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JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

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JOTI JOURNAL JUNE - 2007

SUBJECT- INDEX

PART-I
(ARTICLES & MISC.)

PART-II
(NOTES ON IMPORTANT JUDGMENTS)

PART-III
(CIRCULARS/NOTIFICATIONS)

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

FROM THE PEN OF THE EDITOR

J.P. Gupta
Director, JOTRI

Esteemed Readers

The issue of June, 2007 is in your hands. As you are aware, this has been prepared by the new team of JOTRI. Myself, as Director and Shri Gopal Shrivastava, as Additional Director have taken over the charge recently. The change in functionaries or the authorities or for that matter the personalities does not change the esteemed institution: JOTRI. Like the brook, the echoes of the Institution goes on. The Institute on account of commitment, dedication and knowledge of former learned Directors, Shri B.K. Shrivastava, Shri P.V. Namjoshi, Hon'ble Shri Justice A.K. Saxena (as His Lordship then was) and Shri Ved Prakash Sharma, has achieved great heights and proven as one of the best Institutes of the country which is imparting training to the Judges to convert them as achievers in dispensing justice at the gross-root level.

Inspite of this, we are conscious of the onerous responsibility that has been put on our shoulders. At the very outset we assure that under the dynamic leadership and guidance of Hon'ble the Chief Justice of Madhya Pradesh, Shri A.K. Patnaik and Hon'ble Shri Justice Dipak Misra, Chairman of the Training Committee, the future of the Institute is bright and vivacious but at the same time I would like to emphasize here that the Institute also requires your active and meaningful cooperation in the form of writing articles, expressing of views and giving suggestions for its better performance.

Law & justice is not a static phenomenon. It is dynamic and continuous. It has to develop with developing social environment and related social needs. It is essentially a social process and the ultimate product is justice. Hence, it must change and develop with the changing social culture and values, otherwise there will be struggle between law and justice and law will lose its legitimacy. In this changing scenario of law, the task of dispensing justice can be performed effectively only when the Judge is well aware of the dynamic developments of the law.

This journal aims at being a useful instrument to assist the judges in the aforesaid process and the Institute through this Journal is trying to put forth the developments which are gradually taking place in the field of law either through Acts, Rules or Regulations or through judicial pronouncements. But the efforts of the Institute will only be fruitful when judicial officers spare some of their valuable time to go through the pages of this Journal in order to acquaint themselves with the developments and changes which are taking place in the legal field as well as in the social front and thereafter take pains to apply the law in dispensation of speedy and qualitative justice.

At this juncture, I would also like to share with you that now-a-days Judiciary is under fire. We are under continuous watch of everyone. The litigants are vigilant towards their right or wrong interests and they try to take all kinds of steps to get success. The society as a vibrant collective has activated itself to keep vigil on the activities of the judicial officers. Apart from it, media, as third front, has also emerged in the scenario. Their importance cannot be denied and their criticism will be helpful to the sound health of Judiciary, as long as they do not cross their limits.

In the aforesaid scenario, our singular erroneous step attracts heavy criticism. Hence, every judicial officer is required to be more conscious about his behaviour while working in Court or outside the Court. A judge should be polite and courteous to everyone and perform his duties to the best of his knowledge and ability in a firm, fearless and upright manner and deliver judgments and orders promptly and timely; to achieve the aforesaid purpose, he should be knowledgeable and anxious to know the correct position of law. He should be impartial and honest not only while discharging judicial work but also during discharging other duties and liabilities. He should judge his acts on the parameters of propriety, a sense of righteousness and justness. Then only he will be able to fight all the criticism intended to diminish the reputation of judiciary and sustain the faith of common man in the system.

This issue of the Journal, as usual, contains all useful and relevant material. Part I contains mainly the Articles on 'Protection of Human Rights – Constitutional Thrust and Expanding Horizons of Jurisprudence of Human Rights by way of Judicial Pronouncements' and the concluding part of 'Role of the Victim in the Criminal Justice Process' written by Hon'ble Shri Justice D.M. Dharmadhikari & Hon'ble Shri Justice P.V. Reddi, Former Judges of Supreme Court, respectively as well as articles relating to bi-monthly training programme. Part II contains notes on important judgments of Supreme Court and Madhya Pradesh High Court. In Part III we have included important Enactments, Rules and Circulars.

No one is perfect in this world. There is always room for improvement. This Institute is also no exception. Therefore, all suggestions and criticisms which intend to make the Institute and Journal more purposeful are most welcome.

Thank you.

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Hon'ble Shri Justice Dipak Misra, Chairman, High Court Training Committee delivering inaugural address to the Members of the Juvenile Justice Boards in the workshop on – 'Juvenile Justice (Care & Protection of Children) Act, 2000' held on 27th and 28th June, 2007. Sitting on His Lordship's right is J.P. Gupta, Director, JOTRI and on the left is Gopal Shrivastava, Additional Director, JOTRI & Kapil Mehta, Deputy Director, JOTRI

For every evil under the sun
There is a remedy or there is none:
If there be one, try and find it;
If there be none, never mind it.

W.H.

HON'BLE SHRI JUSTICE SUGANDHILAL JAIN DEMITS OFFICE

Hon'ble Shri Justice Sugandhilal Jain demitted office on 05.06.2007 on His Lordship's attaining superannuation. Born on 5th June 1945 at village Bag, Dist. Dhar. Obtained Degree in Law in Ist Division. Passed Sahitya Visharad. Topped the competitive examination of Civil Judge Class II and joined as Civil Judge Class II, Khandwa on November 9th, 1967. Was promoted to H.J.S. in 1984. Appointed as District Judge in March 1992 and worked as District Judge at Sagar and Bhopal. Was Registrar (Vigilance) and later Registrar General, High Court of Madhya Pradesh, Jabalpur. Was elevated as Additional Judge of the High Court of Madhya Pradesh in April 2002. Took oath as a Judge on 21st March, 2003.

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

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Only the just man enjoys peace of mind.

-EPICURUS, fragment

Injustice anywhere is a threat to justice everywhere.

-MARTIN LUTHER KING, JR., letter from the Birmingham, Ala., Jail, 1963

PART - I

PROTECTION OF HUMAN RIGHTS - CONSTITUTIONAL THRUST AND EXPANDING HORIZONS OF JURISPRUDENCE OF HUMAN RIGHTS BY WAY OF JUDICIAL PRONOUNCEMENTS

Justice D. M. Dharmadhikari
Chairperson
Human Rights Commission
Bhopal (M.P.)

Democracy is 'rule of people'. In democracy people are rulers through their chosen representatives and thus they are ruled by themselves. In constitutional democracy, fundamental human freedoms must reach and be experienced by people. The people include not only powerful and wealthy but also the weakest and the humblest. In democracy people from every section-low to high are entitled to participate in governance and share the benefit of common development. In democracy development means assuring and realizing people's right to social justice.

The preamble of the constitution contains the resolve declared by the people of India to guarantee enjoyment of basic human freedoms and social justice to all while maintaining dignity of the individual. Thus to fulfill people's resolve recorded in the Preamble of the Constitution, to maintain human dignity by guaranteeing 'fundamental rights' in Part III and social justice in Directive Principles in Part IV, the people of India have agreed in all its organs and departments to respect human values, human rights and human dignity. The quintessence of human rights can be said to be maintaining respect for human dignity in all spheres of democratic life.

All human rights declared in International Covenant on Civil and Political Rights 1966 (ICCPR) are incorporated as inalienable fundamental rights in Part III of the Constitution on enjoyment of which only 'reasonable restrictions' in general public interest can be imposed.

The human rights to guarantee social justice contained in The International Covenant on social, economic and cultural rights of 1966 (ICSER) substantially correspond to Directive Principles of State Policy in Part IV of the Constitution. Broadly classified, Fundamental Rights mentioned in Part III are basic human rights of life, liberty, equality and dignity, where as Directive Principles are goals to be gradually achieved by efforts to guarantee social justice. Fundamental rights speak of basic human rights as part of **life**. Directive Principals speak of **quality of life** to be gradually improved.

Fundamental Rights are enforceable directly in the Supreme Court and the High Court. Directive principles are specifically described as non-justiciable as they are merely aims or goals to be achieved in the working of a constitutional democracy. In the initial stage Supreme Court has been giving in its judgment primacy to Fundamental Rights over Directive Principles. In the Course of working of the Constitution, the Apex Court has gradually perceived, as would be evident from its judgments, that *"Fundamental Rights"* and "Directive Principles" complement each other. In determining reasonableness of restrictions on Fundamental Rights, consideration of relevant Directive Principles are held to be permissible. (See *State of Gujarat Vs. Mirzapur Moti Kureshi Kassab Jamat, (2005) 8 SCC 534*).

Directive principles are expressly articulated as goals to be achieved in the course of march of the Nation towards social justice. Art 37 expressly states that Directive Principles are not justiciable or enforceable by Court. The highest court of the Country by its first case in Francis Coralie Mulin gave a wide meaning to expression "life" under Article 21. [1981 (1) SCC 608]. It was held that expression " "life" does not connote merely physical or animal existence but includes right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head".

It is on the basis of this expansive interpretation of word "life" in Article 21, that Supreme Court in case after case has been reading several principles contained in Part IV as part of Article 21 in Part III. In this manner many economic and social rights contained in Part IV have been read into Part III. This is the innovative exercise of the Supreme Court to gradually assimilate and put into practice several human rights Conventions and Agreements to which India is a party and signatory being Member of United Nations.

The judgment in following cases of the Supreme Court would indicate how human rights jurisprudence, on innovating interpretation of constitutional provisions by the Court, has been invoked to protect universally declared human rights of 'life, liberty, equality and dignity' to every citizen and non citizens residing in India.

(1) Right to shelter, which is referred in Article 11(1) of ICESCR [UP *Awas Avam Vikas Parishad Vs. Friends Co-operative Housing Society Limited, AIR 1996 SC 114*].

(2) Right to food - also covered by Article 11(A) of ICESCR [*Madhu Kishwar Vs. State of Bihar, (1996) 5 SCC 125*].

(3) Right to Health - Corresponding to Article 12(1) (a) of ICESCR [*State of Punjab Vs. Mohinder Singh Chawla, AIR 1997 SC 1225*].

(4) Equal pay for equal Work covered in Article 7(a)(1) of ICESCR [*Randhir Vs. Union of India, AIR 1982 SC 879*].

(5) Right to compulsory primary education, which is covered by Article 13(2)(a) of ICESCR [*J.P. Unnikrishnan Vs. State of Andhra Pradesh, AIR 1993 SC 2178*] By amendment introduced to the Constitution in 2002 by adding Art. 21-A. Free and Compulsory education to all children between 6 to 14 years of age has now been guaranteed as a fundamental right. This can be said to be the legislative step based on the expansive interpretation of expression 'life' in Article 21 by the Supreme Court.

(6) Right to legal aid – *Madhav vs. State of Maharashtra, AIR 1978 SC 1548.*

(7) Right to livelihood (*Olga Tellis Vs. Bombay Municipal Corporation, 1985 Vol-III SCC 545*).

(8) Right to privacy – (*Govind Vs. State of Madhya Pradesh, AIR 1975 SC 1378*).

(9) Protection against illegal arrest – *Joginder Kumar Vs. State of UP, (1994) Vol-4 SCC 260.*

(10) Right to hygienic Environment - Holding that hygienic environment is an integral facet of right to healthy life, right to sanitation and health are treated within ambit of Article 21. Thus right to clean environment is held to be a fundamental human right [*Vellore Citizens Welfare Forum Vs. Union of India, (1996) 5 SCC 647*].

(11) Right to speedy trial – *Hussainara Khatoon Vs. State of Bihar, AIR 1979 SC 1360.*

(12) Right to fair trial – *V. Joseph Vs. State of Kerala, (1993) Supp 3 SCC 745.*

(13) Right to bail – *Babu Singh Vs. State of U.P., 78 Vol-I SCC 579.*

(14) Right against handcuffing (*Prem Shanker Vs. Delhi Administration, (1980) 3 SCC 526*).

(15) Right against police torture – *Francis Coralie Vs. Union Territory of Delhi, (1981) 1 SCC 608.*

(16) Right against custodial violence - *D. K. Basu Vs. State of West Bengal, 1997 Vol – I SCC 416.*

(17) Right to damages and compensation for public wrongs as a public law remedy – *Nilabati Vs. State of Orissa, 1993 Vol-2 SCC 746*).

The above list of cases is not exhausting but only illustrative to indicate how, case after case, taking aid of Article 21 and the social justice philosophy in Part IV of the Constitution, Supreme Court has been incorporating human rights jurisprudence, which is globally recognized and accepted, as the creed of the governance of the country. It is in this manner that human rights which is universal

law, by innovating interpretation of constitutional provisions by Supreme Court, is gradually becoming a domestic law of the country. No longer Fundamental Rights have supremacy over Directive Principles. They complement and supplement each other. This is the holistic interpretation of the provisions of the constitution by Supreme Court. This is pro-active interpretation of the Constitution by the highest judiciary and thus is an attempt to do public good by harmonizing Directive Principles with Fundamental Rights. This harmony is infact held to be the basic structure of the constitution. [*1980 Vol-2 SCC 591, Minerva Mills Vs. State*]. The above judicial trend to give recognition and more and more importance to human rights as parts of fundamental rights is a continuous ever-growing process.

Starting from a case of *Francis Coralie Mulin* (Supra) down to the recent decision of the constitutional bench of Supreme Court in [*M. Nagaraj & Others Vs. Union of India, AIR 2007 SC 71*] the trend continues. By upholding validity of Article 16(4-B) providing reservations in promotions to SC, STs and OBCs, the Supreme Court has reiterated that social justice is the goal and basic human rights are recognized as Fundamental Rights in the Constitution.

The above review of the pronouncements of Supreme Court leads us to a conclusion that the thrust of human rights jurisprudence in India revolves primarily around Article 21 i.e. right to life and personal liberty, which [in the case of *A.K. Gopalan Vs. State of Madras (1950), 1 SCR 88*

In the initial years of the working of constitution, was interpreted restrictively. It is only when judgment in A.K. Gopalan was over-ruled in *Menaka Gandhi Vs. Union of India, (1978) 1 SCC 248* that it paved way for growth of human rights jurisprudence in the country. Articles 14, 19 and 21 of the Constitution are thus read together and interpreted with the aid of Directive Principles in Part IV and in the light of provisions contained in each other. The three Articles 14, 19 and 21 are described as **Golden Triangle** in the case of *Minerva Mills* (supra). In this manner language of Article 21 negatively couched has been read positively casting a constitutional commitment on the State to secure human rights and human dignity to every human being in the country.

This march of the judiciary towards achieving goal of social justice by promoting and protecting human rights will continue till all constitutional goals set up in 'Directive Principles' and the resolve of the people of India declared in the 'Preamble' are achieved. The Highest Court of the land is playing its role assigned to it in the constitutional scheme.

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ROLE OF THE VICTIM IN THE CRIMINAL JUSTICE PROCESS

(Continued from April issue)

Justice (Retd.) P.V. Reddi
Former Judge, Supreme Court of India

III. DELIVERING EFFECTIVE JUSTICE TO VICTIMS

A. Victim Compensation

Thus far, we have discussed the need for a distinct role and participation of victims in the criminal justice process. The more important aspect of rendering justice to the victims, however, lies in providing monetary relief for the loss and suffering undergone by the victim. This is a topic which needs exhaustive treatment and I do not propose to add to the length of this article by a detailed discussion thereof. At the same time, this subject should not be left altogether out of consideration because when we talk of the victim's role in the criminal justice system, the victim's needs and interests are allied aspects which call for a holistic approach. Hence, I will briefly discuss this point.

Under the existing provisions of the Cr.P.C., there is a limited scope to grant compensation to the victims. Section 357 (1) provides that in a case where a sentence of fine is imposed (with or without imprisonment), the court may order the whole or any part of fine to be applied for the payment of compensation to any person, for the loss or injury caused to him by the offence. This is subject to the rider that in the opinion of the court, the compensation is recoverable by such person in the civil court. Section 357 (3) enables the court to order the accused person to pay, by way of compensation, a specified amount to the person who has suffered loss or injury by reason of the offending act. Such order can be passed even if the fine does not form part of the sentence imposed.

The Supreme Court in *Harisingh v. Sukhbir Singh,* [36] lamented that courts have seldom invoked the provisions contained in section 357 and recommended the liberal exercise of this power by courts trying criminal cases, so as to meet the ends of justice. The Court however cautioned that such compensation must be fair and reasonable. In some other cases, the Supreme Court has invoked the provisions of section 357 (3), Cr.P.C., and directed payment of substantial compensation by the convict to the victim. [37]

In a recent case, the Supreme Court, while acquitting the accused on a charge of rape on the ground of consensual sex, nevertheless adopted a novel course of exploring the possibility of payment of reasonable compensation under Article 142 of the Constitution, to the victim and her illegitimate child, on finding that the accused committed a breach of promise to marry. The amount which the accused paid as compensation was sent to the Chief Judicial Magistrate for disbursement to the victim and the child.[38] In the exercise of its jurisdiction under

36. (1988) 4 SCC 551.
37. See Harikrishna v. Sukhbir Singh, (1998) 4 SCC 551; Madhukar v. State of Maharashtra, AIR 1978 SC 1525; Venkatesh v. State of TN, AIR 1993 SC 1230
38. Deelip Singh v. State of Bihar, (2005) 1 SCC 88

Articles 32 and 142, the Supreme Court has also been directing payment of compensation by the State to the victims of custodial violence including rape and malafide or illegal detentions. The compensation awarded in such cases stems from the principle of "Public Law Torts" or the breach of public law duty. [39] The court has also been directing rehabilitation of children and other depressed sections subjected to bonded labour and other forms of exploitation. [40]

While the Supreme Court has been active in promoting the interests of the victims of crimes, this is more by exercise of plenary or discretionary power vested with the highest Constitutional Courts, rather than through the vindication of vested rights of the victims. It is regrettable that our country lags behind others in recognizing and attending to victims' rights and needs. The need for change in Indian law in this respect has been recognized time and again, by the Law Commission.

The 42nd Report of the Law Commission, while devoting a paragraph on the State's Responsibility for Compensation to Victims of Crime, observed thus:

> With the emergence of the social welfare State, these traditional notions of State immunity are undergoing rapid change. The idea that the victim of crime deserves as much attention from the State as the criminal and that, if the State fails to protect its citizens against violence, it can legitimately be called upon to compensate the victim is gaining ground in western countries. [41]

The Law Commission referred to the English legal system where a non-statutory scheme of *ex gratia* payments by the State has been introduced, and the Criminal Injuries Compensation Board has been constituted. It also referred to similar programmes in vogue in New Zealand, North Ireland and in some of the states in U.S.A. However, no specific recommendation was made on the point of the State compensating the victim.[42] At the same time, the Law Commission recommended appropriate statutory amendments giving power to the court to direct, while sentencing the accused, that the whole or any part of the fine realized from her shall be paid by way of compensation to the victim, if the court is of the opinion that such compensation is recoverable by means of civil suit.[43] This recommendation led to the introduction of section 357 (3) in the Cr.P.C.

In the 152nd Report of the Law Commission, a limited reference was made to the issue of victim compensation. While discussing custodial crimes, the law Commission recommended the introduction of a provision in the Cr.P.C.,

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39. See generally C. Whitman, Emphasizing the Constitutional in Constitutional Torts, (1997) 72 CHI-KENT L. REV. REVIEW 661.
40. See Nilabati Behra v. State of Orissa, (1993) 2 SCC 746; Rudul Sah v. State of Bihar, (1983) 4 SCC 414
41. Law Commission of India, 42nd Report on the Indian Penal Code, 1860 Paragraph 3.20 (1971)
42. *Id.*
43. *Id.* at Paragraph 3.19

empowering the court to order payment of compensation by the Government as well as any public servant convicted of the offence of causing death or bodily injury to a person in custody. A minimum of Rs. 25,000/- in the case of bodily injury, and Rs. 100,000/- in the case of death, was fixed, and a provision for interim relief was also recommended. [44] However, these recommendations are yet to be translated into action.

The Law Commission again dealt with the State's duty to compensate victims in its 154th Report. It proposed the introduction of a new provision - section 357-A [45] in the Cr.P.C. to provide for the preparation of Schemes by the Central and State Government to establish funds to compensate victims; prescribe procedures for the determination and disbursal of the compensation, both in cases which have gone for trial, as well as cases in which the offender is not traced or identified; and provide free medical facilities to the victim. [46]

This issue also received considerable attention from the Malimath Committee which observed that victim compensation is a *"State obligation in all serious crimes, whether the offender is apprehended or not, convicted or acquitted."* [47] The Malimath Committee Report recommended the framing of a separate legislation which would *inter alia,* provide for the scale of compensation in different offences, and the conditions under which it may be awarded or withdrawn. The Committee recommended for consideration, the Draft Bill

44. Law Commission of India, 152nd Report On Custodial Crimes Paragraph 12.7 (1994)

45. This proposed section reads :

(1) Every State Government in co-ordination with the Central Government shall prepare a Scheme for providing funds for the purpose of compensating the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Under the Scheme the District Legal Services Authority at the district level and the State Legal Services Authority at the State level shall decide the quantum of compensation to be awarded whenever a recommendation is made by the trial court to that effect.

(3) If the trial court, at the conclusion of the trial, is satisfied that the compensation awarded under Section 357 (3) is not adequate for such rehabilitation. or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may recommend to the District Legal Services Authority if the compensation in its view is less than Rs, 30,000 or to the State Legal Service Authority if the compensation is more than Rs. 30,000

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place it is open to the victim or his dependents to make an application under sub-section (2) to the District Legal Services Authority at the district level and the State Legal Services Authority at the State level for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section (4) as the case may be, the District Legal Services Authority or the State Legal Services Authority, as the case may be, shall after due enquiry award adequate compensation by completing the enquiry within two moths.

46. Law Commission of India, 154th Report on the Code of Criminal Procedure 1973 paragraph 15.17 (1996)

47. Malimath Committee Report, supra note 5, at 271

submitted by the Indian Society of Victimology in the year 1995. It also called for the creation of a Victim Compensation Fund to be administered by the Legal Services Authorities. The Committee has also recommended that "legal services to victims in select crimes may be extended to include psychiatric and medical help, interim compensation and protection against secondary victimization. " [48]

The Apex Court has also been cognizant of the deficiencies in the current law relating to victim compensation. It has called for a State sponsored compensation scheme, and recommended the constitution of a Criminal Injuries Compensation Board such as the one existing in England, in the specific context of compensation to rape victims. [49]

Concerns about justice to victims of crime have also been voiced in the international arena. The Resolution adopted by the General Assembly of the United Nations in 1985, incorporating the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power ("Declaration"), [50] is a big milestone in the evolution of the concept of victim's compensation. This Declaration law down the foundation for the State's obligation to compensate the victim, and is considered to be the *Magna Carta* on the rights of victims. The Declaration provides:

> [W]hen compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:
>
> (a) Victims who have sustained bodily injury or impairment of physical or mental health as a result of serious crimes;
>
> (b) The family in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization. [51]

The Declaration recommended the establishment of National Funds for Compensation to Victims. [52] It further provided that victims should receive necessary material, medical, psychological and social assistance through governmental, voluntary, community based and indigenous means. [53] This Declaration underscored the need to strengthen the judicial and administrative mechanisms to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. [54]

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48. *Id.* at 279
49. In Delhi Domestic Working Women's Forum v. Union of India (1995) 1 SCC 14, the Court, for the first time, underscored this need. The National Commission for Women was required to submit a Draft Bill on the same, to the Government of India. A Draft Bill has since been submitted but has not been acted upon.
50. G.A. Res. 40/34 (1985), available at http://www.unhchr.ch/html/menu3b/h_comp49.htm
51. Declaration of Basic Principles of Justice For Victims of Crime And Abuse of Power paragraph 12 (G.A. 1985).
52. *Id* at paragraph 13.
53. *Id* at paragraph 14.
54. *Id* at paragraph 5

In Europe, the Convention on the Compensation to Victims of Violent Crimes, 1983, [55] is another significant move in the field of victimology. It is almost on the same lines as the United Nations Declaration. Drawing inspiration from this Convention, many States in Purpose have taken legislative measures, such as the enactment of the Criminal Injuries Compensation Act, 1995 in the United Kingdom. In these countries, a victim-oriented approach is emerging with an accent on promoting victim satisfaction. Apart from providing monetary compensation, victims' support strategies are being addressed as an integral part of the policies modulating the criminal justice administration, especially in relation to sexual assault cases. There is raging debate in these countries as to whether a needs-based or a rights-based approach is called for in relation to the victim. Restorative justice to the victims is being explored in these countries.[56]

It is high time that in India the Government initiates legislative and executive measures to render justice to victims and to promote victim satisfaction, without being bogged down in jurisprudential quagmires of whether the victim has a right, and the State is under a corresponding obligation, to grant monetary compensation and rehabilitate the victim. Compensation should be made available to the victims of serious crimes, whether or not the offender is traced or convicted. Even where the offender is apprehended, tried and convicted, the order passed by the criminal court directing payment of compensation by the offender may not serve much purpose in certain cases, either because of the indigent status of the convict, or the difficulties involved in the recovery of compensation. Therefore, rendering of monetary assistance to the victim or her dependants in crimes of a serious nature, should be the first and foremost step to be undertaken by the State. The State need not search for jurisprudential justification for affording such monetary help and other assistance. Legal niceties, such as whether the State was in a position to prevent the crime, whether the occurrence of the crime was attributable to culpable negligence or inaction on the part of the police, and whether the State can claim legal immunity, are all mundane and irrelevant points which ought not to be debated at all. [57] We have sufficient indication in our Constitution that the State going to the rescue of the victims of crime, irrespective of its legal obligation, is a part of the ideal of social justice which the Constitution undoubtedly spells out as a goal. A provision such as Article 38 bears ample testimony to the fact that victim assistance and the promotion of welfare ideals are part of that cherished goal. The only limitation which the State has to bear in mind is the resource crunch. Here a balance has

55. European Convention on the Compensation of Victims of Violent Crimes, (E.T.S. No. 116), available at http:/www.conventions.coe.int/Treaty/EN/Treaties/Html/116

56. See, e.g., Andrea Schneider, *Introduction to the Restorative Justice Symposium*, 89 MARQ. L. REV. 247.

57. Here an analogy can be drawn with the 'no fault' liability principle enshrined in statutes such as the Public Liability Insurance act, 1991 and the Motor Vehicles Act, 1988 Along the same lines, the State can compensate victims for the crimes committed against them, even though there is no culpability on the part of the State in the commission of the crime.

to be struck. While the State need not go the entire distance, and pay the full compensation that may be quantified in civil action, it has to bear this burden at least within reasonable limits, by prescribing a scale of minimum monetary relief to be provided to the victims of various offences. In cases of conviction, the provision for payment of compensation by the convict as well as the State can be worked out harmoniously. The scale of monetary relief to be borne by the State and the proportion of such relief to be granted initially, the offences in relation to which it would be appropriate to extend such assistance, and the conditions subject to which the monetary relief should be made available are all matters of detail, and a debate on these and other allied aspects is batter relegated to a separate essay, as already indicated.

B. Victim Support Services

The above discussion becomes irrelevant if there are no means available for the victim to enforce her rights. Quite often, the victim might not even be aware of her rights, much less act upon them. This calls for the provision of legal aid to victims of crime. It hardly needs emphasis that an indigent victim should be provided free legal aid and the services of a fairly experienced lawyer should made available. In *Delhi Domestic Working Women's Forum v. Union of India,* [58] the Supreme Court stressed the need to provide legal assistance to the victims of rape, right from the level of the police station. The Court observed that the advocate provided to the victim of rape should be one who is well acquainted with the criminal justice system. It also observed that it is important to provide continuity of assistance by ensuring that the same advocate who looked after the interests of the victim at the police station represents her till the end of the case.

