are being included in this issue. As we have not received worth publishing articles regarding remaining topics, i.e. topic no. 2 and 4, Institutional Articles are being published on those topics.

1. What is the evidentiary value of a copy of khasra issued by a Patwari and what is the evidentiary value of entry relating to possession made in remarks Column (i.e. Cl. No. 12) of khasra register?

   पटवारी द्वारा प्रदत्त की गयी खसरा की प्रति का साक्ष्यिक मूल्य क्या है तथा खसरा रजिस्टर के कालम क्रमांक 12 में अधिपत्य विषयक प्रविष्टि का साक्ष्यिक मूल्य क्या है?

2. What is the nature of liability of owner/insurer of the vehicle for compensation in case of claim by dependants of the deceased driver where accident was due to the negligence of the driver himself?

   वाहन चालक की लापरवाही के कारण घटित वाहन दुर्घटना में प्रतिकर हेतु उसके आश्रितों के प्रति वाहन स्वामी एवं बीमा कंपनी का उत्तरदायित्व क्या है?

3. Explain the legal position regarding applicability of Section 428 Cr.P.C. where sentence of life imprisonment has been imposed?

   आजीवन कारावास का दण्ड अधिरोपित किये जाने के दशा में धारा 428 दण्ड प्रक्रिया संहिता की प्रयोज्यता का स्वरूप क्या है?

4. What is the nature, ambit and scope of Order 41 Rule 33 C.P.C.?

   व्यवहार प्रक्रिया संहिता, 1908 के ओदश 41 नियम 33 का स्वरूप, परिधि एवं विस्तार क्या है?

5. Whether an instrument stipulating sale of immovable property worth less than Rs. 100/- is required by law to be compulsorily registered?

   क्या रूपया 100/– से कम मूल्य की अचल सम्पत्ति के विक्रय विलेख का पंजीकरण विधि के अन्तर्गत अनिवार्य है?

●

EVIDENTIARY VALUE OF ENTRY RELATING TO POSSESSION IN REMARKS COLUMN OF KHASRA AND A COPY OF KHASRA ISSUED BY PATWARI

Judicial Officers,
District Satna

Most of the litigation in our subordinate courts is relating to land records and the entry in the remark column of Khasra often creates litigation when a person other than recorded Bhumiswami claims title over the land on the basis of these entries. A question arises as to whether these entries have any presumptive value regarding the correctness of land record?

A general provision as regards raising of presumption is contained in S-114 of the Evidence Act. Illustration (e) provides that the court may presume that judicial and official acts have been regularly performed. 'Regularly performed' means done with due regard to form and procedure. It presupposes mandatory provisions of procedure in which case alone in the absence of any evidence to the contrary, the court would presume that all rules and legal form were complied with.

Section 117 of M.P. Land Revenue Code is a special provision with regard to raising of presumption. According to the said provision all entries made under chapter IX (containing sections 104 to 123) in the land records shall be presumed to be correct until contrary is proved. Therefore the presumption under the Section applies only to those entries which are required to be made under the law i.e. under chapter IX and in respect of entries in other land records prepared under the Code. It follows that if any entry existing in a land record is not required to be made under chapter IX of the court or under any other provisions of the Code, no presumption of correctness can arise in respect of such entry.

In *Mithila Prasad and another v. Raguandas Singh and others* (MCC No. 1035 of 1981 decided on the 17th June, 1985 by (Seth, J.) it has been discussed in detail as to what are the land records that are required to be prepared and maintained under the Code and what are the matters in respect of which entries are required to be made in a Khasra or field-book under chapter IX. As has been pointed out in the said case that in so far as the matter relating to occupation of land is concerned, it is apparent from the relevant provisions of the Code and the rules relating thereto that the entries that are required to be made by a Patwari in a Khasra or field book are the name of occupier, right in which the land is held and land revenue or rent payable in respect of it. Column 3 of panchsala Khasra in form 1 is meant for the said purpose. In cases where a person has lawfully acquired any right or interest in respect of any land, he is required to report his acquisition of such right to the Patwari or the

Tahsildar under Section 109. The necessary entry is thereafter made by the Tahsildar in the said record after following the procedure prescribed under Section 110.

Apart from the instances mentioned above, the provision of Chapter IX of the Code or even other provisions of the Code, including the rules framed in respect of them, such as Rules framed under Section 121 of M.P.L.R.C. do not require a Patwari to make any other kind of entry in a Khasra or field in respect of the matter relating to occupation of lands. He is not required to make any entry in the remark column or any other column of a Khasra or field book with regard to any person other than the recorded holder being in occupation of the land unauthorisedly or on the basis of any imperfect title. The State Government realizing that entry made in Column No. 12 of the Khasra by Patwaris gives rise to unwarranted litigations, has issued a circular on 18th August, 1979 (copy of the circular can be seen in Part III of this issue). As per this circular, as soon as the Patwari notices a person other than Bhumiswami in occupation of the land in question, he shall send written intimation within a week to the Bhumiswami and shall also report to the Tehsildar through Revenue Inspector and the Tehsildar shall, after due enquiry, certify such possession.

It is clear from the reading of the circular that the Patwari is not authorised to make such entries in the remark column of Khasra. If he does make such entry, the same cannot have any presumptive value as regards its correctness u/s 117 of the Code. *Churamani v. Ramadhar, 1991 MPLJ 311* is a landmark judgment in this regard in which Division Bench of M.P. High Court has thus held :

> "As far as raising of presumption u/s 114 (e) of the Evidence Act is concerned, there is no reason to think that the term 'official act' as used in the said section has not to be understood in its plain and grammatical meaning of an act which is 'authorised' or 'lawful'. In other words, an official act has to be an act regarding which there is a 'duty' cast on the official concerned to perform it. In the said connection, reference may be made to a decision of the Supreme Court in *Shivlal v. Chetram, AIR 1971 S.C. 2342* where it has been explained that unless it is shown that the official concerned had a duty to do the particular act, the question of drawing any presumption under Section 114 (e) regarding the said act having been regularly performed does not arise. As has already been seen earlier, the relevant provisions of law i.e. the M.P. Land Revenue Code, 1959 and the rules framed thereunder, do not cast any duty on a Patwari to make any entry in the remark column or in

any other column of a Khasra or field book in regard to any person other than the recorded holder being in occupation of the land unauthorisedly or on the basis of any imperfect title. Accordingly, there arises no question of drawing any presumption under Section 114 (e) regarding any such act of the Patwari having been regularly performed."

There is however a contrary view on this point. Hon'ble Justice M.W. Deo in *Budha v. Nathu and others, 1992 RN 62* observed that the column No. 12 is a residuary in nature in which the Patwari is certainly called upon to make note of his actual inspection and local enquiry made in the statutory discharge of his duty under rules 6, 7, 8 of S. 121. Rules 6, 7, 8 (framed under Section 121) ordains that Patwari shall go to the field, make local enquiry and actual inspection of the field and make note on the spot in the Khasra. Single Judge observed :

"Similarly if the Patwari finds a particular person in possession of the filed though he is not either the recorded tenant or a person holding possession in right with land revenue, will the Patwari close eyes to this fact during his actual inspection? The answer must absolutely and manifestly be in the negative. The Patwari, therefore, is called upon to make note of possession without going into the right of such a person and make a note of it in the residuary column No. 12. What was said in the case of *Churamani (supra)* was in fact from the point of view of "fact of continuity of possession". Therefore, the continuity of possession cannot be presumed from entries made by the Patwari."

The judgment in *Churamani's case (supra)* is rendered by a Division Bench while that in *Budha's case (supra)* is by a Single Judge Bench. Although the pronouncement in *Budha's case (supra)* is later in point of time but it is not applicable owing to the principle of precedent.

Moreover, as discussed earlier, the circular issued by the Government prescribes the duty of Patwari in case he finds the land occupied by a person other than the Bhuswami and this duty does not include making an entry in remarks column. Such circular has force of law. In the judgment of Single Judge in *Budha's case (supra)* the scope and effect of this circular has not been taken into account.

Another aspect is also important. A Khasra is a land record which shows the name of occupier of the land. Column No. 3 is prescribed for this purpose. If a particular column is prescribed for the entry of occupation of the land then

there is no need to enter the occupation of other person in remark column without any authority. Although it is true that the remark column is a residuary column, and if a Patwari finds anything over the land on inspection, he may enter that thing in remark column like presence of a tree, well, temple, tapra, road or any other thing. But this authority cannot be extended to enter the occupation of other person on the basis of imperfect title. If a person derives any title over the land, he may report to the Patwari or Tahsildar u/S 109 of MPLRC and only Tahsildar is authorised to make any entry in the remark column after proper enquiry and by proper orders.

[Note from the Institute - Moreover, the aspect of encroachment is required to be noted by Patwari in a separate "register of encroachments" as per Notification No. 3284 - 379 IX/66 dated 25.11.1966, as amended by notification No. 956-3550-IX, dated 16.04.1971. The notification prescribes the Rules regarding "Duties of Patwaris". Thus the aspect of encroachment is required to be noted in a separate register and not in the remarks column.]

Therefore, it is now crystal clear that a Patwari has no authority to make any entry in the remark column of the Khasra about the possession of a person other than a recorded Bhumiswami. There is no requirement of law to make any such type of entry. If a Patwari does so it will have no evidentiary value u/s 114 (e) Evidence Act and u/s 117 M.P. L.R.C.

EVIDENTIARY VALUE OF COPY OF KHASRA ISSUED BY PATWARI -

Rule 13 (4) made under section 256 of M.P. Land Revenue Code, 1959 requires that an application for supply of records in charge of Patwari shall be made to the Tahsildar but there is a proviso appended to this rule that an applicant may obtain an extract copy of any portion of the record of rights directly affecting his rights from the Patwari, if his name is therein recorded. Such a document delivered by the Patwari is a public document within the meaning of Section 74 Evidence Act. A copy of such a document certified in the manner provided as under Section 76 Evidence Act may be produced in proof of contents of the documents (Section 77 Evidence Act). A true copy of Khasra can be said to be certified when on payment of legal fees, a copy of document is given alongwith a certificate written at the foot of such copy that it is a true copy of such document and such certificate shall be dated and subscribed by Patwari with his name and official title and shall be sealed.

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. In *Purashottam v. Mst. Thanbai, 1974 M.P.L.J.S.N. 66* it has been held that a Patwari who has the custody of Khasra, is therefore, entitled under Section 76 Evidence Act to give a certified copy. Such certified copies are admissible un-

der Section 77 of the Evidence Act and there is a presumption of genuineness regarding such copies as per Section 79 Evidence Act.

[Note from the Institute - Thus, a certified copy issued by a Patwari without complying with the provision of law governing its issue raises no presumption in regard to the genuineness (See – Bhinka and others v. Chasran Singh, AIR 1989 SC 960).]

In *Koushalya Bai v. Radha and others 2005 RN 92* it has been held that the copy of Khasra Panchsala in itself is not a certified copy but only a true copy signed by the Patwari and the same could be proved only by examining the Patwari who had issued it.

Therefore, the copy of Khasra given by Patwari is admissible in evidence if it is given as certified copy of the document provided u/s 76 Evidence Act but if it is not issued in the manner prescribed u/s 76, then it would not be the proof of the contents of original Khasra and the examination of Patwari in Court would be necessitated.

[Note from the Institute - In any case, even a duly certified copy of Khasra raises no presumption in respect of entry made in Column No. 12, if such entry pertains to possession of any encroacher.]

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FAREWELL OVATION TO HON'BLE SHRI JUSTICE ASHOK KUMAR TIWARI

Hon'ble Shri Justice Ashok Kumar Tiwari demitted office on 6th June, 2006 after attaining the age of superannuation. Born on 26th June, 1944 in Ujjain, Madhya Pradesh. Obtained B.Sc. degree and then LL.B. degree from Jiwaji University, Gwalior. Enrolled as an Advocate in January, 1970 and started practice at Guna. Directly selected in Higher Judicial Service and joined as Additional District Judge in October 1985. Worked as District & Sessions Judge, District Judge Vigilance and Chairman, State Transport Appellate Tribunal. Was appointed as Additional Judge of the High Court of Madhya Pradesh on 8th September, 2003. His Lordship was accorded farewell ovation on 20th, May 2006 in the High Court of Madhya Pradesh, Bench Indore.

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

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NATURE OF LIABILITY OF OWNER/INSURER IN A CLAIM BY DEPENDENTS OF THE DECEASED DRIVER WHOSE SOLE NEGLIGENCE RESULTED IN ACCIDENT

Institutional Article
VED PRAKASH
Director, JOTRI

The issue relating to the liability of owner or insurer of a motor vehicle regarding death of a person, whose negligence resulted in motor accident has to be examined in the light of various provisions of the Motor Vehicle Act, 1988 (hereinafter the 'Act') related with grant and determination of compensation to the legal representatives of the victim. It also requires a brief over-view of the legislative developments which have taken place in this field.

Liability for compensation in respect of death or bodily injury caused in an accident involving a motor vehicle is basically a tortuous liability. Till 1956 it was within the domain of civil courts to consider and decide the degree of tortuous liability and compensation payable therefor. In 1956 by way of amendment in Motor Vehicle Act, 1939 the mechanism of Motor Accidents Claims Tribunal was introduced with the idea of speedy determination of claim cases relating to motor accidents. Introduction of this mechanism however did not alter the legal basis of liability which continued to remain fault based. This is well reflected from the pronouncement of the Apex Court in *Meenu B. Mehta v. Balkrishna Ramkrishna Nayan, 1977 ACJ 118 SC* wherein it was categorically stated that right to receive compensation can only be against a person who has failed to perform a legal obligation. The Court held that,

> " ..... If a person is not liable legally he is under no duty to compensate anyone else. The Claims Tribunal is a Tribunal constituted by the State Government for expeditious disposal of the motor claims. The general law applicable is only common law and the *law of Torts* .....
>
> It may be that a person bent upon committing suicide may jump before a car in motion and thus get himself killed. We cannot perceive by what reasoning the owner of the car could be made liable."

Having regard to the nature of circumstances which led to sudden spurt in road accidents and considering the difficulty in securing evidence to prove negligence in such cases, the Parliament by Amending Act No. 47 of 1982 incorporated Section 92 -A in Motor Vehicle Act, 1939 (since repealed) which provided for payment of a fixed compensation in case of death or permanent disablement on the basis of no fault liability, meaning thereby the claimant was not required to plead and prove negligence of the owner of the vehicle. Compensation payable under this provision was a limited remedy by way of social justice measure. In *Gujarat State Road Corporation v. Raman Bhai Prabhat Bhai, 1987 ACJ 561 SC*, the Apex Court taking note of this development observed that this

is clearly a departure from the usual common law principle that a claimant should establish negligence on the part of the owner or driver of the motor vehicle before claiming any compensation for the death or permanent disablement caused on account of a motor vehicle accident.

The Motor Vehicle Act, 1939 was replaced in 1988 by Motor Vehicles Act, 1988 whereunder Section 92-A was succeeded by Section 140.

Another perceptible shift in the course of law took place in 1994 when by amending Act No. 54 of 1994, Section 163-A and Section 163-B were inserted in the Act of 1988 which came into force from 14.11.1994. Section 163-A stipulated grant of compensation on no fault basis by resorting to a structured formula appended to the Act.

Sections 140 and 163-A both contemplate payment of compensation on no fault basis. As provided in Section 141, these two remedies are in the alternative in the sense that a person cannot resort to both the remedies.

Though provisions of Section 140 and 163-A contemplate liability on no fault basis still a significant difference is there between the two which is discernible by reading sub-clauses 3 and 4 of Section 140 in juxtaposition to clause 2 of Section 163-A which are as under :

Section 140	**Section 163-A**
Sub clause 3 In any claim for compensation under sub-section (1), the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.	**Sub clause 2** In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.
Sub clause 4 A claim for compensation under sub-section (1) shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement.	**NIL**

From the aforesaid it is apparent that while clause 4 of Section 140 stipulates in so many words that claim for compensation shall not be defeated because of wrongful act, neglect or default of claimant or deceased; no such specific provision is there in Section 163-A. This omission may not be said to be casual one rather it is deliberate and indicates towards the legislative intent in this respect.

A reading of the provisions of the Act of 1988 reveals that a victim of an accident may claim compensation under three different provisions of the Act,

Firstly - fix compensation u/s 140 for death or permanent disablement on no fault basis without incurring any disability for his own negligence or negligence of deceased.

Secondly - compensation for injury or death on structured formula on no fault basis under Section 163-A and

Thirdly - compensation under Section 168 which is basically compensation under tortuous liability where negligence of the owner of the vehicle as well as of the victim of accident has to be looked into to ascertain the liability as well as quantum of compensation.

As regards liability under Section 140 while victim or his legal representatives need not plead or prove the negligence of the owner, the provisions contained in clause 4 do unmistakably indicate that wrongful act, neglect or default on the part of the victim shall not disentitle him for compensation. This clearly is a case of strict liability in which fault on either side may not affect the liability or the quantum of compensation.

In *K. Nandakumar v. Managing Director, Thanthai Periyar Trans. Corpn. Ltd., 1992 ACJ 1095 (Madras),* Madras High Court while interpreting Section 92-A of the Act of 1939 was of the view that where injured or deceased was himself responsible for the accident, payment of compensation on no fault basis was not permissible u/s 92-A. However, this view when assailed before the Supreme Court was reversed in *K. Nandakumar v. Managing Director, Thanthai Periyar Trans. Corpn. Ltd., 1996 ACJ 555.* The Apex Court held that payment of compensation under Section 92-A could not be refused even if the person making claim was himself responsible for such death or permanent disablement.

In view of the aforesaid there may not be scintilla of doubt that liability contemplated u/s 140 is strict and absolute in the sense that even the fault on the part of the victim or deceased will not come in the way of awarding compensation thereunder.

The position u/s 163-A is however, not beyond pale of controversy. While interpreting the provisions of Section 163-A, Himachal Pradesh High Court in *Kokla Devi v. Chet Ram, 2002 ACJ 650 (HP)* and Gujarat High Court in *New India Assurance Co. Ltd. v. Muna Maya Basant, 2001 ACJ 940 (Gujarat)* have taken the view that use of non-obstante clause in Section 163-A gives Section 163-A an overriding effect and therefore, even when the victim himself has caused the accident on account of his own rash and negligent driving, the owner and insurance company shall be liable to pay compensation.

Taking a contrary view and expressing its disagreement with the view taken by the High Courts of Gujarat and Himachal Pradesh, Karnataka High Court in *Appaji (since deceased) and another v. M. Krishna and another, 2004 ACJ 1289* has held that Section 163-A simply absolves the victim or legal representatives of the deceased from pleading and proving negligence on the part of the owner. It does not mean that Section 163-A will be available even in the situation where the accident in question had caused death or physical injury to none except the person who was rash and negligent in using the motor vehicle. The court observed that universal concern was for the safety and the social security of an innocent user of the road and not for a person who had because of his own imprudence, rashness or negligent met with an accident and suffered an injury or death.

In *Oriental Insurance Co. Ltd. v. Hansrajbhai V. Kodala and others, (2001) 5 SCC 175* the Apex Court while considering the scheme and object of Section 163-A observed (Para 15) that the purpose is to avoid long drawn litigation and delay in payment of compensation to the victim or his heirs who are in dire need of relief. It gives vital advantage of *not pleading or establishing any wrongful act or neglect or default of the owner of the offending vehicle or vehicles.*

When examined in the light of provisions contained in Section 163-A, particularly the fact of deliberate omission of a provision in the nature of clause 4 of Section 140 and the object of Section 163-A as spelt out by the Apex Court in *Kodala's case (supra)* the view taken by the Karnataka High Court in *Appaji's case (supra)* appears to be more logical because it aims at striking a balance between the right of a victim to be compensated and the right of the owner of the vehicle not to be held responsible for the sole negligence of the victim. However, the matter does not end here. The Apex Court in *Deepal Girishbhai Soni and others v. Uniter India Insurance Co. and others, (2004) 5 SCC 385* while considering the controversy whether remedy under Sections 166 and 163-A are alternate or simultaneous has observed by way of obiter in para 66 that -

> "Section 163-A of the Act covers cases where even negligence is on the part of the victim."

Viewed in the light of this observation of the Apex Court which is rather binding, the conclusion will be that even if the accident has taken place due to the negligence of the victim, the liability of owner/insurer will remain intact u/s 163-A.

As regards liability u/s 166/168 the legal position which is by now well settled is that if the accident has taken place due to the sole negligence of the claimant/ victim/deceased then remedy u/s 166/168 will not be available to him or his LR's though such person may proceed under the Workman's Compensation Act, 1923 provided he/she comes within the definition of 'workman'. The pronouncement of our own High Court in *Shahjahan Begum and others v. Lakhan Pratap Singh, 2003 (2) ANJ (MP) 194* and *Sidamma v. Vikram Reddy, 2005 ILR 831 (MP)* may profitably be referred to in this respect.

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LEGAL POSITION REGARDING APPLICABILITY OF SECTION 428 CR.P.C. WHERE SENTENCE OF LIFE IMPRISONMENT HAS BEEN IMPOSED

Judicial Officers
District Indore

INTRODUCTION

Before we discuss about the given legal problem, it will be useful to see the provisions of Section 428 Cr.P.C. and general meaning of sentence of life imprisonment.

As per the provision of Section 428 Cr.P.C. 1978, "Where an accused person has on conviction, been sentenced to imprisonment for a term not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him.

So far as the 'sentence of life imprisonment' is concerned, as per Section 45 of I.P.C., "Life" means the life of human being and there is no such provision in I.P.C. or Cr.P.C. or the Prisons Act, whereunder sentence of life imprisonment without any formal commutation or remission by appropriate Government, can be automatically treated as only for a definite period. Thus a sentence of imprisonment for life must *prima facie* be treated as imprisonment for the whole of the remaining period of the convicted person's natural life. (Please see *Gopal Vinayak Godse v. The State of Maharashtra and others, AIR 1961 SC 600*).

Applicability of Section 428 Cr.P.C. where sentence of Life Imprisonment has been imposed -

As we can see that u/s 428 Cr.P.C., setoff of a period of detention can only be claimed where an accused person has been sentenced to imprisonment for a term and sentence of imprisonment for life is termed as imprisonment for whole of the life time of the accused. A question therefore arises as to whether in such a case provision of Section 428 Cr.P.C. is applicable or not.

This question was initially discussed by Apex Court in *Kartar Singh and others v. State of Haryana, AIR 1982 SC 1439 and* it was decided that as per provision of I.P.C. and Cr.P.C. there is a clear distinction between imprisonment for life and imprisonment for a term. The former must mean imprisonment for the remainder of the natural life of the convict and latter must mean imprisonment for a definite or fixed period. Section 428 Cr.P.C. is applicable only where

an accused person has been sentenced to imprisonment for a term and sentence of imprisonment for life would not fall within the purview of this Section.

But after a period of three years, the applicability of provision of Section 428 Cr.P.C. was again re-considered by a larger (five Judges) Bench of the Apex Court in the case of *Bhagirath v. Delhi Administration, AIR 1985 SC 1050* and it overruled the previous decision of *Kartar Singh and others (Supra).*

It was observed by the Apex Court in *Bhagirath's case (supra)* that a person who is sentenced to life imprisonment is sentenced to imprisonment for a term. Under Section 428 Cr.P.C. there are no words of limitation either in the main section or in its marginal note, which would justify restricting the plain and natural meaning of the word 'term', so as to comprehend only sentences which are imposed for a fixed or ascertainable period. A sentence of imprisonment for life is also a sentence of term of life of an accused and to say otherwise would offend not only against the language of the statue but against the spirit of the law. A large number of cases in which the accused suffers long under-trial detentions are cases punishable with imprisonment for life. Usually those who are liable to be sentenced to imprisonment for life are not enlarged on bail. To deny benefit of Section 428 Cr.P.C. to them is to withdraw the application of a benevolent provision which forms a large majority of cases in which such benefit would be needed and justified.

In *State of M.P. v. Ratansingh and others, AIR 1976 SC 1552* it has been observed that a sentence for life imprisonment would enure till the lifetime of the accused as it is not possible to fix a particular period of the prisoner's death. Same principle has been reiterated in *Laxman Naskar v. State of W.B. and others, AIR 2000 SC 2762* and *Mohd. Munna v. Union of India and others, 2005 AIR SCW 4524.* In *Mohd. Munna's case (supra),* the Apex Court has also observed that imprisonment for life is a class of punishment different from ordinary imprisonment, which could be of two descriptions namely, rigorous or simple. whereas imprisonment for life is to be treated as rigorous imprisonment for life.

Legal position regarding applicability of Section 428 Cr.P.C.

Now the question arises as to how the applicability of Section 428 Cr.P.C. is useful where sentence of life imprisonment has been imposed. Generally, imprisonment for life would mean imprisonment for the remainder of life and in such case whatever period undergone by the accused as undertrial detention is of no use, as the accused has to remain in jail till his death. But there are provisions under Sections 432 and 433 Cr.P.C. under which if an order is passed by the appropriate authority, then the period of detention undergone by the accused as undertrial shall be setoff against the sentence of life imprisonment imposed upon him, subject to the provision contained in Section 433 Cr.P.C.

Under Section 432 Cr.P.C. the appropriate Government may at any time remit the whole of the remaining part of the punishment of a person to which he has been sentenced as prescribed therein and under Section 433 Cr.P.C., the appropriate Government may without the consent of the person sentenced, commute a sentence of imprisonment of life for imprisonment for a term not exceeding fourteen years. Section 55 of IPC confers similar powers to the appropriate Government. When an order is passed by the appropriate Government under Section 432 or 433 Cr.P.C., then the period of detention undergone by the accused as undertrial prisoner shall be set off against the sentence of life imprisonment imposed upon him,, subject to the provision of Section 433 Cr.P.C. which provides that where a sentence of imprisonment for life is imposed on a person for an offence for which death is one of the punishment provided by the law, then such person cannot be released from prison unless he has served atleast fourteen years of imprisonment. [Please see *Bhagirath's case (supra)*].

Conclusion

As discussed and crystallized above in respect of the given topic, the legal position is that Section 428 Cr.P.C. is applicable where sentence of life imprisonment has been imposed subject to the limitations summarized as under -

The period of detention undergone by an accused as undertrial prisoner shall be setoff against the sentence of life imprisonment imposed upon him under Section 428 Cr.P.C. subject to the provision contained in Section 433 A Cr.P.C. and provided that orders have been passed by the appropriate Government under Section 432 or 433 Cr.P.C. otherwise such accused person has to remain in jail till his death.

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'Justice is the end of government. It is the end of the civil society. It ever has been and ever will be pursued, until it be obtained or until liberty be lost in the pursuit'.