However, it is a matter of serious doubt whether it is practicable to implement this idea. The more acceptable and practicable course would be to provide immediate assistance of recognized N.G.Os. at the Police Station. Such organizations can help the victim in seeking the advice of a competent lawyer nominated by the District/State Legal Services Authority. Along with making provisions for legal aid and monetary assistance, equal priority should be given to rendering proper and prompt medical aid to the victims of violent crimes, since monetary compensation may not be an adequate remedy in certain circumstances. In the case of offences involving women and children, such as rape, kidnapping and domestic violence, the need to organize counseling by experts, and providing a network of psychiatric services, is of utmost importance. Rehabilitation of poor victims who have lost the parental care, and the sexually victimized women and children, calls for urgent attention, treating it as part of the social welfare ideal of the State. It is in this area that the voluntary organizations can usefully supplement the role of Governmental agencies. Such voluntary organizations play a vital role in counseling and rehabilitating the victims in the U.K. U.S.A., and other advanced countries. Victim support services have made a big impact in these countries.

58. (1995) 1 SCC 14.

The Government on its part, should take the initiative to augment facilities for free expert medical assistance, counseling and psychiatric treatment, in every district, and encourage the role of N.G.Os., while coordinating their efforts in this direction. Instead of launching agitations for stiffer penalties, the N.G.Os would do well to concentrate on extending their support base, and lend a helping hand and psychological support to those victims whose needs will not be met by mere monetary assistance. In short, a package of measures aimed at providing monetary compensation as well as reparation in other ways should be devised by way of legislation and executive intervention.

Another area on which the Government should bestow its attention, is the treatment meted out to victims at police stations and hospitals. Close observers of the criminal justice system at work, often get the feeling that the victim is virtually treated as chattel. Elaborate and effective guidelines, coupled with intensive training in this sensitive area, is the need of the hour, if we go by experience and ground realities.

Witness protection, including the protection of the victim, is another pressing concern. Many a victim, or for that matter a prosecution witness, considers the journey to the court and back, as an arduous and even a traumatic experience. No facilities, such as waiting halls, are provided for the victim and the prosecution witnesses, even though they have to wait in the court for a considerable time. Often they are seated with the accused and his associates. Even elementary facilities, such as chairs and toilets are not available to them. The long period of wait in the courts adds to the misery of victims and witnesses. The long duration of trial is a contributing cause to the malady of witnesses turning hostile, and the victim getting disillusioned with the system. These are the areas in which the judiciary as well as the executive should immediately take positive steps. Provision of a congenial atmosphere for the victims who come to the court for observing the proceedings, or for the purpose of tending evidence, is an imperative need. More importantly, witness protections measures, which are virtually non-existent, should be organized effectively and in earnest.

IV. CONCLUSION

Any civilized system of criminal justice should aim at ensuring safety and instilling a sense of security in the victims and their families. This not only requires that the victim be allowed to participate in a meaningful way in the criminal proceedings, but also that she be provided aid and assistance, both monetary and psychological. Such an approach will incidentally contribute to the reduction in crime rate, as it will improve conviction rates and ensure that the criminal justice system acts as an effective deterrent to potential criminals. Expending money for strengthening the criminal justice system, especially in the area of meting out justice to the victims, therefore, ought not to be regarded as an unproductive expenditure. Drawing a road map to give a better deal to the victims is the need of the day which can brook no delay.

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QUESTIONNAIRE OF BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent by this Institute for discussion in the bi-monthly district level meeting of December, 2006. The Institute has received articles from various districts. Articles regarding topic no. 1, 3 & 5 respectively, from Vidisha, Indore & Panna are being included in this issue. As we have not received worth publishing articles regarding topic no. 2 & 4 the Institute is publishing its own article on topic no. 4. Topic no. 2 shall be repeated to other group of districts in future:

1. Whether a person enlarged on bail by a superior Court can be re- arrested by police or taken into custody by Magistrate, if subsequently a more serious offence is made out against him regarding the same incident?

   क्या वरिष्ठ न्यायालय द्वारा प्रतिभूति पर मुक्त व्यक्ति को उसी घटनाक्रम में प्रगट होने वाले अधिक गंभीर अपराध के लिये पुलिस द्वारा पुनः गिरफ्तार किया जा सकता है अथवा मजिस्ट्रेट द्वारा अभिरक्षा में लिया जा सकता है ?

2. Explain meaning, expanse and scope of expression 'custody' regarding applicability of Section 439 Cr.P.C. when an order u/s 438 Cr.P.C. is in existence?

   धारा 438 दं. प्र. सं. के अन्तर्गत पारित आदेश के अस्तित्व में रहने पर धारा 439 दं. प्र. सं. के संबध में 'अभिरक्षा' का अर्थ, विस्तार एवं परिधि समझाइये ?

3. Mode of applicability of Section 13 (6) of M.P. Accommodation Control Act, 1961 when tenant has failed to comply with Section 13(1) of the Act during pendency of appeal ?

   धारा 13 (1) मध्यप्रदेश स्थान नियंत्रण अधिनियम के पालन में किरायेदार के विफल रहने पर अधिनियम की धारा 13 (6) की प्रयोज्यता की रीति समझाइये ?

4. Explain the legal position regarding amendment of pleadings seeking withdrawal of admission, raising inconsistent plea or seeking relief barred by limitation?

   स्वीकृति के प्रत्याहरण, असंगत अभिवाक एवं परिसीमा काल बाधित अनुतोष चाहने संबंधी अभिवचनों के संशोधन चाहे जाने की विधिक स्थिति समझाइये ?

5. Nature and extent of jurisdiction of civil Court regarding grant of interim and final relief in service matters ?

   सेवा संबंधी मामलों के संबंध में अंतरिम एव अंतिम अनुतोष प्रदान करने विषयक सिविल न्यायालय के क्षेत्राधिकार की प्रकृति एवं विस्तार समझाइये ?

वरिष्ठ न्यायालय द्वारा प्रतिभूति पर मुक्त व्यक्ति को उसी घटनाक्रम में प्रकट होने वाले अधिक गंभीर अपराध में पुलिस द्वारा पुनः गिरफ्तार किया जाना अथवा मजिस्ट्रेट द्वारा अभिरक्षा में लिया जाना कहाँ तक वैधनिष्ठ है?

न्यायिक अधिकारीगण
जिला विदिशा

द.प्र.सं. 1973 की धारा 437, 438 एवं 439 जो विशेषकर किसी व्यक्ति को जमानत दिये जाने से संबंधित प्रावधानों का उल्लेख करती है, मैं स्पष्टतः अभिव्यक्त रूप से इस तथ्य का कोई उल्लेख नहीं किया गया है कि यदि वरिष्ठ न्यायालय द्वारा कोई व्यक्ति पूर्व से जमानत पर निर्मुक्त रहा हो, तो उसी घटनाक्रम में प्रकट होने वाले अधिक गम्भीर अपराध के लिये पुलिस उसे पुनः गिरफ्तार कर सकती है अथवा नहीं। इस एम. पी. सम्बन्ध में माननीय म.प्र उच्च न्यायालय द्वारा अपने निर्णय *रामबाबू शर्मा बनाम म. प्र. राज्य, 1990 (1)* डब्लू. एन. *79* में यह प्रतिपादित किया गया था कि जहाँ अभियुक्त को हत्या के प्रयास के मामले में अग्रिम जमानत प्रदान कर दी गई हो और बाद में आहत व्यक्ति की मृत्यु हो जाये, वहाँ ऐसे अभियुक्त की पुनः गिरफ्तारी का अधिकार केवल धारा 439 की उपधारा (2) के अधीन ही हो सकता है, अन्यथा नहीं, परन्तु विधि की उक्त परिस्थितियाँ कालांतर में परिवर्तित हुई है तथा इस संबंध में अन्य उच्च न्यायालयों ने भी भिन्न–भिन्न मत प्रदत्त किये हैं, इस बाबत् सिंध उच्च न्यायालय, इलाहाबाद उच्च न्यायालय और म.प्र. उच्च न्यायालय में भी परस्पर मत भिन्नता रही है। परन्तु माननीय सर्वोच्च न्यायालय ने अपने निर्णय प्रहलाद सिंह भाटी बनाम एन.सी.टी. दिल्ली और अक्षय ए. आई. आर. 2001 सु. को. 1444 में इसके विपरीत यह स्पष्टतः प्रतिपादित कर दिया है कि जहाँ प्रारंभिक अवस्था में अभियुक्त को किसी छोटे मामले में जमानत दी गई हो और बाद में उसी मामले में अभियुक्त को गंभीर अपराध अर्थात् मृत्यु कारित करने के अपराध में शामिल पाया जाए वहाँ धारा 437 की उपधारा (5) एवं द. प्र. सं. 1973 की धारा 439 (1) के उपबंध आर्कषित नहीं होते हैं और अपराध की प्रकृति में परिवर्तन होने मात्र से अभियुक्त को पूर्व में लघु अपराध में दी गई जमानत को रद्द करने का कोई प्रश्न ही उत्पन्न नहीं होता है बल्कि अभियुक्त छोटे अपराध में दी गई जमानत पर स्वतंत्र रहने में अर्नह हो जाता है यदि अपराध किसी गम्भीर अपराध में परिवर्तित हो जाए अर्थात यदि अपराध पश्चातवर्ती दशा में किसी गम्भीर मामले में परिवर्तित हो जाता है तो पूर्व में दी गयी जमानत का कोई अस्तित्व एवं प्रभाव ही नहीं रहेगा और अभियुक्त पुनः गम्भीर अपराध के मामले मे गिरफ्तार किया जा सकेगा।

माननीय सर्वोच्च न्यायालय ने उक्त प्रकरण में इस तथ्य पर घोर आपत्ति प्रकट की थी कि, जहाँ अभियुक्त को धारा 306, और 498–ए, भा. द. सं. के अपराध में पूर्व में जमानत दी जा चुकी थी वहाँ बाद में वही मामला धारा 302, भा. द. सं. के अन्तर्गत परिवर्तित होने पर न्यायालय द्वारा अभियुक्त को धारा 302, भा. द. सं. के अपराध में भी वही पूर्वतन जमानत मान्य की गई, माननीय सर्वोच्च न्यायालय ने इस प्रक्रिया को घोर आपत्तिजनक ठहराया और प्रकट किया है कि ऐसी प्रक्रिया विधि विरूद्ध है।

माननीय सर्वोच्च न्यायालय के उक्त न्यायदृष्टाँत के प्रकाश में वर्तमान विधिक स्थिति स्पष्ट रूप से यह है कि, यदि किसी छोटे अपराध में किसी अभियुक्त को पूर्व में जमानत का लाभ प्रदान किया जा चुका हो तो बाद में उसी घटना क्रम से प्रकट होने वाले अधिक गम्भीर अपराध के लिए अभियुक्त न केवल पुलिस द्वारा पुनः गिरफ्तार किया जा सकता है बल्कि मजिस्ट्रेट द्वारा भी अभिरक्षा में लिया जा सकता है।

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MODE OF APPLICABILITY OF SECTION 13 (6) OF M.P. ACCOMMODATION CONTROL ACT, 1961 WHEN TENANT HAS FAILED TO COMPLY WITH SECTION 13 (1) OF THE ACT DURING PENDENCY OF APPEAL

Judicial Officers
District Indore

As per Section 13 (1) of M.P. Accommodation Control Act, 1961, in any appeal filed by a landlord on any of the grounds referred in Section 12 or in any appeal filed by tenant against any decree or order of eviction, the tenant shall within one month of the service of notice of appeal or within one month of institution of appeal by the tenant, as the case may be or within such further times as the Court may on an application made to it allow in this behalf deposit in the court or pay to the landlord an amount calculated at the rate of rent at which it was paid, for the period for which the tenant may have made default including the period subsequent thereto up to the end of the month previous to that in which the deposit or payment is made & shall there after continue to deposit or pay, month by month by the 15th of each succeeding month a sum equivalent to the rent at that rat till the decision of the appeal.

The provisions of Section 13 (1) has given a statutory recognition to the fact that an appeal is a continuation of suit & the liability of a tenant continue to remain the same during pendency of appeal, as it was during pendency of suit. It is also clear under Section 13 (6), that if a tenant fails to deposit or pay any amount as required by Section 13 (1), the court **may order the defence against the eviction to be struck out & shall proceed with the hearing of an appeal.** It should be exercised on sound judicial principles, keeping in mind that though M.P. Accommodation Control Act is a beneficient piece of legislation to protect the interest of the tenant, yet sufficient care has been taken under the provisions of the Act to protect the interest of the landlord. [See *Rajesh Omprakash Goel vs. Smt. Mullo & Others, 2000 (2) M.P.L.J 445* & *Basant Singh & another vs Roman Catholic Mission, 2001 (1) M.P.L.J. 577]*

It is not obligatory for the court to strike out the defence of the tenant under Section 13 (6), if the tenant fails to make payment or deposit u/s 13 (1). It must depend upon the facts & circumstances of the case & the discretion of the court whether such a drastic order should or should not be passed. If the court is of the view that in the facts of a particular case the time to make payment or deposit pursuant to an order passed under Section 13 (1) should be extended,

it may do so by passing suitable order. Similarly, if it is not satisfied about the case make out by the tenant, it may order the defence against the eviction to be struck out. But the power to strike out the defence against the eviction to be struck out is discretionary & must not be mechanically exercised, without any application of mind to the fact of the case & this discretion should be exercised by the court judiciously not arbitrarily in furtherance.

Under Section 13 (6) **defence against eviction** of a tenant may be struck out. There can be no defence unless there are in existence one or more grounds for eviction mentioned in Section 12 (1). A landlord is required to plead a ground of eviction & the defendant tenant in reply files his defence in respect of such ground. The section 13 (6) contemplates striking out of such defence pleaded by the defendant. It is not concerned with any other plea or defence of the defendant, which is not related to the ground of eviction. As soon as the defence of the defendant in this respect is struck out, what remains is the allegation made by the plaintiff in the plaint regarding ground of eviction, uncontroverted by the defendant.

If the defence against the eviction is struck out in trial court tham the safeguards mentioned by Hon'ble Supreme Court in *Modula India vs Kamakshya Singh Deo, AIR 1989 S.C. 162* are to be observed which are as under –

> "The defendant (tenant) would generally be entitled to cross-examine the plaintiff's (landlord's) witnesses & to address argument on the basis of the plaintiff's case but the defendant 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 legitimate scope & 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."

But the difficulties arise where the defence is struck out at appellate stage. In this situation the appellate court will have to judge the cross examination & answers given by the witnesses for the plaintiff (landlord) from the point of view of demolition of the case of the plaintiff (landlord).The Presiding judge is required to sift the wheat from chaff as the appellate court will have no occasion to observe the safeguards mentioned by Hon'ble Supreme Court in *Modula India* case (supra) cited above. [See *Mohd. Mahmood Hussain vs Asadulla Usmani, 1997 (2) M.P.J.R. 145.*]

When in a case it is established that the tenant has failed to comply with Section 13 (1) during the pendency of an appeal, his defence against eviction may be struck out u/s 13 (6). Even then the court shall proceed with the hearing of such appeal. The only difference would be that the defence against eviction on one or more grounds u/s 12 (1) taken by the tenant in his written statement shall not be considered. The appeal shall be heard in a manner as if the tenant had not defended the suit but the plaintiff shall have to satisfy the appellate court that he has proved the allegations made by him in the plaint & upon evidence led by him, decree for eviction should be passed against the tenant & in his favour. The defendant will be heard on that point to the limited extent of showing that the plaintiff's evidence is not enough to prove any ground under Section 12. *(See Premdas vs Laxminarayan, 1964 MPLJ 190.)*

Apart from the defence against eviction, a tenant is entitled to plead facts which debar a landlord to file such a suit against him because defence against eviction will not include those defenses which are away from the ground or ground u/s 12 (1), i.e the right of the plaintiff to file suit and/or, maintainability of the suit itself or quantum of rent, arrears of rent etc. *(See Kewal Sharma vs Satishchandra Gothi & Others, 1991 J.L.J. 86* and *Laminarayan vs Jambu Dal Mills & Others, 1993 J.L.J. 117.)*

CONCLUSION

In view of above discussion it is crystal clear that when tenant has failed to comply with Section 13 (1) of the M.P. Accommodation Control Act, 1961 during pendency of appeal the appellate court may order the defence against the eviction of the tenant to be struck out and shall proceed with the hearing of an appeal. This power is discretionary and must not be mechanically exercised without any application of mind to the fact of the case.

Even than the appellate court will still have to see whether on the plaintiff's evidence produced in trial court a ground u/s 12 has been made out. The tenant can also defend the appeal on grounds dispelled from his liability for eviction under Section 12, such as dispute regarding arrears of rent, denial of relationship with plaintiff as tenant and tenability of suit etc. in general law.

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LEGAL POSITION REGARDING GRANT OR REFUSAL OF THE AMENDMENTS WHICH ARE RELATED TO WITHDRAWAL OF ADMISSION, INCONSISTENT PLEADING AND TIME BARRED PLEADINGS

Institutional Article
J.P. Gupta,
Director, JOTRI

The basic law and procedure about the amendment of pleadings, as stipulated in Order 6 Rule 17 of C.P.C., is as follows:

AMENDMENT OF PLEADINGS

The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

"Provided that no application for amendment shall be allowed after the commencement of trial, unless the court come to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of trial".

Order 6 Rule 17 of C.P.C. consists of two parts; whereas the first part is discretionary and leaves the court to order amendment of pleading; and the second part is imperative and enjoin the court to allow all amendments which are necessary for the purpose of determining the real question, the real controversy. It is the basic or cardinal test and it is the primary duty of the court to decide whether such amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed, if it is not, the amendment will be refused.

This rule declares that the court may, at any stage of the proceedings, allow either party to alter or amend his pleadings in such a manner and on such terms as may be just. It also states that such amendments should be necessary for the purpose of determining the real question in controversy between the parties. The proviso enacts that no application for amendment should be allowed after the trial has commenced, unless the court comes to the conclusion that inspite of due diligence, the party could not have raised the matter for which amendment is sought before the commencement of the trial.

At this stage, the courts should not go into the correctness or falsity of the case in the amendment, it should not recorded the finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at this stage.

The object of Order 6 Rule 17 is that the court should try the merits of the case that come before it and should consequently allow all the amendments that may be necessary for determining the real question in controversy between the parties, provided it does not cause injustice or prejudice to other side. The rule of amendment is essential. The rule of justice and equity could conscience and the power of amendment should be exercised in larger interest of doing full and complete justice to the parties before the court. The court always gives leave to amend the plea of the party unless it is satisfied that the party applying was acting malice. The amendment to pleadings should be liberally allowed since the procedural obstacles ought not to implead for dispersion of justice. The courts also notice subsequent events in order to sorting the litigation to protect and safeguard the rights of party and to subserve the ends of justice.

Ordinarily, all amendments should be allowed unless the same is intended to cause injustice to other side. The amendments should be refused when only the other party cannot be placed in the same position as if the original pleading is correct, the amendment cause him an injury which could not be compensated in costs.

Now we have to consider the legal position regarding the duty of the courts to allow or disallow the proposed amendment which are related to withdrawal of admission or an inconsistent and time barred pleading in the aforesaid background to understand the relevant law.

AMENDMENT OF PLEADING RELATED TO THE WITHDRAWAL OF ADMISSIONS

Ordinarily, the withdrawal of admissions are not permitted as it affects other party adversely but in the interest of justice, explanation of admission is allowed and some times withdrawal of admission may be allowed because in this regard no straitjacket formula can be formulated. This legal position has been explained in several case laws. In the case of *M/s Modi Spinning & Weaving Mills v. Ladha Ram & Co., AIR 1977 SC 680,* it has been held that it is true that inconsistent pleas can be made in pleadings but the effect of substitution of paragraphs 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial court.

In the case of *Panchdeo Narain Srivastava v. Km. Jyoti Sahay and another, AIR 1983 SC 462* Hon'ble the Supreme Court has laid down that an admission made by a party may be withdrawn or may be explained away. Similarly, in the case of *Akshay Restaurant v. Anjanappa, 1995 Supp (2) SCC 303,* Hon'ble the

Court has observed that even the admission can be explained and even inconsistent plea could be taken in the pleadings but in other case *Heeralal v. Kalyan Mal, AIR 1998 SC 618* the Apex Court has held that the aforesaid *Akshay Restaurant case* (supra) is *per-incuriam* being rendered without being given an opportunity to consider the findings decision of three Judge Bench given in *Modi Spinning and Weaving Mills case (supra)* and further held that the preposition that once the written statement contains an admission in favour of the plaintiff, by amendment such admission of the defendants cannot be allowed to be withdrawn if such withdrawal would amount to totally displacing the case of the plaintiff and which would cause him irretrievable prejudice.

In case of *Chandrasen Shivlal Jain and others v. Suresh Chand Gulab Jain and others, 2001 (3) MPLJ 9,* Hon'ble High Court of M.P. held that amendment in written statement for withdrawal of admission made earlier by defendant, which would cause prejudice to case of plaintiff, cannot be permitted.

In case of *Hansadevi Sahu v. Bachchalal Jaisinghani and another, 2002 (1) M.P.L.J.* 122 Hon'ble the High Court M.P. held that the amendment of written statement seeking to introduce entirely new case and seeking withdrawal of admission cannot be allowed.

In case of *Gobinda Sahoo v. Ram Chandra Nanda and another, AIR 1974 Orissa 36,* it has been held that one of the paramount considerations in allowing or rejecting an amendment is whether the opposite party would suffer on account of an admission being amended. In many cases such amendments are not allowed. But no general principle can be laid down that every admission already made cannot be permitted to be amended. Such a wide proposition will lead to clear injustice. Much will depend on the facts and circumstances of each case. Where an admission appears to have been made by inadvertence or erroneously in ignorance of the true legal position due to the fault of the advocate, an amendment may be allowed even though the effect of an admission may be taken away.

In view of the aforesaid discussion, it can be said that in general withdrawal of admission by amendment should not be permitted but there may be such circumstances in which withdrawal of admission by amendment may be permitted in the interest of justice if such permission does not cause injustice to the other party.

AMENDMENT RELATED TO INCONSISTENT PLEADINGS

The law relating to aforesaid issue may be understood by going through the relevant case law. Ordinarily inconsistent or alternative pleas can be taken by way of amendment unless such amendment change the nature of the litigation. In this regard, consideration for a plaint and a written statement are different.

In case of *Arundhati Mishra v. Shriram Charitra Pandey, (1994) 2 SCC 29* it has been stated that an amendment to written statement cannot be considered on the same principle as an amendment to the plaint. The pleadings in the written statement may be alternative or on additional grounds or to substitute the original plea.

In case of *Shivanath Ramprasad v. Mahavir Prasad, AIR 1974 SC 177* it has been held that the plaintiff may rely upon different rights alternatively when there is nothing in the court to prevent a party making two or more inconsistent sets of allegations and claiming relief hereunder in the alternative.

In case of *Shanti Bai and other v. Ganpat Rao Gujar and another, 2001 (3) MPLJ 439* it was held that ordinarily a court will not allow an amendment which involves a complete change or in front in either the case set-up in the plaint or in defence (1) just as a plaint cannot be allowed to be amended so as to introduce a new inconsistent cause of action which would change the nature of the suit, so also the defence cannot be allowed to be altered so as to introduce a different set of circumstances, inconsistent with the circumstances pleaded to begin with. Allowing a change in the nature of the case basing the suit on totally new ground and giving an opportunity to the plaintiff to adduce false or perjured evidence cannot be permitted. Such an amendment, if allowed, would cause serious prejudice to the defendants for which there can be no justification.

In case of *G. Nagamma and another v. Siromanamma and another, (1996) 2 SCC 25,* Hon'ble the Apex Court has held that it is settled law that the plaintiff is entitled to plead even inconsistent pleas. In this case, they are seeking alternative reliefs. The application was for amendment of the plaint whereby neither cause of action could be changed nor the relief could be materially affected. We allow the same.

In case of *Sampath Kumar v. Ayyakannu & another, 2003 (I) MPJR 91,* Hon'ble the Apex Court has held that in order to avoid multiplicity of suits it would be a sound exercise of discretion to permit the relief of declaration of title and recovery of possession being sought for in the pending suit. The plaintiff has alleged the cause of action for the reliefs now sought to be added as having arisen to him during the pendency of the suit. The merits of the averments sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for amendment. However, the defendant is right in submitting that if he has already perfected his title by way of adverse possession then the right so accrued should not be allowed to be defeated by permitting an amendment and seeking a new relief which would relate back to the date of the suit and thereby depriving the defendant of the advantage accrued to him by lapse of time, by excluding a period of about 11 years in calculating the period of prescriptive title claimed to have been earned by the defendant. The interest

of the defendant can be protected by directing that so far as the reliefs of declaration of title and recovery of possession, now sought for, are concerned the prayer in that regard shall be deemed to have been made on the date on which the application for amendment has been filed.

In case of *Nathuram and others v. Raghuveerdas, 2006 (3) MPLJ 368* having examined the relevant case law Hon'ble High Court held that in case plaint resist on the pleadings that the defendants were in illegal possession and after demarcation, left possession of suit land. After dismissal of order of injunction he filed an application for amendment of the pleading that he had not been in possession and accordingly, he wanted recovery of possession. Trail Court allowed the amendment application, the same order does not require any interference as cause of justice would be best subserved and no serious prejudice is caused to the defendants and further the character and nature of the suit does not change. By allowing the amendment, justice has been done and the purpose engrafted in the provision for amendment has been met with.

In case of *Modi Spinning & Weaving Mills Co. Ltd. and another v. M/s Ladha Ram & Co., (supra)* Hon'ble the Apex Court has observed that it is true that inconsistent pleas can be made in pleadings.

In case of *Haji Mohd. Ishaq Wd. S.K. Mohammed and others v. Mohammed Iqbal and Mohammed Ali and Co., AIR 1978 SC 798* Hon'ble the Apex Court has pointed out that the amendment of the written statement sought in appeal was on such facts which, if permitted, to be introduced by way of amendment, would have completely changed the nature of their original defence. It would have brought about an entirely new plea which was never taken in the original pleadings.

In case of *Basavan Jaggu Dhobi v. Sukhnandan Ramdas Chaudhary and others, 1995 Supp (3) SCC 179* Hon'ble Apex Court has held that we are afraid that the courts below have gone wrong in holding that it is not open to the defendant to amend his written statement under Order 6 Rule 17 CPC by taking a contrary stand than what was stated originally in the written statement. This is opposed to the settled law. It is open to a defendant to take even contrary stands or contradictory stands; thereby the cause of action is not in any manner affected. That will apply only to a case of the plaint being amended so as to introduce a new cause of action.

In case of *Heeralal v. Kalyan Mal, AIR 1998 SC 618* it has been reiterated that when the amendment sought in the written statement is of such a nature as to displace the plaintiff's case, the same could not be allowed.

In case of *Baldev Singh and others v. Manohar Singh and another, (2006) 6 SCC 498,* Hon'ble Apex Court has held that it is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily

governed by exactly the same principle. It is true that some general principles are certainly common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the written statement. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action. Accordingly, in the case of amendment of written statement, the courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is less likely to operate with same rigour in the former than in the latter case.

This being the position, we are therefore of the view that inconsistent pleas can be raised by the defendants in the written statement although the same may not be permissible in the case of plaint. In *Modi Spg. and Wvg. Mills Co. Ltd. v. Ladha Ram & Co. (supra)* this principle has been enunciated by this Court in which it has been clearly laid down that inconsistent or alternative plea can be made in the written statement.

On perusal of aforesaid case laws, it emerges that the amendment of inconsistent plea should be where it does not effect the basic nature of the suit and does not effect opposite party adversely and necessary to resolve the real dispute existed between the parties and strict yardstick relating to disallowing the amendment applicable to the plaint, cannot be applied in case of amendment of written statement.

AMENDMENT RELATED TO TIME BARRED PLEADINGS

The law relating to amendment of time barred pleading can be understood in the light of relevant case laws. In this regard, from the pronouncement of the higher courts the law emerges that as a general rule where a plaintiff seeks the amendment by setting a fresh claim in respect of the cause of action which since the institution of the suit has become barred by limitation, must be refused as allowing it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence for the claim. But mere this thing does not affect the power of the court to allow the amendment relating to time barred pleading, if that is required in the interest of justice.