JAMES MADISON

व्यवहार प्रक्रिया संहिता, 1908 के आदेश 41 नियम 33 का स्वरूप, परिधि एवं विस्तार

न्यायिक अधिकारीगण
जिला दमोह

आदेश 41 नियम 33 के प्रावधान का प्रभाव अधीनस्थ न्यायालय द्वारा पारित निर्णय और जयपत्र को अपीलीय न्यायालय द्वारा परिवर्तित करने से संबंधित है और यहां तक कि अपील न्यायालय का निर्णय उन पक्षकारों को भी प्रभावित कर सकता है जिन्होंने अपील प्रस्तुत नहीं की है। आदेश 41 नियम 33 के प्रावधान सामान्य नियम के अपवाद के रूप में हैं, और विशेष रूप से आदेश 41 नियम 42 के प्रावधानों के भी अपवाद के रूप में है, जिन्हें सावधानी और सतर्कता से उपयोग किया जाना चाहिए और इस तरह इस नियम का उद्देश्य अपील न्यायालय को पक्षकारों के बीच पूरी तरह न्याय करने के लिए सशक्त बनाया जाना है और अपील न्यायालय ऐसी डिक्री पारित कर सकता है जो वास्तव में पारित की जानी चाहिए थी चाहे उनमें से किसी भी पक्ष ने अपील प्रस्तुत नहीं की हो।

इस बिन्दु पर आज से 43 वर्ष पूर्व माननीय सर्वोच्च न्यायालय की संविधान पीठ द्वारा न्यायदृष्टांत *पन्नालाल वि. बाम्बे राज्य ए.आई.आर. 1963 सुप्रीम कोर्ट पेज 1516* में सिद्धान्त प्रतिपादित किये गये हैं जो आज भी अनुकरणीय हैं। माननीय सर्वोच्च न्यायालय ने प्रतिपादित किया है कि आदेश 41 नियम 33 के प्रावधान अपील न्यायालय को ऐसा निर्णय पारित करने की शक्ति देते हैं जो उस मामले में पारित किया जाना चाहिए और ऐसा निर्णय न केवल अपीलार्थी और प्रत्यार्थी के बीच हो सकता है बल्कि परस्पर प्रत्यार्थियों के बीच भी उनके अधिकारों को प्रभावित कर सकता है। अपीलीय न्यायालय न केवल अपील स्वीकार या अस्वीकार कर सकती है बल्कि प्रत्यार्थी के पक्ष में भी ऐसा अनुतोष दे सकती है जो उस मामले में न्यायोचित रूप से दिया जाना चाहिए भले ही उस प्रत्यार्थी के द्वारा आदेश 41 नियम 22 के अन्तर्गत प्रति आपत्ति नहीं की गई हो। अतः अपीलीय न्यायालय अपवाद स्वरूप परिस्थितियों में न्याय की आवश्यकता के आधार पर प्रति आपत्ति पेश न करने वाले पक्षकार के पक्ष में भी अनुतोष दे सकती है। उपरोक्त मत की पुष्टि पुनः माननीय सर्वोच्च न्यायालय की तीन न्यायमूर्ति की खण्डपीठ द्वारा *के. मुधुस्वामी गुन्डूर वि. एन. पलोनिप्पा गुन्डूर के मामले ए.आई.आर. 1998 सुप्रीम कोर्ट पेज 3118* में करते हुए यह प्रतिपादित किया गया है कि आदेश 41 नियम 33व्य.प्र.सं. अपीलीय न्यायालय को शक्ति देती है कि वह ऐसी डिक्री या आदेश पारित करे जो उस मामले में पारित की जानी चाहिए भले ही अपील डिक्री के एक भाग के प्रति की गई हो या उस पक्षकार ने अपील ही नहीं की है बशर्ते अधीनस्थ न्यायालय के समक्ष वह बिन्दु उचित रूप से उठाया गया हो। किन परिस्थितियों में नियम–33 के प्रावधानों का उपयोग होना चाहिए, यह प्रत्येक मामले की परिस्थितियों पर निर्भर करता है। सामान्य नियम यह है कि कोई डिक्री पक्षकारों पर बन्धनकारक है जब तक कि उसे अपास्त न कर दिया जावे लेकिन अपवाद स्वरूप परिस्थितियों में आदेश 41 नियम 33 व्य.प्र.स. के अन्तर्गत उस पक्षकार के पक्ष में भी डिक्री पारित की जा सकती है जिसने अपील नहीं की है।

माननीय म.प्र. उच्च न्यायालय द्वारा भी न्याय दृष्टांत *तेजकुमार जैन वि. पुरूषोत्तम + अन्य ए.आई.आर. 1981म.प्र. पेज 55* में यह प्रतिपादित किया गया है कि जहाँ किसी प्रत्यार्थी ने प्रति आपत्ति नहीं की हो वहाँ वह न केवल डिक्री का समर्थन कर सकता है, बल्कि इस संबंध में भी तर्क कर सकता है कि जो बिंदु उसके विरूद्ध निर्णीत हुये हैं, उसके पक्ष में निर्णीत किये जाने चाहिए। माननीय म.प्र. उच्च न्यायालय द्वारा एक अन्य

न्यायदृष्टांत *राजेश वि. रूकमणी 2000(4) एम.पी.जे.आर. 436* में यह प्रतिपादित किया गया है कि प्रथम अपीलीय न्यायालय तथ्यों के संबंध में अंतिम न्यायालय है और उसका कर्तव्य है कि वह स्वयं साक्ष्य का विश्लेषण और मूल्यांकन कर स्वतंत्र निष्कर्ष दे।

सामान्य नियम यह है कि उस पक्ष को जिसके विरूद्व निर्णय हुआ है अपील या प्रति अपील पेश करना चाहिए। माननीय सर्वोच्च न्यायालय ने न्याय दृष्टांत *सुपरिटेंडेंट इन्जीनियर वि.बी. सुब्बा रेड्डी, ए.आई. आर. 1999 एस.सी. 1747* में यह प्रतिपादित किया है कि अपील पक्षकारों का महत्वपूर्ण अधिकार है जो विधि से अद्भुत होती है। प्रति आपत्ति अपील की तरह है और उसे आदेश 41 नियम 1 सी.पी. सी. के अन्तर्गत अपील के ज्ञापन के स्वरूप का होना चाहिए जिस पर न्याय शुल्क भी देय होता है। जहाँ अपील वापिस ले ली जाती है या निरस्त कर दी जाती है, वहाँ प्रति आपत्ति को सुना जा सकता है और उसका निश्चय होना चाहिए लेकिन यदि प्रत्यार्थी ने अपील प्रस्तुत नहीं की है तो वह डिक्री का समर्थन अन्य आधारों पर कर सकता है परंतु यदि वह डिक्री में परिवर्तन चाहता है, तो उसे प्रतिआपत्ति पेश करना चाहिए। यह हो सकता है कि कोई पक्षकार उस निर्णय को स्वीकार कर ले जो आंशिक रूप से उसके विरूद्व है, परंतु यदि अपीलार्थी उस निर्णय को चुनौती देता है तो विधि के अन्तर्गत ऐसे प्रत्यार्थी को दूसरा अवसर इस प्रावधान के अंतर्गत प्राप्त है कि वह प्रतिआपत्ति प्रस्तुत करे यदि वह उस निर्णय व डिक्री से असंतुष्ट है। माननीय म.प्र. उच्च न्यायालय द्वारा न्याय दृष्टांत *कमल कुमार वि. श्रीमती इमरती बाई*, 2003 (1) जे.एल.जे.296 में भी प्रतिपादित किया गया है कि प्रत्यार्थी डिक्री का समर्थन किसी अन्य आधार पर कर सकता है। उसके लिये उसे प्रति आपत्ति पेश करने की आवश्यकता नहीं है। माननीय सर्वोच्च न्यायालय ने *बजरंग लाल शिवचन्द रूईया वि. शशिकांत रूईया (2004) 5 एस.सी.सी. 272* में यह प्रतिपादित किया है जहाँ एक ही निर्णय से अनेक प्रतिवादी पीड़ित हैं परंतु उनमें से कुछ अपील नहीं करते है एवं एक प्रतिवादी की अपील कार्यालय आपत्ति के कारण असफल हो जाती है तो इस आधार पर दूसरे प्रतिवादी को अपील से सहायता देने से इंकार नहीं किया जा सकता है और आदेश 41 नियम 33 व्य.प्र.सं. के अंतर्गत न्यायालय को न्याय साम्या और सद्विवेक के आधार पर समुचित आदेश पारित करने के अधिकार हैं।

संक्षेप में यह कहा जा सकता है कि आदेश 41 नियम 33 व्य.प्र.सं. के अन्तर्गत अपीलीय न्यायालय को ऐसे न्यायोचित आदेश को पारित करने का अधिकार है जो उस प्रकरण की परिस्थितियों में पारित किये जाने चाहिए, भले ही किसी पक्षकार ने अपील या प्रतिआपत्ति नहीं की हो। लेकिन सामान्य नियम यह है कि यदि कोई प्रत्यार्थी उस डिक्री में परिवर्तन चाहता है तो उसे अपील या प्रति आपत्ति पेश करना चाहिए और आदेश 41 नियम 33 की शक्तियाँ अपवाद स्वरूप परिस्थितियों में ही उपयोग में लाई जानी चाहिए और अपील न्यायालय ऐसा निर्णय पारित कर सकता है , जो न केवल अपीलार्थी और प्रत्यार्थी के हितों को प्रभावित करता है बल्कि परस्पर प्रत्यार्थीगण के बीच उनके पक्ष में या उनके विरूद्व अनुतोष देने वाला हो।

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AMBIT AND SCOPE OF O.41 R.33 C.P.C.

Institutional Supplement
Shailendra Shukla
Addl. Director, JOTRI

Many a times a civil suit is decreed in part only i.e. one relief granted and the other relief rejected. In such a case both the contesting parties may file

appeals. However, if one of the parties has filed an appeal, the other party can agitate the grievance in respect of denied relief by way of filing cross objection in the same appeal as per O.41 R.22 C.P.C.. It is not required that a counter appeal by such party be filed. If such respondent does not wish to agitate the decree but wants to say that the finding in respect of any issue ought to have been decided in his favour, he is not even required to file cross objection and he may simply make an averment in his reply. Cross objections invite court fees just as an appeal does.

Thus we see that on making cross-objection or simple averment under O.41 R. 22 C.P.C., appellate court may pass suitable decree or modify the finding on any issue respectively. Can the appellate court modify the decree on its own without any express prayer by any party or not? Yes, it can and the concerned provision is O. 41 R. 33 C.P.C. which runs as under :

> **O.41 R. 33 : Power of Court of Appeal .-**The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees.
>
> Provided that the Appellate Court shall not make any order under Section 35 A, in pursuance of any objection on which the Court from whose decree the appeal is preferred as omitted or refused to make such order.

O.41 R. 33 CPC gives wide powers to the appellate Courts to pass such further order or decree as the case may require. Thus O. 41 R. 33 C.P.C. acts as an exception to O. 41 R. 22 C.P.C. as in the latter provision the aggrieved party must approach the appellate court by way of cross objection etc. but in the former provision, there is no such requirement. This power can be exercised in favour of any of the party or respondents even though such party may not have filed any appeal or cross objection. Further, the power may be exercised even when appeal has been preferred only against a part of the decree. and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objec-

tion and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees.

The question that remains is, whether the power accruing to the appellate court under O. 41 R. 33 CPC to grant relief to any party on its own is uncontrolled or whether the power can be exercised subject to certain restrictions?

Hon'ble the Apex Court, in many a judgments has laid down the principle that the power of appellate Court under O.41 R.33 CPC is not uncontrolled and must be used in exceptional circumstances only. The apex court, in the judgment of *Banarsi and others v. Ramphal, AIR 2003 SC 1989*, has, after referring to a number of earlier citations, laid down that normally a person is required to file cross objections under O.41 R.22 C.P.C. so that he may pray for a relief denied to him in the suit. However the appellate Court may *suo motu* grant relief to him under O.41 R.33 C.P.C. if the relief denied to him is so inseparable from the relief granted to the other party that an injustice would result or inconsistent decree would follow if a suitable order is not made under discretionary powers of the appellate Court under O.41 R.33 C.P.C..

It would be worthwhile to narrate the facts in short which prompted the Apex Court to lay down the aforestated guidelines. A suit for specific performance had been filed by a party. The trial Court found the party not entitled for specific performance but only found it entitled for money decree. An additional decree was also passed that if the money was not paid within two months, then the sale deed will be executed. The decree pertaining to additional relief was appealed against by the judgment debtor. The First Appellate Court not only rejected the appeal but also modified the original decree by exercising power under O.41 R.33 CPC and granted original relief prayed for i.e. relief for specific performance. This judgment was challenged before the Apex Court. The Apex Court held that nothing had prevented the respondent from filing his own appeal or taking cross objections against that part of the decree which straightaway refused a decree for specific performance. Since such a person could have taken cross objection under O.41 R.22 CPC, no relief could be granted in his favour under O.41 R.33 CPC as it is not the case that relief of specific performance was intertwined or inseparable from the original relief sought by appellant which was in respect of that part of decree in which it was directed that the sale deed will have to be executed if the money is not deposited within two months.

Thus we can see that one of the conditions in which discretionary power under O.41 R.33 CPC can be exercised is when part of the decree not appealed against is inseparable from the part of the decree appealed against.

Further, as has been laid down in *Rameshwar Prasad v. Sham Bihari Lal and another, AIR 1963 SC 1901,* the power under O.41 R.33 CPC can be exercised in exceptional cases when its non-exercise will lead to difficulties in the adjustment of rights of various parties. It has been categorically held by the Apex Court in *Harihar Prasad Singh and others v. Vlamiki Prasad Singh and others, AIR 1975 SC 73* that normally a party who is aggrieved by the decree should prefer appeal or cross objection, as the case may be, against the decree and only in exceptional circumstances this requirement may be done away with. One such instance is where as a result of interference in favour of the appellant, it becomes necessary to re-adjust the rights of other parties. Second instance may be a case where the relief prayed for is single and individual but is claimed against a number of defendants. In such case if suit is decreed and there is only an appeal by some of the defendants and relief is granted to them, then a possibility may arise that in respect of same subject matter, two inconsistent and contradictory decrees are in existence. In such case the Court shall have to interfere under O.41 R.33 CPC and will be required to adjust the relief granted in respect of other defendants who have not appealed against the decree.

The Apex Court in *Banarsi and others (supra)* has not only laid down instances when such relief may be granted, but has also categorized negative covenants when such power under O.41 R. 3 C.P.C. may not be exercised. These are as follows :

> **firstly**, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the Court;
>
> **secondly**, a claim given up or lost cannot be revived; and
>
> **thirdly**, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such part.

A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate Court exercising power under Rule 33 of Order 41.

Thus it can easily be seen that although O.41 R.33 CPC provides wide discretionary powers to the Appellate Court, however such powers can be exercised only in exceptional circumstances which may be those enumerated as discussed here-in before and discretionary power of the Appellate Court cannot be exercised in an untrammeled manner.

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REQUIREMENT AS TO REGISTRATION OF SALE DEED FOR IMMOVABLE PROPERTY WORTH LESS THAN RUPEES ONE HUNDRED

Judicial Officers,
District Bhind

The problem is whether an instrument stipulating sale of immovable property worth less than Rs. 100/- is required by Law to be compulsorily registered.

The word "immovable property" has been defined in Section 2 (6) of the Registration Act, 1908 and is as follows :

> **Section 2 (6)** - "immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass;

Thus we can see that immovable property can be "tangible" such as land, buildings or "intangible" such as right of way, benefit arising out of land etc.

The term "immovable property" is also mentioned in Section 3 of Transfer of Property Act. As per this Section, "immovable property" does not include standing timber, growing crops or grass.

Statutory provisions pertinent to the moot question as to whether instrument of sale of immovable property worth less than Rs. 100/- is required by law to be compulsorily registered are Section 17 (1) (b) of Registration Act and Section 54 of Transfer of Property Act.

Section 17 (1) (b) of Registration Act, 1908 provides that a non-testamentary instrument when purport or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property, should be registered.

Section 54 of T.P.A. provides that the transfer of tangible immovable property of the value of one hundred rupees and upwards can be made only by registered instrument but in case of tangible immovable property of the value of less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of property.

A combined reading of these provisions makes it clear that instrument worth Rs. 100/- or upwards must be registered, but if the value of instrument of immovable property is less than Rs. 100/- and the property is tangible, then transfer should be made either by delivery of property or by registered instrument, meaning thereby that when transfer is made by delivery of possession then instrument is not required to be registered. But if the transfer is not accompanied with delivery of possession, the instrument is to be compulsorily registered.

In *Mathura Pd. v. Chandra Narain, AIR 1921 P.C. 8* the facts were that at the time of transfer of immovable property valued at less than Rs. 100/-, neither the possession was delivered nor the transfer deed registered. The Privy Council held that it was not a valid sale. It was also held that in such circumstances transfer should be made only by registered instrument but where possession was delivered at the time of transfer of immovable property, then registration is not at all necessary for valid sale.

When a valid sale is complete and additionally an unregistered instrument of transfer is also executed then such instrument may be used as a proof of oral agreement between the parties which together with the actual delivery of physical possession shall be admissible under Section 91 of Indian Evidence Act.

It can thus be concluded that registration of instrument worth less than Rs. 100/- of immovable property is not necessary when actual possession is delivered at the time of transfer of property but registration is necessary when actual possession is not delivered at the time of transfer.

Since delivery is not possible in transfer of non tangible immovable property, therefore the instrument effecting such transfer requires registration even though the property is valued below hundred rupees.

Moreover, if a person other than the owner is already in possession of immovable property worth less than Rs. 100/- and the owner wants to sell the said immovable property then in such circumstances, in order to make the transfer complete, the instrument must be registered.

[Note from the Institute - A question arises as to whether it is imperative for the applicability of Section 54 Transfer of Property Act that the property be delivered simultaneously with execution of sale deed? This question was answered in negative in the case of Lalji v. Someswar, 1980 (II) MPWN 2. The Court in reaching the conclusion, relied upon the judgement pronounced by the Nagpur High Court in Bhukkoo v. Hirijabai, ILR 1949 Nagpur 534.]

विधिक समस्याऐं एवं समाधान

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

समस्या एवं निदान

क्या धारा 80 (2) सिविल प्रक्रिया संहिता के अन्तर्गत वाद प्रस्तुति की अनुमति दिये जाने पर भी धारा 80 (1) के अन्तर्गत शासन को विहित सूचना पत्र देना आवश्यक है?

सिविल प्रक्रिया संहिता (अत्र पश्चात् मात्र "संहिता") की धारा 80 (2) की शब्दावली से ही यह स्पष्ट होता है कि शासन के विरूद्ध अत्यावश्यक त्वरित या तत्काल स्वरूप की सहायता की वांछना करते हुए न्यायालय की अनुमति से कोई वाद धारा 80 उपधारा (1) के अन्तर्गत आवश्यक सूचना पत्र दिये बिना प्रस्तुत किया जा सकता है। ऐसा कोई प्रावधान संहिता में नहीं है जिससे उक्तानुसार अनुमति से वाद प्रस्तुत करने के उपरांत शासन को सूचना पत्र भेजे जाने की आवश्यकत प्रकट हो।

संहिता की धारा 80 (2) के अन्तर्गत सूचना पत्र दिये बिना वाद प्रस्तुति की अनुमति न्यायालय द्वारा प्रदान नहीं किये जाने पर वादी के लिये यह आवश्यक होगा कि धारा 80 (1) के अन्तर्गत विहित सूचना पत्र प्रेषित करें एवं 2 माह की निर्धारित अवधि व्यतीत होने पर न्यायालय ऐसा वाद स्वीकार कर सकेगा किन्तु धारा 80 (2) के अन्तर्गत न्यायालय द्वारा वाद प्रस्तुति की अनुमति प्रदान किये जाने पर वादी के लिये धारा 80 (1) के अन्तर्गत सूचना पत्र प्रेषित करने की कोई विधिक अनिवार्यता नहीं होगी। इस संबंध में न्याय दृष्टांत *हिमाचल स्टील रि-रोलर्स एवं फेबिक्रेटर्स विरूद्ध भारत संघ, ए.आई.आर. 1988 इलाहाबाद 191 (खण्डपीठ) तथा गिरधारी लाल चड्ढा विरूद्ध भारत संघ, आई.एल.आर. (1983) देहली 630* अवलोकनीय है ।

न्याय दृष्टांत संघ शासित क्षेत्र चण्डीगढ़ विरूद्ध पी.के. खन्ना, ए.आई.आर. 1985 पंजाब एवं हरियाणा 32 में यह मत व्यक्त किया गया है कि संहिता की धारा 80 (2) के अन्तर्गत वांछित सहायता प्रदान नहीं किये जाने की दशा में न्यायालय को धारा 80 के परन्तुक के अनुरूप वाद वादी को इस निर्देश के साथ लौटा देना चाहिये कि धारा 80 (1) के अन्तर्गत आवश्यक सूचना पत्र निर्वाह उपरात 2 माह की अवधि पूर्ण होने पर वाद प्रस्तुत किया जाए।

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क्या धारा 173, दण्ड प्रक्रिया संहिता के अन्तर्गत पुलिस प्रतिवेदन (अभियोग पत्र या प्रतिवेदन) प्रस्तुत हो जाने पर भी न्यायिक मजिस्ट्रेट द्वारा पुलिस को अग्रिम अनुसंधान के लिये आदेश दिया जा सकता है?

इस संबंध में दण्ड प्रक्रिया संहिता की धारा 173 (8) विचारणीय है, जो इस प्रकार है:–

> "इस धारा की कोई बात किसी अपराध के बारे में उपधारा (2) के अधीन मजिस्ट्रेट को रिपोर्ट भेज दी जाने के पश्चात आगे और अन्वेषण को प्रवरित करने वाली नहीं समझी जाएगी तथा जहां ऐसे अन्वेषण पर पुलिस थाने के भारसाधक अधिकारी को कोई अतिरिक्त मौखिक या दस्तावेजी साक्ष्य मिले वहां वह ऐसे साक्ष्य के संबंध में अतिरिक्त रिपोर्ट या रिपोर्टें मजिस्ट्रेट को विहित प्रारूप में भेजेगा, और उपधारा (2) से (6) तक के उपबंध ऐसी रिपोर्ट या रिपोर्टों के बारे में जहां तक हो सके, ऐसे लागू होंगे, जैसे वे उपधारा (2) के अधीन भेजी गई रिपोर्ट के संबंध में लागू होते हैं।

इस संबंध में सर्वोच्च न्यायालय द्वारा न्याय दृष्टांत *रामलाल नारंग विरूद्ध राज्य (देहली प्रशासन), ए. आई.आर. 1979 सु.को. 1791* में यह व्यक्त किया गया है कि अभियोजन पक्ष और प्रतिरक्षा पक्ष दोनों के ही यह हित में है कि पुलिस के पास अग्रिम अनुसंधान हेतु एवं पूरक प्रतिवेदन प्रस्तुति हेतु शक्तियां हों । मजिस्ट्रेट द्वारा दण्ड प्रक्रिया संहिता की धारा 173 के अन्तर्गत प्रस्तुत पुलिस प्रतिवेदन के आधार पर अपराध का संज्ञान ले लिये जाने पर भी पुलिस का आगामी अनुसंधान का अधिकार समाप्त नहीं होता है एवं नवीन सूचना प्रकाश में आने पर पुलिस उक्त अधिकार का प्रयोग आवश्यकतानुसार कर सकती है तथा ऐसा करने के लिये न्यायालय से औपचारिक अनुमति लेते हुए न्यायालय के प्रति पुलिस अपना सम्मान व्यक्त कर सकती है।

उच्चतम न्यायालय द्वारा न्याय दृष्टांत *कश्मीरी देवी विरूद्ध देहली प्रशासन, ए.आई.आर. 1988 सु.को. 1323* में आरोपी की पुलिस अभिरक्षा में हुई मृत्यु के प्रकरण में किये गये दूषित एवं पक्षपातपूर्ण अनुसंधान उपरांत अभियोग पत्र प्रस्तुत होने संबंधी तथ्यों को दृष्टिगत रखते हुए संबंधित मजिस्ट्रेट, जिसके समक्ष अभियोग पत्र प्रस्तुत हुआ था को यह निर्देश दिया गया कि वह धारा 173 (8) दण्ड प्रक्रिया संहिता के अन्तर्गत प्रदत्त की गई अपनी शक्तियों का प्रयोग करते हुए केन्द्रीय अन्वेषण विभाग (सी.बी.आई.) को उचित रूप से अनुसंधान का आदेश दे।

इस संबंध में सर्वोच्च न्यायालय द्वारा न्याय दृष्टांत *श्री भगवान श्रीपदा वल्लभ वेकंट विश्वान्दधा महाराज विरूद्ध आंध्रप्रदेश राज्य एवं अन्य, 1999 क्रि.ला.ज.3661 सु.कों.* में व्यक्त किया गया है कि पुलिस द्वारा अंतिम प्रतिवेदन (Final Report) प्रस्तुत कर दिये जाने पर भी मजिस्ट्रेट संबंधित आरोपी को सुनवाई का अवसर दिये बिना धारा 173 (8) दण्ड प्रक्रिया संहिता के अन्तर्गत आगामी अनुसंधान के लिये आदेश दे सकता है । इस संबंध में न्याय दृष्टांत *संघ लोक सेवा आयोग विरूद्ध एस. पपैया एवं अन्य, (1997) 7 एस. सी.सी. 614* भी अवलोकनीय है।

इसी प्रकार न्याय दृष्टांत *हेमन्त धस्माना विरूद्ध केन्द्रीय अन्वेषण विभाग (C.B.I.) 2001 क्रि.ला.ज. 4190, सु.को.* में भी उच्चतम न्यायालय द्वारा यह विनिश्चित किया गया है कि यद्यपि दण्ड प्रक्रिया संहिता की धारा 173 (8) में उप धारा (2) के अन्तर्गत प्रतिवेदन प्रस्तुति उपरांत भी न्यायालय द्वारा पुलिस को आगामी अनुसंधान के लिये निर्देशित किये जाने की शक्ति का विनिर्दिष्टतः उल्लेख नहीं है तथापि न्यायालय द्वारा पुलिस को दण्ड प्रक्रिया संहिता की धारा 173 (8) के अन्तर्गत आगामी अनुसंधान के लिये आदेश दिया जा सकता है।

न्याय दृष्टांत *पन्नालाल विरूद्ध डा. वीरभान 1992 जे.एल.जे. 327* में म.प्र. उच्च न्यायालय की खण्ड पीठ द्वारा यह विनिश्चित किया गया है कि अभियोग पत्र प्रस्तुति उपरांत पुनः अन्वेषण का आदेश देने के लिये न्यायालय के समक्ष ठोस नवीन तथ्य, आधार या अतिरिक्त साक्ष्य उपलब्ध होना आवश्यक है।

उक्त न्याय दृष्टांतों में प्रतिपादित विधि एवं दण्ड प्रक्रिया संहिता की धारा 173 (8) के आलोक में यह स्पष्ट है कि न्यायालय को नवीन सारवान तथ्यों या अतिरिक्त साक्ष्य प्रकट होने पर अभियोग पत्र प्रस्तुत हो जाने के उपरांत भी पुलिस को अतिरिक्त या पुनः अनुसंधान करने के लिये आदेश देने की अधिकारिता प्राप्त है।

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व्यक्तिगत उपस्थिति से अभिमुक्त आरोपी का परीक्षण (धारा 313 दण्ड प्रक्रिया संहिता) उसकी अनुपस्थिति में करने विषयक विधिक स्थिति क्या है?

दण्ड प्रक्रिया संहिता, 1973 की धारा 313 प्रावधित करती है कि प्रत्येक विचारण में अभियुक्त को व्यक्तिगत रूप से साक्ष्य में उसके विरूद्ध प्रगट परिस्थितियों को स्पष्ट करने का अवसर न्यायालय द्वारा दिया जाना चाहिए। जैसा की धारा 313 में प्रावधित है, समंस मामले में जहां अभियुक्त को व्यक्तिगत उपस्थिति से अभिमुक्ति दी गई है, वहां उसे ऐसे परीक्षण से भी अभिमुक्ति दी जा सकेगी।

उक्त प्रावधानों से स्पष्ट है कि सामान्यतया अभियुक्त की परीक्षा व्यक्तिगत रूप से की जानी चाहिए। लेकिन वारंट मामले या सत्र मामले में भी कभी-कभी ऐसी स्थिति उत्पन्न हो सकती है कि अभियुक्त अपने आप को न्यायालय के समक्ष परीक्षण हेतु व्यक्तिशः उपस्थित करने में असमर्थ हो। क्या ऐसी आपवादिक स्थितियों में अभियुक्त का परीक्षण उसकी व्यक्तिगत उपस्थिति के बिना किया जा सकता है?

इस सम्बन्ध में विस्तृत प्रतिपादन माननीय सर्वोच्च न्यायालय ने *वासवराव एवं अन्य विरूद्ध कर्नाटक राज्य एवं अन्य, ए.आई.आर. 2000 एस.सी. 3214* के मामले में किया है । माननीय सर्वोच्च न्यायालय के अनुसार यद्यपि सामान्य नियम यह है कि अभियुक्त का परीक्षण व्यक्तिशः किया जावे लेकिन यदि न्यायालय इस बारे में संतुष्ट है कि अभियुक्त को न्यायालय के समक्ष उपस्थित होने में भारी भरकम व्यय करना होगा अथवा वह शारीरिक निशक्तता के कारण लम्बी यात्रा करने में असमर्थ है या कोई अन्य कठिनाई है, तो उन मामलों में जहां पहले से ही अभियुक्त को व्यक्तिगत उपस्थिति से अभिमुक्ति दी गई है, अभियुक्त की परीक्षा लिखित प्रश्नावली के द्वारा की जा सकेगी । इस हेतु यह आवश्यक है कि अभियुक्त की ओर से असमर्थता के आधार पर शपथ पत्र समर्थित आवेदन पत्र न्यायालय के समक्ष प्रस्तुत किया जाये जिसमें यह आश्वासन भी हो कि

व्यक्तिगत परीक्षण न होने पर उसके हित प्रतिकूलतः प्रभावित नहीं होंगे और न ही पश्चात्वर्ती प्रक्रम पर वह इस बारे में कोई आपत्ति उठायेगा। न्यायालय द्वारा दी गई प्रश्नावली पर अभियुक्त शपथ पत्र द्वारा समर्थित उत्तर न्यायालय में प्रस्तुत कर सकेगा।

क्या कृषि भूमि के संबंध में प्रस्तुत वाद में सिविल प्रक्रिया संहिता के ओदश 1 नियम 3–बी के प्रावधानों के अन्तर्गत मध्यप्रदेश राज्य को पक्षकार बनाये जाने पर धारा 80 (1) सिविल प्रक्रिया संहिता के अन्तर्गत वांछित सूचना पत्र भेजना जाना आवश्यक है?

इस संबंध में सिविल प्रक्रिया संहिता (अत्र पश्चात् "संहिता") की धारा 80 की उपधारा (4) के प्रावधान अवलोकनीय हैं कि यदि आदेश 1 नियम 3–बी में उल्लेखित वाद या कार्यवाही में राज्य को प्रतिवादी या प्रतिप्रार्थी के रूप में संयोजित किया जाता है या आदेश 1 नियम 10 (2) के अन्तर्गत प्रदत्त शक्तियों का प्रयोग करते हुए न्यायालय द्वारा राज्य को प्रतिवादी या प्रतिप्रार्थी के रूप में संयोजित करने का आदेश दिया जाता है तो इस स्वरूप की वाद या कार्यवाही वादी या प्रार्थी द्वारा धारा 80 उपधारा (1) के अन्तर्गत सूचनापत्र देने में लोप के कारण निरस्त नहीं होगी।

इसके अतिरिक्त इस संबंध में 'संहिता' की धारा 80 (1) के प्रावधानों से भी यह स्पष्ट होता है कि वांछित सूचनापत्र शासन के विरूद्ध या लोक अधिकारी के विरूद्ध उस दशा में आवश्यक है जबकि प्रश्नांकित कार्य ऐसे अधिकारी द्वारा पदीय क्षमता के अन्तर्गत किया जाना तात्पर्यित हो। इस संबंध में न्याय दृष्टांत *रेवती मोहन दास विरूद्ध जतिन्द्र मोहन घोष एवं अन्य, ए.आई.आर. 1934 पी.सी. 96* में प्रतिपादित न्याय सिद्धांत अवलोकनीय है।

दूसरे शब्दों में उस स्थिति में सूचनापत्र भेजे जाने की विधिक आवश्यकता नहीं है जब शासन या लोक अधिकारी के विरूद्ध कोई वाद कारण उत्पन्न नहीं हुआ हो और उनके विरूद्ध किसी सहायता की मांग भी वाद या कार्यवाही में नहीं की गई हो।

मध्यप्रदेश उच्च न्यायालय द्वारा इस संबंध में न्याय दृष्टांत *मनमोहन विरूद्ध प्रकाश चन्द्र एवं अन्य, 1995 एम.पी. एल.जे. नोट 36* में यह व्यक्त किया गया है कि राज्य शासन को वाद में उचित पक्षकार के रूप में जोड़े जाने पर राज्य के विरूद्ध किसी सहायता की मांग नहीं की जाने पर 'संहिता' की धारा 80 के अन्तर्गत विधिक सूचनापत्र के निर्वाह न होने पर भी वाद प्रचलन योग्य होगा।

तदानुसार मध्यप्रदेश राज्य के विरूद्ध कोई सहायता चाहे बिना उसे औपचारिक पक्षकार के रूप में संयोजित करते हुए संस्थित वाद में 'संहिता' की धारा 80 (1) के अन्तर्गत वांछित सूचना पत्र दिये जाने की कोई विधिक आवश्यकता नहीं है।

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JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE
HIGH COURT OF M.P., JABALPUR

TRAINING CALENDAR - YEAR 2006 (JULY 2006 - DECEMBER 2006)

S. NO.	NAME OF THE COURSE	TARGET GROUP	NO. OF PARTICIPANTS	DURATION	PERIOD	VENUE
06/II/01	Foundation Training in Mediation Procedure	Lawyers and Judicial Officers	30	2 days	08.07.06 and 09.07.06 Saturday and Sunday	J.O.T.R.I
06/II/02	Workshop On Consumer Protection Act, 1986	Presiding Officers of District Consumer Forums	22	2 days	16.07.2006 & 17.07.06 Sunday and Monday	J.O.T.R.I
06/II/03	Workshop on 'Reference Under Land Acquisition Act - Law, Principles and Procedures'	Additional District Judges	40	2 days	31.07.06 & 01.08.06 (Monday & Tuesday)	J.O.T.R.I
06/II/04	Workshop on 'Cases u/s 138 N.I. Act'	Judicial Magistrates First Class	40	1 day	05.08.2006 (Saturday)	Indore
06/II/05	Workshop on- 'ADR and Mediation'	Judicial Officers	50	1 days	06.08.2006 (Sunday)	Indore

S. NO.	NAME OF THE COURSE	TARGET GROUP	NO. OF PARTICIPANTS	DURATION	PERIOD	VENUE
06/II/06	Training in 'Juvenile Justice and Child Psychology'	C.J.M./A.C.J.M. & J.M.F.C.	40	4 days	21.08.2006 & 24.08.2006 (Monday, Tuesday) Wednesday & Thursday)	J.O.T.R.I.
06/II/07	Workshop on 'Protection of Human Rights- Role of District Judiciary'	Civil Judges Class I & Class II	40	2 days	30.08.06 & 31.08.2006 (Wednesday & Thursday	J.O.T.R.I.
06/II/08	Advance Course Training	Fast Track Judges	50	6 days	11.09.2006, 12.09.2006, 13.09.2006, 14.09.2006, 15.09.2006 &16.09.2006 (Monday Tuesday, Wednesday, Thursday, Friday & Saturday)	J.O.T.R.I.
06/II/09	Workshop on - 'Criminal Justice Administration and Economic Offences'	Chief Judicial Magistrates	40	5 days	25.09.2006, 26.09.2006, 27.09.2006 27.09.2006, 28.09.22006 & 29.09.06 (Monday, Tuesday, Wednesday, Thursday & Friday)	J.O.T.R.I.

S. NO.	NAME OF THE COURSE	TARGET GROUP	NO. OF PARTICIPANTS	DURATION	PERIOD	VENUE
06/II/10	Workshop on - Emerging Cyber Jurisprudence'	Additional Chief Judicial Magistrate	40	2 days	12.10.2006 & 13.10.06 (Thursday & Friday)	J.O.T.R.I.
06/II/11	Basic Training in Office Administration	Class II and Class III Employees of Establishment of High Court	50	2 days	14.10.2006 & 15.10.06 (Saturday & Sunday	J.O.T.R.I.
06/II/12	Workshop on -'Legal Issues in Accident Claim Cases under Motor Vehicles Act'	Additional District Judges	40	2 days	27.10.2006 & 28.10.2006 (Friday & Saturday)	J.O.T.R.I.
06/II/13	Workshop on - 'Trafficking in Women and Children and HIV/AIDS'	Judicial Magistrates First Class	40	2 days	03.11.2006 & 04.11.2006 (Friday & Saturday)	J.O.T.R.I.
06/II/14	Workshop on-'Electricity Act, 2003'	Special Judges under Electricity Act, 2003 and Officers of Electricity Department	60 (30+30)	1 day	13.11.2006 (Monday)	Conference Hall, M.P.S.E.B., Jabalpur

S. NO.	NAME OF THE COURSE	TARGET GROUP	NO. OF PARTICIPANTS	DURATION	PERIOD	VENUE
06/II/15	Workshop on - 'Application of Science and Technology in Judiciary'	Additional District and Sessions Judges and Civil Judges	40	5 days	04.12.2006, 05.12.2006, 06.12.2006, 07.12.2006 & 08.12.2006 (Monday, Tuesday, Wednesday, Thursday & Friday)	J.O.T.R.I.
06/II/16	Workshop on - 'Expeditious Justice through Effective Judicial Administration'	Additional District and Sessions Judges (Senior)	40	2 days	14.12.2006 & 15.12.2006 (Thursday & Friday)	J.O.T.R.I.
06/II/17	Basic Training in Office Administration	Class II and Class III Employess of Establishment of High Court	50	2 days	18.12.2006 & 19.12.2006 (Monday & Tuesday)	J.O.T.R.I.
06/II/18	Workshop on - 'Expeditions Execution of Decress'	Civil Judge Class I	40	2 days	22.12.2006 & 23.12.2006 (Friday & Saturday)	J.O.T.R.I.

PART - II

NOTES ON IMPORTANT JUDGMENTS

132. CRIMINAL PROCEDURE CODE, 1973 – Section 173
Final Report submitted u/s 173, acceptance of – The report should not be accepted mechanically – The complainant or aggrieved person should also be heard while considering the final report – Law explained.
Ran Singh Sikarwar v. The State of M.P. and others
Reported in 2006 (2) MPHT 18 (DB)

Held:

Unfortunately, the Chief Judicial Magistrate, Morena appears to have mechanically accepted the final report oblivious of his statutory duty under Section 173 of the Code of Criminal Procedure. In *Bhagwant Singh vs. Commissioner of Police and another, AIR 1985 SC 1285* the Supreme Court after examining at length the provisions of Section 173 of the Code of Criminal Procedure, 1973, has held :–

> "The report may on the other hand state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the Magistrate again has an option to adopt one of three courses: (1) he may accept the report and drop the proceeding or (2) he may disagree with the report and taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process or (3) he may direct further investigation to be made by the police under sub-section (3) of Section 156."

In the present case, the Chief Judicial Magistrate, Morena, has mechanically accepted the report and dropped the proceedings and the records do not indicate that he has at all applied his mind to evidence that was collected during investigation for or against the case as stated in the FIR.

The aforesaid judgment of the Supreme Court in *Bhagwant Singh* (supra) further lays down the law that when the Magistrate is not inclined to take cognizance of offence and issue process, the informant must be given a notice to be heard so that he can make his submissions to persuade the Magistrate to take cognizance of offence and issue process. In fact, Section 173 (2) (ii) of the Cr.PC itself provides that the Officer shall also communicate the action taken by him to the person, if any, by whom the information for committing offence, was first given, in such manner as may be prescribed by the State Government. In the present case, no communication was made to the petitioner about submission of the final report either by Police or by the Magistrate and no opportunity whatsoever has been given to the petitioner of being heard before final report

was accepted. In *Public Service Commission Vs. S. Papaiah and others, (1997) 7 SCC 614* the Supreme Court relying on its decision in *Bhagwant Singh's case* (supra), quashed the order of the Magistrate accepting the final report on the ground that the informant had not been given such opportunity of hearing at the time of consideration of final report.

As has been held by the Supreme Court in *Bhagwant Singh's case* (supra), where the opinion of the Police Officer is that no offence appears to have been committed, the Magistrate also has the option to direct further investigation to be made by the Police under sub-section (3) of Section 156. In *Kashmiri Devi Vs. Delhi Administation and another, AIR 1988 SC 1323* the Supreme Court after coming to the conclusion that *prima facie* the police had acted in a partisan manner to shield the real culprits and that the investigation had not been done in a proper and objective manner held that in the interest of justice, it was necessary to get a fresh investigation made through an independent authority so that truth may be known. In *Ajab Singh and another vs. State of Uttar Pradesh and others, JT 2000 (3) SC 165* the Supreme Court found that a concocted story had been set out in the affidavits of the respondents and therefore directed investigation to be carried out by the CBI.

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133. NEGOTIABLE INSTRUMENTS ACT, 1881– Section 138
Demand notice u/s 138, Proviso (b) – Whether demand can be for lesser amount than the cheque amount – Held, Yes – Law explained.
Bankat Agrawal v. State of M.P.
Reported in 2006 (2) MPHT 67

Held:

Learned Counsel for the petitioner submitted that this is the notice for demand of Rs. 45,000/- only, which was not the cheque amount and as the cheque amount was of Rs. 50,000/- so the demand should have been for Rs. 50,000/- and not for a lesser amount. If some amount has been paid then remedy left for the complainant, was to file a civil suit and not complaint under Section 138 of Negotiable Instruments Act.

In the case of *Suman Sethi Vs. Ajay K. Churiwal and another, 2000 (2) M.P.H.T. 411 (SC)* the question regarding giving notice under proviso of clauses (b) and (c) of Section 138 of the Act was considered by the Hon'ble Supreme Court and it was held in Para 8 that –

> "It is well settled principle of law that the notice has to be read as a whole. In the notice, demand has to be made for the "said amount" i.e., cheque amount. If no such demand is made the notice no doubt would fall short of its legal requirement. Where in addition to "said amount" there is also a claim by way of interest, cost etc., whether the notice is bad would depend on the language of the notice. If in a notice while giving up break up of the claim the cheque amount, in-

terest damages etc., are separately specified, other such claims for interest, cost etc., would be superfluous and these additional claims would be serverable and will not invalidate the notice. If, however, in the notice an omnibus demand is made without specifiying what was due under the dishonoured cheque, notice might well fail to meet the legal requirement and may be regarded as bad."

It is clear from the observations made by the Hon'ble Supreme Court, that while stating the cheque amount, against which, specific demand in the notice given under the Proviso (b) of Section 138 of the Act has been made and it must be clearly stated in the notice that what was due under the dishonoured cheque, if it is not specified in the notice that what was due under the dishonoured cheque then the notice might well fail to meet legal requirement and may be regarded as bad.

In the present case the notice given by the respondent to the petitioner clearly in specific words shows that out of the amount of Rs. 50,000/- which was amount of cheque, Rs. 45,000/- are due, as Rs. 5,000/- were paid in between by the petitioner and, therefore, applying the principles laid down by the Hon'ble Supreme Court in the facts of the present case the notice which was given by the respondent to the petitioner can not be said to be bad at this stage when the case is yet to be tried by the Trial Court.

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134. EVIDENCE ACT, 1872 – Section 165

Duty of the Judge u/s 165 to put questions to clarify ambiguity – Duty is sacrosanct and pious and must be discharged carefully – Law explained.

Radheshyam v. State of M.P.

Reported in 2006 (2) MPHT 84 (DB)

Held :.

Under Section 165 of the Evidence Act, it is the duty of the Judge to put specific question to the witness or witnesses to clarify ambiguity. Under Section 311 of the Cr.PC power is given to recall any witness at any stage before delivery of judgment for examination, cross-examination or re-examination but it is crystal clear that the learned Trial Court failed to discharge its sacrosanct and pious duty while recording the statement of P.W. 10 Dushyant Kumar Joshi, Station House Officer, who was posted on the date of recording of his statement, *i.e.,* 5-2-1996 at Police Station, Bhavgarh District Mandsaur.

Hon'ble Apex Court in the case of *Ramchander vs. The State of Haryana* (AIR 1981 SC 1036) has observed as under :–

> "The adversary system of trial being what it is there is an unfortunate tendency for a Judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable

distortions flowing from combative and competitive elements entering the trial procedure. If a Criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. But this he must do without unduly trespassing upon the functions of the public prosecutor and the defence Counsel, without any hint of partisanship and without appearing to frighten or bully witnesses. Any questions put by the Judge must be so as not to frighten, coerce, confuse or intimidate the witnesses."

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135. INDIAN PENAL CODE, 1860 – Sections 228-A & 376
Rape – The offence of rape amounts to violation of basic human rights as well as right to life contained in Art. 21 of the Constitution – Disclosure of identity of victim, restriction on – The name of victim should not even be disclosed in judgment – Law explained.
Dinesh alias Buddha v. State of Rajasthan
Judgment dated 28.02.2006 passed by the Supreme Court in Criminal Appeal No. 263 of 2006, reported in (2006) 3 SCC 771

Held :

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

Section 228-A IPC makes disclosure of the identity of the victim of certain offences punishable. Printing or publishing the name or any matter which may make known the identity of any person against whom an offence under Sections 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. True it is, the restriction does not relate to printing or

publication of judgment by the High Court or the Supreme Court. But keeping in view the social object of preventing social victimisation or ostracism of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of this Court, the High Court or lower court, the name of the victim should not be indicated. We have chosen to describe her as "victim" in the judgment. (See *State of Karnataka v. Puttaraja, (2004) 1 SCC 475.*)

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136. SCHEDULED CASTES ANDTHE SCHEDULEDTRIBES (PREVENTION OF ATROCITIES) ACT, 1988 – Section 3 (2) (v)
To constitute offence u/s 3 (2) (v), the same must have been committed against person on the ground that such person is a member of SC/ST – Law explained.
Dinesh alias Buddha v. State of Rajasthan
Judgment dated 28.02.2006 passed by the Supreme Court in Criminal Appeal No. 263 of 2006, reported in (2006) 3 SCC 771

Held:

At this juncture it is necessary to take note of Section 3 of the Atrocities Act. As the preamble to the Act provides, the Act has been enacted to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes. The expression "atrocities" is defined in Section 2 of the Atrocities Act to mean an offence punishable under Section 3. The said provision so far relevant reads as follows:

"3 *Punishments for offences of atrocities.* – (1) * * *

(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,–

* * *

> (v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine."

Sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of the Scheduled Castes or the Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not the case of the prosecution that the rape was committed on the victim since she was a member of a Scheduled Caste. In the absence of evidence to that effect, Section 3(2)(v) has no application. Had Section 3(2)(v) of the Atrocities Act been applicable then by operation of law, the sentence would have been imprisonment for life and fine.

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137. CIVIL PROCEDURE CODE, 1908 – Section 151 and O. XXIII R.1
Recall of the order permitting withdrawal of the suit – Whether recall permissible u/s 151 ? Held, Yes – Law explained.
Jet Ply Wood (P) Ltd. and another v. Madhukar Nowlakha and others Judgment dt. 28.2.2006 passed by the Supreme Court in Civil Appeal No. 1367 of 2006, reported in (2006) 3 SCC 699

Held :

As indicated hereinbefore, the only point which falls for our consideration in these appeals is whether the trial court was entitled in law to recall the order by which it had allowed the plaintiff to withdraw his suit.

From the order of the learned Civil Judge (Senior Division), 9th Court at Alipore, it is clear that he had no intention of granting any leave for filing of a fresh suit on the same cause of action while allowing the plaintiff to withdraw his suit. That does not, however, mean that by passing such an order the learned court divested itself of its inherent power to recall its said order, which fact is also evident from the order itself which indicates that the court did not find any scope to exercise its inherent powers under Section 151 of the Code of Civil Procedure for recalling the order passed by it earlier. In the circumstance set out in the order of 24.9.2004, the learned trial court felt that no case had been made out to recall the order which had been made at the instance of the plaintiff himself. It was, therefore, not a question of lack of jurisdiction but the conscious decision of the court not to exercise such jurisdiction in favour of the plaintiff.

The aforesaid position was reiterated by the learned Single Judge of the High Court in his order dated 4.2.2005 though the language used by him is not entirely convincing. However, the position was clarified by the learned Judge in his subsequent order dated 14.3.2005 in which reference has been made to a Division Bench decision of the Calcutta High Court in *Rameswar Sarkar v. State of W.B., 1986 Cal 19* which in our view, correctly explains the law with regard to the inherent powers of the Court to do justice between the parties. There is no doubt in our minds that in the absence of a specific provision in the code of Civil Procedure providing for the filing of an application for recalling of an order permitting withdrawal of a suit, the provisions of Section 151 of the Civil Procedure Code can be resorted to in the interest of justice. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act *ex debito justitiae* for doing real and substantial justice between the parties. This Court had occasion to observe in *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal, 1962 Supp (1) SCR 540* as follows : (SCR p. 459)

> "It is well settled that the provisions of the Code are not exhaustive for the simple reason that the legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them."

Based on the aforesaid principle, the Division Bench of the Calcutta High Court, in almost indentical circumstances in *Rameswar Sarkar (supra)* allowed the application for withdrawal of the suit in exercise of inherent powers under Section 151 of the Code of Civil Procedure, upon holding that when through mistake the plaintiff had withdrawn the suit, the court would not be powerless to set aside the order permitting withdrawal of the suit.

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138. SERVICE LAW :

Temporary employment – Whether person in temporary/contractual employment has a right to be absorbed in permanent service? Held, No – Doctrine of legitimate expectation not applicable in such a case – Law explained.

Secretary, State of Karnataka and others v. Umadevi (3) and others Judgment dated 10.04.2006 passed by the Supreme Court in Civil Appeal No. 3595 of 1999, reported in (2006) 4 SCC 1

Held:

When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognised by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in *Rai Shivendra Bahadur (Dr.) v. Governing Body of the Nalanda College, AIR 1962 SC 1210.* That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the Government to make them permanent since the employees cannot show that they

have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent.

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139. CIVIL PROCEDURE CODE, 1908 – O.47 R.1

Review – Ambit and scope of O.47 R.1 – Power of review not to be confused with appellate power – Power not to be exercised on the ground that decision is erroneous on merits – Law explained.

Haridas Das v. Usha Rani Banik (Smt) and others

Judgment dated 21.03.2006 passed by the Supreme Court in Civil Appeal No. 7948 of 2004, reported in (2006) 4 SCC 78

Held:

In order to appreciate the scope of a review, Section 114 CPC has to be read, but this section does not even adumbrate the ambit of interference expected of the court since it merely states that it "may make such order thereon as it thinks fit". The parameters are prescribed in Order 47 CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict. This is amply evident from the Explanation to Rule 1 of Order 47 which states that the fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the court should exercise the power to review its order with the greatest circumspection. This Court in *Thungabhadra Industries Ltd. v. Govt. of A.P. (1964) 5 SCR 174* held as follows: (SCR p. 186)

> "[T]here is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error... where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."

In *Meera Bhanja v. Nirmala Kumari Choudhury, (1995) 1 SCC 170* it was held that:

"8. It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC. In connection with the limitation of the powers of the court under Order 47 Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review the orders under Article 226 of the Constitution, this Court, in *Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389* speaking through Chinnappa Reddy, J. has made the following pertinent observations:

> 'It is true there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found, it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate court'." (SCC pp. 172-73, para8)

A perusal of Order 47 Rule 1 shows that review of a judgment or an order could be sought: (a) from the discovery of new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the applicant; (b) such important matter or evidence could not be produced by the applicant at the time when the decree was passed or order made; and (c) on account of some mistake or error apparent on the face of the record or any other sufficient reason.

In *Aribam Tuleshwar Sharma v. Aribam Pishak Sharma,* (supra) this Court held that there are definite limits to the exercise of power of review. In that case, an application under Order 47 Rule 1 read with Section 151 of the Code was filed which was allowed and the order passed by the Judicial Commissioner was set aside and the writ petition was dismissed. On an appeal to this Court it was held as under: (SCC p. 390, para 3)

> "It is true as observed by this Court in *Shivdeo Singh v. State of Punjab, AIR 1963 SC 1909* there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of

new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court to correct all manner of errors committed by the subordinate court."

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140. PRECEDENTS :

Doctrine of overruling by necessary implication – Law explained.

State of Maharashtra and others v. Mana Adim Jamat Mandal

Judgment dated 08.03.2006 passed by the Supreme Court in Civil Appeal No. 5270 of 2004, reported in (2006) 4 SCC 98

Held:

A three-Judge Bench of this Court in *C.N. Rudramurthy v. K. Barkathulla Khan, (1998) 8 SCC 275* has examined the nature and effect of overruling by necessary implication and held that when the law as declared by the Supreme Court contradicts what has been stated in another case, that case stood impliedly overruled. Admittedly, *Dina II (Dadaji v. Sukhdeobabu, (1980) 1 SCC 621)* reached its conclusion after examining the evidence on record of *Dina I [Dina v. Narayan Singh, (1968) 38 ELR 212 SC.]* As pointed out earlier, this is not permissible in view of the law declared by the Constitution Bench of this court in *State of Maharasthra v. Milind, (2001) 1 SCC 4.*

The same view was reiterated in *Union of India v. Raj Rani, (1998) 8 SCC 704.* In that case the payment of solatium and interest has been settled by a three-Judge Bench in *Union of India v. Hari Krishan Khosla, 1993 Supp (2) SCC 149* which held that the respondents were not entitled to the payment of interest and solatium. A contrary view of a two-Judge Bench decision in *Rao Narain Singh v. Union of India, (1993) 3 SCC 60* was brought to the notice of this Court and this Court held that in view of the three-Judge Bench decision in *Hari Krishan Khosla case,* (supra) the ratio of *Rao Narain Singh case* (supra) is no longer good law.

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141. SERVICE LAW :

Civil post, power to abolish – The power is inherent in every sovereign Government.

Avas Vikas Sansthan and another v. Avas Vikas Sansthan Engineers Assn. and others

Judgment dated 28.03.2006 passed by the Supreme Court in Civil Appeal No. 5302 of 2004, reported in (2006) 4 SCC 132

Held:

It is settled law that the power to abolish any civil post is inherent in every sovereign Government and such abolition will not entail any right on the person holding the abolished post, the right to re-employment or to hold the same post. In the present case, the State Government was benevolent enough to float a scheme to absorb such employees whose posts were abolished. Therefore, in our opinion, the arguments advanced by the counsel for the respondents with regard to unfairness meted out to the employees of the Avas Vikas Sansthan hold no water.

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It is well settled that the power to abolish a post which may result in the holder thereof ceasing to be a government servant has got to be recognised. The measure of economy and the need for streamlining the administration to make it more efficient may induce any State Government to make alterations in the staffing pattern of the civil services necessitating either the increase or the decrease in the number of posts or abolish the post. In such an event, a department which was abolished or abandoned wholly or partially for want of funds, the court cannot, by a writ of mandamus, direct the employer to continue employing such employees as have been dislodged...

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142. CIVIL PROCEDURE CODE, 1908 – Section 149
COURT FEES ACT, 1870 – Section 4
Ambit, scope and applicability of Section 149 CPC – Section 149 CPC applicable only in respect of court fees payable at the time of institution of suit or when claim in the plaint has been increased by amendment –Section 149 be read as proviso to Section 4 of Court Fees Act.
K.C. Skaria v. Govt. of State of Kerala and another
Judgment dated 10.01.2006 passed by the Supreme Court in Civil Appeal No. 6885 of 2003, reported in (2006) 2 SCC 285

Held :

Section 4 of the Court Fees Act bars the court from receiving the plaint if it does not bear the proper court fee. Section 149 acts as an exception to the said bar, and enables the court to permit the plaintiff to pay the deficit court fee at a stage subsequent to the filing of the suit and provides that such payment, if permitted by the court, shall have the same effect as if it had been paid in the first instance. Interpreting Section 149, this Court in *Mannan Lal v. Chhotaka Bibi, (1970) 1 SCC 769* held that Section 149 CPC mitigates the rigour of Section 4 of the CF Act, and the courts should harmonise the provisions of the CF Act and CPC by reading Section 149 as a proviso to Section 4 of the CF Act, and allowing the deficit to be made good within the period to be fixed by it. This Court further held that if the deficit is made good, no objection could be raised on the ground of bar of limitation, as Section 149 specifically provides that the document is to have validity with retrospective effect.

A careful reading of Section 149 shows that is would apply only in respect of the court fee payable at the time of institution of the suit. If the court fee due on the plaint, when instituted, is not paid wholly or partly by the person instituting the suit, the court in its discretion, may allow him to pay the court fee or deficit court fee within the period fixed by it. Section 149 has no application where the court fee, due on the plaint as per the valuation of the suit, is fully paid, but subsequently it is found that a larger amount is due to the plaintiff. For example, if the plaintiff values the suit at Rs. 2 lakhs and the court fee payable is Rs. 20,000 and the plaintiff pays a court fee of Rs. 10,000, on his request time for payment of balance of Rs. 10,000 can be extended by the court at its discretion under Section 149 CPC. But where the claim was Rs. 2 lakhs and full court fee on Rs. 2 lakhs was paid at the time of institution of the suit, and during evidence it transpires that the amount due to the plaintiff is actually Rs. 5 lakhs and not Rs. 2 lakhs, the question of permitting the plaintiff to pay deficit court fee at that stage by calling in aid Section 149, does not arise as no court fee becomes payable at that stage. The plaintiff can increase the claim only by seeking amendment of the plaint and paying additional court fee on the amended claim. In regard to such amended claim also, Section 149 may be pressed into service. But then amendment would depend on limitation and may not be permitted after the period of limitation. Where there is no deficit in court fee at the time of institution and when there is no amendment to plaint increasing the suit claim, there is no occasion for pressing Section 149 into service in regard to court fee payable on plaints.

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143. CRIMINAL TRIAL :

Sentencing – Principle of proportionality in sentencing – Proportion between crime and punishment, a respected goal – Law explained. Shailesh Jasvantbhai and another v. State of Gujarat and others Judgment dt. 19.01.2006 passed by the Supreme Court in Criminal Appeal No. 118 of 2006, reported in (2006) 2 SCC 359

Held :

Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law, and society could not long endure under such serious threats. 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. This position was illuminatingly stated by this Court in *Sevaka Perumal v. State of T.N., (1991) 3 SCC 471*

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 sentence 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 undesirable practical consequences.

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144. LAND ACQUISITION ACT, 1894 – Sections 11 and 12 (2)
Notice of award to persons interested in the acquired land – Collector must give notice of award to persons interested, who are not personally present – Law explained.
Bailamma (Smt.) alias Doddabailamma (Dead) and others v. Poornaprajna House Building Cooperative Society and others Judgment dt. 31.01.2006 passed by the Supreme Court in Civil Appeal No. 2013 of 1999, reported in (2006) 2 SCC 416

Held :

There is nothing in Section 11 which expressly requires the Collector to announce his award in the presence of the persons interested, though there is nothing which prevents him from declaring the award on a date fixed by him for the purpose. However, having regard to the provisions of Section 12(2) of the Act, he must give immediate notice to such of the persons interested as are not present personally or by their representatives when the award is made. Thus viewed, there can be no doubt that after the award is approved the same becomes an offer to be made to the persons interested, and this can be done by either giving notice to the persons interested of the date on which he may orally pronounce the award, or by giving written notice of the award to the persons interested. The question of limitation for filing a reference under Section 18 or Section 30 of the Act has to be determined by reference to the date on which the award was either pronounced before the parties who were present, or the date of the receipt of notice of the award by those not present. The mere fact that the Collector did not pronounce the award after notice in the presence of

the parties interested will not invalidate the award, though it may have a bearing on the question of limitation in the matter of seeking a reference under Section 18 or 30 of the Act. The award which has already been signed by the Collector becomes an award as soon as it is approved by the Government without any alteration. At best the appellants can contend that it becomes an award when notice is given to the parties interested.

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145. CRIMINAL PROCEDURE CODE, 1973 – Section 174

Inquest report, contents of – Details regarding overt acts of the accused or the circumstances or the presence of witnesses, foreign to the ambit and scope of Section 174 – Omission or discrepancy in inquest report, effect of – Unless attention of author of report drawn to the omission/ discrepancy, the same cannot be pressed into service.

Radha Mohan Singh alias Lal Saheb and others v. State of U.P. Judgment dt. 20.01.2006 passed by the Supreme Court in Criminal Appeal No. 1183 of 2004, reported in (2006) 2 SCC 450

Held :

The provision for holding of inquest is contained in Section 174 CrPC and the heading of the section is *Police to enquire and report on suicide, etc.* Sub-sections (1) and (2) thereof read as under :

> "174, *Police to enquire and report on suicide, etc.* – (1) When the officer in charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give intimation thereof to the nearest Executive Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the State Government, or by any general or special order of the District or Sub-Divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.
>
> (2) The report shall be signed by such police officer and other persons, or by so many of them as concur there in and shall be forthwith forwarded to the District Magistrate or the Sub-Divisional Magistrate."

The language of the aforesaid statutory provision is plain and simple and there is no ambiguity therein. An investigation under Section 174 is limited in scope and is confined to the ascertainment of the apparent cause of death. It is concerned with discovering whether in a given case the death was accidental, suicidal or homicidal or caused by animal and in what manner or by what weapon or instrument the injuries on the body appear to have been inflicted. It is for this limited purpose that persons acquainted with the facts of the case are summoned and examined under Section 175. The details of the overt acts are not necessary to be recorded in the inquest report. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted or who are the witnesses of the assault is foreign to the ambit and scope of proceedings under Section 174. Neither in practice nor in law is it necessary for the person holding the inquest to mention all these details.