In order to understand the aforesaid legal position, references of following case laws would be more useful:-

1. In the case of *Charan Das v. Amir Khan, AIR 1921 P.C. 5,* the Privy Council observed that the court has full power to make the amendment and same cannot be disputed, and though such a power should not as a rule be exercised where the effect is to take away from a defendant a legal right which

has accrued to him by lapse of time, yet there are cases where such considerations are out-weighed by the special circumstances of the case.

2. In the case of *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil and others, AIR 1957 SC 363,* Hon'ble the Apex Court has observed that all amendments ought to be allowed which satisfy the two conditions; (a) not working injustice to the other side; and (b) of being necessary for the purpose of determining the real question in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. It is merely a particular case of this general rule that where as plaintiff seeks to amend by setting up a fresh claim in respect of a cause of action which since the institution of the suit had become barred by limitation, the amendment must be refused: to allow it would be to cause the defendant an injury which could not be compensated in costs by depriving him of a good defence to the claim. The ultimate test therefore still remains the same: can the amendment be allowed without injustice to the other side, or can it not?

3. In the case of *L.J. Leach and Co. Ltd and another v. Messrs. Jardine Skinner and Company AIR 1957 SC 357,* Hon'ble the Apex Court has observed that it is no doubt true that Courts would as a rule; decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to order it, if that is required in the interests of justice.

4. In the case of *A.K. Gupta and Sons Ltd. v. Damodar Valley Corporation, AIR 1967 SC 96,* the Hon'ble the Apex Court on relying upon the aforesaid case law has observed that in the matter of allowing amendment of pleading the general rule is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on the new cause of action is barred where however, the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts merely to a different or additional approach to the same facts, the amendment is to be allowed even after expiry of the statutory period of limitation.

5. In the case of *Vineet Kumar v. Mangal Sain Wadhera, AIR 1985 SC 817,* Hon'ble the Apex Court held that normally amendment is not allowed, if it changes the cause of action. But it is well recognized that where the amendment does not constitute the addition of a new cause of action, or raise a new case, but amounts to not more than adding to the facts already on record, the amendment would be allowed even after the statutory period of limitation.

6. In the case of *Muni Lal v. The Oriental Fire & General Insurance Company Ltd. and another, AIR 1996 SC 642,* Hon'ble the Apex Court has observed that we are of the view that granting of amendment of plaint seeking to introduce alternative relief of mandatory injunction for payment of specified amount is bad in law. The alternative relief was available to be asked for when the suit was filed but not made. He cannot be permitted to amend the plaint after the suit was barred by the limitation during the pendency of the proceeding in the appellate court or the second appellate court.

7. In the case of *B.K. Narayana Pillai v. Parameshwaran Pillai, (2000) 1 SCC 712 : JT (1999) 10 SC 61,* Hon'ble the Apex Court has observed that the purpose and object of Order 6 rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule, particularly, in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled-for multiplicity of litigation.

8. In the case of *Raguthilak D. John v. S. Rayappan and others, (2001) 2 SCC 472,* Hon'ble Apex Court has held that where it is arguable that the relief sought by way of amendment would be barred by law of limitation, amendment should be allowed and the plea of limitation being disputed matter could be made the subject matter of an issue after allowing the amendment prayed for. The dominant purpose of allowing the amendment is to minimize the litigation. The plea that the relief sought by way of amendment was barred by time is arguable in the circumstances of the case.

9. In the case of *T.N. Alloy Foundry Co. Ltd v. T.N. Electricity Board, (2004) 3 SCC 392,* Hon'ble Apex Court held that the Court would as a rule decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court.

10. In *Pankaja and another v. Yellappa, 2004 (4) MPLJ 218,* Hon'ble Apex Court has held that having examined the question whether in cases where the delay has extinguished the right of the party by virtue of expiry of the period of limitation prescribed in law, can the Court in the exercise of its discretion take

away the right accrued to another party by allowing such belated amendments it is answered that the law in this regard is also quite clear and consistent that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed. Discretion in such cases depends on the facts and circumstances of the case. The jurisdiction to allow or not allow an amendment being discretionary, the same will have to be exercised on a judicious evaluation of the facts and circumstances in which the amendment is sought. If the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation the same should be allowed. There can be no straitjacket formula for allowing or disallowing an amendment of pleadings. Each case depends on the factual background of that case.

Therefore, an application for amendment of the pleadings should not be disallowed merely because it is opposed on the ground that the same is barred by limitation. On the contrary, application will have to be considered bearing in mind the discretion that is vested with the court in allowing or disallowing such amendment in the interest of justice.

Apart from it, Hon'ble Apex Court has also observed that whether the plea of relief sought by way of amendment was barred by time is arguable, the amendment should be allowed.

Thus, by the above pronouncements it becomes crystal clear that ordinarily amendment relating to time barred pleading should be disallowed but whenever, the circumstances require to do complete justice or to resolve the litigation between the parties finally or in avoiding or minimizing further litigation, an amendment related to time barred pleading may be permitted and in that case the plea of limitation being disputed could be made a subject matter of the issue of allowing the amendment.

In all cases, paramount consideration is the same i.e. whether by allowing the application of amendment related to above nature, intends to advance the aforesaid object. In other words, whether the proposed amendment is necessary to adjudicate the real controversy in the suit or useful for avoiding or minimizing the litigation and will not intended to cause such harm which could not be compensated in costs or not prejudiced the opponent.

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सेवा संबंधी मामलों के संबंध में अंतरिम एवं अंतिम आदेश प्रदान करने विषयक सिविल न्यायालय के क्षेत्राधिकार की प्रकृति एवं विस्तार

न्यायिक अधिकारीगण

जिला पन्ना

व्यवहार वादों से सम्बन्धित प्रक्रिया के उपबंध सिविल प्रक्रिया संहिता,1908 (जिसे आगे संहिता से सम्बोधित किया जावेगा) में वर्णित किये गये हैं । व्यवहार प्रक्रिया संहिता की धारा–9 व्यवहार वादो के संबंध में न्यायालय को विचारण करने की अधिकारिता को वर्णित करती है। धारा 9 व्यवहार प्रक्रिया संहिता निम्नानुसार है :–

> **धारा–9**:– जब तक कि वर्जित न हो, न्यायालय सभी सिविल वादों का विचारण करेंगे – न्यायालयों को (इसमें अर्न्तविष्ट उपबंधों के अधीन रहते हुये) उन वादों के सिवाय, जिनका उनके द्वारा संज्ञान अभिव्यक्त या विवक्षित रूप से वर्जित है, सिविल प्रकृति के सभी वादों के विचारण की अधिकारिता होगी।
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> **स्पष्टीकरण 1** :– वह वाद, जिसमें संपत्ति संबंधी या पद संबंधी अधिकार प्रतिवादित है, इस बात के होते हुये भी कि ऐसा अधिकार धार्मिक कृत्यों या कर्मों संबंधी प्रश्नों के विनिश्च पर पूर्ण रूप से अवलंबित है, सिविल प्रकृति का वाद है।
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> **स्पष्टीकरण 2** :– इस धारा के प्रयोजन के लिये यह बात तात्विक नहीं है कि स्पष्टीकरण एक में विर्निदिष्ट पद के लिये कोई फीस है या नहीं अथवा ऐसा पद किसी विनिर्दिष्ट स्थान से जुड़ा है या नहीं।

इस प्रकार धारा 9 व्यवहार प्रक्रिया संहिता का अध्ययन करने से यह प्रकट होता है कि न्यायालय को व्यवहार प्रकति के वादों को सुनवाई करने का पूर्ण अधिकार है यदि किसी अधिनियम में अभिव्यक्त या विवक्षित रूप से व्यवहार न्यायालय की अधिकारिता को वर्जित नहीं किया गया है।

> ***[धारा 9 सि. प्र. सं के प्रावधानों के अनुसार सेवा सम्बन्धी विवाद सिविल प्रकृति के होने से सिविल न्यायालय के श्रेत्राधिकार में आते है जब तक कि ऐसा विवाद किसी विधि विशेष से अभिव्यक्तः या विवक्षित रूप से वर्जित नहीं हैं।***
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> ***सेवा सम्बन्धी विवाद राज्य एवं व्यक्तियों दोनों के साथ हो सकते है। व्यक्ति के साथ सेवा सम्बन्धी विवाद संविदा विधि से शासित होते हैं जिसके सम्बन्ध में सामान्यतः संविदा भंग पर देय क्षतिपूर्ति का उपचार उपलब्ध है। सेवा सम्बन्धी संविदा का विशिष्टतः पालन नहीं कराया जा सकता है, अर्थात् पद पर या सेवा में बने रहने के अधिकार के सम्बन्ध मे कोई सिविल वाद पोषणीय नहीं है। इस संबंध में सर्वोच्च न्यायालय द्वारा न्याय दृष्टाँत इंडियन एयरलाइन्स कार्पो. विरूद्ध सुखदेव राव, 1971 (2) एस. सी. सी. 192 में प्रतिपादित न्याय सिद्धान्त अवलोकनीय है।***

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1. उक्त भाग संस्थान द्वारा जोड़ा गया।

परन्तु जहाँ अशासकीय या निजी सेवाओं को विनियमित या नियंत्रित करने के लिये कोई विधि या नियम प्रभावशील है, तब उनका उल्लंघन होने पर ऐसी सेवाओं के विवाद में सामान्यतः सिविल न्यायालय पद के अधिकार संबंधी घोषणात्मक या अन्य सहायता भी प्रदान कर सकती है जब तक कि ऐसी विधि या नियम द्वारा सिविल न्यायालय का क्षेत्राधिकार प्रत्यक्षतः या विवक्षित रूप से अपवर्जित नहीं कर दिया गया हो। उदाहरणार्थ :– मध्यप्रदेश अशासकीय शिक्षण संस्थान अध्यापकों तथा अन्य कर्मचारियों के वेतनों का संदाय अधिनियम, 1978 के अन्तर्गत अशासकीय संस्थाओं के कर्मचारियों के सेवाओं को संरक्षित किया गया है । उनके विवादों के निराकरण का श्रेत्राधिकार अधिनियम की धारा 6 (क) (iii) एवं धारा 7 के अन्तर्गत राज्य शासन द्वारा विनिर्दिष्ट अपीलीय प्राधिकार को दिया गया है एवं इस प्रकार विवक्षित रूप से सिविल न्यायालय का क्षेत्राधिकार अपवर्जित किया गया है किन्तु ऐसे अपीलीय प्राधिकार द्वारा सदभाव पूर्वक आदेश पारित नहीं करने की दशा में या न्यायिक प्रक्रिया के मूलभूत सिद्धान्तों के उल्लंघन में कार्य करने की दशा में सिविल न्यायालय एवं अपीलीय न्यायालय को क्षेत्राधिकार प्राप्त होगा। उक्त विधिक स्थिति के संबंध में मध्यप्रदेश उच्च न्यायालय द्वारा न्याय दृष्टाँत रामचरण लाल शर्मा एवं अन्य विरूद्ध श्रीमती विनोद श्रीवास्तव,1992 एम. पी. एल. जे. 526 तथा भारतीय विद्या मन्दिर विरूद्ध श्रीमती पुष्पा अग्रवाल, 1993 (II) एम. पी. वीकली नोट्स नोट 38 में प्रतिपादित न्याय सिद्धान्त दृष्टव्य है।

श्रमिक क्षेत्र के सेवा संबधी विवादों का जहाँ तक प्रश्न है, ऐसे विवाद जहाँ श्रमिक विधि के अन्तर्गत प्राप्त अधिकारों पर आधारित है और श्रमिक विधि के अन्तर्गत उनके उल्लघंन पर विशिष्ट उपचार प्रदान करने की अधिकारिता विशिष्ट प्राधिकारी को प्रदान की गई है तब ऐसे विवाद सिविल न्यायालय के श्रेत्राधिकार से परे है परन्तु यदि सामान्य विधि के अन्तर्गत प्राप्त अधिकार के आधार पर दावा लाया जाता है तब सिविल न्यायालय को उनके श्रवण का श्रेत्राधिकार होगा। (देखिये द प्रीमियर आटोमोबाइल्स लिमिटेड विरूद्ध कमलाकर शान्ताराम तथा अन्य, ए.आई.आर. 1975 सु. को. 2238)

इसके अतिरिक्त किसी पद के विवाद के निराकरण के लिये एवं अन्तिम आदेश पारित करने हेतु क्षेत्राधिकार किसी सक्षम प्राधिकार के पास होने पर भी उसके द्वारा पारित आदेश को सिविल न्यायालय में चुनौती दी जा सकती है यदि ऐसे प्राधिकार ने क्षेत्राधिकार से परे कार्य किया है या नैसर्गिक न्याय के सिद्धान्तों के उल्लघंन में कार्य किया है या उसका विनिश्चय अनुचित है या उसके द्वारा ऐसी साक्ष्य को आधार मानकर आदेश पारित किया गया है, जो अग्राह्य है। इस संबंध में माननीय सर्वोच्च न्यायालय द्वारा न्याय दृष्टाँत गुरूबक्श सिंह विरूद्ध फायनेंन्शियल कमिश्नर, ए. आई. आर.1991 सु.को. 435 में प्रतिपादित न्याय सिद्धान्त अवलोकनीय है।

राज्य के साथ सेवा सम्बन्धी विवाद दो श्रेणी के अन्तर्गत आते हैं, एक प्रतिरक्षा (Defence) संबंधी सेवाओं से सम्बन्धित विवाद है, द्वितीय गैर प्रतिरक्षा अर्थात् नागरिक सेवाओं सम्बन्धी विवाद है । प्रथम स्वरूप के विवादों में संविधान के अनुच्छेद 311 का संरक्षण

प्राप्त नहीं है तथा प्रतिरक्षा कार्य संबधी सेवक द्वारा धारित पद सिविल प्रकृति का पद न होने से धारा 9 सिविल प्रक्रिया संहिता के अन्तर्गत वर्णित पद की परिधि में न आने से सिविल न्यायलय को उनके सम्बन्ध में श्रेत्राधिकार नहीं है परन्तु नागरिक सेवाओं के संबंध में विवादों के बारे में न्यायालय को उन मामलों को छोड़कर अधिकारिता है जिन के संबंध में विशेष विधि द्वारा अभिव्यक्तः या विवक्षित रूप से सिविल न्यायालय का श्रेत्राधिकार वर्जित किया गया है (देखिये– लेखराज विरूद्ध यूनियन ऑफ इण्डिया, ए. आई.आर 1971 सु.को. 2111– संवैधानिक पीठ का निर्णय)]–1

भारतीय संविधान संशोधन (42 वाँ संशोधन) अधिनियम,1976 के द्वारा भारतीय संविधान में अनुच्छेद 323 (ए) जोड़ा गया जो दिनांक 3 जनवरी, 1977 से प्रभावशील हुआ। अनुच्छेद 323 (ए) के द्वारा प्रशासनिक प्राधिकरणों (एडमिनिस्ट्रेटिव ट्रिब्यूनल) के गठन का प्रावधान किया गया तथा अनुच्छेद 323 (ए) के प्रावधानों के अधीन भारतीय संसद द्वारा प्रशासनिक अधिकरण अधिनियम, 1985 पारित किया गया (जिसे आगे अधिनियम से सम्बोधित किया जावेगा) अधिनियम की धारा –4 के अन्तर्गत कर्मचारियों की सेवा से संबंधित विवाद के निराकरण हेतु केन्द्रीय प्रशासनिक अधिकरण के गठन का प्रावधान किया गया है। धारा 4 (2) के अधीन राज्य सरकार के अनुरोध पर केन्द्रीय सरकार को राज्य सरकार के कर्मचारियों की सेवा से संबंधित विवादों के निपटारे के लिये प्रशासनिक अधिकरण गठन करने का अधिकार प्रदान किया गया। अधिनियम की धारा 5 के अनुसार प्रशासनिक अधिकरण की खण्डपीठ के गठन का प्रावधान किया गया हैं। अधिनियम की धारा 14 से लेकर 18 तक केन्द्रीय प्रशासनिक अधिकरण एवं राज्य प्रशासनिक अधिकरण के क्षेत्राधिकार एवं अधिकारिता से संबंधित उपबंध किया है। अधिनियम की धारा 28 के अनुसार उस दिनांक से जिस दिनांक से केन्द्रीय अथवा राज्य प्रशासनिक अधिकरण प्रभावशील होंगे, उस दिनांक से केन्द्रीय अथवा राज्य से संबंधित कर्मचारियों की सेवा के पद अथवा सेवा संबंधी विवादों से संबंधित किसी भी विवाद को निराकृत करने की अधिकारिता न्यायालय को नहीं होगी तथा ऐसे विवाद का निराकरण केवल केन्द्रीय प्रशासनिक अधिकरण अथवा राज्य प्रशासनिक अधिकरण द्वारा किया जावेगा। अधिनियम की धारा 28 के द्वारा केन्द्रीय अथवा राज्य के कर्मचारियों की सेवा एवं सेवा शर्तों से संबंधित विवाद का निराकरणं करने की व्यवहार न्यायालय की अधिकारिता को अभिव्यक्त रूप से वर्जित किया गया है।

अधिनियम की धारा 4 के तहत दिनांक 1.11.1985 से केन्द्रीय प्रशासनिक अधिकरण प्रभावशील हुआ तथा केन्द्रीय प्रशासनिक अधिकरण की खण्डपीठ, जबलपुर में मध्य प्रदेश एवं छत्तीसगढ़ राज्य के अन्तर्गत पदस्थ केन्द्रीय कर्मचारियों की सेवा से संबंधित विवाद के निराकरण के लिये गठित किया गया।

अधिनियम की धारा 4 (2) के अन्तर्गत मध्यप्रदेश राज्य द्वारा अपने कर्मचारियों की सेवा से संबंधित विवाद के निराकरण के लिये राज्य प्रशासनिक अभिकरण गठित करने के लिये केन्द्रीय सरकार से आग्रह किया गया तथा केन्द्रीय सरकार ने राज्य सरकार के आग्रह पर दिनांक 29.6.1988 को अधिसूचना जारी करते हुये मध्यप्रदेश राज्य के लिये म. प्र. राज्य प्रशासनिक अधिकरण गठित करने की अधिसूचना जारी की तथा दिनांक 2.8.1988 से म. प्र. राज्य प्रशासनिक अधिकरण प्रभावशील हुआ। मध्यप्रदेश राज्य प्रशासनिक अधिकरण की प्रमुख पीठ जबलपुर में स्थापित की गई तथा ग्वालियर, भोपाल, इन्दौर एवं रायपुर में राज्य प्रशासनिक अधिकरण की खण्डपीठ स्थापित की गई।

मध्यप्रदेश राज्य द्वारा अधिसूचना क्रमांक एफ–ए–4–2–2001–1 (1) – 2171 दिनांक 25.7.2001 के द्वारा मध्यप्रदेश राज्य की उक्त अधिसूचना मध्यप्रदेश राजपत्र (असाधारण) दिनांक 25.7.2001 पृष्ठ क्रमांक 872 पर प्रकाशित हुई (म.प्र.लॉ टाइम्स) भाग–3 पृष्ठ 176 नोट क्रमांक 111 में भी प्रकाशित, इस प्रकार दिनांक 25.7.2001 से मध्यप्रदेश राज्य प्रशासनिक अधिकरण को मध्यप्रदेश राज्य द्वारा समाप्त कर दिया गया है तथा दिनांक 25.7.2001 से मध्यप्रदेश राज्य के कर्मचारियों की सेवा से संबंधित विवाद के निराकरण के लिये राज्य प्रशासनिक अधिकरण समाप्त हो जाने के कारण, मध्यप्रदेश राज्य के कर्मचारियों के सेवा से संबंधित विवाद के निराकरण के लिये व्यवहार न्यायालयों को पुनः अधिकारिता प्राप्त हो गई। जहां तक केन्द्रीय सरकार के कर्मचारियों की सेवा से संबंधित विवाद के निराकरण के लिये न्यायालय के अधिकारिता का प्रश्न है, तो चूँकि केन्द्रीय प्रशासनिक प्राधिकरण अभी भी कार्यरत है तथा मध यप्रदेश एवं छत्तीसगढ़ राज्य में पदस्थ केन्द्रीय कर्मचारियों के लिये जबलपुर में केन्द्रीय प्रशासनिक प्राधिकरण की खण्डपीठ कार्यरत है ऐसी स्थिति में अधिनियम की धारा 28 के अनुसार केन्द्रीय सरकार के कर्मचारियों की सेवा संबंधी विवाद के निराकरण के लिये व्यवहार न्यायालयों की अधिकारिता अभिव्यक्त रूप से वर्जित है तथा व्यवहार न्यायालय केन्द्रीय सरकार के कर्मचारी की सेवा संबंधी विवाद का निराकरण नहीं कर सकता है ।

मध्यप्रदेश राज्य प्रशासनिक अधिकरण (लम्बित आवेदनों का अंतरण) अध्यादेश 2001 जो कि मध्यप्रदेश राजपत्र (असाधारण) दिनांक 28.7.2001 के पृष्ठ 878 में प्रकाशित हुआ है कि धारा 3 के अनुसार गजट में प्रकाशन दिनांक से कोई भी वाद जो कि व्यवहार न्यायालय से राज्य प्रशासनिक अधिकरण को अंतरित हुआ था, वापिस उसी व्यवहार न्यायालय को अंतरित किया जावेगा, यदि उक्त व्यवहार वाद दिनांक 28.7.2001 को राज्य प्रशासनिक अधिकरण में लम्बित था तथा व्यवहार न्यायालय व्यवहार वाद को प्राप्त करने पर वाद को उसी प्रकार से निराकृत करेगा कि मानो उक्त वाद व्यवहार प्रक्रिया संहिता, 1908 के अन्तर्गत वाद का निराकरण करने योग्य है। इस प्रकार व्यवहार न्यायालयों को राज्य प्रशासनिक अधिकरण के समाप्त होने के बाद राज्य के कर्मचारियों की सेवा से संबंधित विवाद को निराकरण करने की अधिकारिता प्रदान की गई है। अध्यादेश की धारा 3 निम्नानुसार है :–

3. Transfer of Pending cases and Application:- (1) Any Plaint or other proceeding which was transferred by Civil Court and is pending on the appointed day before the Tribunal shall stand transferred back to the same Civil Court from which it was transferred and in case such Court is not in existence then to the Court of competent jurisdiction in it's place and such court shall proceed to dispose of the same if it were a plaint under the Code of Civil Procedure, 1908 (No. 5 of 1908).

(2) Every proceeding which was transferred by the High Court to the Tribunal and is pending on the appointed day before the Tribunal shall stand transferred back to the High Court.

(3) Every proceeding of a case which was filed as an original application in the Tribunal and is pending on the appointed day before the said Tribunal shall stand transferred to the High Court.

(4) Where any case or proceeding stands transferred from the Tribunal to a Civil Court or High Court under sub-section (1), (2), (3) :-

(a) The records of such cases or proceedings shall be forwarded to the Civil Court or High Court as the case may be, and

(b) The Civil Court or High Court may on receipt of such records proceed to deal with the case from the stage which was reached before such transfer or from any earlier stage as the Civil Court or High Court may deem fit.

मध्यप्रदेश राज्य का उक्त अध्यादेश एम.पी.एल.टी. (अंग्रेजी संस्करण) के भाग 4 के पृष्ठ क्रमांक 96 पर भी प्रकाशित हुआ है।

इस प्रकार राज्य प्रशासनिक अधिकरण के समाप्त होने के बाद पुनः व्यवहार न्यायालयों को मध्यप्रदेश राज्य के कर्मचारियों की सेवा से संबंधित विवादों का निराकरण करने की अधिकारिता प्राप्त हो गई है।

संहिता के आदेश 39 में अस्थायी व्यादेश और अंतरवर्ती व्यादेशों से संबंधित व्यवहार वादों में व्यवहार न्यायालयों द्वारा अपनाई जाने वाली प्रक्रिया का उपबंध किया गया है। आदेश 39 नियम 1 व 2 व्यवहार प्रक्रिया संहिता के अन्तर्गत व्यवहार न्यायालयों को अस्थायी व्यादेश व्यवहार वाद में जारी करने की अधिकारिता प्रदान की गई है। मध्यप्रदेश राज्य द्वारा मध्य प्रदेश अधिनियम संख्या क्रमांक 29 वर्ष 1984 की धारा 8, जो कि दिनांक 14.8.1984 से प्रभावशील हुई है, के द्वारा मध्यप्रदेश राज्य के अन्तर्गत आदेश 39 नियम 2 व्यवहार प्रक्रिया संहिता में संशोधन करते हुये नियम 2 के बाद उपनियम 2 को राज्य संशोधन के द्वारा संहिता में जोड़ा गया है। जिसके द्वारा कोई भी व्यवहार न्यायालय मध्यप्रदेश राज्य के अन्दर लोकसेवक से संबंधित मामलों के संबंध में अस्थायी व्यादेश जारी नहीं कर सकता है। मध्यप्रदेश राज्य का उपरोक्त संशोधन निम्नानुसार है :-

''मध्य प्रदेश नियम 2 में उपनियम (2) में निम्न परन्तुक अन्तः स्थापित कीजिए – अर्थात् परन्तु कोई ऐसा व्यादेश मंजूर नहीं किया जाएगा :–

(क) जहां विनिर्दिष्ट अनुतोष अधिनियम, 1963 (1963 का अधिनियम संख्यांक 47) की धारा 38 तथा 41 के प्रावधानों के अनुसार कोई शाश्वत व्यादेश मंजूर नहीं किया जा सकता था, अथवा

(ख) किसी व्यक्ति, जो लोकसेवक या राज्य के मामलों से संबंधित पद पर नियुक्त किया गया हो, जिसमें राज्य सरकार के स्वामित्व में या द्वारा नियंत्रित किसी कम्पनी या निगम का कर्मचारी भी शामिल है, के स्थानांतरण, निलम्बन, पदावनति, अनिवार्य सेवानिवृत्ति, पदच्युत, पद से हटाने या सेवा के अन्यथा पर्यवसान या से प्रभार ग्रहण करने के लिये आदेश के प्रवर्तन को स्थगित करने के लिये, अथवा

(ग) किसी व्यक्ति, जो लोक सेवा या राज्य सेवा के मामलों से संबंधित पद पर नियुक्त किया गया हो, जिसमें राज्य सरकार के स्वामित्व में या द्वारा नियंत्रित कम्पनी का कर्मचारी भी शामिल है, के

विरूद्ध किसी अनुशासनिक कार्यवाही, जो लम्बित हो या आशाचित हो या किसी प्रतिकूल प्रविष्टि के प्रभाव को स्थगित करने के लिये, अथवा

(घ) किसी निर्वाचन को निर्बन्धित करने के लिये अथवा

(ड) किसी नीलामी, जो किये जाने के लिये आशयित है, को निर्बन्धित करने के लिये या भू–राजस्व के रूप में वसूली योग्य किसी बकाये की वसूली की कार्यवाही को स्थगित करने के लिये, यदि पर्याप्त प्रतिभूति नहीं दी जाती है,

और इन प्रावधानों के उल्लंघन में मंजूर किया गया व्यादेश का कोई आदेश शून्य होगा (1984 का मध्यप्रदेश अधिनियम संख्यांक 29 धारा 8) दिनांक 14.8.1984 से प्रभावी।

मध्य प्रदेश राज्य द्वारा आदेश 39 नियम 1 व 2 व्यवहार प्रक्रिया संहिता में किये गये संशोधन को देखते हुये मध्यप्रदेश राज्य के अन्तर्गत कोई भी व्यवहार न्यायालय लोक सेवक की सेवा से संबंधित मामलों में उक्तानुसार वर्णित विषयों पर के संबंध में अस्थायी निषेधाज्ञा प्रदान नहीं कर सकता है। कहने का तात्पर्य यह हुआ कि सेवा से संबंधित मामलों में व्यवहार न्यायालय अंतिम आदेश तो प्रदान कर सकता है, परन्तु व्यवहार न्यायालय सेवा संबंधी मामलों में उपरोक्त वर्णित विषयों के संबंध में अस्थायी व्यादेश के रूप अन्तरिम अनुतोष प्रदान करने की अधिकारिता नहीं रखता है।

वर्तमान में मध्यप्रदेश राज्य के अन्तर्गत केन्द्रीय प्रशासनिक अधिकरण की खण्डपीठ जबलपुर में कार्यरत है, जो मध्य प्रदेश एवं छत्तीसगढ़ राज्य के अन्तर्गत पदस्थ केन्द्रीय कर्मचारियों से संबंधित सेवा संबंधी मामलों का निराकरण करने की अधिकारिता रखती है, ऐसी स्थिति में केन्द्रीय कर्मचारियों के मामले में अधिकारिता सिविल न्यायालयों को नहीं है।

मध्य प्रदेश राज्य के अन्तर्गत मध्य प्रदेश राज्य का कोई भी राज्य प्रशासनिक अधिकरण दिनांक 25.7.2001 के बाद से कार्यरत नहीं है, ऐसी स्थिति में मध्य प्रदेश राज्य के कर्मचारियों की सेवा संबंधी विवाद के निराकरण करने की अधिकारिता सिविल न्यायालयों को है। सिविल न्यायालय सेवा संबंधी विवाद को व्यवहार वाद के रूप में सुनवाई कर सकती है तथा अन्तिम आदेश पारित कर सकती है। परन्तु व्यवहार न्यायालय मध्य प्रदेश राज्य द्वारा अस्थायी व्यादेश के संबंध में सिविल प्रक्रिया संहिता, 1908 के आदेश 39 नियम 2 (2) में किये गये संशोधन के प्रभावशील होने के कारण सेवा संबंधी विवाद से संबंधित व्यवहार वाद में उक्तानुसार संशोधन के माध्यम से जोड़े गये विषयों के संबंध में अन्तरिम सहायता के रूप में अन्तरिम व्यादेश जारी नहीं कर सकता है, परन्तु व्यवहार न्यायालय पेंशन, भत्ता, पारिश्रमिक, वरीयता, स्थायीकरण, पदोन्नति एवं सेवानिवृत्ति के बाद के लाभों के संबंध में या अन्य प्रकार की अन्तरिम सहायता तथा अन्तरवर्ती आदेश पारित कर सकता है। इस संबंध में न्याय दृष्टान्त *मध्यप्रदेश बार एसोसिएशन* विरूद्ध *यूनियन ऑफ इण्डिया व अन्य, 2005 (3) जे. एल.जे. 65* एवं न्याय दृष्टांत – *चम्पालाल एवं अन्य* विरूद्ध *यूनियन ऑफ इण्डिया 2006 (2) जे. एल. जे. 127* अवलोकनीय हैं।

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 2006 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)

जहाँ कोई व्यक्ति किशोर न्याय (बालकों की देखरेख एवं संरक्षण) अधिनियम, 2000 के प्रभावी होने के पूर्व किसी अपराध के लिये दोषसिद्ध ठहराये जाने के कारण सजा भुगत रहा है। क्या वह व्यक्ति उसी न्यायालय के समक्ष किशोर न्याय अधिनियम, 2000 के प्रभावी होने के पश्चात् पुनः यह प्रश्न उठा सकता है कि वह विधि के विरोध में किशोर है ओर उसे किशोर न्याय बोर्ड के समक्ष भेजा जावे ?

सामान्य नियम यह है कि यदि कोई निर्णय एवं दण्डादेश जो सक्षम अधिकारिता के न्यायालय द्वारा पारित किया गया हैं उसमें कोई फेरफार अथवा बदलाव उपबंधित प्रावधानों के सिवाय (लिपकीय त्रुटियों को छोड़कर) उसी न्यायालय द्वारा नहीं किया जावेगा।

किशोर न्याय अधिनियम, 2000 के प्रभावशील होने के पूर्व अपचारी बालक की आयु लड़के होने की दशा में 16 वर्ष से कम एवं लड़की होने की दशा में 18 वर्ष से कम थी। नये अधिनियम के प्रभावशील होने के पश्चात् लड़कों एवं लड़की का भेद समाप्त करते हुये किशोर की उम्र 18 वर्ष से कम निर्धारित की गयी है और इसकी गणना उस दिन से होनी है जिस दिन किशोर ने अपराध किया। इसलिये ऐसे अपचारी बालक जिनकी आयु नये अधिनियम के प्रभावी होने के पूर्व 16 से 18 वर्ष के मध्य थी उनका विचारण सामान्य अपराधिक न्यायालय द्वारा किया जाना था यदि ऐसे न्यायालय ने ऐसे किसी व्यक्ति को दोषसिद्ध ठहराया है जो घटना के समय 18 वर्ष से कम का था और आदेश के पालन में सजा भुगत रहा है तो नये अधिनियम के प्रभावी होने पर वह ''विधि के विरूद्ध किशोर'' की परिभाषा की परिधि में है।

किशोर न्याय अधिनियम, 2000 की धारा 7 ऐसी परिस्थितियों में मार्गदर्शन देती है और यह प्रावधान करती है कि ''विधि के विरूद्ध किशोर'' का प्रश्न, किसी भी न्यायालय के समक्ष किसी भी प्रकरण पर चाहे मामले का अंतिम निराकरण क्यों न हो गया हो, उठाया जा सकेगा और न्यायालय उसको अधिनियम के उपबंधों एवं प्रावधानों के अनुसार निराकरण करेगा चाहे वह व्यक्ति इस अधिनियम के प्रभावी होने पर किशोर न रह गया हो।

धारा 7 (क) (2) यह प्रावधान करती है यदि न्यायालय जांच के पश्चात् व्यक्ति को किशोर पाता है तो वह उचित आदेश पारित करने के लिये किशोर को अधिनियम के तहत गठित बोर्ड को भेजेगा और न्यायालय द्वारा जो भी दण्डादेश पारित किया गया है वह अप्रभावी होगा।

क्या ग्रीष्मकालीन एवं शीतकालीन अवकाश के रहते हुए आवश्यक प्रकृति के सिविल कार्यों को निष्पादित करने के लिये किसी अधीनस्थ सिविल न्यायालय को जिला न्यायाधीश की पूर्व अनुमति की आवश्यकता है ?

इस समस्या के निदान के लिये हमें म.प्र. सिविल न्यायालय अधिनियम, 1958 (जिसे आगे 'अधिनियम' कहा जायेगा) की धारा 21 पर दृष्टिपात करना होगा।

अधिनियम की धारा 21(1) प्रावधान करती है कि उच्च न्यायालय राज्य सरकार के अनुमोदन से अपने अधीनस्थ सिविल न्यायालयों के वर्ष की अनुसरित की जाने वाली अवकाश की तिथियों की सूची तैयार करेगा। उप धारा (2) यह प्रावधान करती है कि ऐसी सूची गजट में प्रकाशित की जायेगी। उपधारा (3) यह प्रावधान करती है कि कोई न्यायिक कार्य मात्र इसलिए अवैध नहीं होगा क्योंकि वह अवकाश के दिन निष्पादित किया गया है। उपधारा 4 यह प्रावधान करती है कि जिला न्यायाधीश जैसा उचित समझे अवकाश के दिनों में आवश्यक (urgent nature) सिविल प्रकरणों के निराकरण के लिये व्यवस्था कर सकेगें।

इस पर विवाद नहीं किया जा सकता कि ग्रीष्मकालीन अथवा शीतकालीन अवकाश (Vacation) धारा 21 (1) में निर्धारित अवकाश है। यदि जिला न्यायाधीश धारा 21 (4) के अनुरूप अवकाश के दिन आवश्यक सिविल कार्य को निराकृत करने के लिये कार्य विभाजन पत्रक निर्मित करते हैं तो कोई समस्या नहीं है उसी अनुरूप कार्य निष्पादित किया जायेगा।

अवकाश के दिन सिविल मामलों की सुनवाई प्रक्रियात्मक विधि का क्षेत्र है। विधि इस संबंध में सुस्थापित है कि अन्यथा उपबंधों के अभावों में न्यायालय उन समस्त प्रक्रिया का पालन कर सकती है जो प्रकरण की न्यायोचित उद्देश्य की प्राप्ति के लिये आवश्यक है। धारा 21 (3) स्पष्ट रूप से अवकाश के दिन किए गए कार्यों को वैधानिकता प्रदान करती है। यह प्रावधान इसलिये समाहित किया गया है कि ऐसी परिस्थितियों से निपटा जा सके। Webster Universal Dictionary ने ''अवकाश'' इस प्रकार परिभाषित किया है "Day on which work is wholly or partially suspended" इससे स्पष्ट है अवकाश के दिन कार्य स्थगित होता है। अवकाश अधिकारिता समाप्त नहीं करता। धारा 151 सिविल प्रक्रिया संहिता भी अन्यथा उपबंधों के अभाव में न्यायालय को अधिकारिता प्रदान करती है कि न्यायोचित उद्देश्य की प्राप्ति के लिये कोई भी प्रक्रिया अपना सकती है। मध्यप्रदेश सामान्य खण्ड निर्वचन अधिनियम, 1957 की धारा 8 भी ऐसा ही प्रावधान करती है कि कोई न्यायिक–कार्य मात्र इसलिए अवैधानिक नहीं होगा कि कार्य अवकाश के दिन निष्पादित किया गया।

नगर पालिका महेश्वर विरूद्ध *द्वारकादास ए. आई. आर. 1981 म. प्र. 166* में उच्च न्यायालय के समक्ष ऐसा ही प्रश्न निहित था जिसमें माननीय न्यायालय ने यह निर्धारित किया था कि किसी स्पष्ट उपबंधों के अभावों में न्यायालय ग्रीष्मकालीन अवकाश में भी आवश्यक प्रकृति के कार्य निष्पादित कर सकते हैं। माननीय इलाहाबाद उच्च न्यायालय ने भी ऐसा ही मत *नरसिंहदास* विरूद्ध *मंगलदास दुबे, (1882) आई एल आर 5 इलाहाबाद 163* में निर्धारित किया है।

माननीय म. प्र. उच्च न्यायालय द्वारा *नगर पालिका महेश्वर* (उपरोक्त) मामले के बाद वर्ष 1982 में म. प्र. सिविल कोर्ट अधिनियम में संशोधन हुआ और धारा 21 (4) समाहित की गई जिसके द्वारा जिला न्यायाधीश को अधिकारिता दी गई कि वह अवकाश के दिन आवश्यक कार्य उचित रूप से निष्पादित हो सके इसकी व्यवस्था कर सकेगें। इसका यह अर्थ नहीं है कि इस संशोधन द्वारा न्यायालय की शक्तियों को सीमित किया गया है। संशोधन उपरोक्त मामले के निष्कर्ष को प्रभावहीन करने के लिये नहीं किया गया अपितु माननीय उच्च न्यायालय द्वारा धारा 21 म. प्र. सिविल कोर्ट अधिनियम, 1958 का जो निर्वचन किया गया था उसको विधिक अस्तित्व प्रदान करना था। वास्तव में संशोधन इसी उदेद्श्य से लाया गया कि अवकाश के दिन आवश्यक कार्यों की व्यवस्था बनी रहे।

उक्त संशोधन का यदि इसके विपरीत आश्य होता तो विधयिका ने स्पष्ट उल्लेख किया होता कि जिला न्यायाधीश की अनुमति के पश्चात अवकाश के दिन किया गया कार्य अवैधानिक नहीं होगा, न तो म.प्र. सिविल कोर्ट अधिनियम, 1958 न ही सिविल प्रक्रिया संहिता, 1908 और न ही म.प्र. सामान्य खण्ड निर्वचन अधिनियम न्यायिक कार्य करने के पूर्व किसी से अनुमति की आवश्यकता है। सिविल आदेश व नियम, 1961 का नियम (3) भी यह प्रावधान करती है कि न्यायालय अवकाश के दिन पक्षकारों की सहमति से एवं उपस्थिति साक्षियों की सहमति से कार्य या साक्ष्य अंकित कर सकेगा इससे स्थिति पूर्णतः स्पष्ट हो जाती है कि सामान्यतः अवकाश के दिन न्यायिक कार्य निष्पादित नहीं किया जाना है परन्तु यदि आवश्यकता हुई तो न्यायालय पक्षकारों की सहमति पर ऐसा कर सकता है, जिला न्यायाधीश की अनुमति की आवश्यकता नहीं है।

इसके अतिरिक्त 'कार्य' त्वरित प्रकृति का है या नहीं, इसको जिला न्यायाधीश कैसे निर्धारित कर सकेंगे, संबधित न्यायालय ही इस पर विचार करेगी यदि जिला न्यायाधीश ने अनुमति दे दी और न्यायालय की राय इसके विपरीत है तो विरोधाभास उत्पन्न होने की संभावना निर्मित हो जावेगी।

इसलिये यदि जिला न्यायाधीश ने धारा 21 (4) के अधीन कोई व्यवस्था नहीं बनाई है तो इस दशा में *नगर पालिका महेश्वर विरूद्ध द्वारकादास (उपरोक्त)* मामले में दिये गये दिशा निर्देश प्रभावी होंगे और न्यायालय को ग्रीष्मकालीन अथवा शीतकालीन अवकाश में कार्य निष्पादित करने के लिये जिला न्यायाधीश की अनुमति की आवश्यकता न होगी। यदि जिला न्यायाधीश ने धारा 21 (4) के तहत अवकाश के दिनों में कार्य की कोई व्यवस्था बना रखी है तो उसी अनुरूप कार्य निष्पादित होगा। धारा 21 (4) की अपेक्षा भी यह है कि जिला न्यायाधीश सामान्य या विशेष आदेश द्वारा इस सम्बन्ध में कोई व्यवस्था करें। कई स्थानों पर जिला न्यायाधीशों द्वारा कार्य विभाजन पत्रक में यह व्यवस्था की हैं।

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नोटः– स्तम्भ 'समस्या एवं समाधान' के लिये न्यायिक अधिकारी अपनी विधिक समस्याएं संस्थान को भेज सकते हैं । चयनित समस्याओं के समाधान आगामी अंकों में प्रकाशित किये जाएंगे– संचालक

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PART - II

NOTES ON IMPORTANT JUDGMENTS

132. CRIMINAL PROCEDURE CODE, 1973 – Sections 195 & 340
Whether Court having jurisdiction to decide reference u/s 18 of the Land Acquisction Act is subordinate to the Court of District Judge for the purpose of S.340? Held, No – Law explained.
State of A.P. v. V. Sarma Rao & Ors. etc. etc.
Reported in AIR 2007 SC 137

Held:

Section 195 of the Criminal Procedure Code provides for prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence. The relevant provisions of Section 195 read as under:

> "195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence. – (1) No Court shall take cognizance –
>
> (a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or
>
> (ii) of any abetment of, attempt to commit, such offence, or
>
> (iii) of any criminal conspiracy to commit, such offence,
>
> except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;
>
> (b) (i) of any offence punishable under any of the following section of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or
>
> (ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or
>
> (iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii),
>
> except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate.

(2) .....

(3) In clause (b) of sub-section (1), the term "Court" means a Civil, Revenue or Criminal Court, and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this section.

(4) For the purposes of clauses (b) of sub-section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from appealable decrees or sentences of such former court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within whose local jurisdiction such Civil Court is situate: Provided that –

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(b) where appeals lie to a civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed."

Section 340 of the Criminal Procedure Code reads as under:

"340 Procedure in cases mentioned in section 195. – (1) When upon an application made to it in this behalf or otherwise any Court is of opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance for the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected

an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the former Court is subordinate within the meaning of sub-section (4) of section 195.

(3) A complaint made under this section shall be signed,

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court or by such officer of the Court as the Court may authorise in writing in this behalf.

(4) In this section, "Court" has the same meaning as in section 195".

In terms of a notification issued by the State, a reference was to be made to a subordinate Judge. "Would the said Court be the subordinate to the Court of District Judge?" is the core question.

In our opinion, it would not be. A Court of Subordinate Judge may be subordinate to District Judge for administrative purpose. He may be a court subordinate to it under the Code of Civil Procedure. But in relation to a proceeding under the Land Acquisition Act, it would not be. We have noticed that in terms of Section 53 of the Land Acquisition Act, the procedures laid down under the Civil Procedure Code would apply but the same is subject to the exceptions specified therein, viz., save in so far as they may be inconsistent with anything contained therein. Land Acquisition Act is a special statute. It provides for the forums both original and appellate. Section 2(4) of the Code of Civil Procedure, 1908 defines "district" to mean the local limits of the jurisdiction of a principal Civil Court of original jurisdiction, also known as District Court. It also includes local limits of the ordinary original civil jurisdiction of a High Court. Section 3 thereof provides hierarchy of the courts in the following terms:

> "3. Subordination of Courts. – For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court."

What is of significance is that the subordination of courts as specified therein is only for the purpose of the said Code and not for the purpose of a special Act, although the provisions thereof may be applicable to a case arising thereunder...

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133. WORDS AND PHRASES :

Expressions 'Court', 'Tribunal' or 'Arbitrator', meaning of and difference amongst the three.

Paramjeet Singh Patheja v. ICDS Ltd.

Reported in AIR 2007 SC 168

Held:

... It is well settled that Courts, unlike arbitrators or arbiter tribunals, are

the third great organ under the Constitution: legislative, executive and judicial. Courts are institutions setup by the State in the exercise of the Judicial power of the State will be seen from the cases mentioned hereinbelow:

> "The expression 'Court' in the context (of Art. 136) denotes a tribunal constituted by the State as part of the ordinary hierarchy of Courts which are invested with the State's inherent Judicial powers. A sovereign State discharges legislative, executive and judicial function and can legitimately claim corresponding powers which are legislative, executive and judicial. Under our Constitution, the Judicial functions and powers of the State are primarily conferred on the ordinary Courts which have been constituted under its relevant provisions. The Constitution recognized a hierarchy of Court and to their adjudication are normally entrusted all disputes between citizens as well as between citizens and the State. These Courts can be described as ordinary Courts of civil judicature. They are governed by their prescribed rules of procedure and they deal with questions of fact and law raised before them by adopting a process which is described as judicial process. The powers which these Courts are judicial powers, the functions they discharge are judicial functions and the decisions they reach are and pronounce are judicial decisions.
>
> In every State there are administrative bodies.... But the authority to reach decisions conferred on such administrative bodies is clearly distinct and separate from the judicial power conferred on Courts, and the decisions pronounced by administrative bodies are similarly distinct and separate in character from judicial decisions pronounced by Courts.
>
> Tribunals occupy a special position of their own under the scheme of our constitution. Special matters are entrusted to them and in that sense they share with the Courts one common characteristic; both the Courts and the tribunals are 'constituted by the State and are invested with judicial as distinguished from purely administrative or executive functions'.... The basic and fundamental feature which is common to both the Courts and tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign State..."

"By 'Courts' is meant Courts of civil judicature and by 'tribunals' those bodies of men who are appointed to decide controversies arising under certain special laws. Among the power of the State is the power to decide such controversies. This is undoubtedly one of the attributes of the State, and as aptly called the judicial power of the State."

"All tribunals are not Courts, though all Courts are tribunals. The word 'Courts' is used to designate those tribunals which are set up in an organized State for the administration of justice...."

"It is common knowledge that a 'Court' is an agency created by the sovereign for the purpose of administering justice. It is a place where justice is judicially administered. It is a legal entity."

That litigation is therefore very different from arbitration is clear. The former is a legal action in a Court of law where Judges are appointed by the State; the later is the resolution of a dispute between two contracting parties by persons chosen by them to be arbitrators. These persons need not even necessarily be qualified trained Judges or lawyers. This distinction is very old and was picturesquely expressed by Edmund Davies, J. in these words:

"Many years ago, a top-hatted gentlemen used to parade outside these law Courts carrying a placard which bore a stirring injunction 'Arbitrate – don't Litigate"

Moreover, the position that arbitrators are not Courts is quite obvious and this Court noted the position as under in two decisions:

> "But the fact that the arbitrator under Section 10A is not exactly in the same position as a private arbitrator does not mean he is a tribunal under Article 136. Even if some of the trappings of the Court are present in his case, he lacks the basic, essential and fundamental requisite in that behalf because he is not invested with the State's judicial power..... he is not a Tribunal because the State has not invested him with its inherent judicial power and the power of adjudication which he exercises is derived by him from the agreement between parties. (Engineering *Mazdoor Sabha & Anr. v. Hind Cycles Ltd., AIR 1963 SC 874.*)"
>
> "There was no dispute that the arbitrator appointed under Section 19(1) (b) (of the Defence of India Act, 1939) was not a Court. *(Collector, Varanasi v. Gauri Shankar Misra & Ors., AIR 1968 SC 384)"*

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134. HINDU LAW :

Joint Hindu family property, proof of – Existence of joint family does not lead to presumption that property held by any member is joint – Burden lies upon a person asserting that it is joint.

Appasaheb Peerappa Chandgade v. Devendra Peerappa Chandgade & Ors.
Reported in AIR 2007 SC 218

Held:

So far the legal proposition is concerned, there is no gainsaying that whenever a suit for partition and determination of share and possession thereof is filed, then the initial burden is on the plaintiff to show that the entire property was a joint Hindu family property and after initial discharge of the burden, it shifts on the defendants to show that the property claimed by them was not purchased out of the joint family nucleus and it was purchased independent of them. This settled proposition emerges from various decisions of this Court right from 1954 onwards.

In the case of *Srinivas Krishnarao Kango v. Narayan Devji Kango & Ors,* reported in *AIR 1954 SC 379,* their Lordships held that proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired with out the aid of the joint family property. Therefore, so far as the proposition of law is concerned, the initial burden is on the person who claims that it was joint family property but after initial discharge of the burden, it shifts to the party who claims that the property has been purchased by him through his own source and not from the joint family nucleus. Same proposition has been followed in the case of *Mst. Rukhmabai v. Lala Laxminarayan & Ors.* reported in *AIR 1960 SC 335* wherein it was observed as follows:

"There is a presumption in Hindu Law that a family is joint. There can be a division in status among the members of a joint Hindu family by definement of shares which is technically called "division of status" or an actual division among them by allotment of specific property to each one of them which is described as "division by metes and bounds". A member need not receive any share in the joint estate but may renounce his interest therein; his renunciation merely extinguishes his interest in the estate but does not affect that status of the remaining members vis-a-vis the family property. A division in status can be effected by an unambiguous declaration to become divided from the others and that intention can be expressed by any process. Though prima facie a document clearly expressing the intention to divide brings about a division in status. it is open to a party to prove that the said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. But there is no presumption that any property, whether movable or immovable, held by a member of a joint Hindu family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property to establish that the said property has been acquired without any assistance from the joint family property."

Similarly, in the case of *Achuthan Nair vs. Chinnammu Amma & Ors.* reported in *AIR 1966 SC 411,* Their Lordships (At, P.4 13, Paras 7) held as follows :

> "Under Hindu law, when a property stands in the name of a member of a joint family, it is incumbent upon those asserting that it is a joint property to establish it. When it is proved or admitted that a family possessed sufficient nucleus with the aid of which the member might

have made the acquisition, the law raises a presumption that it is a joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of the said nucleus. This is a well settled proposition of law."

Similarly, in the case of *Bhagwant P. Sulakhe vs. Digambar Gopal Sulakhe & Ors.* reported in *AIR 1986 SC 79,* their Lordships have held that the character of any joint family property does not change with the severance of the status of the joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned amongst the co-sharers. By a unilateral act it is not open to any member of the joint family to covert any joint family property into his personal property.

In the case of *Surendra Kumar vs. Phoolchand (dead) through LRs & Anr.* reported in *(1996) 2 SCC 491* their Lordships held as follows :

> "It is no doubt true that there is no presumption that a family because it is joint possessed joint property and therefore the person alleging the property to be joint has to establish that the family was possessed of some property with the income of which the property could have been acquired. But such a presumption is a presumption of fact which can be rebutted. But where it is established or admitted that the family which possessed joint property which from its nature and relative value may have formed sufficient nucleus from which the property in question may have been acquired, the presumption arises that it was the joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family."

Therefore, on survey of the aforesaid decisions what emerges is that there is no presumption of a joint Hindu family but on the evidence if it is established that the property was joint Hindu family property and the other properties were acquired out of that nucleus, if the initial burden is discharged by the person who claims joint Hindu family, then the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property by cogent and necessary evidence.

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135. SERVICE LAW :

Regularisation of daily wages employees – Regularisation when permissible – Necessary directions to be followed while considering issue of regularisation.

Rakesh and others v. State of M.P. and others

Reported in 2007 (1) MPLJ 133

Held:

Now to resolve the controversy for all the time in the entire State of Madhya Pradesh, in the matter of consideration of the regularisation or regularisation of

the daily wages employees or to grant them benefit of the minimum of the pay in a scale corresponding to the post to which they are working; and in view of the foregoing discussion it is to be held that daily wages employees are not entitled for their regularisation in terms of the policy dated 9.1.1990 or on account of discrimination meted out, on account of regularisation of the incumbent juniors. The consideration of regularisation is permissible by one time measure only to those employees who were appointed irregularly and not illegally; on the vacant post prior to 31.12.1988 and possessing qualification or eligibility and continuing without intervention of the orders of the Court. It is to be further held that the daily wages employees who were engaged prior to 31.12.1988 on daily wages are entitled to get the minimum of the pay in a corresponding scale to the post on which they are working in the light of the judgment of *Secretory, State of Karnataka v. Umadevi, (2006) 4 SCC 4.* At the same time it is to be held here that the daily wages employees, who were appointed without following due process of law are only entitled to get relaxation of their age as well as the weightage/preference while facing the process of fresh selection. The Government must take recourse to fill up the vacant posts through their participation by following due process of selection for their appointment.

In some of the cases the orders for regularisation has been issued and subsequently for non-observance of principles of natural justice those orders have been cancelled. Such action of the State Government is not permissible in view of the judgment rendered by the Main Seat of this Court after referring the judgment of *Umadevi (supra) in W.P. No. 5204/2005(S), Bharat Darshan Shrivastava vs. State of M.P.* vide order dated 31.8.2006. However, in that view of the matter order of cancellation of regularisation passed by the Government without following principles of natural justice cannot be allowed to stand and such deserves to be quashed. The another reason for quashing of those orders of cancellation for regularisation, is, in the judgment of *Umadavi* (supra), in para 53, it is held that the employees who have already been regularised then their cases are not required to be reopended.

In view of the foregoing discussion all these petitions deserve to be disposed of with the following directions :–

i. The daily wages employees, engaged even prior to 31.12.1988 in the State of M.P. are not entitled for their regularisation in the light of the policy dated 9.1.1990 or on the basis of plea of discrimination or otherwise, except who falls within the purview of direction of para (ii)below

ii. The daily wages employees, who were appointed, irregularly (not illegally) prior to 31.12.1988 on a sanctioned vacant post, possessing qualification/eligibility and have continuously worked without intervention of the Court are entitled for their consideration of regularisation in view of the discussion made hereinabove by adopting one time measure. The Sate Government or the instrumentalities of the State shall take recourse for such employees within a period of

six months from today in the light of the observations as made in para 53 in the case of *Umadevi* (supra).

iii. For remaining other employees who are working on daily wages, and are not covered by the directions of para (ii) here in above, the Government is directed to initiate the process of regular selection and recruitment, on the available vacant post as directed by the Supreme Court in the case of *Umadevi* (supra).

iv. As and when vacancies are filled up by the Government by regular process of selection such daily wages employees, be benefited by the age relaxation to the period to which they have rendered their services, while facing regular process of selection for recruitment by them.

v. The respondents should also carve out the measure to grant them additional marks/preference in the process of selection, by virtue of their experience of work on the post, while filling up the vacancies in accordance with the provisions of rules.

vi. Petitions filed by petitioners, challenging the order of cancellation of regularisation, are allowed and the orders of cancellation of regularisation are hereby quashed.

vii. Petitioners given minimum pay in the corresponding scale to the post or cadre in which they are working in the concerned department, from the date of passing of this order. Such benefit be extended to them within a period of six months.

viii. Petitioners who want to seek the relief of classification by approaching the Labour Court; are free to take such recourse if they are covered under the provisions of the Industrial Laws or Labour Laws....