In *Pedda Narayana v. State of A.P., (1975) 4 SCC 153* it was held that the proceedings under Section 174 have a very limited scope. The object of the proceedings is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so, what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of the proceedings under Section 174. Neither in practice, nor in law, was it necessary for the police to mention those details in the inquest report. It is, therefore, not necessary to enter all the details of the overt acts in the inquest report. Their omission is not sufficient to put the prosecution out of Court. In *Shakila Khader v. Nausheer Cama, (1975) 4 SCC 122* the contention raised that non-mention of a person's name in the inquest report would show that he was not an eyewitness of the incident was repelled on the ground that an inquest under Section 174 CrPC is concerned with establishing the cause of death and only evidence necessary to establish it need be brought out. The same view was taken in *Eqbal Baig v. State of A.P., (1986) 2 SCC 476* that the non-mention of name of an eyewitness in the inquest report could not be a ground to reject his testimony. Similarly, the absence of the name of the accused in the inquest report cannot lead to an inference that he was not present at the time of commission of the offence as the inquest report is not the statement of a person wherein all the names (the accused and also the eyewitnesses) ought to have been mentioned. The view taken in *Pedda Narayana v. State of A.P.* (supra) was approved by a three Judge Bench in *Khujji v. State of M.P., (1991) 3 SCC 627* and it was held that the testimony of an eyewitness could not be discarded on the ground that their names did not figure in the inquest report prepared at the earliest point of time. The nature and purpose of inquest held under Section 174 CrPC was also explained in *Amar Singh v. Balwinder Singh, (2003) 2 SCC 518.* In the said case the High Court had observed that the fact that the details about the occurrence were not mentioned in the inquest report showed that the investigating officer was not sure of the facts when the inquest report was prepared and the said feature of the case carried

weight in favour of the accused. After noticing the language used in Section 174 CrPC and earlier decisions of this Court it was ruled that the High Court was clearly in error in observing as aforesaid or drawing any inference against the prosecution. Thus, it is well settled by a catena of decisions of this Court that the purpose of holding an inquest is very limited viz. to ascertain as to whether a person has committed suicide or has been killed by another or by an animal or by machinery or by an accident or has died under circumstances raising a reasonable suspicion that some other person has committed an offence. There is absolutely no requirement in law of mentioning the details of the FIR, names of the accused or the names of the eyewitnesses or the gist of their statements, nor is it required to be signed by any eyewitness. In *Meharaj Singh v. State of U.P., (1994) 5 SCC 188* the language used by the legislature in Section 174 CrPC was not taken note of, nor the earlier decisions of this Court were referred to and some sweeping observations have been made which are not supported by the statutory provision.

No argument on the basis of an alleged discrepancy, overwriting, omission or contradiction in the inquest report can be entertained unless the attention of the auther thereof is drawn to the said fact and he is given an opportunity to explain when he is examined as a witness in court.

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146. SERVICE LAW :

Employment under Government, nature of – Such employment is a matter of status and not contract – Government can unilaterally alter the service rules – Law explained.

Union Public Service Commission v. Girish Jayanti Lal Vaghela and others

Judgment dt. 02.02.2006 passed by the Supreme Court in Civil Appeal No. 933 of 2006, reported in (2006) 2 SCC 482

Held :

It, therefore, follows that employment under the Government is a matter of status and not a contract even though the acquisition of such a status may be preceded by a contract, namely, an offer of appointment is accepted by the employee. The rights and obligations are not determined by the contract of the two parties but by statutory rules which are framed by the Government in exercise of power conferred by Article 309 of the Constitution and the service rules can be unilaterally altered by the rule-making authority, namely, the Government.

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147. SPECIFIC RELIEF ACT, 1963 – Section 16 (c)

Expression 'readiness' and 'willingness' as used in Section 16 (c), meaning and connotation of – Law explained.

H.P. Pyarejan v. Dasappa (Dead) by L. Rs. and others

Judgment dt. 06.02.2006 passed by the Supreme Court in Civil Appeal No. 1501 of 2000, reported in (2006) 2 SCC 496

Held :

The requirements to be fulfilled for bringing in compliance with Section 16 (c) of the Act have been delineated by this Court in several judgments. While examining the requirement of Section 16 (c) this Court in *Syed Dastagir v. T.R. Gopalakrishna Setty, (1999) 6 SCC 337* noted as follows : (SCC p. 341, para 9)

> "9. So the whole gamut of the issue raised is, how to construe a plea specially with reference to Section 16(c) and what are the obligations which the plaintiff has to comply with in reference to his plea and whether the plea of the plaintiff could not be construed to conform to the requirement of the aforesaid section, or does this section require specific words to be pleaded that he has performed or has always been ready and is willing to perform his part of the contract. In construing a plea in any pleading, courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. Such an expression may be pointed, precise, sometimes vague but still it could be gathered what he wants to convey through only by reading the whole pleading, depending on the person drafting a plea. In India most of the pleas are drafted by counsel hence the aforesaid difference of pleas which inevitably differ from one to the other, Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. But to test whether he has performed his obligations, one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded may be in any form. The same plea may be stated by different persons through different words; then how could it be constricted to be only in any particular nomenclature or word. Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance with 'readiness and willingness' has to be in spirit and substance and not in letter and form. So to insist for a mechanical production of the exact words of a statute is to insist for the form rather than the essence. So the absence of form cannot dissolve an essence if already pleaded."

The basic principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes a personal bar. The court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest

that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief.

Section 16(c) of the Act mandates the plaintiff to aver in the plaint and establish as the fact by evidence aliunde that he has always been ready and willing to perform his part of the contract. The principles were recently elaborated in *Aniglase Yohannon v. Ramlatha, (2005) 7 SCC 534.*

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148. FAMILY LAW :

Marriage – Registration of marriages, desirability of – Directions issued to State / Central Government to devise and notify procedure for registration of marriages.

Seema (Smt) v. Ashwani Kumar

Judement dt. 14.02.2006 passed by the Supreme Court in Transfer Petition (C) No. 291 of 2005, reported in (2006) 2 SCC 578

Held :

As is evident from narration of facts, though most of the States have framed rules regarding registration of marriages, registration of marriage is not compulsory in several States. If the record of marriage is kept, to a large extent, the dispute concerning solemnisation of marriages between two persons is avoided. As rightly contended by the National Commission, in most cases non-registration of marriages affects the women to a great measure. If the marriage is registered it also provides evidence of the marriage having taken place and would provide a rebuttable presumption of the marriage having taken place. Though, the registration itself cannot be a proof of valid marriage, per se, and would not be the determinative factor regarding validity of a marriage, yet it has a great evidentiary value in the matters of custody of children, right of children born from the wedlock of the two persons whose marriage is registered and the age of parties to the marriage. That being so, it would be in the interest of the society if marriages are made compulsorily registrable. The legislative intent in enacting Section 8 of the Hindu Marriage Act is apparent from the use of the expression "for the purpose of facilitating the proof of Hindu marriages."

As a natural consequence, the effect of non-registration would be that the presumption which is available from registration of marriages would be denied to a person whose marriage is not registered.

Accordingly, we are of the view that marriages of all persons who are citizens of India belonging to various religions should be made compulsorily registrable in their respective States, where the marriage is solemnised.

Accordingly, we direct the States and the Central Government to take the following steps:

> (i) The procedure for registration should be notified by respective States within three months from today. This can be done by amending the existing rules, if any, or by framing new rules. However, objec-

tions from members of the public shall be invited before bringing the said rules into force. In this connection, due publicity shall be given by the States and the matter shall be kept open for objections for a period of one month from the date of advertisement inviting objections. On the expiry of the said period, the States shall issue appropriate notification bringing the rules into force.

(ii) The officer appointed under the said rules of the States shall be duly authorised to register the marriages. The age, marital status (unmarried, divorcee) shall be clearly stated. The consequence of non-registration of marriages or for filing false declaration shall also be provided for in the said rules. Needless to add that the object of the said rules shall be to carry out the directions of this Court.

(iii) As and when the Central Government enacts a comprehensive statute, the same shall be placed before this Court for scrutiny.

(iv) Learned counsel for various States and Union Territories shall ensure that the directions given herein are carried out immediately.

The registry is directed to hand over a copy of this order to learned Solicitor General for necessary follow-up action.

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149. CIVIL PROCEDURE CODE, 1908 – O. XXXIV R.8
Right of redemption, extinguishment of – Law explained.
Philomina Jose v. Federal Bank Ltd. and others
Judgment dt. 02.02.2006 passed by Supreme Court in Civil Appeal No. 1488 of 2000, reported in (2006) 2 SCC 608

Held :

The High Court has held that by the passing of the decree for sale, the mortgage debt is merged into the decree and thereafter the right to redemption is not available. In taking that view, the High Court has relied on the decision of the Patna High Court in *Sheo Narain Sah v. Deolchan Kuer, AIR 1948 Pat 208*

The view taken by the Patna High Court was held to be not the correct view as observed by this Court in *Mhadagonda Ramgonda Patil v. Shripal Balwant Rainade, (1988) 3 SCC 298.* It was held that unless and until a decree or order debarring the mortgagor from redeeming the property is passed under sub-rule (3) (a) of Rule 8 of Order 34 the right of redemption is available. It was inter alia held as follows: (SCC pp. 303-04, paras 12-13)

> "12. It is thus manifestly clear that the right of redemption will be extinguished (1) by the act of the parties, or (2) by the decree of a court. We are not concerned with the question of extinguishment of the right of redemption by the act of the parties. The question is whether by the preliminary decree or final decree passed in the earlier suit, the right of the respondents to redeem the mortgages has been

extinguished. The decree that is referred to in the proviso to Section 60 of the Transfer of Property Act is a final decree in a suit for foreclosure, as provided in sub-rule (2) of Rule 3 of Order 34 and a final decree in a redemption suit as provided in Order 34 Rule 8 (3) (a) of the Code of Civil Procedure. Sub-rule (2) of Rule 3, inter alia, provides that where payment in accordance with sub-rule (1) has not been made, the court shall, on an application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property. Thus, in a final decree in a suit for foreclosure, on the failure of the defendant to pay all amounts due, the extinguishment of the right of redemption has to be specifically declared. Again, in a final decree in a suit for redemption of mortgage by conditional sale or for redemption of an anomalous mortgage, the extinguishment of the right of redemption has to be specifically declared, as provided in clause (a) of sub-rule (3) or Rule 8 of Order 34 of the Code of Civil Procedure. These are the two circumstances – (1) a final decree in a suit for foreclosure under Order 34 Rule 3 (2); and (2) a final decree in a suit for redemption under Order 34 Rule 8(3)(a) of the Code of Civil Procedure – when the right or redemption is extinguished.

13. In the instant case, the earlier suit was not a suit for foreclosure nor was either of the mortgages, a mortgage by conditional sale or an anomalous mortgage and, accordingly, there was no declaration in the final decree passed in the earlier suit for redemption that the respondents would be debarred from all right to redeem the mortgaged property. Rule 5(1) of Order 34 expressly recognises the right of the mortgagor to redeem the mortgage at any time before the confirmation of a sale made in pursuance of a final decree passed in a suit for sale. Similarly, Rule 8(1) of Order 34 permits the mortgagor to redeem the mortgaged property before the confirmation of the sale held in pursuance of a final decree in a redemption suit, unless such final decree debars the mortgagor from all right to redeem the mortgaged property which, as noticed earlier, is provided for in sub-rule (3)(a) of Rule 8 of Order 34 relating to a mortgage by conditional sale or an anomalous mortgage. Thus, the provisions of Order 34 have laid down in clear terms the circumstances when the right of redemption of the mortgagor would stand extinguished. It is also clear that in a suit for redemption of a mortgage other than a mortgage by conditional sale or an anomalous mortgage, the mortgagor has a right of redemption even after the sale has taken place pursuant to the final decree, but before the confirmation of such sale. In view of these provisions, the question of merger of mortgage debt in the

decretal debt does not at all arise. We are, therefore, of the view that the decision is *Sheo Narain case (supra)*, insofar as it lays down the merger of the mortgage debt in the decretal debt and the consequent extinguishment of the right of redemption of the mortgagor after the passing of the final decree in a suit for redemption, is erroneous."

As there is no such final decree in this case, the right of the mortgagor to redeem the property is available to him till the confirmation of the sale in pursuance to the decree.

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150. CONTRACT ACT, 1872 – Section 23

Partial invalidity in contract, effect of – Partial invalidity will not *ipso facto* make the whole contract void – Principle of 'substantial severability' of contract – Law explained.

Sin Satellite Public Co. Ltd. v. Jain Studios Ltd.

Judgment dt. 31.01.2006 passed by the Supreme Court in Arbitration Petition No. 1 of 2005, reported in (2006) 2 SCC 628

Held :

In several cases, courts have held that partial invalidity in contract will not *ipso facto* make the whole contract void or unenforceable. Wherever a contract contains legal as well as illegal parts and objectionable parts can be severed, effect has been given to legal and valid parts striking out the offending parts.

In *Goldsoll v. Goldman, (1914) 2 Ch 603* the defendant was a dealer in imitation jewellery in London. He sold his business to the plaintiff and covenanted not to compete with the plaintiff as a "dealer in real or imitation jewellery in any part of the United Kingdom, the United States of America, Russia or Spain." When the covenant was sought to be enforced, it was contended that the same was in restraint of trade and could not be enforced. It was, however, held that the covenant was unreasonable and unenforceable insofar as it extended to "real" jewellery and also to competition outside the United Kingdom. But it was valid, reasonable and enforceable with regard to rest, namely, dealing in imitation jewellery and in the United Kingdom. According to the Court, the words "real or" and the listed places outside the United Kingdom could be severed leaving only reasonable covenant which was enforceable.

In *Attwood v. Lamont, (1920) 2 KB 146* the plaintiff was carrying on business as a draper, tailor and general outfitter at Kidderminster. By a contract for employment, the defendant agreed with the plaintiff that he would not, at any time thereafter

> "either on his own account or on that of any wife of his or in partnership with or as assistant, servant or agent to any other person, persons or company carry on or be in any way directly or indirectly concerned in any of the following trades or businesses, that is to say, the trade or business of a tailor, dressmaker, general draper, milliner,

hatter, haberdasher, gentlemen's, ladies' or children's outfitter at any place within a radius of ten miles of"

Kidderminster. The defendant, however, subsequently set up business as a tailor at Worcester, outside the ten-mile limit, but obtained and executed tailoring orders in Kidderminster. when the plaintiff brought an action, it was contended by the defendant that the agreement was illegal and could not be enforced. The Court, however, held that various parts of the contract were severable and valid part thereof could be enforced. Upholding the argument of the plaintiff and granting relief in his favour, the Court observed that the courts would sever in a proper case, where the severance can be made by using a "blue pencil". But it could be done only in those cases where the part so enforceable is clearly severable and not where it could not be severed. By such process,main purport and substance of the clause cannot be ignored or overlooked. Thus, a covenant "not to carry on business in Birmingham *or* within 100 miles" may be severed so as to reduce the area to Birmingham, but a covenent "not to carry on business within 100 miles of Birmingham" will not be served so as to read "will not carry on business in Birmingham." The distinction may appear to be artificial, but is well settled.

Davstone Estates Ltd. Leases, Re, (1969) 2 All ER 849 on which reliance was placed by the learned counsel for the respondent, is clearly distinguishable. In that case, the Court held that the agreement entered into between the parties was opposed to public policy and hence was not enforceable.

Similarly, Kall-Kwik Printing (U.K.) Ltd. v. Frank Clearence Rush, 1996 FSR 114 instead of supporting the respondent, helps the petitioner. There it was observed that if the convenant is severable, it could be implemented by applying the "blue pencil" test.

The legal position in India is not different.

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151. MOTOR VEHICLES RULES, 1989, (CENTRAL) – Rule 9 (3)
Driving licence for drivers of goods carriages carrying dangerous/ hazardous goods –Whether lack of endorsement as required under Sub-rule (4) amounts to fundamental breach and may be a ground for exonerating the Insurance Company ? Held, No.
Baghelkhand Filling Station and another v. Brijbhan Prasad and others
Reported in 2006 (2) MPLJ 211 (DB)

Held :

For better appreciation of sub-rules (3) and (4) of Rule 9 of the Rules, we deem it apposite to reproduce the same :

"9. *Educational qualifications for drivers of goods carriages carrying dangerous or hazardous goods* :–

XXX XXX XXX

XXX XXX XXX

(3) The licensing authority, on receipt of the applications referred to in sub-rule (2), shall make an endorsement in the driving license of the applicant to the effect that he is authorised to drive a goods carriage carrying goods of dangerous or hazardous nature to human life.

(4) A licensing authority other than the original licensing authority making any such endorsement shall communicate the fact to the original licensing authority."

A perusal of the aforesaid relevant Rules would show that endorsement in the driving license of the applicant is necessary to the effect that he is authorised to drive a goods carriage carrying goods of dangerous or hazardous nature to human life. This endorsement was of course not seen on the driving license of respondent No. 3, by the appellants. But, it is equally true that driver was holding a license to drive a tanker. It is not the case of the respondents that accident had taken place on account of the fact that there was no endorsement to drive such a vehicle. The endorsement neither increases the efficiency of the driver nor in its absence, the efficiency of the driver is likely to be reduced in any manner whatsoever. It only certifies additionally that he is authorised to drive a goods carriage carrying goods of dangerous or hazardous nature. For driving such a vehicle, no further expertise or driving is required. This could be said to be a lapse on the part of the driver as well as on the part of the appellants herein, but this lapse was not responsible for the cause of the accident.

Even without the endorsement as contemplated under sub-rule (3), the driving skill of respondent No. 3 had not reduced. Infect appellants having seen a certificate from Hindustan Petroleum that respondent No. 3 was driving their tanker earlier appeared to be satisfied that the driver was holding a valid and proper license and did not care to inquire with regard to endorsement. By taking the endorsement from the licensing authority, the nature of vehicle or the kind of the vehicle which the driver would be driving would not have changed, it would have remained the same. Thus, taking of the endorsement from the licensing authority was for some other propose and not for giving him further certificate for driving the tanker, as he was already holding a valid license for driving it. Precisely this is what has been said in *National Insurance Company Limited Vs. Swaran Singh & others, (2004) 3 SCC 297* in para 110. It has been held so –

"....To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time."

It has further been held as under :–

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

Thus, the crux of the matter would be whether such a breach that is to say not having obtained necessary endorsement as required under sub-rule (3) of Rule 9 of the Rules, the accident occurred due to that non-endorsement has been discussed hereinabove, the said endorsement is not required to be given to the driver after having gone through any specialized training or after having passed any special test. Any driver who has held a driving license to drive a tanker would be entitled to have endorsement subject to fulfilling of other conditions as contemplated in sub-rule (3) of Rule 9, but they do not deal with the professional skill of driving. With regard to professional skill of driving, he has already been certified by the licensing authority at the time of granting of license to him. It is not the case of the respondents that his driving license was not obtained properly.

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152. MOTOR VEHICLES ACT, 1988 – Section 147
Insurer's liability – Liability regarding owner of goods travelling in goods vehicle with his goods – Accident taking place before amendment of 1994 – Risk not covered otherwise – Insurer not liable – Law explained.
Nilabai v. Rameshwar Giri and others
Reported in 2006 (2) MPLJ 225 (DB)

Held :

Coming to the question of liability of the insurer, it has not been disputed at bar that both the deceased were travelling in the goods vehicle with their goods in the year 1992, risk of the owner travelling with goods in the goods vehicle has been covered by way of effecting amendment made in the year 1994, it appears that premium was also not realized by the insurer to cover the risk of the owner travelling with goods, hence, insurer was not liable. However, in the light of the decision of *Pramod Kumar Agrawal and another vs. Mushtari Begum (Smt.) and others, (2004) 8 SCC 667*, in which the earlier decisions have been considered by the Apex Court. The claimant can recover the amount from insurer and insurer in turn can recover the amount from insured. The decision relied upon by Shri Shriniwas Ganjedrayadkar, learned counsel for insurer in *New India Assurance Co. Ltd. vs. Asha Rani and others* is not authority on the proposition as laid down in *Pramod*

Kumar case (supra) for similar reason, the other decision relied in *Oriental Insurance Co. Ltd. vs. Devireddy Konda Reddy and others* (supra) is distinguishable. In the light of the decision of *Pramod Kumar* (supra), we have given the liberty to the claimants to recover the amount from the insurer apart from driver and owner and insurer in turn is at libetry to recover the amount from insured.

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153. CIVIL PROCEDURE CODE, 1908 – O. VI R. 14
WORDS & PHRASES
Expression 'duly authorised' as used in proviso to Order VI Rule 14, meaning and connotation of – Expression not restricted to authorization only by written authority or power of attorney.
Nav Bharat Corporation, Bombay v. M.P. Electricity Board, Rampur, Jabalpur
Reported in 2006 (2) MPLJ 306 (DB)

Held :

The first point to be decided is whether the officer-in-charge had authority to sign the plaint and verify the pleadings or not. The plaintiff has pleaded that as per the provisions of section 5 read with section 12 of the Indian Electricity Supply Act 1948 the officer-in-charge V.K. Shukla, Divisional Engineer was appointed to sign and verify the plaint and pleadings. This fact has not been specifically denied by the defendant in his written statement. What the defendant says is no authority in writing has been filed by the plaintiff. But that has not been challenged in the statement of Shri V.K. Shukla (P.W. 1). There is no reason to disbelieve the version of Shri V.K. Shukla that he had authority to do so. In *Sarju Prasad vs. Badriprasad, 1939 NLJ 333 = AIR 1939 Nag. 242, All India Reporter vs. Ramchandra, AIR 1961 Bom. 292* and in *Netram vs. Bhagwan, 1941 NLJ 151 = AIR 1941 Nag. 159, it was held that the words 'duly authorized' in the proviso to Order VI, Rule 14* need not be restricted to mean authorised by proper written authority or by power of attorney. It may be oral also. Therefore, it is held that the plaint has been duly signed and verified by the person authorised in this behalf.

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154. SPECIFIC RELIEF ACT, 1963 – Section 16(c)
Agreement for sale relating to immovable property – Whether generally time essence of such contract ? Held, No – Law explained.
Leeladhar Yadav v. Siddhartha Housing Co-operative Society Ltd., Garha
Reported in 2006 (2) MPLJ 329 (DB)

Held :

In *K.S. Vidyanadam and others vs. Vairavan, (1997) 3 SCC 1* the Apex Court has laid down that in the case of agreement of sale relating to immovable property time is not essence of the contract, however, Court is required to look into all the relevant circumstances in order to find out whether it is proper to decree the specific performance. Though Article 54 of Limitation Act provides limitation

of three years from the date of refusal to execute the sale deed, but it should be performed within reasonable time having regard to terms of contract prescribing a time limit. Steep rise in the price of the property would be relevant factor for the Court to decide whether delay or laches on part of the plaintiff to perform his part of contract would disentitle him the relief of specific performance. The Apex Court has laid down thus :-

> "10. It has been consistently held by the Courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other things by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit(s) specified in the agreement have no relevance and can be ignored with impunity ? It would also mean denying the discretion vested in the Court by both sections 10 and 20. As held by a Constitution Bench of this Court in *Chand Rani vs. Kamal Rani, (1993) 1 SCC 519* (SCC p. 528; para 25) :-
>
> > ".... it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the Court may infer that it is to be performed in a reasonable time if the conditions are (evident?) : (1) from the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances, for example, the object of making the contract."

In other words, the Court should look at all the relevant circumstances including the time-limit(s) specified in agreement and determine whether its discretion to grant specific performance should be exercised."

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155. SERVICE LAW :

Over-qualification – Disqualification because of over-qualification violative of Art. 14 of the Constitution of India – Concealment of higher qualification not a material suppression.

Triveni Sharan Mishra v. Life Insurance Corporation of India and others

Reported in 2006 (2) MPLJ 339

Held :

The Counsel for the petitioner is correct in his subinission that if the petitioner is over-qualified then that will not be a bar in getting the employment. Ignoring the candidates having more or over-qualification than the prescribed has already been held to be arbitrary and violative of Article 14 of the Constitution of India by the Apex Court in the judgment as reported in *2000 (2) SCC 606 (Mohd. Riazul Usman Gani and others vs. District and Sessions Judge, Nagpur and others.* The said judgment would be relevant in the present case to ascertain. Whether a person who has the over qualification, will not be qualified or will not be eligible to get the employment. If the persons having higher qualification are ignored as they possess the higher qualification than the minimum qualification prescribed for the post then it may lead to discrimination and therefore it is not a case where a person having higher qualification would be debarred from getting the employment. Thus, in the present case there does not seem to be a case of material suppression which could have debarred from getting the employment for the petitioner.

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156. SERVICE LAW :

M.P. REVISION OF PAY RULES, 1990 – Rule 3 (d)

Advance increments – Whether an employee can claim benefit of advance increments granted under R. 27 of M.P. Fundamental Rules for Family Planning Operation on his promotion or fixation in higher pay scale ? Held, No – Law explained.

State of M.P. and others v. R.K. Chaturvedi and another

Reported in 2006 (2) MPLJ 374 (FB)

Held :

Rule 3(d) of the M.P. Revision of Pay Rules, 1990 states what, "pre-fixation emoluments" include and is quoted hereinbelow:

3(d) "pre-fixation emoluments" shall include –

(i) the basic pay in the existing scale;

(ii) 6% of basic pay in existing scale subject to a minimum of Rs. 50;

(iii) special pay (only, where the existing scale with special pay has been replaced by a revised scale without special pay); and

(iv) personal pay.

Explanation. (1) If the sum total so computed includes a part of a rupee, it shall be rounded off to the nearest rupee i.e. less than 50 paise shall be ignored, while 50 paise or more shall be rounded off to the next higher rupee.

Explanation.– (2) Where increment in the existing scale is payable on 1st January, 1986 it will be treated as part of basic pay.

It will be clear that, pre-fixation emoluments include not only the basic pay in the existing scale but also 6% of basic pay in the existing scale subject to a minimum of Rs. 50, special pay and "personal pay". As we have held, the two advance increments granted under Rule 27, of the M.P. Fundamental Rules for a government servant for Family Planning Operation under the circular dated 29-1-1979 constitute "personal pay" of the government servant. Therefore the said two advance increments are included in the pre-fixation emoluments. Since under sub-rule (1) of Rule 7, the pay of a government servant is fixed in the revised scale at the stage above the pre-fixation emoluments, the government servant gets the benefit of the two advance increments at the time of fixation of his pay in the revised scale under sub-rule (1) of Rule 7 of the M.P. Revision of Pay Rules, 1990. Hence, once the pay of government servant in the revised scale of pay is fixed in accordance with sub-rule (1) of Rule 7 of the M.P. Revision of Pay Rules, 1990, he cannot have a grievance that the two advance increments given to him for Family Planning Operations have not been included in his pay at the time of revision of his pay-scale w.e.f. 1.1.1986.

In the result our answer to the question referred to us by the Division Bench is that an employee whose pay is revised w.e.f. 1.1.1986 in accordance with sub-rule (1) of Rule 7 of the M.P. Revision of Pay Rules, 1990 automatically gets the benefit of the advance increments given to him for Family Planning Operations under the Circular dated 29.1.1979 and once his revised scale of pay is fixed in accordance with the said provisions of sub-rule (1) of Rule 7 of the M.P. Revision of Pay Rules, 1990, he cannot claim any further benefit of advance increments in the event of his promotion or in the event of payment of higher pay-scale.

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157. LIMITATION ACT , 1967 – Article 54

Suit for specific performance of agreement for sale, limitation for – Mode and manner of enquiry regarding limitation – Law explained. Gunwantbhai Mulchand Shah and others v. Anton Ellis Farel and others Reported in 2006 (2) MPLJ 412 (SC)

Held :

We may straightway say that the manner in which the question of limitation has been dealt with by the Courts below is highly unsatisfactory. It was rightly noticed that the suit was governed by Article. 54 of the Limitation Act, 1963. Then, the enquiry should have been, first, whether any time was fixed for performance in the agreement for sale, and if it was so fixed, to hold that a suit filed beyond three years of the date was barred by limitation unless any case of extension was pleaded and established. But in a case where no time for performance was fixed, the Court had to find the date on which the plaintiff had notice that the performance was refused and on finding that date, to see whether the suit was filed within three years thereof. We have explained the position in the recent decision in *R.K. Parvatharaj Gupta vs. K.C. Jayadeva Reddy, 2006 (2)*

SCALE 156. In the case on hand, there is no dispute that no date for performance is fixed in the agreement and if so, the suit could be held to be barred by limitation only on a finding that the plaintiffs had notice that the defendants were refusing performance of the agreement. In a case of that nature normally, the question of limitation could be decided only after taking evidence and recording a finding as to the date on which the plaintiff had such notice. We are not unmindful of the fact that a statement appears to have been filed on behalf of the plaintiffs that they do not want to lead any evidence. The defendants, of course, took the stand that they also did not want to lead any evidence. As we see it, the trial Court should have insisted on the parties leading evidence, on this question or the Court ought to have postponed the consideration of the issue of limitation along with the other issues arising in the suit, after a trial.

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158. MOTOR VEHICLES ACT, 1988 – Sections 149 and 167
WORKMEN'S COMPENSATION ACT, 1923 – Section 30
Insurer's liability – Claimant having option to claim compensation either under M.V. Act or under Workmen's Compensation Act – Claim before Workmen's Compensation Act –Whether insurer's right to raise defences is limited in terms of Section 149 (2)? Held, No – Law explained.
National Insurance Co. Ltd. v. Mastan and another
Judgment dt. 09.12.2005 passed by the Supreme Court in Civil Appeal No. 7381 of 2005, reported in (2006) 2 SCC 641

Held :

Section 143 of the 1988 Act limits its applicability to the 1923 Act in a case where the liability arises despite the fact that the accident might have taken place without any fault on the part of the driver of the vehicle or others in control thereof. Under the 1923 Act also, as noticed hereinbefore, a workman is entitled to compensation even if no negligence is proved against the owner or any other person in charge of the vehicle. It is, thus, not possible to extend the applicability of Section 143 of the 1988 Act to include Chapter XI thereof to a claim under the 1923 Act.