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136. INDIAN PENAL CODE, 1860 – Section 290 (1)
Obscenity –Test of obscenity to be applied by Courts – Law explained.
Ajay Goswami v. Union of India and others
Judgment dated 12.12.2006 passed by the Supreme Court in Writ Petition No. 384 of 2005, reported in (2007) 1 SCC 143

Held:

Test of obscenity

This Court has time and again dealt with the issue of obscenity and laid down law after considering the right to freedom of expression enshrined in Article 19 (1) (a) of the Constitution of India, its purport and intent, and laid down the broad principles to determine/judge obscenity.

In a recent judgment *Director General, Directorate General of Doordarshan v. Anand Patwardhan, (2006) 8 SCC 433 (Dr. Ar. Lakshmanan and L.S. Panta, JJ.) this Court has referred to the Hicklin test* laid down in *R. v. Hicklin, (1868) LR 3 QB 360* and observed : *(SCC p. 446, para 32)*

"32, (a) whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest...;

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically, defined by the applicable State law; and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

In *Chandrakant Kalyandas Kakodkar v. State of Maharashtra, (1969) 2 SCC 687* this Court has held: (SCC pp. 693-94, para 12)

"In early English writings authors wrote only with unmarried girls in view but society has changed since then to allow litterateures and artists to give expression to their ideas, emotions and objective with full freedom except that it should not fall within the definition of 'obscence' having regard to the standards of contemporary society in which it is read. The standards of contemporary society in India are also fast changing. The adults and adolescents have available to them a large number of classics, novels, stories and pieces of literature which have a content of sex, love and romance. As observed in *Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881* if a reference to sex by itself is considered obscence, no books can be sold except those which are purely religious. In the field of art and cinema also the adolescent is shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions are more taken for granted without in any way tending to debase or debauch the mind. What we have to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lechrous though aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect."

In *Samaresh Bose v. Amal Mitra, (1985) 4 SCC 289 : 1985 SCC (Cri) 523* this Court held as under : (SCC pp. 313-14, para 29)

"29. In England, as we have earlier noticed, the decision on the question of obscenity rests with the jury who on the basis of the summing up of the legal principles governing such action by the learned Judge decides whether any particular novel, story or writing is obscence or not. In India, however, the responsibility of the decision rests essentially on the court. As laid down in both the decisions of this Court earlier referred to, 'the question whether a particular article or story or book is obscene or not does not altogether depend on oral evidence, because it is the duty of the court to ascertain whether the book or story or any passage or passages therein offend the provisions

of Section 292 IPC'. In deciding the question of obscenity of any book, story or article the court whose responsibility it is to adjudge the question may, if the court considers it necessary, rely to an extent on evidence and views of leading literary personage, if available, for its own appreciation and assessment and for satisfaction of its own conscience. The decision of the court must necessarily be on an objective assessment of the book or story or article as a whole and with particular reference to the passages complained of in the book, story or article. The Court must take on overall view of the matter complained of as obscence in the setting of the whole work, but the matter charged as obscene must also be considered by itself and separately to find out whether it is so gross and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall. Though the court must consider the question objectively with an open mind, yet in the matter of objective assessment the subjective attitude of the Judge hearing the matter is likely to influence, even though unconsciously, his mind and his decision on the question. A Judge with a puritan and prudish outlook may on the basis of an objective assessment of any book or story or article, consider the same to be obscence. It is possible that another Judge with a different kind of outlook may not consider the same book to be obscene on his objective assessment of the very same book. The concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally expected to read the book. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries. In our opinion, in judging the question of obscenity, the Judge in the first place should try to place himself in the position of the author and from the viewpoint of the author the Judge should try to understand what is it that the author seeks to convey and whether what the author conveys has any literary and artistic value. The Judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers. A Judge should thereafter apply his judicial mind dispassionately to decide whether the book in question can be said to be obscene within the meaning of Section 292 IPC by an objective assessment of the book as a whole and also of the passage complained of as absence separately. In appropriate cases, the court, for eliminating any subjective element or personal preference which may remain hidden in the subconscious mind and may unconsciously affect a proper objective assessment, may draw upon the evidences on record and also consider the views expressed by reputed or recognised authors of literature on such questions if there be any for

his own consideration and satisfaction to enable the court to discharge the duty of making a proper assessment."

Per se nudity is not obscenity

The American courts, from time to time, have dealt with the issues of obscenity and laid down parameters to test obscenity. It was further submitted that while determining whether a picture is obscene or not it is essential to first determine as to quality and nature of material published and the category of readers. In 50 Am Jur 2 d, para 22 at p. 23 reads as under:

> "Articles and pictures in a newspaper must meet the Miller test's constitutional standards of obscenity in order for the publisher or distributor to be prosecuted for obscenity. Nudity alone is not enough to make material legally obscence".

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Contemporary society

It was also submitted that in order to shield minors and children the State should not forget that the same content might not be offensive to the sensibilities of adult men and women. The incidence of shielding the minors should not be that the adult population is restricted to read and see what is fit for children.

In *Alfred E. Butler v. State of Michigan, 352 US 380* the US Supreme Court held as under : (L Ed p. 414)

> "The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig."

There should be no suppression of speech and expression in protecting children from harmful materials. In *Reno v. American Civil Liberties Union, 521 US 844* it has been held that:

> "The Federal Government's interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults, in violation of the Federal Constitution's First Amendment; the Government may not reduce the adult population to only what is fit for children, and thus the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into the statute's validity under the First Amendment; such inquiry embodies an overarching commitment to make sure that Congress has designed its statute to accomplish its purpose without imposing an unnecessarily great restriction on speech."

In *United States v. Playboy Entertainment Group, Inc. 529 US 803* it has been held that:

"In order for the State.... to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. [393 US 503, 509, (1969)]... What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us."

Literary merit and "prepondering social purpose"

Where art and obscenity are mixed, what must be seen is whether the artistic, literary or social merit of the work in question outweighs its "obscence" content. This view was accepted by this Court in *Ranjit D. Udeshi (Supra)* (AIR pp. 886 & 889, paras 9 & 21)

> Where there is propagation of ideas, opinions and information of public interest or profit the approach to the problem may become different because then the interest of society may tilt the scales in favour of free speech and expression. It is thus that books on medical science with intimate illustrations and photographs, though in a sense immodest, are not considered to be obscene but the same illustrations and photographs collected in book from without the medical text would certainly be considered to be absence....
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> Where art and obscenity are mixed, the element of art must be so prepondering as to overshadow the obscenity or make it so trivial/inconsequential that it can be ignored; obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech.

Contemporary standards

In judging as to whether a particular work is obscene, regard must be had to contemporary mores and national standards. While the Supreme Court in India held *Lady Chatterley's Lover* to be obscene, in England the jury acquitted the publishers finding that the publication did not fall foul of the obscenity test. This was heralded as a turning point in the fight for literary freedom in U.K. Perhaps "community mores and standards" played a part in the Indian Supreme Court taking a different view from the English jury. The test has become somewhat outdated in the context of the internet age which has broken down traditional barriers and made publications from across the globe available with the click of a mouse.

Judging the work as a whole

It is necessary that publication must be judged as a whole and the

impugned should also separately be examined so as to judge whether the impugned passages are so grossly obscene and are likely to deprave and corrupt.

Opinion of literary/artistic experts

In *Ranjit Udeshi* (supra) this Court held that the delicate task of deciding what is artistic and what is obscene has to be performed by courts and as a last resort by the Supreme Court and, therefore, the evidence of men of literature or others on the question of obscenity is not relevant. However, in *Samaresh Bose v. Amal Mitra* (supra) this Court observed : (SCC p. 314, para 29)

> "In appropriate cases, the court, for eliminating any subjective element or personal preference which may remain hidden in the subconscious mind and may unconsciously affect a proper objective assessment, may draw upon the evidence on record and also consider the views expressed by reputed or recognised authors of literature on such questions if there be any for his own consideration and satisfaction to enable the court to discharge the duty of making a proper assessment."

Clear and present danger

In *S. Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574* while interpreting Article 19(2) this Court borrowed from the American test of clear and present danger and observed: (SCC pp. 595-96, para 45)

> "[The] commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. [In other words, the expression should be inseparably] like the equivalent of a 'spark in a power keg'."

Test of ordinary man

The test for judging a work should be that of an ordinary man of common sense and prudence and not an "out of the ordinary or hypersensitive man". As Hidayatullah, C.J. remarked in *K.A. Abbas v. Union of India, (1970) 2 SCC 780 (SCC p. 802, para 49)*

> "If the depraved begins to see in these things more than what an average person would, in much the same way, as it is wrongly said, a Frenchman sees a women's legs in everything, it cannot be helped."

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137. CIVIL PROCEDURE CODE, 1908 – Sections 96 and 100

Whether appeal maintainable against a mere adverse finding recorded against the party though no decree passed against him? Held, unless finding amounts to res judicata, appeal not maintainable – Law explained.

Gendalal and another v. Raghunath (dead) Kamod Singh and others

Reported in 2006 (4) MPLJ 510

Held:

The question therefore, now in this appeal is as to whether the first appeal was maintainable against a mere adverse finding recorded when the suit was dismissed and no decree was passed in the suit. supreme Court in the case of *Banarasi and others vs. Ramphal, AIR 2003 SC 1989* has held that when no decree is passed appeal under section 96 is not maintainable. In para 8 of the aforesaid judgment it has been laid down that an appeal under sections 96 and 100 of the Code of Civil Procedure will only lie against a decree. It is held that a mere finding or judgment is not enough for the purpose of maintainability of an appeal. The aforesaid judgment is passed on the basis of an earlier judgment of the Supreme Court in the case of *Smt. Ganga Bai vs. Vijay Kumar and others, AIR 1974 SC 1126* on this question there are series of judgments rendered by High Court which indicates that an appeal under section 96 is only maintainable against a decree and an appeal against a mere finding or judgment is not maintainable. However, while considering the question, Calcutta High Court in the case of *Hera Chandra Das vs. Bhola Nath Das, (1935) ILR 62 Cal 701* held that if the finding operates as res judicata and is likely to adversely affect a party in any subsequent proceeding then the party has a right to appeal, even if the suit has dismissed and no decree is passed. This judgment of the Calcutta High Court was considered by the Supreme Court in the case of *Smt. Ganga Bai vs. Vijay Kumar and others* (supra). In the aforesaid judgment it has been held by the Supreme Court that under the Code of Civil Procedure an appeal lies only against a decree or against an order passed under the rules from which an appeal is expressly allowed under Order 43, Rule 1 of Civil Procedure Code. In para 17 it has been specifically held by the Supreme Court in the said case that no appeal can lie against a mere finding for the simple reasons that the code does not provide for any such appeal, thereafter the question was again examined in the light of adverse effect on a party and the finding operating as res judicata, after considering the judgment of Calcutta High Court in the case of *Hara Chandra Das vs. Bhola Nath Das* (supra), Supreme Court left the question open and did not express its view either way on the ground that it is not necessary to do so. However it has been held in this case by the Supreme Court that until and unless a decree is not passed, no appeal is maintainable. That being so form the settled legal principles it is clear that in the present case as the suit has been dismissed and no decree is passed appeal was not maintainable. However the question that requires consideration is as to whether in view of the adverse finding recorded against the deceased respondents Raghunath and Kamod Singh they had a right to challenge the said finding by filing an appeal. This question is considered by various High Court Courts and I propose to deal with the views taken by the various High Courts in the matter. A Full Bench of Patna High Court has considered this question in the case of *Arjun Singh and others vs. Tara Das Ghosh and others, AIR 1974 Patna 1* and after considering the legal principles it is observed by the Full Bench that, it is well settled that a party against whom a finding is recorded has got right to appeal even though the

ultimate decision may be in his favour. However such a right is available only if the finding can operate as res judicata in a subsequent suit or proceedings it is held by Full Bench that if finding does not operate as res judicata then no right to appeal is accrues. Matter was again considered in the year 1977 in the case of *Banarasi Sah and others vs. Bhagwanlal Sah and others, AIR 1997 Patna 206*. In this case it was held that when a decree passed in a suit is wholly in favour of one party they cannot file appeal against such a decree merely because some finding is recorded against them in the suit. After considering the provisions of section 96 of Civil Procedure Code, it has been held by Patna High Court that no appeal is maintainable, firstly on the ground that the decree passed is not adverse to the aggrieved party and as there is no decree with regard to this fact, right to file appeal does not exist, it is further held if the aggrieved person has no right to appeal against the finding the same will not operate as res judicata. This principle of a finding not operating as res judicata in the absence of a right to appeal being available is considered by the Rajasthan High Court also in the case of *Tara Singh vs. Smt. Shakuntala, AIR 1974 Rajasthan 21* and after following the judgment of a Division Bench of the same High Court so also certain judgment of the Punjab High Court it has been held that if against the adverse finding recorded the person aggrieved cannot file an appeal then the said finding will not operate as res judicata. The question is again considered by the Patna High Court in case of *Jugal Kishore Singh and others vs. Sheonandan Singh and others, AIR 1973 Patna 22* so also Andhra Pradesh High Court in the case of *Konda Lakshman Bapuji vs. The State of Andhra Pradesh and others, AIR 1977 Andhra Pradesh 427* and by Madras High Court in the case of *Corporation of Madras vs. P.R. Ramachandrish and others, AIR 1977 Madras 25* and *M/s Ram Mohan and Co. and another vs. M/s Ganesar Ginning Co. P. Ltd. Coimbatore and others, AIR 2000 Madras 1* and in the case of *Ramesh Chandra vs. Shiv Charan Dass and others 1990 (Supp) SCC 633,* a complete reading of all these judgments indicate as finding if it does not form part of the decree. Even through a finding is adverse appeal under section 96 or 100 of Code of Civil Procedure is not maintainable only against an adverse finding if it does not form part of the decree. Even though a finding is adverse to a party concerned the right to file appeal against such a finding is available only if the same operates as res judicata in a subsequent case. The question as to how a finding will operate as res judicata in a subsequent proceeding is considered by Andhra Pradesh High Court in the case of *Konda Lakshman Bapuji vs. The State of Andhra Pradesh and others* (supra) after considering an earlier judgment on the question it has been held that a finding can be challenged if the finding operates as res judicata and is binding on the aggrieved party in the future also it is explained that if the decree could be passed even without deciding the issues against the aggrieved persons then the finding will not operate as res judicata.

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In the case of *Ramesh Chandra vs. Shiv Charan Dass and others, 1990 (Supp) SCC 633,* it has been held by the Supreme Court that one of the test to

ascertain if a finding operates as res judicata is if the party aggrieved could challenge it. It is therefore clear that if a party aggrieved by a finding is unable to challenge the finding by filing an appeal then the said finding will not operate as challenge the finding by filing an appeal then the said finding will not operate as res judicata.

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138. CRIMINAL TRIAL :

Appreciation of evidence – Non-explanation of injuries found on the person of the accused, effect of – Such non-explanation will have no effect, where injuries are minor, superficial or where evidence is clear, cogent, consistent and creditworthy.

Shajahan and others v. State of Kerala and another

Reported in 2007 (2) MPHT 1 (SC)

Held:

Non-explanation of injuries by the prosecution will not affect the prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of prosecution to explain the injuries. As observed by this Court in *Ramalagan Singh vs. State of Bihar (AIR 1972 SC 2593)* prosecution is not called upon in all cases to explain the injuries received by the accused persons. It is for the defence to put questions to the prosecution witnesses regarding the injuries of the accused persons. When that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an accused. In *Hare Krishna Singh and others vs. State of Bihar* (AIR 1988 SC 863), it was observed that the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. If the witnesses examined on behalf of the prosecution are believed by the Court in proof of guilt of the accused beyond reasonable doubt, question of obligation of prosecution to explain injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused. It is more so when the injuries are simple or superficial in nature. In the case at hand, trifling and superficial injuries on accused are of little assistance to them to throw doubt on the veracity of the prosecution case. (See *Surendra Paswan vs. State of Jharkhand, (2003) 8 Supreme 476) and Anil Kumar vs. State of U.P., (JT 2004 (8) SC 355)*.

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139. INDIAN PENAL CODE, 1860 – Section 96

Right of private defence – No test in the abstract can be laid down for determining legitimacy of action in the exercise of right of private defence – Accused need not prove the existence of right of private defence beyond reasonable doubt – Preponderance of probabilities is enough in favour of the plea.

Shajahan and others v. State of Kerala and another

Reported in 2007 (2) MPHT 1 (SC)

Held:

The only other question which needs to be considered, is the alleged exercise of right of private defence. Section 96, IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The Section does not define the expression 'right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the Court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case the Court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short 'the Evidence Act') the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the Court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material

on record. [See *Munshi Ram and others vs. Delhi Administration (AIR 1968 SC 702), State of Gujarat vs. Bai Fatima (AIR 1975 SC 1478), State of U.P. Vs. Mohd. Musheer Khan (AIR 1977 SC 2226), and Mohinder Pal Jolly Vs. State of Punjab (AIR 1979 SC 577).* Sections 100 and 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The off quoted observation of this Court in *Salim-Zia Vs. State of U.P.* (AIR 1979 SC 391), runs as follows :-

> "It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that, while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of the prosecution witnesses or by adducing defence evidence."

The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.

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140. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 118
Presumption regarding passing of consideration u/s 118 – Presumption arises only when execution of promissory note is proved.
Shyamrao v. Champalal
Reported in 2007 (2) MPHT 14

Held:

The question of statutory presumption under Section 118 of the Act would arise only if the execution of the promissory note is admitted. Since, execution of the same is not proved, there cannot be any presumption. Apart from this, the presumption arising under this section can be rebutted even by circumstantial evidence. In the present case, both the parties have adduced evidence in regard to the execution of the promissory note. The evidence of plaintiff has not been relied by the two Courts below. While appreciating the evidence, learned two Courts below also arrived at a pure finding of fact that consideration of Rs. 2,000/- was passed to the dependent, is not at all proved, therefore, I am of the view that there cannot be any presumption under Section 118 of the Act in the facts and circumstances of the present case.

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141. MOTOR VEHICLES ACT, 1988 – Sections 168 & 169
CIVIL PROCEDURE CODE, 1908 – Order XLVII Rule 1
Filing of second claim petition after getting compensation in a motor accident based on subsequent events – Claimant may prefer a review petition before Tribunal under O.XLVII R.1 of the Code on the ground of 'any other sufficient cause' mentioned in that provision.
Narayan Lillahare v. Dinesh and others
Reported in 2007 (2) MPHT 32 (DB)

Held:

On a perusal of the aforesaid provisions there remains no scintilla of doubt that the second claim petition cannot be entertained. Mr. Pandey with immense vehemence has submitted that the law laid down in the cases of *Anant Narayan v. Brij Mohan Chhotulal and others, AIR 1996 Nag 93 Ramesh Chand and others v. Board of Revenue and others, AIR 1973 All. 120* and *Smt. Mira Chatterjee v. Sunil Kumar Chhaterjee AIR 1998 Cal. 333*, do render assistance to him as a consequence of which the second claim petition would lie. We have carefully perused the aforesaid decisions. In the case of *Anant Narayan* (supra), the Division Bench of the High Court of Nagpur was dealing with a case of mortgage. The claim was made on the mortgage which comprised the entire three fields but at the trial it was conceded on behalf of the plaintiff that he could not have obtained decree against *A, who was then minor under a guardian adlitem.* The Court, therefore, passed a decree in favour of the plaintiff in respect of only the mortgagor's moiety share. In execution of that decree the plaintiff instead obtaining joint possession in respect of undivided moiety share in the three fields obtained physical possession of the entire three fields. A, against whom no decree had been passed claimed possession of the entire three fields and that possession granted back to him. Subsequently, the plaintiff filed a suit for partition. In that context, the Bench expressed the opinion that the plaintiff's remedy of a suit for partition had not been affected. Mr. Pandey to further his submission has read Paragraph 10 of the aforesaid judgment. On a perusal of the same we are of the considered opinion that the said decision is of no assistance to Mr. Pandey and it has been erroneously placed reliance upon.

In view of the aforesaid pronunciation of law there can be no trace of doubt that the Tribunal has the power to review. If the provision contained under Order 47 Rule 1, CPC is read in proper perspective there can be no shadow of doubt that the subsequent events can be taken note of on certain conditions precedent being satisfied. In the case at hand, the subsequent event is amputation, as set forth in the claim petition. The said amputation may have nexus with the accident occurred on 28.4.2003. The same might have happened due to some other reason. As presently advised, we do not intend to dwell upon the same at present but the said facet can be factor for recall or modification or review of the award as the concept of 'for any other sufficient reason' would get attracted. The same has to be dealt with by the Tribunal within the parameters of review.

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142. CRIMINAL PROCEDURE CODE, 1973 – Section 156 (3)
Whether Magistrate can direct investigation under S.156 (3) in a case triable by the Special Court or Court of Sessions? Held, Yes.
Damodar Sharma and others v. Nathuram Jatav and another
Reported in 2007 (2) MPHT 111

Held:

In this regard, we have to see Section 156 (3) and proviso (a) to sub-clause (2) of Section 202 of Cr.PC. This two provisions impose two limitations on the power of Magistrate in respect of offences exclusively triable by a Court of Sessions. Clause (a) of proviso to sub-clause (1) bars a Magistrate from sending complaint to police officer or some other person for investigation. He is to enquire himself. But, this proviso does not bar him to order investigation by the police under Section 156 (3) of Cr.PC before taking cognizance.

In the case of *Devarapalli Lakshminarayana Reddy and others Vs. Narayana Reddy and others,* reported in *AIR 1976 SC 1672,* in which it is laid down that the power to order police investigation under Section 156 (3) is different from the power to direct investigation conferred by Section 202 (1). The two operate in distinct is exercisable at the pre-cognizance stage, the second at the post-cognizance stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence the power under Section 156 (3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190 (1) (a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156 (3). It may be noted further that an order made under sub-section (3) of Section 156, is in the nature of a peremptory reminder of intimation to the police to exercise their plenary power of investigation under Section 156 (1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173. On the other hand, Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under Section 202 to direct, within the limits circumscribed by that section, an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding". Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceeding already instituted upon a complaint before him.

It is made clear that the expression "taking cognizance of an offence", cognizance can be set to be taken. Hence, the Magistrate applies his mind for proceeding under Section 200 of Cr.P.C.

In the case of *Kamlesh Pathak and five others v. State of M.P. and another, 2006 (I) MPJR 159*, the Court observed in Para 7 that :-

> "From the perusal of the said judgment, it appears that in that case the Apex Court was not considering the powers of Magistrate in cases where the offence is triable by the Session Court. Counsel for the petitioner relying on proviso to Section 202 (2), Cr.PC has urged that as in the present case offence under Section 307, IPC is triable exclusively by Session Court, the impugned order issuing direction under Section 156 (3), Cr.PC. is without jurisdiction and cannot be sustained in the eyes of law."

Therefore in view of the present context and the decision of the Apex Court in the case of *Devarapalli* (supra), it is clear that the Magistrate prior to taking cognizance in the case, ordered for investigation under Section 156 (3) of Cr.PC. It cannot be said that the Magistrate has committed any illegality or irregularity.

●

143. SERVICE LAW :

Simultaneous criminal proceedings and departmental enquiry based on same facts – Whether departmental enquiry may be stayed? No – It is to be determined whether prejudice is caused by simultaneous proceeding of the departmental proceedings.

Ashok Kumar Kahar v. MPSEB and another

Reported in 2007 (2) MPHT 114

Held:

The obtaining factual matrix is to be tested on the anvil and touchstone of the aforesaid pronouncement of law. As has been held by the Apex Court, there cannot be a straight-jacket formula as to in which case departmental proceedings are to be stayed. In the case at hand, as has been stated by the petitioner, the criminal cases are on the verge of completion. He has admitted that in one case the prosecution has closed its evidence. That apart there has been considerable progress in the departmental proceeding. The acid and real test is whether the department inquiry would cause prejudice to the petitioner in criminal case at this stage. As the factual matrix would luminescent reveal, the criminal cases are almost in the verge of completion and there is progress in the departmental proceedings. In this backdrop, there is no question of prejudice being caused to the delinquent employee in his defence at the trial in criminal case.

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144. CIVIL PROCEDURE CODE, 1908 – Section 47

Joint decree, execution of – Dispute between two plaintiffs – Co-decree holders not covered by S.47 and can avail separate remedy under the law.

Shiv Autar and another v. Hariom and others

Reported in 2007 (2) MPHT 165

Held:

The contention of the learned Counsel for the petitioner is that as the present petitioner is covered by sub-section (3) of Section 47, CPC the present dispute is covered by Section 47 and the Executing Court has committed an error in not deciding the said dispute. In support of this argument, learned Counsel for the petitioner relied on the judgment of Nagpur High Court reported in 1949 Nagpur 398.

In reply to this argument, learned Counsel for the respondents pointed out that an explanation is added to sub-section (3) of Section 47, CPC w.e.f. 1-2-1977 and Explanation No. 1 clarifies that for purposes of Section 47 parties remain the plaintiff and the defendant, and the dispute between the co-plaintiff or co-defendants is not covered by Section 47. He relied on the judgment of Apex Court in case of *Jagdish Dutt and others vs. Dharma Pal,* reported in *AIR 1999 SC 1694* and Para 7 of the said judgment, the Apex Court has laid down that a joint decree can be executed as a whole since it is not divisible and it can be executed in part only where the share of the decree-holders are defined or those share can be predicated or the share is not in dispute. Otherwise, the Executing Court cannot find out the shares of the decree-holders and dispute between joint decree holders is foreign to the provisions of Section 457, CPC.

Thus, it is clear that the dispute between the co-plaintiff or co-decree holders is not covered by Section 47 and decree will have to be executed as a whole.

So far as dispute between co-decree holders are concerned, they have a separate remedy under the law which they can avail. But such dispute cannot be decided in execution proceedings against a judgment-debtor and not concerned with the said dispute.

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145. HINDU SUCCESSION ACT, 1956 – Section 22

Transfer of interest in an immovable property by co-heir in violation of S.22 (1) of the Act – Remedy for other co-heirs to enforce preferential right by way of filing civil suit – Law explained.
Vishwanath Gupta & 4 Ors. v. Virendra Nath Agrawal & Ors.
Reported in 2007 (I) MPJR 412

Held:

On going through the provisions of section 22 of the Act it is gathered that this provision has been enacted in the said Act to keep out strangers coming into the heirs of Class I of the Schedule after coming into force of the Act. On going through this provision it is also luminously clear that the alienation of his interest by a co-heir in violation of section 22 (1) is not void, but is voidable at the instance of other non-alienating co-heirs. In this regard I may profitably rely Division Bench decision of the Kerala High Court *Valliyil Sreedevi Amma v. Subhadra Devi and others, AIR 1976 Kerala 19* wherein it has been held that if a co-heir transferring his interest in violation of section 22(1), the remedy of other

co-heirs to acquire transferred interest is by way of suit and such suit is maintainable and the transfer made by co-heir of his share is voidable and not void. Thus the transfer made by defendant no. 1, who is a co-heir is voidable and the suit can be brought at the instance of other co-heirs challenging the alienation to a stranger since it is a voidable transaction. I may further add that it is the sale against the right of co-heirs that would constitute an infringement of the right conferred under section 22(1) of the Act. In other words, the cause of action is a sale to a third party without reference to the other co-heirs who might have purchased the property for the proper price, if it had been offered to them.

On bare perusal of section 22 it is as clear like a noon day that preferential right has been accrued to a co-heir to purchase the share of alienating co-heir, and I am of the view that the burden of proof of waiver of such right is upon the purchaser to establish that other co-heir has waived his preferential right. Thus where one of the co-heirs transfers his interest in a immovable property in violation of section 22 (1) of the Act the remedy of other co-heir to enforce his preferential right under the said provision is by way of filing regular civil suit.

Looking to the scheme of this section it appears to have been though necessary as an antidote to the inconvenient effects sometimes resulting from transfer to an out-sider by a co-heir his or her interest in the property simultaneously inherited along with other co-heirs.