Right of appeal is a creature of statute. The scope and ambit of an appeal in terms of Section 30 of the 1923 Act and Section 173 of the 1988 Act are distinct and different. They arise under different situations. In a case falling under the 1923 Act, negligence on the part of the owner may not be required to be proved. Therein what is required to be proved is that the workman suffered injuries or died in the course of employment. The amount of compensation would be determined having regard to the nature of injuries suffered by the worker and other factors as specified in the Act. The findings of fact arrived at by the Commissioner for Workmen's Compensation are final and binding. Subject to the limitations contained in Section 30 of the 1923 Act, an appeal would be

maintainable before the High Court; but to put the insurer to further disadvantages would lead to an incongruous situation.

An insurer, subject to the terms and conditions of contract of insurance, is bound to indemnify the insured under the 1923 Act as also the 1988 Act. But as noticed hereinbefore, keeping in view the nature and purport of the two statutes, the defences which can be raised by the insurer being different, the scope and ambit of appeal are also different.

Under the 1988 Act, the driver of the vehicle is liable but he would not be liable in a case arising under the 1923 Act: If the driver of the vehicle has no licence, the insurer would not be liable to indemnify the insured. In a given situation, the Accidents Claims Tribunal, having regard to its rights and liabilities vis-a-vis the third person may direct the Insurance Company to meet the liabilities of the insurer, permitting it to recover the same from the insured. The 1923 Act does not envisage such a situation. Role of reference by incorporation has limited application. A limited right to defend a claim petition arising under one statute cannot be held to be applicable in a claim petition arising under a different statute unless there exists express provision therefore. Section 143 of the 1988 Act makes the provisions of the 1923 Act applicable only in a case arising out of no fault liability, as contained in Chapter X of the 1988 Act. The provisions of Section 143, therefore, cannot be said to have any application in relation to a claim petition filed under Chapter XI thereof. A fortiori in a claim arising under Chapter XI, the provisions of the 1923 Act will have no application. A party to a lis, having regard to the different provisions of the two Acts cannot enforce liabilities of the insurer under both the Acts. He has to elect for one.

Section 167 of the 1988 Act statutorily provides for an option to the claimant stating that where the death of or bodily injury to any person gives rise to a claim for compensation under the 1988 Act as also the 1923 Act, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both. Section 167 contains a non obstante clause providing for such an option notwithstanding anything contained in the 1923 Act.

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159. EVIDENCE ACT, 1872 – Section 32

Dying declaration, evidently value of – Dying declaration, which is true and voluntary can be sole basis of conviction – Satisfaction recorded by the Magistrate regarding proper mental state of the maker necessary – Dying declaration not to be invalidated solely on the condition that doctor has not certified the condition of the declarant to make dying declaration – Law explained.

Ravikumar alias Kutti Ravi v. State of Tamil Nadu

Reported in 2006 (1) ANJ (SC) 305

Held :

Section 32 of the Indian Evidence Act, 1872 is an exception to the general rule against hearsay, Clause (1) of Section 32 makes the statement of the deceased admissible which is generally described as 'dying declaration'. The dying declaration essentially means statements made by the person as to the ause of his death or as to the circumstances of the transaction resulting in his death. The admissibility of the dying declaration is based upon the principle that the sense of impending death produces in man's mind the same feeling as that of the conscientious and virtuous man under oath. The dying declarations is admissible upon consideration that the declarant has made it in extremity when the maker is at the point of death and when every hope of this world is gone, when every motive to the falsehood is silenced and mind induced by the most powerful consideration to speak the truth Notwithstanding the same, care and caution must be exercised in considering the weight to be given to these species of evidence on account of the existence of many circumstances which may affect their truth, The court has always to be in guard to see that the statement of the deceased was not the result of either tutoring or prompting or a product of imagination. The court has also to see and ensure that deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy itself that the deceased was in fit mental condition to make the dying declaration, has to look for the medical opinion. Once the court is satisfied that the declaration was true and voluntary, is undoubtedly, can base its conviction on dying declaration without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely the rule of prudence. These well settled principles have been recognized and reiterated by the rule of prudence. These well settled principles have been recognized and reiterated by this court in the cases *Smt. Paniben vs. State of Gujarat (1992) 2 SCC 474, Uka Ram vs. State of Rajasthan, (2001) 5 SCC 254, Laxman vs. State of Maharashtra, (2002) 6 SCC 710, P.V. Radhakrishna vs. State of Karnataka, (2003) 6 SCC 443, State of maharashtra vs. Sanjay Dr. Rajhans, AIR 2005 97, and Muthu Kutty and Another Vs. State by Inspector of Police, Tamilnadu, (2005) 9 SCC 113.*

In *Kanchy Komuramma vs. State of A.P., (1995) Supp. 4 SCC 118* at para 11, it is laid down that there are certain safeguards which must be observed by the Magistrate when he is requested to record the dying declaration. The Magistrate before recording the dying declaration must satisfy himself that deceased is in a proper mental state to make the statement. He must record that satisfaction before recording the dying declaration. He must also obtain the opinion of the doctor, if one is available about the fitness of the patient to make the statement and the prosecution must prove that opinion at the trial in the manner known to law. In *Laxman v. State of Maharashtra* (supra), a constitution Bench of this court while affirming an earlier ruling of a 3-Judge Bench of this Court in *Koli Chunilal Savji and Anr. vs. State of Gujarat, (1999) 9 SCC 562* held

that if the person recording the dying declaration is satisfied that the declarant was in fit mental condition to make the dying declaration then such dying declaration would not be invalid solely on the ground that the doctor has not certified as to the condition of.the declarant to make the dying declaration.

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160. CRIMINAL PROCEDURE CODE, 1973 – Section 154

Registration of FIR regarding cognizable offence – Duty of police – Police Officer duty bound to register FIR – Genuineness or cerdibility of the information to be considered only after registration of case – Law explained.

Ramesh Kumari v. State (NCT of Delhi) and others

Judgement dt. 21.02.2006 Passed by the Supreme Court in Criminal Appeal No. 1229 of 2002, reported in (2006) 2 SCC 677

Held :

The learned Additional Solicitor General, at the outset, invites our attention to the counter-affidavit filed by the respondent and submits that pursuant to the aforesaid observation of the High Court the complaint/representation has been subsequently examined by the respondent and found that no genuine case was established. We are not convinced by this submission because the sole grievance of the appellant is that no case has been registered in terms of the mandatory provisions of Section 154(1) of the Criminal Procedure Code. Genuineness or otherwise of the information can only be considered after registration of the case. Genuineness or credibility of the information is not a condition precedent for registration of a case. We are also clearly of the view that the High Court erred in law in dismissing the petition solely on the ground that the contempt petition was pending and the appellant had an alternative remedy. The ground of alternative remedy nor pending of the contempt petition would be no substitute in law not to register a case when a citizen makes a complaint of a cognizable offence against a police officer.

That a police officer mandatorily registers a case on a complaint of a cognizable offence by the citizen under Section 154 of the Code is no more res integra. The point of law has been set at rest by this Court in *State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335.* This Court after examining the whole gamut and intricacies of the mandatory nature of Section 154 of the Code has arrived at the finding in paras 31 and 32 of the judgment as under : (SCC pp. 354-55)

> "31. At the stage of registragion of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154 (1) of the Code, the police officer concerned cannot embark upon an enquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of

a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to Section 157. (As we have proposed to make a detailed discussion about the power of a police officer in the field of investigation of a cognizable offence, within the ambit of Sections 156 and 157 of the Code in the ensuing part of this judgment, we do not propose to deal with those sections in extenso in the present context.) In case, an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory dury cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by sub-section (3) of Section 154 of the Code.

32. Be it noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression *'information'* without qualifying the same as in Section 41 (1) (a) or (g) of the Code wherein the expressions, *'reasonable complaint'* and *'credible information'* are used. Evidently, the non-qualification of the word *'information'* in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word 'information' without qualifying the said word, Section 139 of the Code of Criminal Procedure of 1861 Act 25 of 1861) passed by the Legislative Council of India read that *'every complaint or information'* preferred to an officer in charge of a police station, should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that 'every complaint' preferred to an officer in charge of a police station shall be reduced in writing. The word 'complaint' which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word 'information' was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 190(c) of the present Code of 1973 (Act 2 of 1974). An overall reading of all

the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be an information and that information must disclose a cognizable offence."

(emphasis in original)

Finally, this Court in para 33 said : (SCC p. 355)

"33. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154 (1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information."

5. The views expressed by this Court in paras 31, 32 and 33 as quoted above leave no manner of doubt that the provision of Section 154 of the Code is mandatory and the officer concerned is duty-bound to register the case on the basis of such an information disclosing cognizable offence.

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161. SERVICE LAW :

Temporary employment – Appointment as daily wager – Appointee has no vested legal right to be regularized – Law explained.

M.P. Housing Board and another v. Manoj Shrivastava

Judgment dt. 24.02.2006 passed by the Supreme Court in Civil Appeal No. 1265 of 2006, reported in (2006) 2 SCC 702

Held :

A daily wager does not hold a post unless he is appointed in terms of the Act and the Rules framed thereunder. He does not derive any legal right in relation thereto.

The effect of such an appointment recently came up for consideration in *State of U.P. v. Neeraj Awasthi, (2006) 1 SCC 667* wherein this Court clearly held that such appointments are illegal and void. It was further held : (SCC pp. 690-91, paras 75-76)

"75. The fact that all appointments have been made without following the procedure, or services of some persons appointed have been regularised in past, in our opinion, cannot be said to be a normal mode which must receive the seal of the court. Past practice is not always the best practice. If illegality has been committed in the past, it is beyond comprehension as to how such illegality can be allowed to perpetuate. The State and the Board were bound to take steps in accordance with law. Even in this behalf Article 14 of the Constitution will have no application. Article 14 has a positive concept. No equality can be claimed in illegality is now well settled. (See – *State of A.P. v. S.B.P.V. Chalapathi Rao, (1995) 1 SCC 725, SCC para 8; Jalandhar*

Improvement Trust v. Sampuran Singh,(1999) 3 SCC 494 SCC para 13 and State of Bihar v. Kameshwar Prasad Singh, (2000) 9 SCC 94, SCC para 30.)

76. In the instant case, furthermore, no post was sanctioned. It is now well settled when a post is not sanctioned, normally, directions for reinstatement should not be issued. Even if some posts were available, it is for the Board or the Market Committee to fill up the same in terms of the existing rules. They, having regard to the provisions of the Regulations, may not fill up all the posts."

It is now well settled that only because a person had been working for more than 240 days, he does not derive any legal right to be regularised in service. (See *Madhyamaik Shiksha Parishad, U.P. v. Anil Kumar Mishra, (2005) 5 SCC 122. Executive Engineer, ZP Engineering Divn v. Digambara Rao, (2004) 8 SCC 262. Dhampur Sugar Mills Ltd. v. Bhola Singh, (2005) 2 SCC 470. Manager Reserve Bank of India v. S. Mani, (2005) 5 SCC 100 and Neeraj Awasthi* (supra).

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162. RENT CONTROL AND EVICTION :

Eviction of tenant at the instance of co-owner – One of the co-owners can file eviction suit without joining other co-owners – Consent of other co-owners to be assumed unless shown otherwise – Law explained.

Mohinder Prasad Jain v. Manohar Lal Jain

Judgment dt. 24.02.2006 passed by the Supreme Court in Civil Appeal No. 1263 of 2006, reported in (2006) 2 SCC 724

Held :

This question now stands concluded by a decision of this Court in *India Umbrella Mfg. Co. v. Bhagabandei Agarwalla, (2004) 3 SCC 178* wherein this Court opined: (SCC p. 183, para 6)

"6. Having heard the learned counsel for the parties we are satisfied that the appeals are liable to be dismissed. It is well settled that one of the co-owners can file a suit for eviction of a tenant in the property generally owned by the co-owners. (See *Sri Ram Pasricha v. Jagannath, (1976) 4 SCC 184 and Dhannalal v. Kalawatibai, (2002) 6 SCC 16, SCC para 25*). This principle is based on the doctrine of agency. one co-owner filing a suit for eviction against the tenant does so on his own behalf in his own right and as an agent of the other co-owners. The consent of other co-owners is assumed as taken unless it is shown that the other co-owners were not agreeable to eject the tenant and the suit was filed in spite of their disagreement. In the present case, the suit was filed by both the co-owners. One of the co-owners cannot withdraw his consent midway the suit so as to prejudice the other co-owner. The suit once filed, the rights of the parities stand crystal-

lised on the date of the suit and the entitlement of the co-owners to seek ejeetment must be adjudged by reference to the date of institution of the suit; the only exception being when by virtue of a subsequent event the entitlement of the body of co-owners to eject the tenant comes to an end by act of parties or by operation of law."

A suit filed by a co-owner, thus, is maintainable in law. It is not necessary for the co-owner to show before initiating the eviction proceedings before the Rent Controller that he had taken option or consent of the other co-owners. However, in the event a co-owner objects thereto, the same may be a relevant fact.

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163. BANKER AND CUSTOMER :

Bank guarantee, encashment of – Rule of non-intervention, exceptions for – Law explained.

BSES Ltd. (Now Reliance Energy Ltd.) v. Fenner India Ltd. and another Judgment dt. 03.02.2006 passed by the Supreme Court in Civil Appeal No. 955 of 2006, reported in (2006) 2 SCC 728

Held :

... learned Senior Counsel for the appellant, urged that the settled law in this country is that a bank guarantee is an independent contract between the bank and the beneficiary thereof. Accordingly, irrespective of any dispute between the beneficiary and the party at whose instance the bank has given the guarantee, the bank is obliged to honour its guarantee, as long as the guarantee is unconditional and irrevocable. Our attention was drawn to the judgment of this Court in *U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd., (1988) 1 SCC 174* (hereinafter "U.P. Coop. Federation"). It was pointed out in that case that a bank guarantee must be honoured in accordance with its terms as the bank, which gives the guarantee, is not concerned with the relations between the supplier and the customer. Neither is the bank concerned with the question whether any of them have failed in their contractual obligations or not. In other words, the bank must pay according to the tenor of its guarantee, on demand, without proof or condition.

There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are "special equities" in favour of injunction, such as when "irretrievable injury" or "irretrievable injustice" would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court (see e.g. *U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568* at pp. 574-77, paras 12-16; *State of Maharashtra v. National Construction Co., (1996) 1 SCC 735* at p. 741, para 13. See also *United Commercial Bank v. Bank of India, (1981) 2 SCC 766; Centax (India) Ltd., v. Vinmar Impex Inc., (1986) 4 SCC 136),* that in *U.P. State Sugar*

Corpn. v. Sumac International Ltd., (1997) 1 SCC 568 (hereinafter "U.P. State Sugar Corpn.") this Court, correctly declared that the law was "settled" (Ibid. at p. 574, para 12, per Sujata V. Manohar J.).

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164. CIVIL PROCEDURE CODE, 1908 – O. VI and O. VII

Nature of provisions contained in O.VI and O. VII – Provisions being procedural, omission in respect thereof not to render the plaint invalid – Such defect or omission not only curable but also date back to the presentation of the plaint – Law explained.

Vidhyawati Gupta and others v. Bhakti Hari Nayak and others Judgment dt. 03.02.2006 passed by the Supreme Court in Civil Appeal No. 3005 of 2005, reported in (2006) 2 SCC 777

Held :

In this regard we are inclined to agree with the consistent view of the three Chartered High Courts in the different decisions cited by Mr. Mitra that the requirements of Order 6 and Order 7 of the code, being procedural in nature, any omission in respect there of will not render the plaint invalid and that such defect or omission will not only be curable but will also date back to the presentation of the plaint. We are also of the view that the reference to the provisions of the Code in Rule 1 of Chapter 7 of the Original Side Rules cannot be interpreted to limit the scope of such reference to only the provisions of the Code as were existing on the date of such incorporation. It was clearly the intention of the High Court when it framed the Original Side Rules that the plaint should be in conformity with the provisions of Order 6 and Order 7 of the Code. By necessary implication reference will also have to be made to Section 26 and Order 4 of the Code which, along with Order 6 and Order 7, concerns the institution of suits. We are *ad idem* with Mr. Pradip Ghosh (sic) on this score. The provisions of sub-rule (3) of Rule 1 Order 4 of the Code, upon which the Division Bench of the Calcutta High Court had placed strong reliance, will also have to be read and understood in that context. The expression "duly" used in sub-rule (3) of Rule 1 Order 4 of the Code implies that the plaint must be filed in accordance with law. In our view, as has been repeatedly expressed by this Court in various decisions, rules of procedure are made to further the cause of justice and not to prove a hindrance thereto. Both in *Sk. Salim Haji Abdul Khayum Sab v. Kumar, (2006) 1 SCC 46* and *Kailash v. Nanhku (2005) 4 SCC 480* although dealing with the amended provisions of Order 8. Rule 1 of the Code, this Court gave expression to the salubrious principle that procedural enactments ought not to be construed in a manner which would prevent the Court from meeting the ends of justice in different situations.

The intention of the legislature in bringing about the various amendments in the Code with effect from 1.7.2002 were aimed at eliminating the procedural delays in the disposal of civil matters. The amendments effected to Section 26, Order 4 and Order 6 Rule 15, are also geared to achieve such object, but being

procedural in nature, they are directory in nature and non-compliance therewith would not automatically render the plaint *non est.*, as has been held by the Division Bench of the Calcutta High Court.

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165. SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1988 – Section 2 (1) (c)
Complainant whether a person belonging to Scheduled Caste/ Scheduled Tribe, proof of – Proper course for the prosecution – Prosecution should file certificate regarding SC/ST duly issued by authorized authority.
Bhagwatsingh & seven others v. State of M.P.
Reported in 2006 (1) ANJ (MP) 355

Held :

In the Act Scheduled Caste and Scheduled Tribe is defined u/s 2(1) (c) as under :–

> "Scheduled Castes and Scheduled Tribes shall have the meanings assigned to them respectively under clause (24) and clause (25) of Article 366 of the Constitution."

The Act does not give definition of the terms Scheduled Castes and Scheduled Tribes in their original or natural connotation. "Clauses 24 and 25" of Article 366 as mentioned in the definition hereinabove refer us back to Articles 341 and 342 of the Constitution for the meanings of these terms and by virtue of powers vested under Articles 341 and 342 of the Constitution of India, the President is empowered to issue public notification specifying the castes, races or tribes or part of or groups within castes, races or tribes which shall, for the purposes of Constitution, be deemed to be Scheduled Castes or Scheduled Tribes in relation to a State or Union Territory, as the case may be.

In the instant case, complainant Tejram (P.W.4) has mentioned his caste as "Khatri" and in deposition he has Stated that he belongs to "Khatiq" community. But in his whole statement, he has no where stated that his caste "Khatri" or "Khatiq" fall within the category of Scheduled Castes and prosecution has also not led any evidence, oral or documentary to this effect. In view of the definition of Scheduled Castes and Scheduled Tribes as mentioned hereinabove the proper course for the prosecution for the purposes of this Act is to file certificate regarding Scheduled Castes or Scheduled Tribes as the case may be, duly issued by authorised authority and to this effect from the office of Police Head Quarter, Madhya Pradesh, Bhopal. From time to time circulars were issued and in Circular dated 1.2.2005 under the signature of Director General of Police in para nine directions were given to Superintendent of Police to evolve method by co-operation with District Magistrate for obtaining/ issuing caste certificate under the provisions of the Act as early as possible without any delay. For convenience, the relevant para nine is reproduced as under :–

प्रकरण के लंबित रहने का कारण अधिकांशतः जाति प्रमाण पत्र का समय पर न प्राप्त होना बताया जा रहा है। यह भी देखा गया है कि अ.जा./अ.ज.जा. अधिनियम के तहत पंजीबद्ध प्रकरणों में जाति प्रमाण पत्र जारी करने हेतु वही प्रक्रिया अपनाई जा रही है जो कि यह सामान्य रूप जाति प्रमाण पत्र जारी करने हेतु अपनाई जाती है। इससे निश्चित रूप से जाति प्रमाणपत्र विलंब से प्राप्त होते हैं जिससे एक ओर चालानी कार्यवाही अनावश्यक रूप से लंबित होती है वहीं दूसरी ओर पीड़ित को समय पर राहत राशि भी प्राप्त नहीं होती है। अतः पुलिस अधिक्षकगण, जिला मजिस्ट्रेट से समन्वय स्थापित कर जिले में ऐसी प्रक्रिया प्रारम्भ करवायें जिससे कि अ.जा. /अ.ज.जा. अधिनियम के अंतर्गत पंजीबद्ध प्रकरणों में संबंधित जाति प्रमाणपत्र बगैर विलंब के समय पर उपलब्ध हो जावें।

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166. MOTOR VEHICLES ACT, 1988 – Section 166
WORDS & PHRASES :
Right of L. Rs. of deceased injured to pursue claim for compensation filed by the complainant – L. Rs. entitled to claim loss of the estate – Expression "Loss of estate", meaning and connotation of.
National Garage, Raipur (CG) v. Oriental Insurance Co. Ltd. Raipur
Reported in 2006 (2) MPHT 13

Held :

Learned Counsel for respondent No. 3 submits that since the deceased passed away, therefore, no appeal is maintainable for enhancement of the award. It is submitted that appellants who are the parents are not entitled for and enhancement of compensation. For this contention learned Counsel for respondent No. 3 placed reliance on a decision in the matter of *Melepurath Sankunni Ezhuthassan Vs. Thekatil Geopalankutty Nair,* reported in *1986 ACT 440,* wherein Hon'ble Apex Court in a suit filed for damages for defamation which was dismissed by the Trial Court, partly decreed by the Appellate Court and again dismissed by the High Court, in appeal pending before the Apex Court, appellant died, his Legal Representatives filed application for their substitution, in that case the Apex Court held as under :-

> "The position, therefore, is that had the appellant died during the pendency of his suit, the suit would have abated. Had he died during the pendency of the appeal filed by him in the District Court, the appeal would have equally abated because his suit had been dismissed by the Trial Court. Had he, however, died during the pendency of the second appeal filed by the respondent in the High Court, the appeal would not have abated because he had succeeded in the first appeal and his suit had been decreed. As however, the High Court allowed the second appeal and dismissed the suit, the present appeal by special leave must abate because what the appellant was seeking in this appeal was to enforce his right to sue for damages for defamation. This right did not survive his death and accordingly the appeal abated

automatically on his death and his legal representatives acquired no right in law to be brought on the record in his place and stead."

Further reliance was placed by Shri Jindal, on a decision in the matter of *Virendra Singh Vs. Ashok Kumar and others,* reported in *2004 ACJ 1638,* wherein after placing reliance on a decision of the Apex Court (supra), a Division Bench of this Court held that "Legal representatives of the deceased appellant are entitled to the amount of compensation already awarded by the Tribunal, are however not entitled to prosecute an appeal filed by the deceased injured for enhancement of the amount of compensation. It is held that the amount already awarded formed part of the estate of the deceased and as such, the legal representatives of the deceased are entitled to receive the same. But they are certainly not entitled to seek any enhancement of the amount of the award."

Learned Counsel for appellants placed reliance on a decision of Division Bench of this Court in the matter of *Kartar Kaur Vs. Dayal Singh,* reported in *(1999) II ACC 372* (DB), wherein the Division Bench of this Court has observed as under :–

> 'Where the injured claimant dies as a result of the injuries during the pendency of this claim for compensation, the legal representatives would be entitled to pursue the claim as in case of death caused in an accident by the use of motor vehicle. Where the insured dies his natural death and not because of injuries suffered in motor accident, the legal representatives would be entitled to pursue the claim to the extent as recognized by Section 306 of the Indian Succession Act, that is, the claim on account of loss to the estate of the deceased."

Further reliance was placed by the Counsel for the appellants on a decision in the matter of *Umedchand Golcha Vs. Dayaram and others,* reported in *2001 (1) JLJ 365,* wherein a Division Bench of this Court has considered the word 'estate' and observed as under :–

> "The question is "what is estate ?" A person earns for himself and his dependents. He also augments his estate by savings out of his earnings. "Estate" has undoubtedly in law a diversity of meaning and variety of signification. It may mean property of a living man or that of a deceased person, which passes to his administrator, executor and legal heirs. It may be movable and immovable. The amount spent on himself and dependents stands exhausted, while the amount added to the estate augments the same unless it is used for meeting expenditures like medicines, treatment, diet, attendant, transport, doctor's fee etc. thereby causing pecuniary loss to the estate."
>
> "Further, the existing state of estate may suffer loss by application towards medical expenses, expenditure on travelling, expenditure on attendant, expenditure on diet, expenditure on doctor's fee, reasonable monthly/annual accretion to the estate for certain period etc.,

the claimant does not keep separate amount for such unforeseen expenditures during his lifetime. His income is at the most divided in three parts namely expenditure on himself, expenditure on family and savings to the estate. Therefore, he has to meet such expenditure from out of his estate. There may be circumstance where it is borne by his legal representative. Therefore, it is held that the legal representatives can ask for loss to the estate of these items by production of satisfactory evidence unless Court is able to draw legitimate conclusion about such expenditures from out of the estate, from the facts and circumstances and on the basis of experience."

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167. PREVENTION OF FOOD ADULTERATION ACT, 1954 – Sections 2 (vii), 9 and 10
Whether Food Inspector notified for the entire district should further be notified for a particular local area ? Held, No – Law explained.
Kailash Budhwani and another v. State of M.P.
Reported in 2006 (2) MPHT 382 (DB)

Held :

Learned Single Judge has made a reference in this revision. Following question has been referred for consideration in the Division Bench :–

> "Whether the "Food Inspector" Shri S.C. Gupta, could function as a Food Inspector in local area of Mandideep in absence of a notification assigning him the local area of Mandideep ?"

Learned Single Judge has referred the matter for consideration of the aforesaid question in the backdrop of the fact that it was contended on behalf of the accused that there was no notification issued by the State Govt. assigning the area of Mandideep to Shri S.C. Gupta hence he could not function as Food Inspector in the local area of Mandideep. Reliance was placed upon Section 9 (1) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as "the Act of 1954").

Learned Single Judge has observed that it is necessary to issue notification to assign the local area to Food Inspector so that any person is free to verify whether his appointment is good and he has the prescribed qualification as per rules made in this behalf in accordance with Section 2 (xii) of the Act of 1954. Secondly, Food Inspector has drastic powers under Section 10 and 11 of the Act and this power can be exercised only by the Food Inspector and not by a private person. If his name is not notified in the Official Gazette, it would not be known to the concerned person in advance that person claiming to be a Food Inspector is really appointed as such. Therefore, Parliament has required the publication of his name in the Official Gazette by the concerned Govt. A Food Inspector can function in a local area under the Act and consequently it is necessary that the local area should be assigned to him in the notification.

Though, apparently a Food Inspector may appear to be comparatively low salaried officer, but he exercises drastic powers under Section 10 and 11 of the Act of 1954. Local area in which he has to operate should be known to the public at large. If an obstruction is caused to the Food Inspector that is also punishable, minimum sentences has already been prescribed of six months which may extend to three years with fine. Learned Single Judge has considered the question involved is likely to affect appointment of food inspectors in the entire State. Therefore, a reference has been made. Matter was directed to be placed before my Lord the Chief Justice to constitute the Bench of two or more Judges for considering the question arising out of this criminal revision. Hon'ble the Chief Justice has referred the matter to the Division Bench, hence, this matter has travelled to us.

In our opinion, it is not necessary as per the aforesaid provisions that assigning of area to Food Inspector is required to be published in the Official Gazette; what is necessary that his appointment as Food Inspector should have been notified which has been notified in the instant case and local area has also been notified in the Official Gazette. It is not necessary to issue gazette notification; whenever any area which is already a local area as defined in Section 2 (vii) of the Act of 1954 that a fresh notification should be issued by the State Govt. in the Official Gazette. This interpretation is further fortified by reading of sub-rule (3) of Rule 4 of the Rules of 1962. It is apparent from the afore quoted Rule 4 (3) that the Local Authority may appoint persons in such number as it thinks fit, having qualifications preseribed under the Central Rules, to be Food Inspectors for the purposes of this Act., notification under Section 9 of Act is not necessary. It is nowhere necessary that their appointment has to be notified by the Local Authority in the official gazette. What is the function of the Local Authority has also been assigned to the Local (Health) Authority by virtue of insertion by Act 34 of 1976 of Section 2 (viii-a) w.e.f. 1.4.76, thus Local (Health) Authority can exercise all the powers as it is to be in charge of Health Administration in such area. Thus, in our opinion, it is not necessary to issue a notification under Section 9 of the Act whenever a Food Inspector is posted at any particular area that he is to be the Food Inspector for that particular area, no such notification is required with respect to the individual concerned, it can be done by an order issued by Local Authority or Local (Health) Authority. Similar view has been taken by Single Bench of this Court in *Mohan Singh Vs. State of M.P., 1995 MPLJ 62* wherein notification issued by the District Family Planning and Health Officer under Rule 4 (3) of the Rules of 1962 was considered; it was held that status of (sic) Food Inspector can be conferred by District Family Planning & Health Officer, Food Inspector and Notification issued by CMO under Rule 4 (3) of the State Rules empowering the Sanitary Inspector to work as Food Inspector was held to be proper. This Court in *Mohan Singh's case* (supra) has opined thus :–

> "11. Normally whenever, a word is defined in a statute and that word occurs in the succeeding sections, the meaning given in the defini-

tion clause must be applied in construing the sections concerned. However, if in the subject or context of a particular section, it appears that there is something different or repugnant so that the definition can not be fitted in, the Court is at liberty to construe the word occurring in the section in a manner in which it has not been defined and to give it the ordinary meaning or some other meaning opposite to the context or the subject. The ordinary meaning of the word 'prescribe' is lay down or impose authoritatively' Section 2 (vii) which deals with the definition of Local Authority' is in two parts. In the first part, the statute itself locates the Local Authority in relation to Municipality, Cantonment or Notified Area. In the second part, it is stated that Local Authority in any other local area is such authority as may be prescribed by the Government under the Act. If rules are required to prescribe Local Authority in such cases also the exercise will become too rigid since rules are required to be laid before the State Legislature. Such a rigid meaning for the word 'prescribe' is not indicated by the context of the definition of 'Local Authority'. Therefore, the Government Notification pre-seribing District Family Planning and Health Officer or Civil Surgeon (redesignated as Chief Medical Officer) as Local authority has to be regarded as valid prescription though it is not made by way of rules. That being so, Ex. P-4 notification issued by the District Family Planning and Health Officer and Ex. P-5 notification issued by Chief Medical Officer constitute valid appointment empowering P.W. 3 to act as Food Inspector."

Division Bench of this Court in *Shri Prasad Vs. State of M.P., 2004 (1) MPHT 362* has also considered the similar question and has approved the view taken in *Mohan Singh's case* (supra) and has upheld similar order issued by Local (Health) Authority and Deputy Director, Food & Drugs Administration, Jabalpur authorizing certain incumbents to act as Food Inspector for whole of the District of Jabalpur to exercise the power under the Act of 1954 and the Rules framed thereunder.

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168. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 and 141 Liability of the Managing Director or the person issuing cheque on behalf of the company – Placing reliance on *S.M.S. Pharmaceuticals Ltd., (2005) 8 SCC 89,* **held Managing Director/Signatory of cheque can be prosecuted on behalf of the Company for dishonour of cheque. Kaptan Singh Thakur v. M/s Betwa Developers Ltd. Reported in 2006 (2) MPHT 396**

Held :

In the decision of *S.M.S. Pharmaceuticals Ltd v. Neeta Bhalla and another, (2005) 8 SCC 89* a Larger Bench of the Supreme Court was constituted and the following questions were referred to it which reads thus :–

"(a) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1981, it is sufficient if the substance of the allegation read as a whole fulfil the requirements of the said section and it is not necessary to specifically state in the complaint that the person asused was in charge of or responsible for the conduct of the business of the company.

(b) Whether a Director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

(c) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the Managing Directors or Joint Managing Director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against."

After considering several decisions, the questions of reference were answered in Para 19 as under :–

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 can not be said to be satisfied.

(b) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a Director of a company is not sufficient to make the person liable under Section 141 of the Act. A Director in a company can not be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases.

(c) The answer to Question (c) has to be in the affirmative. The question notes that the Managing Director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. *So far as the signatory of a cheque* which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered

under sub-section (2) of Section 141."

(Emphasis supplied)

Thus, the Larger Bench of the Supreme Court in *S.M.S. pharmaceuticals Ltd* (supra), by answering all the questions referred to it specifically held that so far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for incriminating act and will be covered under sub-section (2) of Section 141 of the Act. In the present case there is specific averment in the complaint that the accused/petitioner issued a cheque of Rs. 13,09,852.00 of Allahabad Bank MCA, Habibganj Branch in favour of the complainant company. On bare perusal of the photocopy of the impugned cheque, it is gathered that it bears the signature of Kaptan Singh Thakur in between the specified space of the seal of Abhimat Prakashan Pvt. Ltd. On bare perusal one can read "K.S. Thakur Director". In the cause title of the complaint, where the description of accused has been mentioned, it is gathered that Kaptan Singh Thakur, Chairman and Managing Director M/s Abhimat Prakashan Pvt. Ltd. has been arrayed as accused and if for the convenience, in the body of complaint he has been denoted by the term "accused" it would mean that Kaptan Singh Thakur Chairman and Managing Director of M/s Abhimat Prakashan Pvt. Ltd. Thus, there is no force in the contention of learned Senior Counsel for the petitioner that in the complaint that nowhere it is mentioned that what is the status of Kaptan Singh. On being asked to him specifically that what is the status of Kaptan Singh in the company, Abhimat Prakashan Pvt. Ltd., learned Senior Counsel did not specifically answer to the query but conveniently argued that it should have come in the complaint that what is the status of accused in the company. The word "accused" which has been used in the complaint would mean the person whose description has been given in the cause title of the complaint. Since there is averment in the complaint that the accused issued the cheque, rightly he has been prosecuted.

There is no merit in the contention of learned Counsel that because no where in the complaint it has been mentioned that the accused has signed the impugned cheque of Rs. 13,05,852/- on the contrary there is an averment that the accused had only issued the cheque therefore, it can not be said that the accused has in fact signed the cheque. On bare perusal of the photocopy of the cheque clearly the signature of K.S. Thakur, Director, Abhimat Prakashan is appearing, therefore, it can not be said that the accused hat not signed the cheque. Apart from this the word "issue" can not be construed in a narrower and it should be interpreted in comprehensive manner. In Section 140 of the Act also, where the legislature has disallowed certain type of the defence to be taken in the prosecution under Section 138, has clearly used the words "that he issued the cheque". Thus the word "issued" is comprehensive enough and would also include signature on the cheque.

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169. CRIMINAL PROCEDURE CODE, 1973 – Section 389
Suspension of execution of sentence and release on bail by Hon'ble the High Court u/s 389 – Directions issued by the Special Bench regarding formalities to be performed while filing application – Law explained.
Rajendra Marar and another v. State of M.P.
Reported in 2006 (2) MPHT 410 (DB)

Though it is correct that accused/appellant is having a right to make successive applications for grant of bail and the Court entertaining such subsequent applications has a duty to consider the application on merits, but while considering the successive applications the Court is also duty bound to go through reasons and grounds on which the earlier applications were considered. In case any application is considered by the Apex Court and subsequently when the High Court is moved for the same relief, the Court is under obligation to take note of the grounds which persuaded the Apex Court to cancel the bail on earlier occasions. In absence of provisions in the Rules, it will be appropriate to issue certain directions so that a complete justice may be done in the matter and the Court while considering the application should be made aware at a glance in respect of past history of previous applications, filed in the matter in respect of same applicant/appellant. Needless to say it will also save a lot of the time of the Court while considering the application of accused/appellants.

Consequently following directions are issued :–

(1) The applicant/appellant who is filing an application under Section 389 of the Code for suspension of execution of sentence and for grant of bail, in the cause title of application shall disclose following facts:–

  (i) Whether the applicant had filed any application for suspension of sentence before the Apex Court, subsequently when the High Court did not grant bail and all the particulars of the aforesaid application of Special Leave petition. The applicant/appellant as far as possible either shall file copy of order passed by the Apex Court or shall give details of the order passed by the Apex Court.

  (ii) The applicant/appellant shall disclose how many applications he has filed in the past, their numbers, date of filing of application, date of decision, which Bench heard the matter specifying the name of Hon'ble Judges who have heard the previous application and result of previous application in brief. This information shall be given in chronological order so that at a glance it may come into the notice of the Bench the entire history, in brief in respect of previous applications.

(2) The aforesaid order be complied with forthwith. Any information incorrectly submitted or suppressed shall be taken into consideration by the Bench hearing the aforesaid application.

(3) A copy of this order be sent to the High Court Bar Association for information to the Members of the Bar.

(4) The office shall insist for compliance of the aforesaid directions and in case of non-compliance of directions the matter be placed before the concerned Registrar, in default. The office before placing the application for hearing shall verify the aforesaid facts from the record.

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170. CRIMINAL PROCEDURE CODE, 1973 – Section 391
Prayer to adduce additional evidence – Prayer should be considered along with the hearing of the appeal on merits and not in isolation – Law explained.
Dharmendra v. State of M.P.
Reported in 2006 (1) MPLJ 436

Held :

The Code of Criminal Procedure gives power to appellate Court to take additional evidence which for reason to be recorded by the Court, it considers to be necessary to pronounce the judgment. The additional evidence should have such of which there may be an occasion of failure of justice. The additional evidence must have some direct bearing on the facts of the case. The opening words of section 391, Criminal Procedure Code says that :–

> "In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate."

These opening words clearly suggest that the application moved under section 391, Criminal Procedure Code should be considered by the Appellate Court while dealing with the criminal appeal and when it comes to the conclusion that this additional evidence is necessary, such application can only be dealt with after going through the entire record of the trial Court and after hearing both the parties. Therefore, the wording of section 391, Criminal Procedure Code suggests that the application moved under this section should not be considered in isolation but should be considered after hearing the parties on merits. If after hearing parties on merits Court comes to the conclusion that the additional evidence is unnecessary then while deciding the appeal application moved under section 391 Code of Criminal Procedure can be dismissed. If such additional evidence appears necessary regarding decision of the matter and without which the appeal cannot be disposed of then such additional evidence may be taken on record either by the Appellate Judge himself or by the trial Court. The Appellate Judge may also remand back the matter to the trial Court for the purpose recording additional evidence as provided under sub-section (2) of the said section 391 therefore, the whole scheme of section 391 suggests

that like civil cases an application for taking additional evidence on record under section 391 of the Code of Criminal Procedure should also be considered and disposed of after hearing the criminal appeal on merits and such application should not be disposed of in isolation without hearing the appeal on merits because if such applications are disposed of without hearing the appeal on merits then there may be cases of failure of justice.

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171. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 (1) (a) & 12(1) (c)

(i) Arrears of rent, deposit of – Whether tenant is bound to pay time barred rent? Held, No – Law explained.

(ii) Disclaimer of title in written statement – The plea subsequently taken back by way of amendment – Whether initial plea can be a basis for eviction u/s 12 (1) (c)? Held, Yes – Law explained.

Ramgopal Kanhaiyalal v. Firm M/s Dinanth Gyasilal
Reported in 2006 (1) MPLJ 445

Held :

Scope of ground under section 12(1) (c) has been precisely made clear by the Apex Court in the case of *Sheela and others vs. Firm Prahald Rai Prem Prakash* reported as *(2002) 3 SCC 375.* The Apex Court has held :-

> "In our opinion, denial of landlord's title or disclaimer of tenancy by tenant is an act which is likely to affect adversely and substantially the interest of the landlord and hence is a ground for eviction of tenant within the meaning of clause (c) of sub-section (1) 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. A tenant bonafide calling upon the landlord to prove his ownership or putting the landlord to proof of his title so as to protect himself (i.e. the tenant) or to earn a protection made available to him by the rent control law but without disowning his character of possession over the tenancy premises as tenant cannot be said to have denied the title of landlord or disclaimed the tenancy. Such an act of the tenant does not attract applicability of section 12 (1) (c) above said. It is the intention of the tenant, as culled out from the nature of the plea raised by him, which is determinative of its vulnerability.

The question involved in the case would be whether requisites for the purpose of section 12 (1) (c) of the Act as laid down by the Apex Court were available or not. Viewing from the initial written statement, it is clear that the dependent denied the ownership of Vinod Kumar (see original paragraphs-3 of

written statement) and also denounced his charåcter as a tenant vide paragraph 12 of the original written statement. In the order sheet dated 13-9-1996, it was observed by the learned trial Judge that the defendant refused to acknowledge the plaintiff as his landlord. The citation *(2000) 1 SCC 451* relied upon by Shri N.K. Jain, learned senior counsel is not based on M.P. Accommodation Control Act. So, I may prefer to examine the present case in the light of *Sheela's* case (supra). The Apex Court has made emphasis on the bona fide of the tenant while taking such pleas. In the present case the defendant right at the first instance not only denied the ownership of his landlord but denounced his character also as a tenant. Such pleadings were permitted to be on record for quite a long and an application for amendment was made only consequent to the amendment made in the plaint..... The question before me is about the effect of the averments contained in the written statement initially but withdrawn subsequently. Shri N.K. Jain, learned senior counsel relying upon *AIR 1976 Allahabad 399* submitted that once an amendment is allowed no reference ought to be made to the original pleadings while deciding an issue and the amended pleadings alone should be considered. However, this legal position is not found to be proper in view of various decisions of this Court. In the case of *Kubra Bai vs. Islam Bai* reported as *1983 MPWN 46,* this Court has observed that it is always open to the defendants to cross-examine the plaintiffs in the light of original pleadings and the party could well be cross-examined as to what he meant by such initial pleadings. In the case of *Mangilal vs. Sakaribai* reported as *1979 (1) MPWN 93,* this Court has categorically observed that it cannot be said that merely because the defendant chooses to delete certain portion from the written statement, it does not mean that such portions will be scored out from the record. The original statement will remain on record and if the plaintiff wants he can use as and when it is necessary. It has been further held that it cannot be said that some valuable admissions will be lost if the application for amendment is allowed.

Lastly, I may refer to the decision of this Court rendered by Hon'ble Justice Shri R.C. Lahoti (presently Hon'ble the Chief Justice of India) in the case of *Bhagwati Prasad vs. Ramesh chand and others* reported as *1994 MPLJ 619.* In an identical situation is has been held:-

> "Moreover the sin which the tenant/appellant has committed, would not be wiped out in spite of the proposed amendment. Once the tenant has incurred the liability for ejectment under clause (c) of section 12(1) of the Act merely because he chose to withdraw the denial belatedly, the cause of action accrued to the landlord/plaintiffs would not be wiped out in the absence of there being a specific provision to that effect in the Act.

Shri N.K. Jain, learned senior counsel submitted that the contention of the defendant/tenant is that the plaintiff Saraswati Bai is not alone the owner of the suit shop and therefore in view of *1991 JLJ 343* the pleadings of the defendant

do not amount to denial of title. It may be seen that this Court has categorically found that the ownership of Vinod Kumar was expressly denied in paragraph-3 of the original written statement and the character as tenant was denounced expressly in paragraph-12 of the written statement. This Court having further found in the light of the aforesaid legal position that the denials existing before the amendment can very well be taken into consideration for grant of eviction under section 12(1) (c) of the M.P. Accommodation Control Act, the learned lower Appellate Court is not found to have committed any mistake. Accordingly, the substantial question of law No. 3 is answered hereby in favour of the respondent.

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172. CIVIL PROCEDURE CODE, 1908 – O.XXXVII R.3 (6)
WORDS AND PHRASES
Expression 'security' as used in O.37 R.3 (6), meaning and connotation of – The expression should be construed in restricted sense – Law explained.
Devendra Kumar v. G.N. Goyal
Reported in 2006 (1) MPLJ 472

Held :

The word "security" which is used in Order 37 relates to the security of the amount. This word cannot be stretched to the extent that in the garb of security, defendant may be directed to deposit the suit amount. When the legislature used the word 'security' only without any qualification or giving any option to the Court to direct the defendant to deposit the amount then the security has to be constituted in restricted sense. If the word security is stretched to the extent of direction to deposit the amount by way of security, then the entire purpose of sub-rule (6) of Rule 3 of Order 37, Civil Procedure Code shall be frustrated. The Court examined the case of the defendant at the time while the Court was granting leave to defend to the defendant. On second occasion when the Court was considering the application filed by the plaintiff cannot go back to the stage of granting leave to defend and only has to consider the case in respect of the direction to furnish security. In this case the word security has to be interpreted in the reference, which can be explained only security is in respect of the suit amount and not beyond it. If at the stage when the Court has already granted leave to defend then at the time of considering the case for judgment if the defendant is directed to deposit the entire suit amount or the amount of promissory notes, then grant of leave to defend unconditionally shall become redundant. In the circumstance, security can be considered only in respect of securing payment of suit amount and not beyond it.

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173. CIVIL PROCEDURE CODE, 1908 – O.29 R.1

Expression 'principal officer' as used in O.29 R.1, meaning and connotation of – Principal Officer can properly sign and verify the pleadings even in the absence of power of attorney – Law explained.
Bank of India v. S.K. Mukerjee and another
Reported in 2006 (1) MPLJ 477

Held :

Thus in view of the aforesaid Order 29 Rule 1 of the Code of Civil Procedure principal officer of the Corporation is competent and authorized to defend or prosecute the legal proceedings and he had also the authority to verify, sign and date the pleadings. The power of attorney is not the basic requirement for this purpose. It is not in dispute that the appellant bank is a corporate body under the concerning banking provisions. Thus, it is held that the Regional Manager has verified, signed with date the plaint as Principal Officer of that branch and his authority was not challenged by cogent and reliable evidence thus even in the absence of proof or presentation of the power of attorney it's suit could not be dismissed on this ground. In fact the suit should have been decreed if other factual circumstances of transaction have been found proved. The aforesaid view is satisfactorily fortified by following precedents.

At earlier occasion in the matter of *Jagdish Singh vs. Central Bank of India and ors.* reported in *(1995) II BC 320* this question has been answered as under :–

> "I have considered the argument. Provisions of Order 29, Rule 1, Civil Procedure Code show that the plaint can be signed by the Principal Officer of the Corporation who is able to depose to the facts of the case. Jaswant Rai Mitra was Assistant Divisional Manager at Gwalior and he was able to depose to the facts on the case and he was Principal Officer at Debra. The plaint in para 2 states that Jaswant Rai Mitra is authorized to sign plaints to verify them and to do all other legal acts on behalf of the plaintiff Bank. In his statement PW-1 Subhash Chandra in para 3 specifically stated that J.R. Mitra was Assistant Divisional Manager and Principal Officer and the plaint bore his signatures. This statement was not challenged in cross-examination at all. Learned Counsel for the appellant contended that authority has not been filed and as such the statement could not be accepted. I respectfully do not agree with the learned counsel because the statement of PW-1 Subhash Chandra has not been challenged at all. It has, therefore, to be taken that J.R. Mitra was Principal Officer and had an authority to sign the plaint. The plaint was, therefore, properly signed. The contention of the appellant fails,"

On other occasion in the matter of *Allahabad Bank, City Branch, Kamania Gate, Jabalpur vs. Desh Singh Bhakhna and ors. (1993) 1 BC 367* it has been held as under :-

"The learned Counsel for the respondents is no doubt right in submitting that the bank should have produced some documentary evidence showing authorization in favour of the then Branch Manager Shri A.L. Pahawa. In our opinion, however, this was not such a fatal defect warranting dismissal of the suit itself. In the oral evidence of the Branch Manager Shri A.C. Kulshreshtha (PW-1), who succeeded Shri A.L. Pahawa, it has been clearly stated that by virtue of his office, Shri Pahawa was the duly authorized officer to sign the pleadings and verify the plaint. In cross-examination of the said witness it could not be seriously disputed that Shri A.L. Pahawa was the Branch Manager of the City Branch and he had signed the plaint and verification clause in that capacity. Non-production, therefore, of any document, showing authorization by the bank in favour of Shri A.L. Pahawa could not merit dismissal of the suit. Under the provisions of Order 29, Rule 1 of the Code, which prima facie apply, even in a suit filed by the bank, the principal officer of the bank who is able to depose to the facts of the case, was fully authorized to sign the pleadings and the verification clause of the plaint."

1. Again in the matter of *Union Bank of India vs. Naresh Kumar and Ors.,* Hon. Apex Court has answered this question till some extent as reported in *AIR 1997 SC Page 3* which reads as under :-

"12. The Courts below having come to a conclusion that money had been taken by respondent No. 1 and that respondent No. 2 and husband of respondent No. 3 had stood as guarantors, and that the claim of the appellant was justified it will be a travesty of justice if the appellant is to be non-suited for a technical reason which does not go to the root of the matter. The suit did not suffer from any jurisdictional infirmity and the only defect which was alleged on behalf of the respondents was one which was curable."

"13. The Court had to be satisfied that Shri L.K. Rohatgi could sign the plaint on behalf of the appellant. The suit had been filed in the nature of the appellant company; full amount or Court-fee had been paid by the appellant bank; documentary as well as oral evidence had been led on behalf of the appellant and the trial of the suit before the Sub Judge, Ambala, had continued for about two years. It is difficult, in these circumstances even to presume that the suit had been filed and tried without the appellant having authorized the institution of the same. The only reasonable conclusion which we can come to is that Shri L.K. Rohatgi must have been authorized to sign the plaint and in any case, it must be held that the appellant had ratified the action of Shri L.K. Rohatgi in signing the plaint and thereafter it continued with the suit."

In view of the aforesaid dictum of different Courts the facts and circumstances of the case at hand are identical till some extent because in the instant case the respondents have not led any evidence, even they have not examined themselves to challenge the authority of the Regional Manager as Principal Officer of the appellant. Thus, it is held that the plaint was properly signed, verified and filed by the Principal Officer of the appellant as permissible under Order-XXIX Rule 1 of the Code of Civil Procedure even in the absence of power of attorney it could not be dismissed. Consequently the finding of the trial Court in this regard is hereby set aside.

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174. INDIAN PENAL CODE 1860 – Sections 406 and 498-A
CRIMINAL PROCEDURE CODE, 1973 – Section 181 (4)
Territorial jurisdiction regarding the offence u/s 498-A IPC – The Court within whose jurisdiction offence committed has jurisdiction – Territorial jurisdiction regarding offence u/s 406 – The Court within whose local jurisdiction the offence was committed or any part of the subject of the offence received or retained or was required to be returned or accounted for, has jurisdiction – Law explained.
Mohammad Noor and others v. Nikhat Pharjana
Reported in 2006 (1) MPLJ 486

Held :

The allegations regarding cruelty as mentioned in the complaint took place at matrimonial home in Uttar Pradesh then certainly in view of the aforesaid decisions of the Supreme Court, *"Surjit Singh v. Nahar Ram and another, 2004 L.T. (SC) 118* the Bhopal Court has no jurisdiction to take the cognizance for the offence of cruelty i.e. 498A Indian Penal Code. But so far offence of section 406, Indian Penal Code the breach of trust is concerned the Bhopal Court has jurisdiction to entertain the complaint if other circumstances are prima facie proved by admissible evidence because the Court of either place Bhopal or Uttar Pradesh had jurisdiction as per provision of section 181 (4) Criminal Procedure Code which says as under :

> "181. *Place of trial in case of certain offences* – (4) Any offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or any part of the property which is the subject of the offence was received or retained, or was required to be returned or accounted for, by the accused person."

The case of the Apex Court as cited by petitioner *AIR 1985 SC 628* (supra) in such matter the section 181 (4) Criminal Procedure Code was not considered and therefore on this point this reported case is distinguishable. While the Bhopal Court is having the jurisdiction as per decided case of this Court in the matter of *Gopal Rao vs. Baldeo* reported in *1960 MPLJ Note 180* in which it was held as under :

"It is not essential under sub-section (2) of section 181, Criminal Procedure Code that at the time property is said to have been received or retained by the accused person, he must have a dishonest intention to misappropriate it or to commit criminal breach of trust in respect thereof. It is enough if the property which is the subject of the offence was received or retained by the accused at a particular place to give jurisdiction to the Magistrate of that place to try the case, even though the property was received lawfully and innocently at that place and was subsequently dealt with dishonestly at another place. *AIR 1954 All. 648 and AIR 1927 Bom. 38.*"

In view of the aforesaid the Bhopal Court has jurisdiction to entertain the matter for cognizance under section 406, Indian Penal Code. But so far the cognizance under section 498A of Indian Penal Code is concerned the complaint is not maintainable in such Court.

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175. PREVENTION OF CORRUPTION ACT, 1988 – Sections 13 (2) and 1(e) Disproportionate assets and unaccounted money – Accused pleading unaccounted money as property belonging to wife – Wife coming forward to depose in favour of the accused and supporting her statement by income-tax returns – Held, in such a situation it is difficult to saddle the accused with all the unaccounted money.
D.S.P., Chennai v. K. Inbasagaran
Reported in 2006 (1) MPLJ 512 (SC)

Held :

We have heard both the learned counsel at length. The basic question that emerges in the present case is whether the accused could be saddled with all the unaccounted money at his hand or not. It is the admitted position that both the husband and wife were living together. The wife was running three concerns though those concerns were running in loss. Yet she could manage to earn black money by selling goods without bills and amassed this wealth without disclosing the same to the Income-tax authority and when the raid was conducted she disclosed the unaccounted money and accepted herself for being assessed by the Income-tax Department. Therefore, in this context, the question arises whether the joint possession of the premises by the husband and wife and the unaccounted money which has been recovered from the house could be said to be in exclusive possession of the accused. There is no two opinion in the matter that the initial burden has be discharged by the prosecution. The prosecution in order to discharge that burden has examined the Investigating Officer, P.W. 53-Shri Viswanathan, D.S.P. (Investigation). P.W. 53-Viswanathan has collected all the materials from various places and he has given the details of his investigation. He has also supported the recoveries which have been made by the Income-tax Department. He in his statement, has also deposed that some money was deposited at various branches of Punjab National Bank at Bangalore and he has examined all the Senior Managers of Pun-

jab National Bank to show that various amounts were deposited in their Banks and the prosecution has also produced them in the witness box to substantiate their allegation as P.Ws. 22, 23, 24, 25, 26 and 32. He has also examined the persons against whose names those amounts were deposited in the witness box. He has also examined the Income-tax Officer as P.W. 14, P.W. 44- Assistant Director of Income-tax (Investigation) and P.W. 51-S. Ganapathy Iyer. By this evidence the prosecution has established that the money was recovered at the house of the accused as well as various purchases of immovable properties mady by the wife of the accused. The prosecution has tried to establish that all the moneys which had been recovered from the house of the accused, various deposits in the Punjab National Bank at various places through the influence of the Regional Manager of Punjab National Bank and the recovery of the gold ornaments as well as the recovery of foreign exchange i.e. dollars belong to accused. Thus, the prosecution has tried to establish that all the moneys belonged to the accused and after taking sanction, prosecution was launched against the accused. There is no two opinion in the matter that the initial burden lies on the prosecution. In the case of *C.S.D. Swami vs. The State* reported in *AIR 1960 SC 7,* this Court has taken the view that in section 5(3) of the Prevention of Corruption Act. 1947 a complete departure is made from the criminal jurisprudence still initial burden lies on the prosecution and in that context it has been observed as follows :

> "Section 5(3) does not create a new offence but only lays down a rule of evidence, enabling the Court to raise a presumption of guilt in certain circumstances- a rule which is a complete departure from the established principle of criminal jurisprudence that the burden always lies on the prosecution to prove all the ingredients of the offence charged, and that the burden never shifts on to the accused to disprove the charge framed against him."

Therefore, the initial burden was on the prosecution to establish whether the accused has acquired the property disproportionate to his known source of income or not. But at the same time it has been held in a case of *State of M.P. vs. Awadh Kishore Gupta and others* reported in *(2004) 1 SCC 691* that accused has to account satisfactorily the money received in his hand and satisfy the Court that his explanation was worthy of acceptance. In order to substantiate the plea taken by the accused that all the moneys which had been received belonged to his wife and in support thereof he has examined as many as 13 witnesses including himself, his wife and his son-in-law. D.W. 12 is the wife of the accused. She has deposed that the entire money belonged to her. She has admitted the raid on her house and she has also admitted that she has amassed the wealth by selling cycle rims and leather products without any bill and out of the money amassed by her she had persuaded her husband to deposit the same at various Banks. She has come forward and admitted the recovery of the foreign exchange at her house and she has accounted for the same. She has also admitted the recovery of the gold ornaments at her house and she has explained that she has purchased those gold ornaments. She has also submit-

ted that some real estate was purchased out of self earning as well as the loan from the mother of the son-in-law and some contribution was made by the son-in-law and the son-in-law has also admitted. Likewise, D.W.8 - her son-in-law, Thiru S. Rajasankar also appeared in the witness box and admitted that he has also saved certain foreign exchange when he had gone on various visits abroad. He has also admitted to have carried some money to be deposited in the Bank. The accused has also come forward in the witness box as D.W. 13 and has deposed that all the moneys belonged to his wife and when he came to know about the uncounted money at his house, he gave his piece of mind to her. He has admitted that on one or two occasions money was carried by himself to be deposited in the account in Punjab National Bank and some money was also deposited on account of some of the members of the family by P.W.8, S. Rajasankar, son-in-law. Therefore, under these circumstances, the respondent has explained the possession of unaccounted money.

Now, in this background when the accused has come forward with the plea that all the money which has been recovered from his house and purchase of real estate or the recovery of the gold and other deposits in the Bank, all have been owned by his wife, then in that situation how can all these recoveries of unaccounted money could be laid in his hands. The question is when the accused has provided satisfactorily explanation that all the money belonged to his wife and she has owned it and the Income-tax Department has assessed in her hand, then in that case, whether he could be charged under the Prevention of Corruption Act. It is true that when there is joint possession between the wife and husband, or father and son and if some of the members of the family are involved in amassing illegal wealth, then unless there is categorical evidence to believe, that this can be read in the hands of the husband or as the case may be, it cannot be fastened on the husband or head of family. It is true that the prosecution in the present case has tried its best to lead the evidence to show that all these moneys belonged to the accused but when the wife has fully owned the entire money and the other wealth earned by her by not showing in the Income-tax return and she has accepted the whole responsibilities, in that case, it is very difficult to hold the accused guilty of the charge. It is very difficult to segregate that how much of wealth belonged to the husband and how much belonged to the wife. The prosecution has not been able to lead evidence to establish that some of the money could be held in the hands of the accused. In case of joint possession it is very difficult when one of the persons accepted the entire responsibility. The wife of the accused has not been prosecuted and it is only the husband who has been charged being the public servant. In view of the explanation given by this husband and when it has been substantiated by the evidence of the wife, the other witnesses who have been produced on behalf of the accused coupled with the fact that the entire money has been treated in the hands of the wife and she has owned it and she has been assessed by the Income- tax Department, it will not be proper to hold the accused guilty under the Prevention of Corruption Act as his explanation appears to be plausible and justifiable.

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176. MOHAMMADAN LAW :

Divorce - Divorce by husband – Divorce may be oral or in writing – Ingredients of valid divorce – Law explained.