It is also clear on bare perusal of this section that it does not apply where the property develoves by survivoushiip and the scope of this provision is restricted and applicable to the cases of inheritance only. It is also clear on bare perusal of this section that in case of proposed transfer an application could be filed and where the alienation is concluded regular suit should be filed.

The effect of this section may be thus summarized :-

> "(1) In case any heir specified in Class I of the Schedule desires to dispose of his interest in the property (immovable property or interest in a business) inherited by him simultaneously with any other heir or heirs of an interstate under the provisions of the Act the latter have a preferential right to acquire that interest by purchase.
>
> (2) If the parties are unable to agree as to the quantum of consideration payable by the heir or heirs who intend to exercise the right conferred by sub-section. (1) the price will be determined by the court in an application made for the purpose. The intending purchaser is not, however, bound to pay the price fixed by the court. If he does not choose to pay the same, he will only be liable to pay costs of the application.
>
> (3) In case of two or more heirs seeking to exercise the right conferred by sub-section (1) that heir who offers the highest consideration must be preferred and allowed to acquire the interest.
>
> (See commentary on *Mulla Principles of Hindu Law* Volume II Page 361 and 362 17th edition)

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146. LIMITATION ACT, 1963 – Article 136

Execution application is to be moved within 12 years from enforceability and not from executionability – Law explained.

Bherulal v. Jamil

Reported in 2007 (I) MPJR 422

Held:

It is appropriate to refer to *Hameed Joharan (Dead) by L.Rs. and others v. Abdul Salam (Dead) by L.Rs.and others, (2001) 7 SCC 573* first at this stage, therein it is held that Article 136 of the Limitation Act, 1963 provides that limitation period for execution of decree begins to run from the date of decree which is the date when rights stand crystallized and decree becomes enforceable. The same view has been reiterated by a Larger Bench in *Dr. Chiranji Lal* (D) by *L.Rs. v. Hari Das* (D) by *L.Rs., AIR 2005 SC 2564*

In the circumstances of the case the ex parte decree under reference became enforceable right from the time it was passed. Article 136 provides that the execution application is to be moved within 12 years from enforceability and not from executionability. The ex parte decree became enforceable right at the time when it was passed and, therefore, when admittedly the application for execution under reference was moved beyond 12 years from the date of the passing thereof, the same is barred by time and the doctrine of merger not being applicable, the limitation is not saved. I reached this conclusion after thoughtful consideration of the above referred decisions.

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147. MOTOR VEHICLES ACT, 1988 – Section 168

Death of 9 year old child – Compensation must be just – It should not be a bonanza but the same not be a pittance.

Age of parents also relevant factor – An award of a sum of Rs. 1,80,000/- would meet the ends of justice along with interest at the rate of 7.5% per annum from the date of filing of petition.

New India Assurance Co. Ltd. v. Satender & Ors.

Reported in AIR 2007 SC 324

Held:

There are some aspects of human life which are capable of monetary measurement, but the totality of human life is like the beauty of sunrise or the splendour of the stars, beyond the reach of monetary tape-measure. The determination of damages for loss of human life is an extremely difficult task and it becomes all the more baffling when the deceased is a child and/or a non-earning person. The future of a child is uncertain. Where the deceased was a child, he was earning nothing but had a prospect to earn. The question of assessment of compensation, therefore, becomes stiffer. The figure of compensation in such cases involves a good deal of guesswork. In cases, where parents are claimants, relevant factor would be age of parents.

In case of the death of an infant, there may have been no actual pecuniary benefit derived by its parents during the child's lifetime. But this will not necessarily bar the parent's claim and prospective loss will find a valid claim provided that the parents' establish that they had a reasonable expectation of pecuniary benefit if the child had lived. This principle was laid down by the House of Lords in the famous case of *Taff Vale Rly. V. Jenkins, (1913) AC 1,* and Lord Atkinson said thus:

".... all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that the existence of this expectation is an inference of fact – there must be a basis of fact from which the inference can reasonably be drawn; but I wish to express my emphatic dissent from the proposition that it is necessary that two of the facts without which the inference cannot be drawn are, first that the deceased earned money in the past, and, second, that he or she contributed to the support of the plaintiff. These are, no doubt, pregnant pieces of evidence, but they are only pieces of evidence; and the necessary inference can I think, be drawn from circumstances other than and different from them." (See *Lata Wadhwa and Ors. v. State of Bihar and Ors., [2001 (8) SCC 197*].

This Court in Lata Wadhwa's case (supra) while computing compensation made distinction between deceased children falling within the age group of 5 to 10 years and age group of 10 to 15 years.

In cases of young children to tender age, in view of uncertainties abound, neither their income at the time of death nor the prospects of the future increase in their income nor changes of advancement of their career are capable of proper determination on estimated basis. The reason is that at such an early age, the uncertainties in regard to their academic pursuits, achievements in career and thereafter advancement in life are so many that nothing can be assumed with reasonable certainty. Therefore, neither the income of the deceased child is capable of assessment on estimated basis nor the financial loss suffered by the parents is capable of mathematical computation.

Applying the principles indicated in *State of Haryana and another v. Jasbir Kaur and ors., (2003 (7) SCC 484)* to the facts of the present case we think award of a sum of Rs. 1,80,000/- would meet the ends of justice. The same shall carry interest at the rate of 7.5% from the date of filing of petition till payment is made. Payment shall be made within a period of three months from today. Amounts, if any, already paid shall be adjusted from the aforesaid amount of Rs. 1,80,000/-.

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148. ARBITRATION ACT, 1940 – Section 14
CIVIL PROCEDURE CODE, 1908 – Order III Rule 5
Award filed by counsel of the appellant as agent of Arbitrator – Whether it may amount to notice to the appellant? Held, No – Presumption under O.3 R.5 CPC not attracted – Law explained.
Oil and Natural Gas Corporation Ltd. v. M/s Nippon Steel Corporation Ltd.
Reported in AIR 2007 SC 327

Held:

The respondent has misconstrued the pleadings of the appellant. The appellant is not denying the fact that M/s. Little & Co. was the counsel for the appellant in the arbitration proceedings. The appellant is, in fact, only contending that at the time of filing of the award, the counsel was not acting on behalf of the appellant but was acting as a representative of the arbitrator. The law requires the arbitrator to file the award before the competent Court. The Arbitrator can discharge this legal duty by himself or through an agent who happened to be an appellant's counsel in the Arbitration. The fact that the counsel had filed the award at the express request of the arbitrator reflects that the counsel was acting as a representative of the Arbitrator at the time of filing of the award and was not discharging any professional service as a lawyer to the appellant. In fact, as contended by the Learned ASG appearing for the appellant, that the appellant had occasioned to appoint M/s. Little & Co. to act as its lawyer before the High Court even before the award was filed. Since the appellant had no intention to get the award filed in Court, there was no question of appointing M/s. Little & Co. to coordinate with arbitrator to obtain the award and file the same before the court. Therefore, in our view, the knowledge of the said lawyer about the filing of the award is not a notice, either actual or constructive to the appellant.

Order III, Rule 5, CPC :-

... In our view, the principles enshrined in Order III. Rule 5, C.P.C. is not applicable to the facts of the instant case. The principles embodied in the said Rule is only applicable in cases where the counsel acts on behalf of his client and where the counsel in its rep-resentiative capacity represents its client. In the instant case, by filing the award at the instance of the arbitrator, the counsel is acting as a representative of the arbitrator and was not acting as a representative of the appellant and, therefore, the presumption envisaged by the said Rule cannot be stretched to situations where the pleader is not acting on behalf of the party...

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149. INDIAN PENAL CODE, 1860 – Section 300, Exception 4 and Section 96

(i) What is sudden fight? Difference between Exceptions 1 and 4 – Benefit of Exception 4 not available when offender has taken undue advantage or acted in cruel manner.
Verbal altercation in the beginning – Accused became very furious and caused injury on vital parts of unarmed person – Acted brutally – Benefit not available – Law explained.

(ii) Right of private defence – Mere presence of injuries on body of accused and non explanation of the same does not raise presumption of availability of such right – It is a defensive right in nature – It is not available for vindictive, aggressive or retributive purpose of offence – Law explained.

Naveen Chandra v. State of Uttaranchal
Reported in AIR 2007 SC 363

Held:

The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 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 reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the guarrel 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.

The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's 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 the 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 and more persons whether with a without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden guarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In *Kikar Singh v, State of Rajasthan (AIR 1993 SC 2426)* it was held that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that using the blows with the knowledge that they were likely to cause death, he had taken undue advantage.

In the instant case blows on vital parts of unarmed persons were given with brutality. The abdomens of two deceased persons were ripped open and internal organs come out. In view of the aforesaid factual position, Exception 4 to S. 300, I.P.C. has been rightly held to be inapplicable.

Considering the background facts in the backrop of legal principles as set out above, the inevitable conclusion is that 4th Exception to S. 300, I.P.C. does not apply. The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused parabolise the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstances. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable. consistent and credit-worthy, that it far out-weights the effect of the omission on the part of the prosecution to explain the injuries. (See *Lakshmi Singh v. State of Bihar (AIR 1976 SC 2263)*. A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 deals with the subject-matter of right of private defence. The plea of right comprises the body or property (i) of the person exercising the right; or (ii) of any other person; and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Ss. 96 to 98 and 100 to 106 is controlled by S. 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101. I.P.C. define the limit and extent of right of private defence.

The right of private defence is essentially a defensive right circumscribed by the governing statute i.e. the I.P.C. available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of

defence, not of retribution, expected to repel unlawful aggression and not as retaliatory measure. While providing for exercise of the right, care has been taken in I.P.C. not to provide and has not devised a mechanism whereby an attack may be a pretence for killing. A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived. [See *V. Subramani and another v. State of Tamil Nadu, 2005 (10) SCC 358*].

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150. CONSUMER PROTECTION ACT, 1986 – Section 2 (g)
Deficiency in service – Claim against insurance company for damages of insured building on account of heavy rains and floods.
Exclusion clause not included 'subsidence' – No exemption on such ground.
Plea of defective structure i.e. column of building not tenable as construction was certified first class – Insurance company could not escape its liability to compensate.
United India Insurance Co. Ltd. v. M/s Kiran Combers and Spinners
Reported in AIR 2007 SC 393

Held:

We have considered the rival submissions of the parties. It is an admitted position that the claimant was covered from 11.1.1993 to 10.1.1994 and the flood took place on 24.7.1993 and caused extensive damage to the building. It is submitted that as per the policy, fire policy is covered for flood, storm and tempest on payment of extra 20 per cent premium i.e. Rs. 500/-. Therefore, there is no dispute that the incident has taken place during the coverage of the policy and the cause of the damage is flooding of water into the building. The basic submission which has been addressed by learned counsel for the appellant was that the company has not covered subsidence. Subsidence means "the gradual caving in or sinking of an area of land". But on account of the water flooding into the premises of the claimant-respondent's factory from Kohinoor Woollen Mills, the land caved in as a result of which one column of the building collapsed. The question is whether subsidence was covered in the policy or not. In this connection, a reference may be made to the terms of the policy. Clause 8 of the policy deals with Exclusions that if any loss is occasioned on account of these events then policy shall not cover. Clause 8 of the Exclusions in the Policy reads as under:

> "8. Any loss or damage occasioned by or through or in consequence directly or indirectly of any of the following occurrence namely.
>
> (a) Earthquake, volcanic eruption, or other convulsion of nature,
>
> (b) Typhoon, storm, cyclone, tempest, Hurricane, Tornado, Flood and Inundation.
>
> (c) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not). Civil War.

(d) Mutiny, civil commotion assuming the proportions of or amounting to a popular rising, military rising insurrection, rebellion, military or usurped power.

(d) Burning, whether accidental or otherwise, forest bush and jungles and the clearing of lands by fire.

In any action, suit or other proceeding where the Company alleges that the reason of the provisions of the above Exclusions any loss or damage is not covered by this Insurance, the burden of proving that such loss or damage is covered shall be upon the insured."

A perusal of the aforesaid clause would clearly show that there is no exclusion clause for subsidence. Clause 8(b) only talks of typhoon, storm, cyclone, tempest, hurricane, tornado, flood and inundation. None of the events mentioned above includes subsidence. We fail to understand from where the Surveyor has brought the expression "subsidence" although clause 8 which specifically talks about Exclusions, does not mention anything like subsidence. The policy is covered for flood and inundation for which the claimant is covered by paying extra premium, therefore, now to say that the policy has not covered subsidence, which is not a clause in the present policy cannot be sustained. Therefore, on the basis of this ground, repudiation of the claim of the claimant by the appellant does not appear to be justified. Had this been the clause, that if damage is caused on account of sinking and caving of the building i.e. subsidence then perhaps this would have come to the rescue of the company but since in the exclusion clause there is no mention of subsidence, therefore, this ground taken by the appellant-Company and by the Survevor to defeat the claim, is absolutely unwarranted.

Now, coming to the next question of collapse of the building on account of pouring, there also the submission appears to be not justified. In fact, the Company has certified that this building has a first class construction. Normally when the company insures any factory, then their Officers and the Engineers used to inspect the building to find out whether there is any defect in the construction or the construction is of poor quality. In the present case, the company certified that it is first class construction, then for some defect which has not been noticed by the company no benefit could be given to the company for such defect. Morose, in the present case, as pointed out that because of defective stricture i.e. column No. 3 the building has collapsed but the question is what aggravated or accentuated this, factory is in place for more than 12 years and it is on account of flood water entering in factory that has caused this damage. So-called defect was aggravated on account of flooding of the water in the premises of the factory, if the flood water has not entered into the factory, perhaps the construction which stood good for 12 years, would have lasted

long. The cause of the damage to the column No. 3 of the building was flood water. Therefore, the company cannot escape the liability to compensate the claimant for collapse of the building on account of floods. As a result of above discussion, we are of opinion that the view taken by the National Consumer Disputes Redressal Commission is correct and is fully justified and there is no ground to interfere with the order. As such, the appeal is dismissed. There would be no order as to costs.

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151. INDIAN PENAL CODE, 1860 – Section 100

No right of private defence – When established that accused went to field of deceased and his family – Attacked them with lethal weapons – Right to defend does not include a right to launch an offence or to be aggressive.

Dharam & Ors. v. State of Haryana

Reported in AIR 2007 SC 397

Held:

The plea of self defence has been rejected by the Trial Court, inter alia, observing that the danger was to the life of the deceased and his party and not to the appellants. However, the High Court has dealt with the issue more elaborately. Referring to the testimony of investigating officer S.I. Amardas (PW-7) and Rajinder Singh Patwari (PW-6) who had prepared the site plan (Exhibit-PC) after identification of place of occurrence by PW-10, the High Court has recorded a clear finding that the plea of the appellants that the occurrence took place on or near their tube-well had been completely demolished by the prosecution. The High Court has affirmed the finding recorded by the Trial Court that the occurrence had taken place in the fields belonging to the deceased Partap and his family. Besides, the statement of the appellants recorded under Section 313, Criminal Procedure Code, 1973, extracted above, proves their presence and participation in the fight. These two factors clearly prove that the appellants went and attacked with lethal weapons the deceased and his family members in the latter's fields. We are convinced that in the light of the evidence on record that in the light of the evidence on record they were the aggressors. Thus, being members of the aggressors' party none of the appellants can claim right of self-defence. As observed hereinabove, right to defend does not include a right to launch an offence or aggression. Therefore, we have no hesitation in holding that the appellants have failed to establish that they were exercising right of private defence.

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152. EVIDENCE ACT, 1872 – Section 3
INDIAN PENAL CODE, 1860 – Section 300/149
Appreciation of evidence of injured and eye witnesses – Examination of witness after five years of the incident – Subjected to lengthy cross-examination – Occurring discrepancies in their testimony and in comparison to versions of eye-witnesses in connection with weapons used by each of accused person for inflicting injuries on the persons of each of injured witness as also on the person of deceased – The same cannot be treated very serious, vital and significant for disbelieving and discarding substratum of prosecution case.
Karibasappa and Ors. v. State of Karnataka
Reported in AIR 2007 SC 432

Held:

We have independently scrutinized the evidence of the material witnesses in the teeth of the rival contentions of the parties. On reprisal and scrutiny of the evidence of the injured witnesses Shekharappa (PW-2), B.G. Shivamurthaiah (PW-3) and B.G. Prakashaiah (PW-4), they have fully established the case of the prosecution against A-2, A-3, A-17, A-19 and A-20, although there were certain discrepancies in their testimony and in comparison to the versions of PW-6, PW-7 and PW-19, the eye-witnesses, in regard to the weapons of offence individually used by A-1, A-3, A-17, A-19 and A-20 for inflicting injuries on the person of each of injured witness as also on the person of the deceased. The discrepancies, as pointed out by the learned counsel for the appellants, are minor and insignificant. The occurrence took place on 05.07.1995 and the witnesses were examined in the court after about a gap of almost five years. The evidence on record further shows that the injured witnesses had been subjected to searching lengthy cross-examination and in such type of cross-examination, some improvements, contradictions, and omissions are bound to occur in their evidence, which cannot be treated very serious, vital and significant so as to disbelieve and discard the substratum of the prosecution case. The evidence of the injured witnesses and other eye-witnesses has been rightly re-appreciated and accepted by the High Court and we find no cogent and sound reason to differ from the well reasoned judgment upholding the order of the trial court. There is therefore, no merit in the argument of the learned counsel for the appellants that the evidence of the injured witnesses and other eye-witnesses should be labelled as the evidence of the interested witnesses. On the other hand, we find that the evidence of all the eye-witnesses including injured persons is quite natural, convincing and trustworthy. There is no material on record from which an inference can be drawn that the material witnesses have implicated the appellants Karibasappa (A-2), Halanaika (A-3), B.K. Manjunathaa (A-17), B.K. Parmeshwarappa (A-19), and B.K. Shivarajappa (A-20) in a false case.

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153. CONSTITUTION OF INDIA – Articles 299 & 226

The law relating to award of contract by the State and Public Sector Corporation – Contractual matters – Judicial review – Governing principles – Summarised.

Contract awarded – Power of relaxation exercised by the employer – It is fair, reasonable and bonafide – The Writ Court should refrain to interfere – Law explained.

M/s B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. & Ors.

Reported in AIR 2007 SC 437

Held :

The law relating to award of contract by the State and public sector corporations was reviewed in *Air India Ltd. v. Cochin International Airport Ltd., 2005 AIR SCW 1682* and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere."

In *State of NCT of Delhi and Another v. Sanjeev alias Bittoo [(2005) 5 SCC 181],* the Court reiteratedthe principles of judicial review.

We are not oblivious of the expansive role of the superior courts on judicial review.

We are also not shutting our eyes to wards the new principles of judicial review which are being developed:but the law as it stands now may be summarized as under :

i) If there are essential conditions, the same must be adhered to;

ii) If there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully ;

iii) If, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing.

iv] The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of another part of tender contract, particularly when he was also not

in a position to comply with all the conditions of tender fully, unless the court other wise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction.

v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down the same may not ordinarily be interfered with.

vi) The contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority.

vii) Where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint.

●

154. CONSTITUTION OF INDIA – Article 14
Education – Practise of educational institutions – Admitting students without requisite recognition or affiliation – Deprecated – Law explained.
Order not allowing students to appear in examination conducted by CBSE – Proper.
Minor Sunil Oraon Tr. Guardian & Ors. v. C.B.S.E. & Ors.
Reported in AIR 2007 SC 458

Held :

Now, we would refer to the law settled by this Court in various Judgments to the effect that interim orders of the nature passed in the present case are detrimental to education and its efficient management. As a matter of course, such interim orders should not be passed, as they are aberrations and it is subversive of academic discipline.

In *Regional Officer, CBSE v. Sheena Pethambaran, [(2003) 7 SCC 719],* at page this Court has observed :

> "6. This Court has on several occasions earlier deprecated the practice of permitting the students to pursue their studies and to appear in the examination under the interim orders passed in the petitions. In most of such cases it is ultimately pleaded that since the course was over or the result had been declared, the matter deserves to be considered sympathetically. It results in very awkward and difficult situations. Rules stare straight into the face of the plea of sympathy and concessions, against the legal provisions".

In the case of *C.B.S.E. & Anr. v. P. Sunil Kumar & Ors. [(1998) 5 SCC 377]*, the institutions whose students were permitted to undertake the examination of the Central Board of Secondary Education were not entitled to appear in the examination. They were, however, allowed to appear in the examination under the interim orders granted by the High Court. In that context the Supreme Court observed:

> "4. ...." But to permit students of an unaffiliated institution to appear at the examination conducted by the Board under orders of the Court and then to compel the Board to issue certificates in favour of those who have undertaken examination would tantamount to subversion of law and this Court will not be justified to sustain the orders issued by the High Court on misplaced sympathy in favour of the students."

In the case of *Guru Nanak Dev University v. Parminder Kr. Bansal [(1993) 4 SCC 401]* the Supreme Court observed that such interim order is subversive of academic discipline. The relevant observations are as under:

> "We are afraid that this kind of administration of interlocutory remedies, more guided by sympathy quite often wholly misplaced, does no service to anyone. From the series of orders that keep coming before us in academic matters, we find that loose, illconceived sympathy masquerades as inter locutory justice exposing judicial discretion to the criticism of degenerating into private benevolence. This is subversive of academic discipline, or whatever is left of it, leading to serious impasse in academic life. Admissions cannot be ordered without regard to the eligibility of the candidates .... The courts should not embarrass academic authorities by themselves taking over their functions."

Yet in another case i.e. in the case of *A.R. Christians Medical Educational Society v. Govt of A.P. [(1986) 2 SCC 667]* this Court held that:

> "We cannot by our fiat direct the University to disobey the statute to which it owes its existence and the regulations made by the University itself. We cannot imagine anything more destructive of the rule of law than a direction by the court to disobey the laws."

In the case of *State of Tamil Nadu v. St. Jopseph Teacher's Training Institute [(1991) 3 SCC 87]* this Court observed that the direction of admitting the students of unauthorized educational institutions and permitting them to appear at the examination has been looked on with disfavour and the students of unrecognised institutions who are not legally entitled to appear at the examination conducted by the Educational Department of the Government cannot be allowed to sit at the examination and the High Court committed an error in granting permission to such students to appear at the public examination.

In the case of *Central Board of Secondary Education v. Nikhil Gulati [(1998) 3 SCC 5]*, this Court deprecated the practice followed by the High Court to issue

direction and also observed that such aberrations should not be treated as a precedent in future.

In *Krishna Priya Ganguly v. University of Lucknow [(1984) 1 SCC 307]*, the Supreme Court observed :

> "3. Whenever a writ petition is filed provisional admission should not be given as a matter of course on the petition being admitted unless the court is fully satisfied that the petitioner has a cast-iron case which is bound to succeed or the error is so gross or apparent that no other conclusion is possible."

In *State of Maharashtra v. Vikas Sahebrao Roundale (1992) 4 SCC 435]*, it was held that the students of unrecognized and unauthorized educational institutions could not have been permitted by the High Court on a writ Petition being filed to appear in the examination and to be accommodated in recognized institutions. This Court observed:

> "12. Slackening the standard and judicial fiat to control the mode of education and examining system are detrimental to the efficient management of the education."

Time and again, therefore, this Court had deprecated the practice of educational institution admitting the students without requisite recognition or affiliation. In all such cases the usual plea is the career of innocent children who have fallen in the hands of the mischievous designated school authorities. As the factual scenario delineated against goes to show the school has shown scant regards to the requirements for affiliation and as rightly highlighted by learned counsel for the CBSE, the infraction was of very serious nature. Though the ultimate victims are innocent students that cannot be a ground for granting relief to the appellant. Even after filling the undertakings the School non-challantly continued the violations.

Students have suffered because of the objectionable conduct of the school. It shall be open to them to seek such remedy against School as is available in law, about which aspect we express no opinion.

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155. LIMITATION ACT, 1963 – Articles 91 & 137

What should be the period of limitation in respect of wrongful detention of goods ? Held, three years – It is not continuing wrong – Limitation starts from the date when property is wrongfully taken or injured or when the detainer's possession becomes unlawful.

Counter-claim time barred – Rejected.

Sankar Dastidar v. Smt. Banjula Dastidar & Anr.

Reported in AIR 2007 SC 514

Held :

Articles 68, 69 and 91 of the Limitation Act govern suits in respect of

movable property. For specific movable property lost or acquired by theft, or dishonest misappropriation or conversion; Knowledge as regards possession of the party shall be the starting point of limitation in terms of Article 68. For any other specific movable property, the time from which the period begins to run would be when the property is wrongfully taken, in terms of Article 69. Article 91 provides for a period of limitation in respect of a suit for compensation for wrongfully taking or injuring or wrongfully detaining any other specific movable property. The time from which the period begins to run would be when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful.

The possession was said to have been taken over the entire property on 16.03.1987 when the appellant had put a lock in the room. The counter claim was filed by Respondent No. 1 on 24.06.1992, i.e., five years after the alleged detention. In the peculiar factsd and circumstances of a case of this nature, if Article 91 of the Limitation Act would not apply, the residuary provision would. The fact that the plaintiff had locker in the room where the almirah containing the goods belonging to Respondent No. 1 was stored was known to Respondent No. 1 on 16.03.1987. She knew thereabout. If she had to claim damages for that act on the part of the appellant, she should have filed suit within a period of three years from the said date. Furthermore, Respondent No.1 knew about the purported alleged wrongful act on the part of the appellant. She filed an application in the nature of prointersse suo in the earlier suit. The same was rejected. Her cause of action was different and distinct from that of her brother. One lis was in relation to the declaration of title as also possession another one was in respect of damages for wrongful detention of specific movable properties. Only because in another legal proceedings by and between the appellant and Respondent No. 2, an Advocate Commissioner was appointed and inventory of the goods of the said room was prepared, the same, in our opinion, would not give rise to a fresh cause of action for laying a claim for damages. The matter might have been different if a suit for possession of the goods had been filed.

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156. LAND ACQUISITION ACT, 1894 – Sections 18 & 30

Reference u/s 18 – Only regarding the amount of compensation – Court's jurisdiction confined to answer only that question – Going beyond this issue and adjudicating dispute regarding appointment *inter se* u/s 30 is illegal as out of jurisdiction – Law explained.

Reference u/s 30 as to apportionment – No time limit – However, it should be done within reasonable time.

P.K. Sreekantan & Ors. v. P. Sreekumaran Nair & Ors.

Reported in AIR 2007 SC 516

Held :

The reference court derivé jurisdiction from the reference made. Reference under Section 18 and Section 30 are conceptually different from each other.

The decree in terms of Section 18 is different from the one in terms of Section 30. Remedy available in terms of Section 55 of the Act is against a decree. The question whether reference court can deal with the question covered by Section 30 of the Act in reference made under Section 18 of the Act and vice versa has been the subject matter of judicial determination. In *(Raj) Pramatha Nath Mullick Bahadur v. Secretary of State (AIR 1930 PC 64)* it was held that the jurisdiction of the courts under the Act is a special one and strictly limited to the terms of Sections 18, 20 and 21. It only arises when a specific objection has been taken to the Collector's Award and it is confined to a consideration of that objection. Therefore, it is certain that when the only objection taken is to the amount of compensation that alone is the matter referred and the Court has no jurisdiction to determine or consider anything beyond it.

Above being the position, the High Court's view that it was impermissible to deal with the matter covered under Section 30 of the Act while dealing with a reference in terms of Section 18 of the Act is irreversible.

However, it is to be noted that there is no time limit for seeking reference under Section 30 of the Act, though it should always be done within a reasonable time. The reasonableness of time flows from the need for a finality to judicial proceedings.

In the background of the facts situation of the present case, it would be appropriate to permit the appellants to make an application before the competent Land Acquisition Authority seeking reference in terms of Section 30 of the Act. If that is done, the necessary reference shall be made expeditiously. The amount in deposit shall be transmitted to the concerned court. It shall be open to the parties to seek with-drawal of such portion of the awarded amount in deposit on such terms as may be deemed proper by the said Court. Learned counsel for the parties stated that motion shall be moved for getting withdrawal with security. That is an aspect that the concerned court shall deal with in accordance with law.