Shahzad v. Anisa Bee

Reported in 2006 (1) MPLJ 555

Held :

Hon'ble Apex Court in the case of *Shamim Ara vs. State of U.P., AIR 2002 SC 3551* after considering the provisions of para 310 of the Mulla's Principles of Muhammadan Law has considered in detailed as to how Talaq can be given by a husband to his wife. As per Para 310 of Mulla's Principles of Muhammadan Law Talaq may be in oral or in writing, in case of oral Talaq the intention of giving Talaq must be pronounced by husband. In case of written Talaq the written Talaqnama is required to be sent to the wife. The Hon'ble Supreme Court held that :–

> "The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiter-one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected. In *Rukia Khatun's case,* the Division Bench stated that the correct law of talaq, as ordained by Holy Quaran, is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. In the case before Hon'ble Supreme Court the plea of Talaq was taken by husband in his written statement and it was pleaded that wife has been divorced on 11.7.1987. This part in his application was not found sufficient to draw conclusion in favour of Talak."

In the present case also when the husband has not even made any averment in his reply by way of amendment and the said Talaqnama was never communicated to the wife then it is hard to conclude that respondent No. 1 was really given Talak by the applicant.

Full Bench of our High Court in the case *Wali Mohammad vs. Batulbai, 2003 MPLJ 513* has held that :-

> "12. – Coming to question No. (iii), the answer to the question is contained in the Supreme Court decision in the case of *Shammim Ara (supra)*, wherein it was held that Talaq to be effective has to be pronounced. The term "pronounce" means to proclaim, to utter formally, to utter rheotically, to declare to utter and to articulate. Their Lordships further cautioned that mere plea taken in the written statement of a divorce having been pronounced sometime in the past, cannot be treated as effectuating Talaq on the date of delivery of the copy of the written statement to the wife. A plea of previous divorce

taken in the written statement cannot at all be treated as pronouncement of Talaq by the husband on the wife on the date of filing of written statement in the Court followed by delivery of a copy thereof to the wife." It was, thus, held that the respondent–husband shall continue to remain liable for payment of maintenance until the obligation comes to an end in accordance with law."

The law on the point has clearly been laid down by the Hon'ble Apex Court and our High Court has also followed the same in many cases. This law apply to the facts of the present case also with full force and, therefore, in the facts and circumstances of the present case it is held that applicant has not given divorce to his wife and, therefore, wife respondent No. 1 shall continue to be entitled for a maintenance under section 125 of the Code of Criminal Procedure as ordered by learned Additional Sessions Judge.

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177. CIVIL PROCEDURE CODE, 1908 – Section 10
Stay of suit – Whether trial Court can pass interlocutory order after stay of suit u/s 10? Held, Yes – Law explained.
Jagdamba Oil Agency v. State of M.P.
Reported in 2006 (1) MPLJ 564

Held :

..Supreme Court in the case of *Indian Bank* v. *M.S. Co-operative Federation, AIR 1998 SC 1952,* has considered the aforesaid question in paras 8 and 9 in the said judgment meaning of the word "trial" as contained in section 10 has been interpreted and it has been held by the Supreme Court that the object of prohibition contained in section 10 is to prevent concurrent finding from simultaneous trial of two parallel suits. It has been held by Supreme Court that there is no bar to the institution of a suit nor is there any bar for passing interlocutory orders, such as orders for consolidation of the suit, attachment and appointment of receiver. It is clear from the observations made by Supreme Court in paras 8 and 9 of the aforesaid judgment even if the trial of the suit is stayed exercising power under section 10 of Civil Procedure Code, the Court is not precluded from proceeding to hearing of interlocutory application like application for temporary injunction. The aforesaid view of the Supreme Court is consistently followed in all the cases relied upon by Shri Mriglani. The same view is reiterated by Allahabad High Court in the case of *Rameshwar v. Vth Additional District Judge, Bast and others, AIR 1999 Allahabad 1* in para 6 wherein, it is held that even after stay of proceeding of the suit under section 10, consideration of interlocutory matter's can be made by the Court. Similarly, in the case decided by Delhi High Court and Mysore High Court, the same view is upheld. Two Benches of this Court have also considered the said question in the case of *Bhuralal Tejpal and others v. Kailashchand Tejpal, 1982 MPLJ 512* it has been held by this Court that applications for temporary injunction or appointment of receiver can be taken up even after orders are passed staying proceeding in a

trial. In the case of *Shri Mahila Grih Udyog Lijjat Papad v. Smt. Usha Sontake, 1990 (I) MPJR 130* specific question with regard to consideration of an application for temporary injunction under Order 39, Rules 1 and 2 of Civil Procedure Code and the implication of stay of a suit under section 10 of Civil Procedure Code was considered and learned Judge has held in clear term that even after staying proceeding pertaining to trial of a suit, application for temporary injunction under Order 39, Rules 1 and 2 of Civil Procedure Code can be taken up for hearing.

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178. CRIMINAL PROCEDURE CODE, 1973 – Section 401
Revision against acquittal by private party – Scope of interference by the revisional Court – Law explained.
Tejmal v. Smt. Sarjudevi and another
Reported in 2006 (1) MPLJ 590

Held :

The scope of interference in the judgment of acquittal by way of revision at the instance of a private party is very much limited. The finding recorded by the Lower Appellate Court may be erroneous to some extent but unless it is shown that such finding is perverse or contrary to the recorded facts, no interference can be made in the criminal revision at the instance of a private party. The Apex Court in the matter of *Akalu Ahir and others vs. Ramdeo Ram, AIR 1973 SC 2145* relying on its earlier judgment has observed as under :-

> "This Court, however, by way of illustration, indicated the following categories of cases which would justify the High Court in interfering with finding of acquittal in revision :-
>
> (i) where the trial Court has no jurisdiction to try the case, but has still acquitted the accused;
>
> (ii) where the trial Court has wrongly shut out evidence which the prosecution wished to produce;
>
> (iii) where the Appellate Court has wrongly held the evidence which was admitted by the trial Court to be inadmissible;
>
> (iv) where the material evidence has been over-looked only (either?) by the trial Court or by the Appellate Court; and
>
> (v) where the acquittal is based on the compounding of the offence which is invalid under the law.
>
> These categories were, however, merely illustrative and it was clarified that other cases of similar nature can also be properly held to be of exceptional nature where the High Court can justifiably interfere with the order of acquittal."

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179. CRIMINAL TRIAL :

Post-mortem report, proof of – Post-mortem report cannot be admitted u/s 294 Cr.P.C. – Further held, concerned doctor should be examined – Law explained.

Amritlal and others v. State of M.P.

Reported in 2006 (1) MPLJ 610 (DB)

Held :

The Division Bench of this High Court in case of *Nahadariya vs. State of M. P., 1980 JLJ 501* has held that :

> "Post-mortem report cannot be relied on without examining the doctor even if the defence counsel is admitting the postmortem report as per provision under section 294, Criminal Procedure Code, Division Bench of this Court has specifically held that such report cannot be admitted in evidence without examining the doctor". (Also see *Jagdeo Singh* and *Ors. vs. State, 1979 CrLJ 236* and *Ganpat Raoji Suryavanshi vs. The State of Maharashtra, 1980 CrLJ 853.)*

In view of this legal position, as a matter of fact, postmortem report Ex. P/13 is not admissible document in evidence and also cannot be looked into. Since this report has not been put to the accused persons in their statements recorded under section 313, Criminal Procedure Code, therefore, the same cannot be relied on without giving opportunity to the accused persons to explain the circumstances falling against them. (*1980 JLJ 501*).

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180. CONSTITUTION OF INDIA – Articles 15 (4) & 16 (4)

Caste status – Whether marriage of a member of non-Scheduled Caste to a member of Scheduled Caste *ipso facto* **confers on him caste status of SC/ST? Held, No.**

Meera Kanwaria v. Sunita & Ors.

Reported in 2006 (I) MPJR 397 (SC)

Held :

It is therefore, beyond any doubt or dispute that a person who is a high caste Hindu and not subjected to any social or educational or backwardness in his life; by reason of marriage alone cannot *ipso facto* become a member of Scheduled Caste or Scheduled Tribe. In absence of any strict proof he cannot be allowed to defeat the very provisions made by the State for reserving certain seats for disadvantaged people.

The High Court may or may not be right in holding that no special ceremony was required for conversion from upper caste to Jatav, but the finding of fact arrived at by the learned District Judge that her marriage had taken place as per Vedic Hindu Rites and her marriage has been accepted by her Biradari meaning thereby elders of her husband's family only cannot be held to be the same as that she had been accepted by the community of her husband.

We may notice that in *State of Kerala and Another v. Chandra Mohanan [(2004) 3 SCC 429]*, a three-Judge Bench after noticing the said decisions opined:

> "The customary laws of a tribe not only govern his culture, but also succession, inheritance, marriage, worship of Gods etc. The characteristics of different tribes despite the fact that they have been living in the same area for a long time are different. They indisputably follow different Gods. They have different cultures. Their customs are also different."

It was further observed:

> "Before a person can be brought within the purview of the Constitution (Scheduled Tribes) Order, 1950, he must belong to a tribe. A person for the purpose of obtaining the benefits of the Presidential Order must fulfil the condition of being a member of a tribe and continue to be a member of the tribe. If by reason of conversion to different religion a long time back, he/his ancestors have not been following the customs, rituals and other traits, which are required to be followed by the members of the tribe and even had not been following the customary laws of succession, inheritance, marriage etc. he may not be accepted to be a member of a tribe. In this case, it has been contended that the family of the victim had been converted about 200 years back and in fact the father of the victim married a woman belonging to a Roman Catholic, wherefrom he again became a Roman Catholic. The question, therefore, which may have to be gone into is as to whether the family continued to be a member of a Scheduled Tribe or not. Such a question can be gone into only during trial."

In *Lillykutty v. Scrutiny Committee, SC & ST & Ors. JT 2005 (12) SC 569* Thakker, J., speaking for the Division Bench clearly held that once a certificate is cancelled, the election is also liable to be cancelled. It may be true that in terms of the rules framed under the Delhi Municipal Corporation Act, it was not necessary for the First Respondent herein to produce the caste certificate at the time of filing of nomination as a declaration in that behalf subserve the purpose. But such a caste certificate was necessary having regard to the fact that in the event a dispute or doubt arises as regard the question as to whether the conditions precedent for filing the nomination are fulfilled or not. The Returning Officer was required to arrive at a prima facie finding that the candidate belonged to Scheduled Caste. She applied for grant of a Scheduled Caste Certificate on the basis that she was Scheduled Caste by birth. Her claim has been found to be incorrect. Unless it is established as of fact that she had been accepted as a member of Scheduled Caste by the community as contra-distinguished from acceptance of her marriage by her husband's family, in our opinion, she cannot claim the benefit of her reservation.

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181. COURT FEES ACT, 1870 – Section 7 (iv)
SUITS VALUATION ACT, 1887 – Section 8
Valuation of the suit for the purpose of court fees/ jurisdiction – Jurisdictional value must follow the value for the purposes of payment of court fees – Law explained.
Jagdish Chandra v. Mohanlal & 13 others
Reported in 2006 (I) MPJR 429

Held :

Section 8 of the Act of 1887 provides that where in the suits courts fees are payable ad-valorem under the Courts Fees Act 1870 (for short the Act) other than the suit specified in Section 7 (v) (vi) (ix) and (x) (d) of Act, the issue for purpose of payment of court fees and valuation for purpose of jurisdiction, must be the same. The suits which excluded from operation of this Sections are: (i) suits for possession of land, houses and gardens [Section 7 (iv)]; (ii) suits to enforce a right of pre-emption [Section 7 (vi)]l (iii) mortgage suits [Section 7 (ix)] and (iv) suits for specific performance of Award [Section 7 (x) (d)].

For the purpose of determining the jurisdiction, valuation of suit may be classified in three categories namely :-

(1) Suits falling under Section 7 (v) (iv) (ix) and (x) (d) of Act;

(2) Suits falling under other clauses of Section 7 of the Act, and

(3) Suits in respect of which fixed court fees are payable.

Suits falling under category (2) above do not admit of any definite or exact value and law allows the plaintiff to give his own value to the relief he seeks and court-fee is payable on the plaint according to the relief. In other words, suits falling in second category, the jurisdictional value must follow the value for purposes of payment of court-fee. Suits falling under category (1) above, the jurisdictional value will be the market value of the land subject to the provisions, of Section 3 and 4 of the Act of 1887 where the property is 'land' or an 'interest in land'. Suits falling under category (3) the jurisdictional value will ordinarily be determined according to the rules framed under Section 9 of the Act. Once the category of suit is ascertained, the Court has to find out whether plaintiff has correctly valued the relief for the purposes of court-fee in the manner laid down in section 7 of the Act. This process also involves the examination of plaint allegations alone and, if there is nothing to indicate otherwise, the plaintiff's valuation prima facie is accepted as correct at the first instance but if it transpires subsequently that an allegation of fact on the basis of the court fee was computed, is not correct, then it is within the power of the Court to demand additional court before judgment is pronounced. The Court's power to intervene and realize court-fee in such circumstances extends to any stage of the proceeding in the case.

It has been laid down by the Supreme Court in *Sathappa Chettiar vs. Ramanathan Chettiar (AIR 1958 SC 253)* that the effect of the provision of Sec-

tion 8 of the Act of 1887 is to make the valuation for the purpose of jurisdiction dependent upon the valuation determinable for computation of court-fee Once the value for the purposes of court fees is determined that decides the valuation for the purposes of pecuniary jurisdiction. In such a case it is the amount on which the plaintiff has valued the relief sought for purposes of court fees that determines the value for jurisdiction in the suit and not vice versa.

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182. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 1956 – Section 12

Bail – Release of juvenile on bail – Whether merits of the case have to be taken into consideration? Held, No – Further held question of bail should be considered on the basis of Section 12 of the Act.

Gaddo @ Vinod v. State of M.P.

Reported in 2006 (I) MPJR SN 35

Held:

According to submission of learned counsel for the applicant since long the applicant has been in custody while no offence is made out against him. He also submitted that in view of mandatory provisions of Section 12 of the Act applicant be enlarged on bail till disposal of the trial and prayed for releasing him on bail. In support of this contention he cited a decision of this Court in the matter of *Rahul Rajendra Mishra vs. State of Madhya Pradesh (2001) (1) MPLJ 172)* and also a decision of Himachal Pradesh High Court in the matter of *Ranjit Singh vs. State of Haryana (2005 Cr.L.J. 972).*

On other hand leraned Panel Lawyer submitted that if the applicant would be released on bail he would influence the prosecutrix and her family and prayed for dismissal of this revision.

On considering the aforesaid submissions, it is apparent that application for bail was dismissed by the trial court on factual matrix of the case and on appeal this order has been affirmed on the ground that on releasing him on bail the applicant would be involved in same activities and try to influence the prosecutrix who is residing in the same locality, but the provisions of Section 12 of the said Act was not considered in its actual spirits.

> Concerning portion of Section 12 of aforesaid Act reads as under: "Bail of Juvenile: (1) When any person accused of a bailable or non-bailable offence, and apparently a juvenile, is arrested or detained or appears or is brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice."

In view of aforesaid mandatory provisions of the Act only on certain grounds the bail application could have been dismissed which were not in existence in the case at hand. So the applicant ought to have been released on bail but the provisions were not considered with its real spirits. The grounds which has been put forth by the respondent for dismissing the revision have not appealed me.

Even otherwise in the light of aforesaid cited cases on behalf of the applicant he is entitled to release on bail. Although the *Rajendra Mishra's* case (supra) was decided under the old Act, but the principle was laid down in view of mandatory provisions of the Act because there is no vast difference in between the old and new Act regarding provisions of bail to the juvenile. While the *Ranjit Singh's case* (Supra) was decided by considering the said section 12 of the new act and principle laid down in it is directly applicable to the case at hand.

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183. CRIMINAL TRIAL :

Appreciation of evidence – Relative witness – Evidence of a relative witness – Evidence of a relative witness if otherwise inspiring confidence not to be discarded merely because of his relationship with the victim – Relative witness not necessarily an interested witness.

State of A.P. v. S. Rayappa and others

Judgment dt. 14.2.2006 passed by the Supreme Court in Criminal Appeal No. 1401 of 1999, reported in (2006) 4 SCC 512

Held :

By now it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as an interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons.

On the contrary it has now almost become a fashion that the public is reluctant to appear and depose before the court especially in criminal case because of varied reasons. Criminal cases are kept dragging for years to come and the witnesses are harassed a lot. They are being threatened, intimidated and at the top of all they are subjected to lengthy cross-examination. In such a situation, the only natural witness available to the prosecution would be the relative witness. The relative witness is not necessarily an interested witness. On the other hand, being a close relation to the deceased they will try to prosecute the real culprit by stating the truth. There is no reason as to why a close relative will implicate and depose falsely against somebody and screen the real culprit to escape unpunished. The only requirement is that the testimony of the relative witnesses should be examined cautiously.

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184. LAND ACQUISTION ACT, 1894 – Section 28-A

Compensation – Compensation payable u/s 28-A is the compensation decreed by the reference Court as modified by higher Courts – Law explained.

Union of India v. Munshi Ram (Dead) by L.Rs. and others

Judgment dt. 01.3.2006 passed by the Supreme Court in Civil Appeal No. 4010 of 1997, reported in (2006) 4 SCC 538

Held:

We are of the view that the Union of India is right in submission that the amount payable under Section 28-A of the Act is the amount which is finally payable by way of compensation to the owners of the land who challenged the award of the Collector and claimed reference under Section 18 of the Act. The said provision seeks to confer the benefit of enhanced compensation even on those owners who did not seek a reference under Section 18. It cannot be that those who secure a certain benefit by reason of others getting such benefit should retain that benefit, even though the others on the basis of whose claim compensation was enhanced are deprived of the enhanced compensation to an extent. This would be rather inequitable and unfair. Moreover, even if it be that the compensation payable to claimants who have applied under Section 28-A of the Act, is the enhanced compensation decreed by the Reference Court, we must understand the decree to mean the decree of the Reference Court as modified in appeal by the higher courts. Otherwise, an incongruous position may emerge that a person who did not challenge the award of the Collector and did not claim a reference under Section 18 of the Act would get a higher compensation than one who challenged the award of the Collector and claimed a reference, but in whose case a higher compensation determined by the Reference Court was subsequently reduced by the superior court. There can be no dispute that those claiming higher compensation and claiming reference under Section 18 of the Act are bound by the decree as modified by the superior court in appeal. The principle of restitution must apply to them. For the same reason, the same consequence must visit others who have been given the benefit of enhanced compensation pursuant to the decree passed in reference proceeding on the application of others.

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185. CRIMINAL PROCEDURE CODE, 1973 – Section 197

Sanction for prosecution – Ambit, scope and applicability of Section 197 – Law explained.

Sankaran Moitra v. Sadhana Das and another

Judgment dt. 24.3.2006 passed by the Supreme Court in Criminal Appeal No. 330 of 2006, reported in (2006) 4 SCC 584

Held:

A Constitution Bench of this Court had occasion to consider the scope of Section 197 of the Code of Criminal Procedure in *Matajog Dobey v. H.C. Bhari,*

(1955) 2 SCR 925 after holding that Section 197 of the Code of Criminal Procedure was not violative of the fundamental rights conferred on a citizen under Article 14 of the Constitution, this Court observed: (SCR pp. 931-32)

> "Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard. It was argued that Section 197, Criminal Procedure Code vested an absolutely arbitrary power in the Government to grant or withhold sanction at their sweet will and pleasure, and the legislature did not lay down or even indicate any guiding principles to control the exercise of the discretion. There is no question of any discrimination between one person and another in the matter of taking. proceedings against a public servant for an act done or purporting to be done by the public servant in the discharge of his official duties. No one can take such proceedings without such sanction."

On the test to be adopted for finding out whether Section 197 of the Code was attracted or not and to ascertain the scope and meaning of that section, Their Lordships stated: (SCR pp. 932-33)

> "Slightly differing tests have been laid down in the decided cases to ascertain the scope and the meaning of the relevant words occurring in Section 197 of the Code; 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty'. But the difference is only in language and not in substance. The offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. No question of sanction can arise under Section 197, unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What we must find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation."

After referring to the earlier decisions of the Federal Court, the Privy Council and that of this Court, Their Lordships summed up the position thus: (SCR pp. 934-35)

> "The result of the foregoing discussion is this: There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

Their Lordships then proceeded to consider the stage at which the need for sanction under section 197(1) of the Code had to be considered. Their Lordships stated: (SCR p. 935)

> "The question may arise at any stage of the proceedings. The complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty; but facts subsequently coming to light on a police or judicial inquiry or even in the course of the prosecution evidence at the trial, may establish the necessity for sanction. Whether sanction is necessary or not may have to be determined from stage to stage. The necessity may reveal itself in the course of the progress of the case."

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186. INDIAN PENAL CODE, 1860 – Section 300

Culpable homicide not amounting to murder – Conditions for applicability of Exception 4 to Section 300 – Meaning and connotation of expressions 'sudden fight' and 'fight' – Law explained.

Sandhya Jadhav (Smt.) v. State of Maharashtra

Judgment dt. 31.3.2006 passed by the Supreme Court in Criminal Appeal No. 368 of 2006, reported in (2006) 4 SCC 653

Held:

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

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

The aforesaid aspects have been highlighted in *Sridhar Bhuyan v. State of Orissa, (2004) 11 SCC 395, Prakash Chand v. State of H.P., (2004) 11 SCC 381 and Sachchey Lal Tiwari v. State of U.P., (2004) 11 SCC 410.*

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187. CIVIL PROCEDURE CODE, 1908 – O. XXI R. 64
LIMITATION ACT, 1963 – Article 134

(i) Sale of property under attachment – Exercise of discretion by the Court – Only that part of the property, which is sufficient to satisfy the claim should be sold – Sale without examining this aspect illegal – Law explained.

(ii) Commencement of limitation for purposes of Art. 134 – Limitation starts from the date of confirmation of sale and not from the date of issue of sale certificate.

Balakrishanan v. Malaiyandi Konar
Judgment dt. 17.2.2006 passed by the Supreme Court in Civil Appeal No. 2062 of 2000, reported in (2006) 3 SCC 49

Held :

Order 21 Rule 64 reads as follows :

> "64. *Power to order property attached to be sold and proceeds to be paid to person entitled.* – Any court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same."

The provision contains some significant words. They are "necessary to satisfy the decree." Use of the said expression clearly indicates the legislative intent that no sale can be allowed beyond the decretal amount mentioned in the

sale proclamation. (See *Takkaseela Pedda Subba Reddi v. Pujari Padmavathamma, (1997) 3 SCC 337.*) In all execution proceedings, the court has to first decide whether it is necessary to bring the entire property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small the court must bring only such portion of the property the property the proceeds of which would be sufficient to satisfy the claim of the decree-holder. It is immaterial whether the property is one or several. Even if the Property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This is not just a discretion but an obligation imposed on the court. The sale held without examining this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction. (See *Ambati Narasayya v. M. Subba Rao, 1989 Supp (2) SCC 693.*) The duty cast upon the court to sell only such property or portion thereof as is necessary to satisfy the decree is a mandate of the legislature which cannot be ignored. Similar view has been expressed in *S. Mariyappa v. Siddappa, (2005) 10 SCC 235.*

In *S.S. Dayananda v. K.S. Nagesh Rao, (1997) 4 SCC 451* it was held that the procedural compliance with Order 21 Rule 64 of the Code is a mandatory requirement. This was also the view expressed in *Desh Bandhu Gupta v. N.L. Anand.*

The residual question is the effect of Article 134 of the Limitation Act, as appearing in the Schedule to the Limitation Act relatable to Sections 2(j) and 3 providing for periods of limitation. Article 134 reads as follows :

"Description of suit	*Period of limitation*	*Time from which period begins to run*
134. For delivery of possession by a purchaser of immovable property at a sale in execution of decree.	One year	When the sale becomes absolute."

The limitation for the purpose of Article 134 starts from the date of confirmation of sale. (See *Ganpat Singh v. Kailash Shankar, (1987) 3 SCC 146). In Pattam Khader Khan v. Pattam Sardar Khan, (1996) 5 SCC 48* this Court held that it is not from the date when sale certificate is issued that the limitation starts running. The sale becomes absolute on confirmation under Order 21 Rule 92 of the Code effectively passing title. It cannot be said to attain finality only when sale certificate is issued under Order 21 Rule 94. There can by variety of factors conceivable for which delay can be caused in issuing a sale certificate. The period of one-year limitation now prescribed under Article 134 of the Limitation Act in substitution of a three-year period prescribed under Article 180 of the Limitation Act, 1908 is reflective of the legislative policy of finalising proceedings in execution as quickly as possible by providing a quick forum to the auction-purchaser to ask for the delivery of possession of the property purchased within that period from the date of the sale becoming absolute rather than from the date of issuance of the sale certificate. On his failure to avail such

a quick remedy the law relegates him to the remedy of a regular suit for possession based on title, subject again to limitation.

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188. GUARDIANS AND WARDS ACT, 1890 – Sections 7 and 25
Custody of minor – Rival claims of father and mother – Paramount consideration is welfare of child – The choice of minor should also be given due consideration.
Sheila B. Das v. P.R. Sugasree
Judgment dt. 17.2.2006 passed by the Supreme Court in Civil Appeal No. 6626 of 2004, reported in (2006) 3 SCC 62

Held :

Having regard to the complexities of the situation in which we have been called upon to balance the emotional confrontation of the parents of the minor child and the welfare of the minor, we have given anxious thought to what would be in the best interest of the minor. We have ourselves spoken to the minor girl, without either of the parents being present, in order to ascertain her perference in the matter. The child who is a little more than 12 years of age is highly intelligent, having consistently done extremely well in her studies in school, and we were convinced that despite the tussle between her parents, she would be in a position to make an intelligent choice with regard to her custody. From our discussion with the minor, we have been able to gather that though she has no animosity as such towards her mother, she would prefer to be with the father with whom she felt more comfortable. The minor child also informed us that she had established a very good relationship with her paternal aunt who was now staying in her father's house and she was able to relate to her aunt in matters which would concern a growing girl during her period of adolescence.

We have also considered the various decisions cited by the appellant which were all rendered in the special facts of each case. In the said cases the father on account of specific considerations was not considered to be suitable to act as the guardian of the minor. The said decisions were rendered by the courts keeping in view the fact that the paramount consideration in such cases was the interest and well-being of the minor. In this case, we see no reason to consider the respondent ineligible to look after the minor. In fact, after having obtained custody of the minor child the respondent does not appear to have neglected the minor or to look after all her needs. The child appears to be happy in the respondent's company and has also been doing consistently well in school. The respondent appears to be financially stable and is also not disqualified in any was from being the guardian of the minor child. No allegation, other than his purported apathy towards the minor, has been levelled against the respondent by the appellant. Such an allegation is not borne out from the materials before us and is not sufficient to make the respondent ineligible to act as the guardian of the minor.

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189. EVIDENCE ACT, 1872 – Section 116

Doctrine of estoppel as incorporated in Section 116, nature of – The doctrine is based on the principle that a person not to be allowed to approbate and reprobate at the same time – Law explained.

Bansraj Laltaprasad Mishra v. Stanely Parker Jones

Judgment dt. 16.2.2006 passed by the Supreem Court in Civil Appeal No. 6396 of 2001, reported in (2006) 3 SCC 91

Held :

It would be relevant at this point of time to take note of what is stated in Section 116 of the Evidence Act. The same reads as follows :

> "116. *Estoppel-of tenant and of licensee of person in possession.* – No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had title to such possession at the time when such licence was given."

The "possession" in the instant case relates to the second limb of the section. It is couched in negative terms and mandates that a person who comes upon any immovable property by the licence of the person in possession thereof, shall not be permitted to deny that such person had title to such possession at the time when such licence was given.

The underlying policy of Section 116 is that where a person has been brought into possession as a tenant by the landlord and if that tenant is permitted to question the title of the landlord at the time of the settlement, then that will give rise to extreme confusion in the matter of relationship of the landlord and tenant and so the equitable principle of estoppel has been incorporated by the legislature in the said section.

The principle of estoppel arising from the contract of tenancy is based upon a healthy and salutary principle of law and justice that a tenant who could not have got possession but for his contract of tenancy admitting the right of the landlord should not be allowed to launch his landlord in some inequitable situation taking undue advantage of the possession that he got and any probable defect in the title of his landlord. It is on account of such a contract of tenancy and as a result of the tenant's entry into possession on the admission of the landlord's title that the principle of estoppel is attracted.

Section 116 enumerates the principle of estoppel which is merely an extension of the principle that no person is allowed to approbate and reprobate at the same time.

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190. CIVIL PROCEDURE CODE, 1908 – O. VI R. 2

Pleadings – Expression 'material facts' as used in O. VI R. 2, meaning and connotation of – Law explained.

Mayar (H.K.) Ltd. and others v. Owners & Parties, Vessel M.V. Fortune Express and others

Judgment dt. 30.1.2006 passed by the Supreme Court in Civil Appeal No. 867 of 2006, reported in (2006) 3 SCC 100

Held :

As per law of pleadings under Order 6 Rule 2 of the Code, every pleading should contain, and contain only, a statement in a concise form of the material facts on which the party relies for his claim or defence, as the case may be. Thus, the facts on which the plaintiff relies to prove his case have to be pleaded by him. Similarly, it is for the defendant to plead the material facts on which his defence stands. The expression "material facts" has not been defined anywhere, but from the wording of Order 6 Rule 2 the material facts would be, upon which a party relies for his claim or defence. The material facts are facts upon which the plaintiff's cause of action or the defendant's defence depends and the facts which must be proved in order to establish the plaintiff's right to the relief claimed in the plaint or the defendant's defence in the written statement. Which particular fact is a material fact and is required to be pleaded by a party, would depend on the facts and circumstances of each case.