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157. INDUSTRIAL RELATIONS ACT, 1960 (M.P.) – Section 111
Distinction between illegal appointment and irregular appointment – If an appointment is illegal – Not entitled to be classified as permanent employee nor be directed to be regularised – Law explained.
State of M.P. & Ors. v. Lalit Kumar Verma
Reported in AIR 2007 SC 528

Held :

Where the respondent was appointed as daily wager, however, the appointment was not made in terms of statutory rules or against clear vacancy or in permanent post or he was not placed on probation and he was not given ticket of permanent employee and he was furthermore not entitled to any regular scale of pay attached to any post, he could not be directed to be regularized and was not entitled to permanent status.

The legal position somehow was uncertain before the decision rendered by the Constitution Bench of this Court in *Uma Devi, 2006 AIR SCW 1991.* It has categorically been stated before us that there was no vacant post in the department in which the respondent could be reinstated. The State had also adopted a policy decision regarding regularisation. The said policy decision has also no application in the case of the respondent. Even otherwise, it would be unconstitutional being hit by Article 16 to the Constitution of India.

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158. CRIMINAL PROCEDURE CODE, 1973 – Sections 427 & 482

When neither trial court nor appellate court had exercised jurisdiction u/s 427 while passing judgments of separate conviction and separate sentences in two distinct and different offences – Application thereafter to High Court u/ss 482 and 427 praying that sentences imposed in both cases be directed to run concurrently – Not maintainable.

M.R. Kudva v. State of Andhra Pradesh

Reported in AIR 2007 SC 568

Held :

However, in this case the provision of Section 427 of the Code was not invoked in the original cases or in the appeals. A separate application was filed before the High Court after the special leave petitions were dismissed. Such an application, in our opinion, was not maintainable. The High Court could not have exercised its inherent jurisdiction in a case of this nature as it had not exercised such jurisdiction while passing the judgments in appeal. Section 482 of the Code was, therefore, not an appropriate remedy having regard to the fact that neither the Trial Judge nor the High Court while passing the judgments of conviction and sentence indicated that the sentences passed against the appellant in both the cases shall run concurrently or Section 427 would be attracted. The said provision, therefore, could not be applied in a separate and independent proceeding by the High Court....

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159. SUCCESSION ACT, 1925 – Section 63

EVIDENCE ACT, 1872– Section 63

Will – Mode and manner to prove execution of Will – Law explained – What circumstances may be suspicious ? Stated.

Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao & Ors.

Reported in AIR 2007 SC 614

Held :

Section 63 of the Indian Evidence Act lays down the mode and manner in which the execution of an unprivileged will is to be proved. Section 68 postulates the mode and manner in which proof of execution of documen is required by law to be attested. It in unequivocal terms states that execution of will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A Will is to prove

what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an animus attestandi, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

The burden of proof that the will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. [See *Madhukar D. Shende v. Tarabai Shedage, (2002) 2 SCC 85* and *Sridevi & Ors. v Jayaraja Shetty & Ors., (2005) 8 SCC 784*]. Subject to above, proof of a will does not ordinarily differ from that of proving any other document.

There are several circumstances which would have been held to be described by this Court as suspicious circumstances :–

(i) When a doubt is created in regard to the condition of mind of the testator despite his signature on the Will;

(ii) When the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;

(iii) Where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit.

[See *H. Venkatachala Iyengar v. B.N. Thimmajamma & Ors., AIR 1959 SC 443* and *Management Committee T.K. Ghosh's Academy v. T.C. Palit & Ors., AIR 1974 SC 1495*]

We may not delve deep into the decisions cited at the Bar as the question has recently been considered by this Court in *B. Venkatamuni v. C.J. Ayodhya Ram Singh & Ors. [2006 (11) SCALE 148]*, wherein this Court has held that the court must satisfy its conscience as regards due execution of the Will by the testator and the court would not refuse to probe deeper into the matter only because the signature of the propounder on the will is otherwise proved.

The proof of a will is required not as a ground of reading the document but to afford the judge reasonable assurance of it as being what it purports to be.

We may, however, hasten to add that there exists a distinction where suspicions are well founded and the cases where there are only suspicions

alone. Existence of suspicious circumstances alone may not be sufficient. The court may not start with a suspicion and it should not close its mind to find the truth. A resolute and impenetrable incredulity is demanded form the judge even there exist circumstances of grave suspicion. [See *Venkatachala Iyengar* (supra)]

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160. STAMP ACT, 1899 – Sections 36 & 33

Insufficiently stamped document – If admitted in evidence S.36 will be attracted and Court is prohibited from re-opening the matter – Judicial determination is required when document is tendered in evidence and objection is taken before marking as an exhibit in the case.

Shyamal Kumar Roy v. Sushil Kumar Agarwal

Reported in AIR 2007 SC 637

Held :

Objection as regards admissibility of a document, thus, specifically required to be taken that it was not duly stamped. On such objection only the question is required to be determined judicially.

Reliance has been placed on *Ram Rattan (Dead) by Legal Representatives vs. Bajrang Lal & Ors. [AIR 1978 SC 1393],* which in our opinion has no application to the fact of the present case.

When there had been no determination as regards sufficiency of the stamp duty paid on an instrument and in the event the document is taken in evidence with an endorsement, that "objected, allowed subject to objection", this Court in *Ram Rattan* (supra) held that the objection was not judicially determined and the document was merely tentatively marked and in such a situation Section 36 would not be attracted. *Ram Rattan* (supra) also therefore, is an authority for the proposition that the party objecting to the admissibility of the document must raise an objection so as to enable the trial judge to determine the issue upon application of his judicial mind at the appropriate stage.

If no objection had been made by Appellant herein in regard to the admissibility of the said document, he, at a later state, cannot be permitted to turn round and contend that the said document is inadmissible in evidence.

Appellant having consented to the document being marked as an exhibit has lost his right to reopen the question.

What was necessary was that the document should be marked in presence of the parties and they had an opportunity to object to the marking of the document. The question of judicial determination of the matter would arise provided an objection is taken what document is tendered in evidence and before it is marked as an exhibit in the case....

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161. LIMITATION ACT, 1963 – Article 58

A suit for declaration relating to service matter – Governed by Article 58 of Limitation Act and the period is three years.

Declaration about illegality of order denying revised scale of pay – Time stated to run from the date of endorsement of the order.

State of Punjab & Anr. v Balkaran Singh

Reported in AIR 2007 SC 641

Held :

... The suits filed are for declaration that the order or endorsement dated 13.3.1980 was illegal and void. The suits were filed more than 12 years after the order fixing the revised scale of pay at Rs. 940-1850/-. A suit for declaration is governed by Article 58 of the Limitation Act and the period is three years and the terminus a quo is "when the right to sue first accrues". Clearly, the right to seek the relief of declaration that they are entitled to revised scale of pay of Rs. 1200-1850/-, accrued to the plaintiffs on 13.3.1980, when the endorsement in that behalf was made by the Director of Agricultural Services and the plaintiffs were denied revised pay at Rs. 1200-1850/- and were paid only at Rs. 940-1850/-.It was not the mere making of an order, but an action that had immediate impact on the right of the plaintiffs to recover a higher salary as per their claim. The cause of action thus clearly arose for the first time. Thus the suit for declaration was clearly barred by limitation going by Article 58 of the Limitation Act. The fact that some other officer had been given a decree for the enhanced revised scale, does not furnish the plaintiffs in the first two suits with a fresh cause of action. It is well settled that the time does not stop to run once it has started to run.

... This Court in *S.S. Rathore vs. State of Madhya Pradesh (1989 (4) SCC 582)*, a decision rendered by seven Hon'ble Judges, has clearly held in suits relating to service matters, that "yet, suits outside the purview of the Administrative Tribunals Act shall continue to be governed by Article 58". In a series of subsequent decisions, this Court has held that a suit for declaration in matters relating to a service is governed by Article 58 of the Limitation Act, 1963. (See for instance, *Mohdd. Quaramuddin (Dead) by Lrs. vs. State of A.P. [(1994) 5 SCC 118]; Vasant Ramchandara Deshpande vs. State of Maharashtra & Ors. [(1997) 11 SCC 305]; Rajasthan State Road Transport Corporation & Ors, vs. Nand Lal [1999 SCC (L & S) 658]. In State of Punjab & Ors. vs. Gurdev Singh [(1991) 4 SCC 1]*, a three-Judge Bench of this Court held that a party aggrieved by the order, even if it is found to be void, has to approach the court for relief of declaration that the order against him is inoperative and void within three years of the order. It is one thing to say that the plaintiffs might make a claim that they must also be paid in future at the revised scale of pay of Rs. 1200-1850/- in view of the decision rendered in favour of another officer of the same department. But that does not enable them to revive a claim for the relief of declaration which had become long ago barred. A cause of action once barred does not get revived in such a case...

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162. INDIAN PENAL CODE, 1860 – Sections 300 & 302

Murder – Circumstantial evidence – Chain of evidence completed – Conviction of accused proper.

Death sentence, when proper ? Law explained.

Accused committed murder of his wife and four children – Act not only brutal but also inhumane with no remorse for the same.

Claim to be in drunkenness at relevant time – Does not dilute the gravity of the offence – Case squarely falls under rarest of rare category to warrant death sentence.

Bablu alias Mubarik Hussain v. State of Rajasthan

Reported in AIR 2007 SC 697

Held :

The trial Court relied upon the following circumstances to find the accused guilty –

(1) Extra judicial confession made by the appellant before Murad Khan (PW-1), Bablu Kalva (PW-2), Mohd Sharif (PW-3) and Alladeen (PW-4).

(2) The presence of the appellant in the house wherein the alleged incident took place.

(3) Recovery of ear-ring of the wife from the possession of the appellant.

... The circumstances highlighted by the prosecution according to the High Court presented a complete chain of circumstances.

Though it was submitted by the accused-appellant that even if the prosecution case was accepted in its totality, there was no special reason to impose the death sentence. The High Court considered this plea in the back ground of what has been stated by this Court in *Machhi Singh and Ors. v. State of Punjab, (1983 (3) SCC 470)* and *Bachan Singh v. State of Punjab, (1980 (2) SCC 684)*. Reference was also made to the decision in *State of Rajasthan v. Kheraj Ram, (2003 (8) SCC 224)*. The High Court was of the view that the appellant had acted in a most cruel and diabolic manner. He deliberately planned and meticulously executed the same. There was not even any remorse for such gruesome acts. On the contrary, he was satisfied with what he had done. He made a declaration of his act of abusing his wife and children. Accordingly, the death sentence was confirmed.

★ ★ ★

Therefor the only other thing which needs consideration is whether death sentence as awarded by trial Courts is proper.

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In *Bachan Singh's case (supra) it* has been observed that *(SCC p. 751, para 209)*

"A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. In order to apply these guidelines, inter alia, the following questions may be asked and answered, (a) is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence ? and (b) are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

Another decision which illuminatingly deals with the question of death sentences is *Machhi Singh's Case* (supra).

In *Machhi Singh* (supra) and *Bachan Singh* (supra) cases the guidelines which are to be kept in view when considering the question whether the case belongs to the rarest of the rare category were indicated.

In *Machhi Singh case* (supra) it was observed (SCC p. 489, para 39) :

The following questions may be asked and answered as a test to determine the rarest of the rare case in which death sentence can be inflicted :–

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence ?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

The following guidelines which emerge from *Bachan Singh's case* (supra) will have to be applied to the facts of each individual case where the question of imposition of death sentence arises (SCC p. 489, para 38) :–

(1) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'cirme'.

(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether in adequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances :

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

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

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

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

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

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

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The defence of drunkenness can be availed of only when intoxication produces such a condition as the accused loses the requisite intention for the offence. The onus of proof about reason of intoxication due to which the accused had become incapable of having particular knowledge in forming the particular intention is on the accused. Basically, three propositions as regards the scope and ambit of Section 85 IPC are as follows :

(i) The insanity whether produced by drunkenness or otherwise is a defence to the crime charged ;

(ii) Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into account with the other facts proved in order to determine whether or not he had this intent; and (iii) The evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime and merely establishing that his mind is affected by drink so that he more readily give to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

In the instant case, the plea of drunkenness can never be an excuse for the brutal, diabolic acts of the accused. The trial Court and the High Court have rightly treated the case to be one falling in rarest of rare category thereby attracting the death sentence.

The brutal acts done by the accused appellant are diabolic in conception and cruel in execution. The acts were not only brutal but also inhuman with no remorse for the same. Merely because he claims to be drunk at the relevant point of time, that does not in any way get diluted not because of what is provided in Section 85 IPC but because one after another five lives were taken and that too of four young children. This case squarely falls under the rarest of rare category to warrant death sentence.

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163. INDIAN PENAL CODE, 1860 – Section 304-B
DOWRY PROHIBITION ACT, 1961 – Section 2
No dowry – Demand for money due to financial stringency or meeting urgent domestic expenses.
Accused demanding money for domestic expenses and purchase of manure – Cannot be convicted for dowry death.
Appasaheb & Anr. v. State of Maharashtra
Reported in AIR 2007 SC 763

Held :

Two essential ingredients of Section 304-B IPC, apart from others, are (i) death of woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances, and (ii) woman is subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for "dowry". The explanation appended to sub-section (1) of Section 304-B IPC says that "dowry" shall have the same meaning as in Section 2 of Dowry Prohibition Act, 1961.

Section 2 of Dowry Prohibition Act reads as under :–

"2. Definition of "dowry" – In this Act "dowry" means any property or valuable security given or agreed to be given either directly or indirectly-

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parent of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (shariat) applies."

In view of the aforesaid definition of the word "dowry" any property or valuable security should be given or agreed to be given either directly or indirectly at or before or any time after the marriage and in connection with the marriage of the said parties. Therefore, the giving or taking of property or valuable security must have some connection with the marriage of the parties and a correlatio between the giving or taking of property or valuable security with the marriage of the parties is essential. Being a penal provision it has to be strictly construed. Dowry is a fairly well known social custom or practice in India. It is well settled principle of interpretation of Statute that if the Act is passed with reference to a particular trade, business or transaction and words are used which everybody conversant with that trade, business or transaction knows or understands to have particular meaning in it, then the words are to be construed as having that particular meaning. (See *Union of India vs. Garware Nylons Ltd. AIR 1996 SC 3509 and Chemicals and Fibres of India vs. Union of India AIR 1997 SC 558).* A demand for money on account of some financial stringency or for meeting some urgent domestic expenses or for purchasing manure cannot be termed as a demand for dowry as the said word is normally understood. The evidence adduced by the prosecution does not, therefore, show that any demand for "dowry" as defined in Section 2 of the Dowry Prohibition Act was made by the appellants as what was allegedly asked for was some money for meeting domestic expenses and for purchasing manure. Since an essential ingredient of Section 304-B IPC viz. demand for dowry is not established, the conviction of the appellants cannot be sustained.

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164. HINDU MARRIAGE ACT, 1955 – Sections 23 (2) & 24
***Pendent lite* maintenance granted without making an effort of reconciliation u/s 23 (2) is not illegal – Provisions of S. 23 (2) of the Act not mandatory.**
Sidharth v. Smt. Kanta Bai
Reported in AIR 2007 MP 59

Held :

Dwelling upon various aspects, we proceed to state our conclusions as follows :

(i) Section 24 of the Act fundamentally deals with an ancillary or incidentally relief and is an enabling provision to empower either of the spouses to put forth the defences in the main proceeding.

(ii) Section 23(2) and Section 24 coexist in harmony and in fact if the context and subject-matter are appreciated in proper perspective, there is no anomaly in between the two provisions.

(iii) Section 23(2) is not mandatory and does not operate in absolute terms.

(iv) Any order passed without compliance under Section 23(2) as has been held in the case of *Dharmendra Kumar* (AIR 1995 MP 210) would be an irregularity and not illegality.

(v) An order under Section 24 can always be passed without taking steps for bringing out reconciliation under Section 23(2) of the Act for the timing to make efforts for reconciliation is in the discretion of the Court.

(vi) Grant of pendent lite maintenance under Section 24 of the Act is not to be construed in a narrow compass as the Court has jurisdiction to pass the order arises at the stage of institution of proceedings and continues till the proceeding is concluded.

(vii) The maintenance and the entitlement under section 24 of the Act can be made available even in a proceeding pertaining to setting aside of an exparte decree and restoration of the main suit.

(viii) The judgment delivered in the case of *Kesav Rao v. Tihalivai, 2003 (I) MPHT 5 (NOC)* does not lay down the correct law and any judgment following the said decision should be deemed not to have lay down the law correctly.

(ix) 'Any relief' that has been used in Section 23(2) would not cover an incidental and ancillary relief during the proceeding as that has to be construed in broader canvass and would include only substantive relief and further if there is non-conpliance of the same, it would amount to an irregularity and not an illegality and such irregularity is rectifiable at the appellate stage and would not render the judgment or an order a nullity.

(x) As we have concurred with the view rendered in the case of *Dharmendra Kumar* (supra) there is no need to refer the matter to a larger bench.

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165. HINDU SUCCESSION ACT, 1956 – Section 14
HINDU WOMEN'S RIGHT TO PROPERTY ACT, 1937– Section 3
Right to maintenance of Hindu female – Pre-existing right under Shastric Hindu Law – Even 1937 Act does not apply – Widow in possession of property of her husband has right in the same – Word 'acquired' used in Section 14 of the Act includes right acquired by succession – Alienation of property by widow is valid.
Dayalal & Ors. v. Bhaiyalal & Ors.
Reported in AIR 2007 MP 72

Held :

As per the findings of the two Courts below, Pooran died in 1947 and

Rambai who was his widow continued to be in possession and became the owner as per 1937 Act. Contention of the learned counsel for the appellants is that Kurwai was situated in the erstwhile State of Bhopal and as per Merger of States Act, 1949, 1937 Act was adopted in the erstwhile Madhya Bharat in the year 1951. Therefore, in the year 1947-48 i.e. on the date of death of Pooran, 1937 Act was not in force at Kurwai and therefore, Rambai had no right, title or interest in the suit property and sale deed executed by her in favour of Kanhaiyalal does not convey any title and the property devolved on the plaintiff after the death of Pooran.

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.... The Apex Court in the case of *Raghubar Singh v. Gulab Singh, AIR 1998 SC 2401* has held that the right to maintenance of a Hindu female flows from the social and temporal relationship between the husband and the wife and that right in the case of a widow is "pre-existing right", which existed under the Shastric Hindu Law long before the passing of the 1937 or the 1946 Acts. Those laws merely recognises the position as was existing under the Shastric Hindu Law and gave it a "statutory" backing. Where a Hindu widow is in possession of the property of her husband, she has a right to be maintained out of it and she is entitled to retain the possession of that property in lieu of her right to maintenance and becomes the absolute owner by virtue of Section 14 of Hindu Succession Act.

In view of this, counsel for the respondents submitted that even if 1937 Act was not applicable to Kurwai, Still the principles will be applicable in the present case as rights given to Hindu widow under 1937 Act are pre-existing rights which are recognised by Shastric Hindu Law. 1937 Act merely recognises these existence of rights under Shastric Hindu Law by giving statutory effect. Thus, the right of Hindu widow is pre-existing right and therefore, even in the absence of application of 1937 Act at Kurwai, the right of Rambai remained the same.

... In the case of *Badri Prasad v. Kanso Devi, AIR 1970 SC 1963* the Supreme Court interpreted the word "acquired" appearing in S. 14 of the Hindu Succession Act. The Apex Court has laid down that the word "acquired" used in sub-section (1) of S. 14 of the Hindu Succession Act has also to be given the widest possible meaning. This would be so because of the language of the Explanation which makes sub-section (1) applicable to acquisition of property in manners mentioned therein. Sub-section (2) is more in the nature of a proviso or an exception to sub-section (1). It comes into operation only if acquisition in any of the methods indicated therein is made for the first time without there being any pre-existing right in the female Hindu who is in possession of property.

Thus, as per the judgment of the Apex Court, the Word "Acquired" has to be given the widest possible meaning.

Similar view is taken by the Apex Court in the case of *Munnalal v. Rajkumar, AIR 1962 SC 1493.*

Thus, the word "acquired" is used in the widest possible meaning which will also include the right acquired by succession. Thus, property of Pooran which came in possession of Rambai after his death and Rambai being the widow of Pooran had acquired right in the suit property by way of succession. Even in the absence of any evidence that 1937 Act was applicable to Kurwai or not as per Shastric Hindu Law, Rambai had right in the suit property for maintenance or as heir or Pooran and therefore, she had become the absolute owner after coming into force of Hindu Succession Act. Therefore, she had right to alienate the property.

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166. TRANSFER OF PROPERTY ACT, 1882 – Sections 41, 43 & 52

Scope and applicability – S.52 only binds the purchaser during the pendency of suit – Not render the transaction quite as it is neither contrary to law nor hit by S.43 of the Act.

S.43 operates to perfect respondents' title in suit property on the transfer acquiring the subsequent interest in the sale – It is different from the requirement u/s 41 – The ingredients of S.41 enumerated.

Defence that S.43 is not applicable may be raised only by the transferor.

Doctrine of "Feeding the estopple" explained.

Hardev Singh v. Gurmail Singh (Dead) by L. Rs.

Judgment dt. 2.2.2007 passed by the Supreme Court of India in Civil Appeal No. 6222 of 2000, reported in (2007) 2 SCC 404

Held :

Application of Section 41 of the TP Act is based on the law of estoppel to the effect that if a man has represented that the transferor consents to an act which has been done and that he would not offer any opposition thereto, although the same could not have been lawfully done without his consent and he thereby induces others to do that from which they might have abstained, he could not question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct.

The ingredients of Section 41 of the TP Act are :

(i) the transferor is the ostensible owner;

(2) he is so by the consent, express or implied, of the real owner;

(3) the transfer is for consideration ;

(4) the transferee has acted in good faith, taking reasonable care to ascertain that the transferor had power to transfer.

Section 43, on the other hand, embodies a "rule of feeding the estoppel" and enacts that a person who makes a representation shall not be heard to allege the contrary as against a person who acts thereupon and it is immaterial whether the transferor acts bona fide or fraudulently in making the

representation. The principle is based on an equitable doctrine that a person who promised to perform more than he can perform must make good his contract when he acquires the power of performance. The doctrine of feeding the estopple envisages that "where a grantor has.purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition, goes automatically to the earlier grantee, or as it is usually expressed, *feeds the estoppel.*"

Jumma Masjid v. Kodimaniandra Deviah, AIR 1962 SC 847 : 1962 Supp (2) SCR 554, relied on

In order to get the benefit of Section 43 the conditions which must be satisfied are :

(1) the contract of transfer was made by a person who was competent to contract; and

(2) the contract would be subsisting at the time when a claim for recovery of the property is made.

However, the provisions of Section 43 would have no application if the transfer was invalid as being forbidden by law or contrary to public policy, as envisaged under Section 23 of the Contract Act, 1872, Thus, no estoppel can be pleaded contrary to the provisions of a statute. The "rule of feeding the estoppel" shall apply in absence thereof.

The difference between the ambit of Sections 41 and 43 of the Act is apparent. Section 41 provides that a transfer by an ostensible owner cannot be avoided on the ground that the transferor was not authorised therefore, subject to the condition that the transferee should take reasonable care to ascertain that the transferor had power to make the transfer and to act in good faith before a benefit thereof is claimed by him. Section 43, on the other hand, enables the transferee to whom a transferor has made a fraudulent or erroneous representation to lay hold, at his option, of any interest which the transferor may subsequently acquire in the property, unless the right of any subsequent purchaser for value without notice is in effect.

In the present case the High Court has declined to grant any relief to the respondent in terms of Section 41 of the TP Act, inter alia, on the premise (1) that *H* admitted that he had sold the property to the respondent in order to frustrate the claim of *U;* (2) a public notice was not given; and (3) that the respondent had knowledge regarding the pending litigation, and it was for the respondent to show that he had no knowledge about the litigation. In applying the provisions of Section 43 of the Transfer of Property Act, the High Court, however, held:

(i) it was *H* who had pleaded the mischief;

(ii) after the death of *U, H* would be the natural heir of the half-share of her property.

Section 52 of the TP Act merely prohibits a transfer. It does not state that the same would result in an illegality. Only the purchaser during the pendency of a suit would be bound by the result of the litigation. The transaction as per the sale deed dated 17-3-1982, therefore, was not rendered void and/or of no effect nor was it contrary to any provision of law. It was not hit by Section 23 of the Contract Act. Hence the submission that the ingredients of Section 41 would also be applicable in a case falling under Section 43 of the Act cannot be accepted.

It is one thing to say that the respondent was aware of the litigation, but it is another thing to say that he did not purchase the property on representation of H. In fact, from the judgment of the courts below it does not appear that any finding has been arrived at to the effect that the respondent was aware that the said H had no title over the property.

The appellant claimed absolute interest in the property on the premise that his mother has executed a will in his favour on 3-10-1995. The said will has not been proved. If the title claimed is on the basis of the will, the same was required to be proved in the light of the provisions contained in Section 63 of the Succession Act and Section 68 of the Evidence Act. If the will has not been proved, in the absence of such proof the general law of succession and inheritance shall apply.

Further, the plea of inapplicability of Section 43 of the Transfer of Property Act could have been taken by *H* and not by the appellant, who has based his claim on the basis of the will. The principle of feeding the estoppel will apply against H and not against the appellant. The appellant could to have therefore, raised the said plea.

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167. HINDU MARRIAGE ACT, 1955 – Sections 13 & 23 (2)
CIVIL PROCEDURE CODE, 1908 – O. 3 R.1, O. 9 R.12 & O. 32 R. 3
Power of Court to direct a party (plaintiff or defendant) to appear in person.
Divorce petition – Issuance of interim order of non-bailable warrant for non-compliance with Court order to appear in person – Legality – Held, it is within the power of Court.
Jagraj Singh v. Birpal Kaur.
Judgment dt. 13.2.2007 passed by the Supreme Court in Civil Appeal No. 711 of 2007, reported in (2007) 2 SCC 564

Held:

It is not possible to accept the bald assertion of the appellant that no court of law can direct a party to remain personally present. Apart from the matters under the Act, even in civil matters also, a court of law may order either the plaintiff or the defendant to remain personally present in court. For instance, from Order 3 Rule 1, and Order 9 Rule 12 CPC, it is clear that in appropriate

cases, a civil court may direct a party to the suit, plaintiff or defendant, to appear in person.

Order 32-A Rule 3 CPC requires the court to make efforts for settlement of family disputes. The Hindu Marriage Act, 1955 is a special Act dealing with the provisions relating to marriages, restitution of conjugal rights and judicial separation as also nullity of marriage and divorce. The approach of a court of law in matrimonial matters is much more constructive, affirmative and productive rather than abstract, theoretical or doctrinaire. Matrimonial matters must be considered by courts with human angle and sensitivity, Delicate issues affecting conjugal relations have to be handled carefully and legal provisions should be construed and interpreted without being oblivious or unmindful of human weaknesses.

Section 23(2) of the Act is a salutary provision exhibiting the intention of Parliament requiring the court "in the first instance" to make every endeavour to bring about a reconciliation between the parties. Therefore, if an order is passed by a matrimonial court asking a party to the proceeding (husband or wife) to remain personally present, it cannot successfully be contended that the court has no such power and that in case a party to a proceeding does not remain present, at the most, the court can proceed to decide the case ex parte against him/her. Upholding of such argument would virtually make the benevolent provision nugatory, ineffective and unworkable, defeating the laudable object of reconciliation in matrimonial disputes.

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168. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
CRIMINAL PROCEDURE CODE, 1973 – Section 243 (2)
Rejection of prayer of accused to sign the cheque for opinion of handwriting expert to ascertain the genuineness of signature on it – Improper – Court should have granted such a request unless it considers that the object of the accused was vexatious or delaying the criminal proceedings – Denial of the prayer would lead to unfair trial.
Kalyani Baskar (Mrs.) v. M.S. Sampoornam (Mrs.)
Judgment dt. 11.12.2006 passed by the Supreme Court in Criminal Appeal No. 1293 of 2006, reported in (2007) 2 SCC 258

Held :

The present appeal involved a question with regard to the scope of the powers of the powers of the Magistrate under Section 243 CrPC.