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191. HUMAN RIGHTS:

Custodial violence – Steps required to be taken for effective prevention of custodial violence – Law explained.

Sube Singh v. State of Haryana and others

Judgment dt. 3.2.2006 passed by the Supreme Court in Writ petition (Crl.) No. 237 of 1998, reported in (2006) 3 SCC 178

Held :

Custodial violence requires to be tackled from two ends, that is, by taking measures that are remedial and preventive. Award of compensation is one of the remedial measures after the event. Effort should be made to remove the very causes, which lead to custodial violence, so as to prevent such occurrences. Following steps, if taken, may prove to be effective preventive measures :

(a) Police training should be reoriented, to bring in a change in the mindset and attitude of the police personnel in regard to investigations, so that they will recognise and respect human rights, and adopt thorough and scientific investigation methods.

(b) The functioning of lower level police officers should be continuously monitored and supervised by their superiors to prevent custodial violence and ensure adherence to lawful standard methods of investigation.

(c) Compliance with the eleven requirements enumerated in *D.K. Basu vs. State of W.B., (1997) 1 SCC 416* should be ensured in all cased of arrest and detention.

(d) Simple and foolproof procedures should be introduced for prompt registration of first information reports relating to all crimes.

(e) Computerisation, video-recording and modern methods of record maintenance should be introduced to avoid manipulations, insertions, substitutions and antedating in regard to FIRs, mahazars, inquest proceedings, post-mortem reports and statements of witnesses, etc. and to bring in transparency in action.

(f) An independent investigating agency (preferably the respective Human Rights Commissions or CBI) may be entrusted with adequate power, to investigate complaints of custodial violence against police personnel and take stern and speedy action followed by prosecution, wherever necessary.

The endeavour should be to achieve a balanced level of functioning, where police respect human rights, adhere to law, and take confidence-building measures (CBMs), and at the same time firmly deal with organised crime, terrorism, white-collared crime, deteriorating law and order situation, etc.

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192. CIVIL PROCEDURE CODE, 1908 – O. 41 R. 31

Judgment of the appellate Court, contents of – Desirability about complying with the requirements of O. 41. R. 31 stated – Further held that appellate Court should make honest endeavour to consider the controversy and appraisement of respective cases – Law explained. G. Amalorpavam and others v. R.C. Diocese of Maduria and others Judgment dt. 6.3.2006 passed by the Supreme Court in Civil Appeal No. 894 of 2002, reported in (2006) 3 SCC 224

Held :

Order 41 Rule 31 CPC reads as follows :

"31. *Contents, date and signature of judgment.* – The judgment of the Appellate Court shall be in writing and shall state –

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

The question whether in a particular case there has been substantial compliance with the provisions of Order 41 Rule 31 CPC has to be determined on the nature of the judgment delivered in each case. Non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate court is in a position to ascertain the findings of the lower appellate court. It is no doubt desirable that the appellate court should comply with all the requirements of Order 41 Rule 31 CPC. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient. Where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate court there is substantial compliance with the provisions of Order 41 Rule 31 CPC and the judgment is not in any manner vitiated by the absence of a point of determination. Where there is an honest endeavour on the part of the lower appellate court to consider the controversy between the parties and there is proper appraisement of the respective cases and weighing and balancing of the evidence, facts and the other considerations appearing on both sides is clearly manifest by the perusal of the judgment of the lower appellate court, it would be a valid judgment even though it does not contain the points for determination. The object of the rule in making it incumbent upon the appellate court to frame points for determination and to cite reasons for the decision is to focus attention of the court on the rival contentions which arise for determination and also to provide litigant parties opportunity in understanding the ground upon which the decision is founded with a view to enable them to know the basis of the decision and if so considered appropriate and so advised to avail the remedy of second appeal conferred by Section 100 CPC.

At this juncture it would be relevant to note what this Court said in *Girja Nandini Devi v. Bijendra Narain Choudhury, (1967) 1 SCR 93.* In AIR para 12 it was noted as follows : (SCR p. 101 F-G)

> "It is not the duty of the appellate court when it agrees with the view of the trial court on the evidence either to restate the effect of the evidence or to reiterate the reasons given by the trial court. Expression of general agreement with reasons given by the Court decision of which is under appeal would ordinarily suffice."

The view was reiterated in *Santosh Hazari v. Purushottam Tiwari , (2001) 3 SCC 179. In para 15* it was held with reference to *Girja Nandini Devi case (supra)* as follows : (SCC pp. 188-89)

> "The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for

rehearing both on questions of fact and law. The Judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. The task of an appellate court affirming the findings of the trial courts is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice (see *Girja Nandini Devi b. Bijendra Narain Choudhury (supra)*) We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it. While writing a judgment of reversal the appellate court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial court must weigh with the appellate court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact. (See *Madhusudan Das v. Narayanibai, (2005) 10 SCC 235.*) The rule is – and it is nothing more than a rule of practice – that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial Judge on a question of fact. (See *Sarju Pershad v. Jwaleshwari Pratap Narain Singh, (1997) 4 SCC 451* Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate court continues, as before, to be a final court of facts; pure findings of fact remain immune from challenge

before the High Court in second appeal. Now the first appellate court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one."

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193. MOTOR VEHICLES ACT, 1988 – Section 168

Contributory negligence, determination of in a case of head-on collision – Generally, drivers of both the vehicles should be held responsible who have contributed equally – Law explained.

Bijoy Kumar Dugar v. Bidya Dhar Dutta and others

Judgment dt. 1.3.2006 passed by the Supreme Court in Civil Appeal No. 3731 of 2002, reported in (2006) 3 SCC 242

Held :

The Maruti car being driven by the deceased Raj Kumar Dugar and the and the offending bus had a head-on collision. MACT has not accepted the evidence of PW 2 to prove that the driver of the offending bus was driving the vehicle at abnormal speed. If the bus was being driven by the driver abnormally in a zigzag manner as PW 2 wanted the Court to believe, it was but natural, as a prudent man, for the deceased to have taken due care and precaution to avoid head-on collision when he had already seen the bus coming from the opposite direction from a long distance. It was head-on collision in which both the vehicles were damaged and, unfortunately, Raj Kumar Dugar died on the spot. MACT, in our view, has rightly observed that had the knocking been on one side of the car, the negligence or rashness could have been wholly fastened or attributable to the driver of the bus, but when the vehicles had a head-on collision, the drivers of both the vehicles should be held responsible to have contributed equally to the accident. The finding on this issue is a finding of fact and we do not find any cogent and convincing reason to disagree with the well-reasoned order of MACT on this point.

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194. CONSTITUTION OF INDIA – Articles 15 & 16

Whether an offspring of a marriage between tribal and non-tribal automatically gets the status of Scheduled Tribe ? Held, No – Duty of the authorities issuing caste certificates explained.

Anjan Kumar v. Union of India and others

Judgment dt. 14.2.2006 passed by the Supreme Court in Civil Appeal No. 6445 of 2000, reported in (2006) 3 SCC 257

Held :

In view of the catena of decisions of this Court, the questions raised be-

fore us are no more *res integra*. The condition precedent for granting tribe certificate being that one must suffer disabilities wherefrom one belongs. The offshoots of the wedlock of a tribal woman married to a non-tribal husband – Forward Class (Kayastha in the present case) cannot claim Scheduled Tribe status. The reason being such offshoot was brought up in the atmosphere of Forward Class and he is not subjected to any disability. A person not belonging to the Scheduled Castes or Scheduled Tribes claiming himself to be a member of such caste by procuring a bogus caste certificate is a fraud under the Constitution of India. The impact of procuring fake/bogus caste certificate and obtaining appointment/ admission from the reserved quota will have far-reaching grave consequences. A meritorious reserved candidate may be deprived of reserved category for whom the post is reserved. The reserved post will go into the hands of non-deserving candidate and in such cases it would be violative of the mandate of Articles 14 and 21 of the Constitution.

The Scheduled Caste and Scheduled Tribe certificate is not a bounty to be distributed. To sustain the claim, one must show that he/she suffered disabilities – socially, economically and educationally cumulatively. The authority concerned, before whom such claim is made, is duty-bound to satisfy itself that the applicant suffered disabilities socially, economically and educationally before such certificate is issued. Any authority concerned issuing such certificates in a routine manner would be committing a dereliction of constitutional duty.

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195. CIVIL PROCEDURE CODE , 1908 – O. XXXIX Rr. 1 & 2

***Ex parte* injunction, grant of – Order directing parties to maintain status quo not to be passed unless the Court has ascertained the status – Law explained.**

Kishore Kumar Khaitan and another v. Praveen Kumar Singh

Judgment dt. 13.02.2006 passed by the Supreme Court in Civil Appeal No. 1101 of 2006, reported in (2006) 3 SCC 312

Held :

It is necessary to notice at this stage that in an original suit of this nature, it was not appropriate for the Additional District Judge to pass an order directing the parties to maintain status quo, without indicating what the status quo, was. If he was satisfied that the appellant before him had made out a prima facie case for an ad interim ex parte injunction and the balance of convenience justified the grant of such an injunction, it was for him to have passed such an order of injunction. But simply directing the parties to maintain status quo without indicating what the status quo was, is not an order that should be passed at the initial stage of a litigation, especially when one court had found no reason to grant an ex parte order of injunction and the appellate court was dealing with only the limited question whether an ad interim order of injunction should or should not have been granted by the trial court, since the appeal was only

against the refusal of an ad interim ex parte order of injunction and the main application for injunction pending suit, was still pending before the trial court itself. Therefore, we are prima facie of the view that the Additional District Judge ought not to have passed an equivocal order like the one passed in the circumstances of the case. But of course, that aspect has relevance only to the extent that before ordering an interim mandatory injunction or refusing it, the court has first to consider whether the plaintiff has proved that he was in possession on the date of suit and on the date of the order and he had been dispossessed the next day.

Unless a clear prima facie finding that the plaintiff was in possession on those dates is entered, an order for interim mandatory injunction could not have been passed and any such order passed would be one without jurisdiction.

An interim mandatory injunction is not a remedy that is easily granted. It is an order that is passed only in circumstances which are clear and the prima facie materials clearly justify a finding that the status quo has been altered by one of the parties to the litigation and the interests of justice demanded that the status quo ante be restored by way of an interim mandatory injunction.

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196. GENERAL CLAUSES ACT, 1891 – Section 6

Effect of repeal of enactment – Repeal followed by fresh legislation, effect of – Held, the provisions of new Act should be looked into to determine 'different intention' as contemplated u/s 6 – Law explained.
Gammon India Ltd. v. Special Chief Secretary and others
Judgment dt. 16.02.2006 passed by the Supreme Court in Civil Appeal No. 1148 of 2006, reported in (2006) 3 SCC 354

Held :

The controversy in issue was dealt with comprehensively with meticulous precision by a Constitution Bench of this Court in *State of Punjab v. Mohar Singh, (1955) 1 SCR 893.* Respondent Mohar Singh filed a claim as an evacuee under the East Punjab Refugees (Registration of Land Claims) Act, 1948. The claim was investigated into and it was found to be false; It was held to be an offence under the Act. At the trial, on his confession, the respondent was convicted and sentenced to imprisonment. On suo motu revision, the District Magistrate found the sentence to be inadequate and referred the case to the High Court. The High Court found that since the ordinance was repealed, he could not be convicted under Section 7 of the Act. This Court, on appeal, reversed the decision and upheld the conviction applying Section 6 of the General Clauses Act.

The principle which has been laid down in this case is that whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for

expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purposes of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether if manifests an intention to destroy them. We cannot therefore, subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section.

In view of the interpretation what follows is absolutely clear that unless a different intention appears in the repealing Act, any legal proceeding can be instituted and continued in respect of any matter pending under the repealed Act as if that Act was in force at the time of repeal. In other words, whenever there is a repeal of an enactment the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears in the repealing statute.

In case the repeal is followed by fresh legislation on the same subject the court has to look to the provisions of the new Act for the purpose of determining whether they indicate a different intention. The question is not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. The application of this principle is not limited to cases where a particular form of words is used to indicate that the earlier law has been repealed. As this Court has said, it is both logical as well as in accordance with the principle, upon which the rule as to implied repeal rests, to attribute to that legislature which effects a repeal by necessary implication the same intention as that which would attend the case of an express repeal. Where an intention to effect a repeal is attributed to a legislature then the same would attract the incident of saving found in Section 6.

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197. CRIMINAL TRIAL :

Fair trial, principle of – Fair trial should be a search for the truth and not a mere technicality – Failure to accord fair hearing violates minimum standards of due process of law – Law explained.

Zahira Habibullah Sheikh (5) and another v. State of Gujarat and others

Judgment dt. 8.3.2006 passed by the Supreme Court in Criminal Misc. Petition No. 6658 of 2004, reported in (2006) 3 SCC 374

Held :

The principal of fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new changing circumstances, and exi-

gencies of the situation – peculiar at times and related to the nature of crime, persons involved – directly or operating behind, social impact and societal needs and even so many powerful balancing factors which may come in the way of administration of criminal justice system.

As will presently appear, the principle of a fair trial manifests itself in virtually every aspect of our practice and procedure, including the law of evidence. There is, however, an overriding and, perhaps, unifying principle. As Deane, J. put it:

> "It is desirable that the requirement of fairness be separately identified since it transcends the contest of more particularised legal rules and principles and provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal law."

This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affects the whole community as a community and is harmful to society in general. The concept of fair trial entails-familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice – often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinity variety of actual situations with the ultimate object in mind viz. Whether

something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.

Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an over hasty stage-managed, tailored and partisan trial.

The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.

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198. ENVIRONMENTAL LAW :

Doctrine of public trust – Doctrine signifies that State is trustee of all natural resources on behalf of the public – Held, doctrine is a part of Indian law.

Intellectuals Forum, Tirupathi v. State of A.P. and others

Judgment dt. 23.2.2006 passed by the Supreme Court in Civil Appeal No. 1251 of 2006, reported in (2006) 3 SCC 549

Held :

Another legal doctrine that is relevant to this matter is the Doctrine of Public Trust. This doctrine, though in existence from Roman times, was enunciated in its modern form by the US Supreme Court in *Illinois Central Railraod Co. v. People of the State of Illionis, 146 US 387* where the Court held :

> "The bed or soil of navigable waters is held by the people of the State in their character as sovereign in trust for public uses for which they are adapted.
>
> (L Ed p. 1018)
>
> ★ ★ ★
>
> The State holds title to the bed of navigable waters upon a public trust, and no alienation or disposition of such property by the State which does not recognise and is not in execution of this trust, is permissible.
>
> (L Ed p. 1033)"

What this doctrine says therefore is that natural resources, which include lakes, are held by the State as a "trustee" of the public, and can be disposed of only in a manner that is consistent with the nature of such a trust. Though this doctrine existed in the Roman and English law, it related to specific types of resources. The US courts have expanded and given the doctrine its contemporary shape whereby it encompasses the entire spectrum of the environment.

The doctrine, in its present form, was incorporated as a part of Indian law by this Court in *M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388* and also in *M.I. Builders (P) Ltd. v. Radhey Shyam Sahu, (1999) 6 SCC 464.* In *M.C. Mehta (supra),* Kuldeep Singh, J., writing for the majority held : (SCC p. 413, para 34)

> "34. Our legal system .... includes the public trust doctrine as part of its jurispsrudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment .... The State as a trustee is under a legal duty to protect the natural resources."

The Supreme Court of California, in *National Audubon Society v. Superior Court of Alpine Country, 33 Cali 419* also known as *Mono Lake case* (supra) summed up the substance of the doctrine. The Court said:

> "Thus the public trust is more than an affirmation of State power to use public property for public public purposes. It is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering the right only in those rare cases when the abandonment of the right is consistent with the purposes of the trust."

This is an articulation of the doctrine from the angle of the affirmative duties of the State with regard to public trust. Formulated from a negatory angle, the doctrine does not exactly *prohibit* the alienation of the property held as a public trust. However, when the State holds a resource that is freely available

for the use of the public, it provides for a high degree of judicial scrutiny on any action of the Government, no matter how consistent with the existing legislations, that attempts to restrict such free use. To properly scrutinise such actions of the Government, the courts must make a distinction between the Government's general obligation to act for the public benefit, and the special, more demanding obligation which it may have as a trustee of certain public resources [Joseph L. Sax "The Public Trust Doctrine in Natural Resource Law : Effective Judicial Intervention", *Michigan Law Review,* Vol. 68, No. 3 (Ja. 1970) pp. 471-566]. According to Prof. Sax, whose article on this subject is considered to be an authority, three types of restrictions on governmental authority are often thought to be imposed by the public trust doctrine [ibid]:

1. the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public;

2. the property may not be sold, even for fair cash equivalent;

3. the property must be maintained for particular types of use (i) either traditional uses, or (ii) some uses particular to that form of resources.

●

199. LIMITATION ACT, 1963 – Article 54

Suit for specific performance of agreement for sale – Inquiry regarding limitation – Unless time fixed for performance the Court should find the date on which plaintiff has the notice that performance was refused – Question normally to be decided after taking evidence – Law explained.

Gunwantibhai Mulchand Shah and others v. Anton Elis Farel and others

Judgment dt. 6.3.2006 passed by the Supreme Court in Civil Appeal No. 1492 of 2006, reported in (2006) 3 SCC 634

Held :

We may straightaway say that the manner in which the question of limitation has been dealt with by the courts below is highly unsatisfactory. It was rightly noticed that the suit was governed by Article 54 of the Limitation Act. 1963. Then, the enquiry should have been, first, whether any time was fixed for performance in the agreement for sale, and if it was so fixed, to hold that a suit filed beyond three years of the date was barred by limitation unless any case of extension was pleaded and established. But in a case where no time for performance was fixed, the court had to find the date on which the plaintiff had notice that the performance was refused and on finding that date, to see whether the suit was filed within three years thereof. We have explained the position in the recent decision in *R.K. Parvatharaj Gupta v. K.C. Jayadeva Reddy, (2006) 2 SCC 428.* In the case on hand, there is no dispute that no date for performance is fixed in the agreement and if so, the suit could be held to be barred by limitation only on a finding that the plaintiffs had notice that the defendants were refusing performance of the agreement. It a case of that nature normally, the

question of limitation could be decided only after taking evidence and recording a finding as to the date on which the plaintiff had such notice. We are not unmindful of the fact that a statement appears to have filed on behalf of the plaintiffs that they did not want to lead any evidence. The defendants, of course, took the stand that they also did not want to lead any evidence. As we see it, the trial court should have insisted on the parties leading evidence on this question or the court ought to have postponed the consideration of the issue of limitation along with the other issues arising in the suit, after a trial.

●

200. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
Object of Section 138 – Facts required to be proved to bring a case within the fold of Section 138 – Law explained.
Mosaraf Hossain Khan v. Bhagheeratha Engg. Ltd. and others
Judgment dt. 24.2.2006 passed by the Supreme Court in Civil Appeal No. 1269 of 2006, reported in (2006) 3 SCC 658

Held :

It is now well known that the object of the provision of Section 138 of the Act is that for proper and smooth functioning of business transaction in particular, use of cheques as negotiable instruments would primarily depend upon the integrity and honesty of the parties. It was noticed that cheques used to be issued as a device *inter alia* for defrauding the creditors and stalling the payments. It was also noticed in a number of decisions of this Court dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. It was also found that the remedy available in a civil court is a long-drawn process and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee.

[See *Goa Plast (P) Ltd. v. Chico Ursula D' Souza, (2004) 2 SCC 235* and *Monaben Ketanbhai Shah v. State of Gujarat, (2004) 7 SCC 15]*

In *Prem Chand Vijay Kumar v. Yashpal Singh, (2005) 4 SCC 417* we may, however, notice that it was held that for securing conviction under the Negotiable Instruments Act, 1881 the facts which are required to be proved are : (SCC p. 423, para 10)

> "10. (a) that the cheque was drawn for payment of an amount of money for discharge of a debt/liability and the cheque was dishonoured;
>
> (b) that the cheque was presented within the prescribed period;
>
> (c) that the payee made a demand for payment of the money by giving a notice in writing to the drawer within the stipulated period; and
>
> (d) that the drawer failed to make the payment within 15 days of the receipt of the notice."

●

PART - III

CIRCULARS/NOTIFICATIONS

भूमिस्वामियों की भूमि पर अन्य व्यक्ति के कब्जे का खसरे में अंकन

म.प्र. शासन, भू–अभिलेख विभाग, क्रमांक 2887/22–6/नौ/78 दिनांक 18 अगस्त 79

प्रति,

आयुक्त,
भू–अभिलेख एवं बंदोबस्त,
मध्यप्रदेश ग्वालियर

विषय:– भूमि स्वामियों को भूमि पर अन्य व्यक्ति के कब्जे का खसरे में अंकित करने बाबत।

मध्यप्रदेश भू–अभिलेख नियमावली भाग। के अध्याय 5 की कंडिका 5 में दिए गए निर्देश के आधार पर पटवारियों के दुबारा गिरदावरी के समय खसरे पाना भी 12 में यदि भूमि स्वामी के अतिरिक्त अन्य व्यक्ति का कब्जा पाया जाता है तो यह लिख दिया जाता है। इस बारे में संभवतः भूमिस्वामी को यह शिकायत रहती है कि उसे बिना बताए ही दूसरे व्यक्ति का कब्जा उसको, भूमि के सामने अंकित कर दिया गया है। यह भी देखा गया है कि कब्जे के बारे में मत प्रविष्ट किए जाने के कारण, कृषकों को अकारण मुकदमेबाजी में फँसना पड़ता है। कभी–कभी समय पर जानकारी न होने के कारण उन्हें अपनी जमीन से हाथ धोना पड़ता है । उपर्युक्त स्थिति के प्रयास में शासन ने पूर्ण विचारोपरान्त निर्णय लिया है कि म.प्र. भू–अभिलेख नियमावली भाग–1 के अध्याय 5 में खसरे के खाना क्रमांक 12 में कब्जे के बारे में प्रविष्टि करने के संबंध में संशोधन किया जाए। तदनुसार निम्न संशोधन किया जाता है जो कि उक्त अध्याय की कंडिका 6 के बाद 6 "अ" के रूप में जोड़ा जाए ।

खसरा में कब्जा लिखने की प्रक्रिया :–

6–अ (1) ज्यों ही पटवारी भूमिस्वामी की भूमि में किसी अन्य के कब्जे को देखेगा, वह ऐसे कब्जे की सूचना भूमिस्वामी और यदि संयुक्त खाता हो तो किसी हिस्सेदार को एक सप्ताह के अन्दर लिखित में देगा और उसकी/उनकी अभिस्वीकृति प्राप्त करेगा।

(2) यह इस प्रकार पाए गए कब्जे की ग्रामवार सूची तैयार करेगा और खसरे की नकल के साथ गिरदावरी कर लेने के पश्चात् 15 दिन के अन्दर राजस्व निरीक्षक के माध्यम से तहसीलदार को प्रेषित करेगा।

(3) तहसीलदार ऐसी सूचियाँ प्राप्त होने पर ग्रामवार अलग–अलग धारा 113 म.प्र. भू–राजस्व संहिता के अंतर्गत प्रकरण क्रमांक पंजीयन करेगा। वह भूमि स्वामियों को आहूत करेगा और यदि आवश्यक हुआ तो सरसरी जाँच भी करेगा। इस प्रकार प्रकरण सुनिश्चित कर लेने पर कि वास्तव में पटवारी ने खसरे में सही प्रविष्टियाँ की हैं तो वह उन्हें अभिप्रमाणित करेगा और अन्य स्थिति में अपनी जाँच में पाये गए तथ्यों के आधार पर पटवारी द्वारा की गई प्रविष्टि में अपने हस्ताक्षर के अधीन परिवर्तन करेगा। ऐसे सभी प्रकरण यथा शीघ्र एवं अनिवार्य रूप से अगले कृषि वर्ष प्रारंभ होने के पूर्व निपटा दिए जायेंगे ।

2. उपरोक्त संशोधन तत्काल प्रभाव से लागू होगा। सभी संबंधित अधिकारियों एवं कर्मचारियों को खसरे के खाना क्रमांक 12 में प्रविष्टि करने की प्रक्रिया का अनुसरण तुरंत करने की कार्यवाही करने के लिए निर्देशित किया जाए।

हस्ताक्षर

(मूलचन्द शुक्ल)
अपर सचिव
मध्यप्रदेश शासन, भू–अभिलेख विभाग।

●

Ministry of Home Affairs Notification No. S.O. 523 (E) dated the 12th April, 2006. Published in the Gazette of India (Extraordinary) Part II Section 3 (ii) dated 12-4-2006 Page 1.

In exercise of the powers conferred by sub-section (2) of Section 1 of the **Criminal Law (Amendment) Act, 2005 (No. 2 of 2006),** the Central Government hereby appoints the **16th day of April, 2006** as the date on which the provisions of the said Act, except the provisions of Section 4, shall come into force.

●

MINISTRY OF HEALTH AND FAMILY WELFARE

(Published in Official Gazette dated 11.11.2005)

G.S.R.659 (E). – In exercise of the powers conferred by Section 23 of the said Act, the Central Government, after consultation with the Central Committee for Food Standards, hereby makes the following rules further to amend the Prevention of Food Adulteration Rules, 1955, namely:-

1. (1) These rules may be called the Prevention of Food Adulteration (Third Amendment) Rules, 2005.

(2) They shall come into force on the date of their final publication in the Official Gazette.

2. In the Prevention of Food Adulteration Rules, 1955, (hereinafter referred to as said rules), in Rule 22, after the Table, for the existing "Note", the following note shall be substituted, namely :-

"Note:- Food sold in packaged (sealed container of package) shall be sent for analysis in its original condition, without opening the package as far as practicable, to constitute approximate quantity along with original label. In case the bulk packages wherever preservatives are to be added, as per the requirement under rules, the sample shall be taken after opening sealed container or package and the contents of the original label shall also be sent along with the sample for analysis. However, such samples shall not be fit for microbiological analysis."

●

THE INDIAN STAMP (MADHYA PRADESH AMENDMENT) ACT, 2004

No. 1 of 2006**

[Received the assent of the President on the 23rd December, 2005; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 5th January 2006.]

An Act further to amend the Indian Stamp Act, 1899 in its application to the State of Madhya Pradesh.

Be it enacted by the Madhya Pradesh Legislature in the Fifty-fifth Year of the Republic of India as follows :–

1. Short title and commencement. – This Act may be called the Indian Stamp (Madhya Pradesh Amendment) Act, 2004.

(2) It shall come into force from the date of its publication in the Madhya Pradesh Gazette.

2. Amendment of Central Act No. II of 1899, in its application to the State of Madhya Pradesh. – The Indian Stamp Act, 1899 (No. II of 1899) (hereinafter referred to as the principal Act), shall in its application to the State of Madhya Pradesh, be amended in the manner hereinafter provided.

3. Amendment of Section 10.– For Section 10 of the principal Act, the following section shall be substituted, namely :–

"**10. Duties how to be paid.** – (1) Except as otherwise expressly provided in this Act, all duties with which the instruments are chargeable shall be paid, and such payment shall be indicated on such instrument by means of Stamps, franked stamps or a certificate endorsed under sub-section (5), by the Registrar or Sub-Registrar appointed under Section 6 of the Registration Act, 1908 (No. 16 of 1908) :–

(a) According to the provisions herein contained ; or

(b) when no such provision is applicable thereto, as the State Government may by rules prescribe

Provided that if the State Government is satisfied that circumstances exist in public interest to restrict the mode of indicating the payment of duty on any instrument or a particular class of instruments to any of the modes as specified in sub-section (1), it can do so by an order published in this behalf in the official Gazette.

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* Published in M.P. Rajpatra (Asadharan) dated 15-9-2005 Page 872.

** Published in M.P. Rajpatra (Asadharan) dated 5-1-2006 Pages 24 (2-3)

(2) The rules made under sub-section (1) may, among other matter, regulate :–

(a) in the case of any or all kinds of instruments the number or description of stamps which may be used;

(b) the size or other description of the paper which may be used;

(c) the type or brand of franking machine or any other such machine used to make impressions on instruments chargeable with duty to indicate payment of duties payable on such instruments;

(d) the form of certificates which may be endorsed on the instruments to indicate payment of sums into Government account as stamp duties.

(3) Subject to the rules made under sub-section (2), the State Government may authorise any person, body or organisation, including post offices, banks, and Government or Semi Government Offices to use a franking machine or any other such machine for making impression on stamps indicating the payment of stamp duty on the instruments.

(4) Stamp duty may also be paid into Government account in cash by a challan in any Government Treasury, sub-Treasury or bank authorised to conduct Government business.

(5) The Registrar or sub-Registrar shall on production of such challan and after due verification that the duty has been paid, endorse the amount of duty so paid on the instrument in such form as may be prescribed.

(6) An impression made by the franking machine or any other such machine by the person, body or organisation authorised under sub-section (3), or an endorsement made by the Registrar or Sub Registrar as provided in sub-section (5) shall have the same effect as if duty of an amount equal to the amount indicated in the impression or stated in the endorsement, as the case may be, has been paid in respect of such instrument."

4. Omission of Section 10-A.– Section 10-A of the principal Act, shall be omitted.

5. Insertion of Section 75-A.– After Section 75, of the principal Act, the following section shall be inserted, namely :–

"**75-A. Rules made by the State Government to be placed before the State Legislature.–** All rules made by the State Government under this Act shall, as soon as possible after they are published, be laid on the table of the Legislative Assembly."

Supreme Court Yearly Digest, 2005

by

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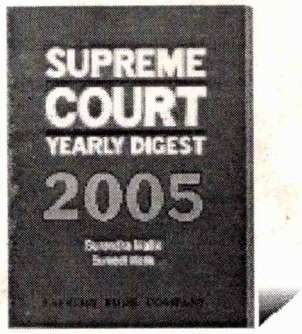

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