A complaint was filed against the appellant and her husband for the offence under Section 138 of the Negotiable Instruments Act, 1881. In the complaint it was alleged that the appellant along with her husband jointly signed and issued a cheque for discharging their liability, but the said cheque got dishonoured due to "insufficient funds" in the account. The accused appeared before the Magistrate and filed an application under Section 245 CrPC raising *inter alia*

preliminary objections that : (1) the accused had not signed the cheque nor issued it to the complainant, (2) the cheque in question was drawn from the individual account of the accused and therefore, as alleged by the complainant, the appellant and her husband could not have jointly signed and issued the cheque; (3) the signature on - Arising out of SLP (Crl.) No. 26.39 of 2004. From the Final Judgment and Order dated the cheque may be sent for expert opinion to ascertain *bona fides* of the same; and (4) neither the appellant nor her husband owe any debt to the complainant.

The Magistrate dismissed the said application on the ground that the genuineness of the signature could be questioned only at the time of trial of the complaint. During the trial, the appellant preferred an application under Section 243 CrPC, requesting the Magistrate to send the cheque in question for expert opinion to ascertain the correctness and genuineness of the appellant's signature appearing thereon. The Magistrate dismissed the said application on the ground that it was not mandatory that every disputed document or signature must be sent to an expert for opinion, that the original document filed in the court cannot be sent out for any reason and that every document filed before the court should be safe till the disposal of the litigation. The challenge made to the said order was rejected by the High Court. Hence, the present appeal.

Section 243(2) CrPC is clear that a Magistrate holding an inquiry under CrPC in respect of an offence triable by him does not exceed his powers under Section 243(2) if, in the interest of justice, he directs to send the document for enabling the same to be compared by a handwriting expert because even in adopting this course, the purpose is to enable the magistrate to compare the disputed signature or writing with the admitted writing or signature of the accused and to reach to his own conclusion with the assistance of the expert.

The appellant in this case requested for sending the cheque in question for the opinion of the handwriting expert after the respondent had closed her evidence. The Magistrate should have granted such a request unless he thinks that the object of the appellant is vexation or delaying the criminal proceedings. The appellant is entitled to rebut the case of the respondent and if the document viz. The cheque on which the respondent has relied upon for initiating criminal proceedings against the appellant would furnish good material for rebutting that case, the Magistrate having declined to send the document for the examination and opinion of the handwriting expert has deprived the appellant of an opportunity of rebutting it. The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. "Fair trial" includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right and denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and the courts should be jealous in seeing that there is no breach of them. The view of the High Court that the petitioner has filed application under Section 243 CrPC without naming any person as witness or anything to be

summoned, which are to be sent for handwriting expert for examination, could not be appreciated.

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169. ARBITRATION ACT, 1940 – Section 37

Application for setting aside award filed – Delay of 3320 days – No explanation given – Condoning the inordinate unexplained delay without assigning any satisfactory, reasonable, sufficient and proper reasons, cannot be countenanced.

D. Gopinathan Pillai v. State of Kerala and another

Judgment dt. 15.1.2007 passed by the Supreme Court in Civil Appeal No. 220 of 2007, reported in (2007) 2 SCC 322

Held :

We have perused the entire order. However, without assigning any acceptable reason, Principal Sub-Judge, Thiruvananthapuram has condoned the inordinate delay of 3320 days and allowed the IA filed by the State of Kerala. While condoning the delay, the learned Sub-Judge has also observed that the officers of the State of Kerala have committed gross negligence in not filing the objection for a long period of 3320 days and therefore, for the fault of the officers, the State should not be penalised.

We are unable to countenance the finding rendered by the Sub-Judge and also the view taken by the High Court. There is no dispute in regard to the delay of 3320 days in filing the petition for setting aside the award. When a mandatory provision is not complied with and when the delay is not properly, satisfactorily and convincingly explained, the court cannot condone the delay, only on the sympathetic ground. The orders passed by the learned Sub-Judge and also by the High Court are far from satisfactory. No reason whatsoever has been given to condone the inordinate delay of 3320 days. It is well-considered principle of law that the delay cannot be condoned without assigning any reasonable, satisfactory, sufficient and proper reason. Both the courts have miserably failed to comply and follow the principle laid down by this Court in a catena of cases. We, therefore, have no other option except to set aside the order passed by the Sub-Judge and as affirmed by the High Court ...

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170. CRIMINAL PROCEDURE CODE, 1973 – Section 389 (1)

Appellate Court – Suspension or grant of stay of order of conviction – But accused should specifically draw the attention of the Appellate Court to the consequences that may arise otherwise – Moreover, grant of stay of conviction can be resorted to in rare cases depending upon the facts of the case – Law explained.

Navjot Singh Sidhu v. State of Punjab and another

Judgment dt. 23.1.2007 passed by the Supreme Court in Criminal MP No. 49 of 2007, reported in (2007) 2 SCC 574

Held :

Before proceeding further it may be seen whether there is any provision which may enable the Court to suspend the order of conviction as normally what is suspended is the execution of the sentence. Sub-section (1) of Section 389 says that pending any appeal by a convicted person, the appellate court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond. This sub-section confers power not only to suspend the execution of sentence and to grant bail but also to suspend the operation of the order appealed against which means the order of conviction. This question has been examined in considerable detail by a three-Judge Bench of this Court in *Rama Narang vs. Ramesh Narang, (1995) 2 SCC 513* and Ahmadi, C.J. speaking for the Court, held as under (para 19 of the reports) : (SCC p. 527)

> "19. That takes us to the question whether the scope of Section 389(1) of the Code extends to conferring power on the appellate court to stay the operation of the order of conviction. As stated earlier, if the order of conviction is to result in some disqualification of the type mentioned in Section 267 of the Companies Act, we see no reason why we should give a narrow meaning to Section 389(1) of the Code to debar the court from granting an order to that effect in a fit case. The appeal under Section 374 is essentially against the order of conviction because the order of sentence is merely consequential thereto; albeit even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilt. Therefore, when an appeal is preferred under Section 374 of the Code the appeal is against both the conviction and sentence and therefore, we see no reason to place a narrow interpretation on Section 389 (1) of the Code not to extend it to an order of conviction, although that issue in the instant case recedes to the background because High Courts can exercise inherent jurisdiction under Section 482 of the Code if the power was not to be found in Section 389 (1) of the Code. We are, therefore, of the opinion that the Division Bench of the High Court of Bombay was not right in holding that the Delhi High Court could not have exercised jurisdiction under Section 482 of the Code if it was confronted with a situation of there being no other provision in the Code for staying the operation of the order of conviction. In a fit case if the High Court feels satisfied that the order of conviction needs to be suspended or stayed so that the convicted person does not suffer from a certain disqualification provided for in any other statute, it may exercise the power because otherwise the damage done cannot be undone; the disqualification incurred by Section 267 of the Companies Act and given effect to cannot be undone at a subsequent date if the conviction is set aside by the appellate court.

But while granting a stay or suspension of the order of conviction the Court must examine the pros and cons and if it feels satisfied that a case is made out for grant of such an order, it may do so and in so doing it may, if it considers it appropriate, impose such conditions as are considered appropriate to protect the interest of the shareholders and the business of the company."

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The legal position is, therefore, clear that an appellate court can suspend or grant stay of order of conviction. But the person seeking stay of conviction should specifically draw the attention of the appellate court to the consequences that may arise if the conviction is not stayed. Unless the attention of the court is drawn to the specific consequences that would follow on account of the conviction, the person convicted cannot obtain an order of stay of conviction. Further, grant of stay of conviction can be resorted to in rare cases depending upon the special facts of the case.

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171. CONTRACT ACT, 1872 – Sections 74 & 55

Court had accepted the highest bid and only after confirmation of the same by the Supreme Court, appellant was to pay the balance amount of consideration in this situation, time cannot be said to be essence of the contract – Hence, direction of the Court for forfeiture of the earnest money was not justified – Forfeiture of earnest money can be permissible only after concluded contract comes into existence.

Yogesh Mehta v. Custodian Appointed under the Special Court and Others **Judgment dt. 4.1.2007 passed by the Supreme Court in Civil Appeal No. 4512 of 2006, reported in (2007) 2 SCC 624**

Held :

The acceptance of the bid was subject to the order of the Supreme Court which by reason of the order of the Special Court or otherwise did not result in a concluded contract. The deposit was to be made within sixty days from the date of grant of sanction which would mean final acceptance of the bid, which was to depend upon the ultimate order which was to be passed by the Supreme Court.

If there had been a stay in regard to acceptance of the bid, it could not have been sanctioned. It could be sanctioned subject to the final order of the supreme Court. Moreover, when the Supreme Court issued direction in regard to confirmation of sale, the matter ought to have been considered afresh.

In the peculiar facts and circumstances of this case, it is difficult to accept the submission that the bid was accepted finally, but only possession was to be taken by the purchasers at their own risk.

State of Maharashtra v. A.P. Paper Mills Ltd., (2006) 4 SCC 209, distinguished

Foreiture of the earnest money in the aforementioned situation, could not have been directed. While directing forfeiture of the "earnest money" the provisions

of the Contract Act, 1872 are to be kept in mind. Forfeiture is permissible only when a concluded contract has come into being and not prior thereto.

Chairman, Bankura Municipality v. Lalji Raja & Sons. AIR 1953 SC 248 : 1953 Cri LJ 1101 : *Maula Bux v. Union of India,* (1969) 2 SCC 554 : AIR 1970 SC 1955; *Saurabh Prakash v. DLF Universal Ltd.,* (2007) 1 SCC 228 : (2006) 12 Scale 531, relied on

It may be that the time was of the essence of contract. But this question is required to be considered having regard to the fact situation obtaining in each case. If the deposit was to be made from the date of final sanction of the offer, question of applicability of the said proposition of law could not arise.

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172. BANKER AND CUSTOMER :

Hire Purchase – Recovery – The practice of hiring recovery agents, who are muscle men, is deprecated and needs to be discouraged – Bank should resort the procedure recognized by law to take possession of vehicles in cases where borrower has committed default instead of resorting to strongarm tactics.

ICICI Bank Ltd. v. Prakash Kaur and others

Judgment dt. 26.2.2007 passed by the Supreme Court in Criminal Appeal No. 267 of 2007, reported in (2007) 2 SCC 711

Held :

Before we part with this matter, we wish to make it clear that we do not appreciate the procedure adopted by the Bank in removing the vehicle from the possession of the writ petitioner. The practice of hiring recover agents, who are musclemen, is deprecated and needs to be discouraged. The Bank should resort to procedure recognised by law to take possession of vehicles in cases where the borrower may have committed default in payment of the instalments instead of taking resort to strong-arm tactics.

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In conclusion, we say that we are governed by the rule of law in the country. The recovery of loans of seizure of vehicles could be done only through legal means. The banks cannot employ goondas to take possession by force.

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173. SERVICE LAW :

M.P. CIVIL SERVICES PENSION RULES, 1976 – Rule 42

Assistant Surgeon – Appointed on ad hoc basis – Not entitled to pension under Rules of 1976.

Dr. Arjun Kumar Assudani v. State of Madhya Pradesh and others

Judgment dt. 08.03.2007 passed by the High Court at Main Seat, Jabalpur in W.P. No. 4366 of 2003

Held:

Admittedly, the aforesaid finding that the petitioner's appointment was on adhoc basis for a fixed period of six months under the contract recorded by the Tribunal has attained finality.

Sub Clause (ii) of Rule 2 of the M.P. Civil Services Pension Rules, 1976 (for short 'Pension Rules') provides that these rules shall not apply to persons in a work-charged establishment, persons in casual and daily rated employment, persons paid from contingencies, persons entitled to the benefit of Contributory Provident Fund, persons employed on contract except when the contract provides otherwise and persons whose terms and conditions of service are regulated by any other rules for the time being in force. In the circumstances, the petitioner's claim to grant pensionery benefits permissible under Rule 42 of the Pension Rules cannot be accepted as the Pension Rules are not applicable to the petitioner's case.

The petitioner's next contention that the orders relating to the treating the absence period as dies-non are illegal and arbitrary, also, cannot be accepted. As already held by the Tribunal the petitioner was appointed on ad hoc basis for a fixed period under the contract. In the circumstances the provisions of M.P. Civil Services (Leave) Rules, 1977 (for short 'Leave Rules') are not applicable to the petitioner in view of Section 2 of the Leave Rules. In view of the nature of appointment of the petitioner which is ad hoc in nature, the petitionier's reliance on the order dated 4.5.2005 passed in W.P. No 6969.2002 by a Division Bench order dated 3.8.2006 passed in W.P. No. 6829/2003 by the learned Single Judge of this Court in *Dr. Nemi Kochar vs. State of M.P. and others* is misplaced. The aforesaid cases are based on entirely different footings and are not applicable to the facts of this case.

Having regard to the aforesaid, in the absence of applicability of the Pension Rules and the Leave Rules the petitioner is not entitled for the reliefs claimed. No case for interference is made out.

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174. SERVICE LAW :

M.P. EDUCATIONAL (COLLEGIATE BRANCH) RECRUITMENT RULES, 1967 Absorption – Principal of private college absorbed on the post of Assistant Professor who was lacking teaching experience as a Professor – Held, while he was holding the post of Principal which is higher than Professor his absorption as Principal not to be denied on the aforesaid ground – Undertaking for abiding the condition of absorption cannot be stretched to the extent of denying him legal right accrued under the rule of absorption.

Rejendra Prasad Gupta v. State of Madhya Pradesh and another

Judgment dt. 01.02.2007 passed by the High Court at Main Seat, Jabalpur in W.P. No. 6225 of 2003

Held:

... In the circumstances, the teaching experience or the petitioner while he was holding the post of Principal which is higher than the post of Professor cannot be ignored and the petitioner cannot be denied the absorption only on the count that he never held the post of Professor. Clause 4(3) of Schedule III-A cannot be interpreted so as to exclude the experience gained by the petitioner while he was holding the higher post of Principal.

Thus, in my considered view the petitioner was having requisite experience provided under clause 4(3) of Schedule III-A of the rules for his absorption on the post of Principal of degree. Accordingly, the decision of the screening committee denying him absorption on the post of Principal and ordering his absorption on the lower post of Assistant Professor is quashed. The respondents contention that since the petitioner gave an undertaking that he shall abide by the conditions of absorption and as such he cannot challenge his absorption to a lower post cannot be accepted. In my view, the petitioner in his undertaking did not will accept the undertake even to a lower post, Moreover, the undertaking as given by the petitioner cannot be stretched to the extent of denying him his legitimate right accrued to him under the rules of absorption.

In this view of the matter the respondents are directed to treat the petitioner to be absorbed on the post of Principal and treat him on the said post from the initial date of his absorption on the post of Assistant Professor. The petitioner shall be entitled for consequential benefits flowing from his absorption on the post of Principal from that date.

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175. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (m) Eviction on the ground of alternation in accommodation – Nature and scope of S.12 (1) (m) – Construction of temporary nature does not amount to materially altering the accommodation – Hence, not covered by S.12 (1) (m) – Law explained.
Manisha Lalwani v. Dr. D.V. Paul
Reported in 2007 (2) MPLJ 52

Held :

Under clause (m) of sub-section (1) of section 12 of the Act a landlord is allowed to file a suit for eviction against his tenant if the tenant has made or permitted to be made any construction in the suit-premises –

(a) without the written permission of the landlord;

(b) (i) which has materially altered the accommodation to the detriment of the landlord's interest; or

(b) (ii) which is likely to diminish its value substantially.

It is an unauthorized construction which provides a cause of action for tenant's eviction but every construction or alteration made by the tenant in the building

does not provide a ground for eviction. Instead the construction complained of must be of such nature and character to materially alter the accommodation.

The Act does not define either the word *'materially'* or the word *'altered'*. In the absence of any legislative definition of the aforesaid words it would be useful to refer to the meaning given to these words in dictionaries. Concise Oxford Dictionary defines the word *'alter'* as change in the charter, position *'materially'* as an adverb means *'important'* essentially concerned with matter not with form. The expression *'alteration'* with reference to building means *'substantial'* change, varying change the form or the nature of the building without destroying its identity. The meaning given to these two words show that the expression *'materially altered'* means *'a substantial change in the character, from and the structure of the building without destroying its identity'*. It means that the nature and character of change or alteration of the building must be of substantial and important nature.

In determining the question the Court must address itself of the nature and character of the construction and the extent to which the tenant makes changes in front structure of the accommodation having regard to the purpose for which the accommodation may have been let out to the tenant. Only those constructions which bring about substantial change in the front structure of the building could provide a ground for tenant's eviction. The material alteration contemplated is alterations or changes of substantial nature.

Many a times tenants make minor constructions and alterations for the convenient use of the demised accommodation. The construction so made would furnish a ground for eviction only when they bring about the substantial change. Construction of the 'Chabutra' , almirah, opening a window or door or closing a veranda by temporary structure, placing partition in the room or making similar minor alterations for the convenient use of the accommodation do not materially alter the building as in spite of such constructions the front structure of the building may remain unaffected.

It is not possible to give exhaustive list of the construction which do not materially change or alter the nature of the building as the determination of this question depends upon facts of each case. The disputed construction which the trial Court found to be not material, consists of raising walls in the veranda, construction of open tank, putting up asbestos sheets on the roofs after raising walls, the demolition of a wall between the two rooms and converting the same into one hall.

The trial Court has found that the above construction has not materially altered the accommodation to the determent of the landlord's and has not diminished its value substantially.

In *Om Prakash vs. Amar Singh and another, AIR 1987 SC 817,* the tenant constructed a partition wall in a hall and a tin shade in the open courtyard adjacent to the building. It was held that the partition wall was made without

digging any foundation on the floor of the room. It was a temporary wall of 6, height converting the big hall into two portions for its convenient use which could be removed any time without causing any damage to the building. The partition wall did not make any structural change of substantial character either in the form or structure of the accommodation. It was further held the taking into consideration the nature of the construction of the tin shade, it could not be said to have altered the accommodation. Construction of a temporary nature does not amount to materially altering the accommodation to the detriment of the landlord's interest or is likely to diminish its value substantially.

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176. CRIMINAL PROCEDURE CODE, 1973 – Sections 105-A to 105-L, Chapter VII-A & Section 166-A

Chapter VII-A, applicability of – By virtue of Ss. 166-A and 166-B Chapter VII-A is applicable only to the territories which are foreign.

Balram Mehani and others v. State of M.P.

Reported in 2007 (2) MPLJ 74

Held:

The answer to the question referred to us, in essence, requires consideration of the following questions :-

1. Whether the provisions of Chapter VII-A are the ordinary law of the land or these are applicable to only specified offence.
2. Whether the provisions of Chapter VII-A override the provisions of Chapter V, VI and VII of the Code relating to search and seizure etc. during investigation.

Section 166-A deals with letter of request to the competent authority for investigation in a country or place outside India and section 166-B deals with letter of request from a country or place outside India to a Court or an authority for investigation in India. Apparently, the purpose of insertion of Chapter VII-A of the Code was to give full and complete effect to the provisions contained in sections 166-A and 166-B.

As mentioned hereinabove, these provisions had come into operation w.e.f. 19.2.1990 but in absence of relevant and corresponding provisions available in the Code, it had been found difficult to give full effect to the aforesaid sections.

Heading is generally regarded as a preamble to the sections which follow under it, and is considered a part of the Act itself *(Bhinka vs. Charan Singh, AIR 1959 SC 960.)* The preamble of a statute like the long title is a part of the Act and is an admissible aid to construction. Although, not an enacting part, the preamble is expected to express the scope, object and purpose of the Act more comprehensively than the long title. It may recite the ground and cause of making the statute, the evils sought to be remedied or the doubts, which may be intended to be settled.

It is equally true that the preamble in itself is not an enacting provision and is not of the same weight as an aid to construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act but the same can still be looked into to arrive at the conclusion the purpose for which the provisions have been enacted.

It is also too well settled that the Courts must adopt that construction, which shall suppress the mischief and advance the remedy. Critical examination of section 105-A to 105-L falling in Chapter VII-A of the Code would make it abundantly clear that they have been incorporated with an intention to curb mischief or completely eliminate terrorist activities and international crimes, otherwise there was no reason to have enacted Chapter VII-A in the Code. Provisions of this Chapter are in effect supplemental to the special provisions contained in sections 166-A and 166-B and have nothing to do with investigation into offences in general.

There is yet another reason for coming to the aforesaid conclusion that Chapter VII-A of the Code applies only to terrorist activities or to international crime. The reason is that in no other section or provision in the Code, the words "where the Court in India...." have been used. These words have direct relevance with the definition of Contracting States. Contracting State has been defined as a country through a treaty or otherwise. The conjoint reading of the definitions of "Contracting State" and other provisions of Chapter VII-A of the Code, would show that the same can be invoked only with regard to crime or such criminal activities within those two countries between whom reciprocal arrangements exists or treaties have been executed and not for those offences which are committed within the territory of India.

No doubt, it is true that the words terrorist activities of international crime or crime including crimes involving currency transfers, have not been used in any of the sections falling in Chapter, VII-A of the Code, but that alone would not be sufficient to hold that the provisions can be invoked even when any other cognizable offence has been committed by an accused within the territory of India. The true, correct and proper interpretation of the sections falling under Chapter VII-A of the Code, would be that the same can be invoked only when it pertains to two Contracting States. Contracting States would mean that any country or place outside India on the one hand and Indian territory on the other hand, if there exists a treaty between the two countries.

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177. CRIMINAL PROCEDURE CODE, 1973 – Section 407
Transfer of criminal proceedings to different Court – Factors to be taken into consideration – Law explained.
Satish Jaggi v. State of Chhattishgarh and others
Judgment dated 22.02.2007 passed by the Supreme Court in Criminal Appeal No. 241 of 2007, reported in (2007) 3 SCC 62

Held :

The law with regard to transfer of cases is well settled. This Court in *Gurcharan Das Chadha v. State of Rajashtan, AIR 1966 SC 1418* held that a case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. This Court said that a petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. This Court further held that it is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. The court has further to see whether the apprehension is reasonable or not. This Court also said that to judge the reasonableness of the apprehension, the state of mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained, but must appear to the court to be a reasonable apprehension.

It was further held by this Court in *Maneka Sanjay Gandhi v. Rani Jethmalani, (1979) 4 SCC 167* that assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or availability of legal services or any like grievance. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. This Court, in the facts and circumstances of the case, said that the grounds for the transfer have to be tested on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. If further said that even so, the process of justice should no harass the parties and from that angle the court may weigh the circumstances.

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...A judicial officer in whatever capacity he may be functioning has to act with the belief that he is not to be guided by any factor other than to ensure that he shall render a free and fair decision which according to his conscience is the right one on the basis of materials placed before him. There can be no exceptions to this imperative, but at the same time there should not be any scope given to any person to go away with the feeling that the Judge was biased, however unfounded the impression may be.

"7. The qualities desired of a judge can be simply stated: 'that if he be a good one and that he be thought to be so'. Such credentials are not easily acquired. The Judge needs to have 'the strength to put an end to injustice' and 'the faculties that are demanded of the historian and the philosopher and the

prophet'. A few paragraphs from the book Judges by David Pannick which are often quoted need to be set out here:

> 'The judge has burdensome responsibilities to discharge. He has power over the lives and livelihood of all those litigants who enter his court.... His decisions may well affect the interests of individuals and groups who are not present or represented in court. If he is not careful, the judge may precipitate a civil war... or he may accelerate a revolution... He may accidentally cause a peaceful but fundamental change in the political complexion of the country.
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> Judges today face tribulations, as well as trials, not contemplated by their predecessors.... Parliament has recognised the pressures of the job by providing that before the Lord Chancellor recommends anyone to the Queen for appointment to the Circuit Bench, the Lord Chancellor "shall take steps to satisfy himself that the person's health is satisfactory"... This seems essential in the light of the reminiscences of Lord Roskill as to the mental strain which the job can impose.... Lord Roskill added that, in his experience, "the workload is intolerable: seven days a week, 14 hours a day."...
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> He judges is a symbol of that strange mixture of reality and illusion, democracy and privilege, humbug and decency, the subtle network of compromises, by which the nation keeps itself in its familiar shape.' " (See *Brij Mohan Lal v. Union of India, (2002) 5 SCC 1, SCC pp. 6-7, para 7*).

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178. ARBITRATION ACT, 1940 – Section 30

Non-speaking award – No reasons assigned by arbitrator – Objection of respondent not referred by the arbitrator – Cannot be set aside on these grounds.

Engineers Syndicate v. State of Bihar and others

Judgment dated 17.01.2007 passed by the Supreme Court in Civil Appeal No. 266 of 2007, reported in (2007) 3 SCC 99

Held :

... learned Senior Counsel submitted that the order passed by the learned Subordinate Judge as affirmed by the High Court is not correct and that the award can be set aside on the ground of error of law apparent on the face of the record under Section 30 of the Act but it qualified the above legal position that the Court while dealing with the application for setting aside an award has no power to consider whether the view of the arbitrator on the evidence was Justified.

In support of the said contention, the learned Senior Counsel placed strong reliance on the judgment of this Court in *Raipur Development Authority v. Chokhamal Contractors, (1989) 2 SCC 721* (five-Judge Bench). The learned Senior Counsel invited our attention to some of the judgments referred to in the said judgment and in particular paras 14, 16, 17, 19 and 38 also. This Court, in the above judgment has categorically held that it was not open to the High Court to speculate where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. The Court declined to recognise the power of the Court to attempt to probe the mental process by which the arbitrator had reached his conclusion where it was not disclosed by the terms of his award. It is also further observed in the said judgment that the Court in dealing with an application to set aside an award has not to consider whether the view of the arbitrator on the evidence is justified and that the arbitrator's adjudication is generally considered binding between the parties, for he is a tribunal selected by the parties and the power of the Court to set aside the award is restricted to cases set out in Section 30. It is also further observed that it is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. This Court in para 19 of the above judgment has also observed as under : (SCC p. 736)

> "19. It is now well settled that an award can neither be remitted nor set aside merely on the ground that it does not contain reasons in support of the conclusion or decisions reached in it except where the arbitration agreement or the deed of submission requires him to give reasons. The arbitrator or umpire is under no obligation to give reasons in support of the decision reached by him unless under the arbitration agreement or in the deed of submission he is required to give such reasons and if the arbitrator or umpire chooses to give reasons in support of his decision it is open to the court to set aside the award if it finds that an error of law has been committed by the arbitrator or umpire on the face of the record on going through such reasons. The arbitrator or umpire shall have to give reasons also where the court has directed in any order such as the one made under Section 20 or Section 21 or Section 34 of the Act that reasons should be given or where the statute which governs an arbitration requires him to do so."

The learned Senior Counsel then relied upon the judgement of this Court in *Rajendra Construction Co. v. Maharashtra Housing & Area Development Authority, (2005) 6 SCC 678* in which similar question arose for consideration by this Court. In the said case, the High Court concluded that the awards were vitiated under Section 30 of the Act and observed that the view taken by the sole arbitrator which has been made rule of the court by the trial court is unsustainable on the ground that it suffers from errors apparent on the face of the record and the sole arbitrator misdirected the proceedings, inasmuch as, he was required to adjudicate upon the issues framed by the trial court and

give reasons therefore in respect of the claims allowed by him. The said observation made by the High Court was not countenanced by this Court as could be seen from para 23 of the said judgment at p. 687. This Court also observed that the present awards are not under the new Act by under the old Act and it is, therefore, obvious that they could not have been set aside by the High Court on the ground that they were not supported by reasons and were non-speaking awards.

Learned counsel appearing for the respondents placed his reliance on a judgment in *Bharat Coking Coal Ltd. v. Annapurna Construction, (2003) 8 SCC 154.* This judgment was rendered on 29.8.2003 by a Division Bench comprising of two Judges of this Court. Before the Bench, the judgment reported in *Chokhamal case* (supra) was also cited. However, the Court has not followed the said principle laid down in *Chokhamal case* (supra) on the ground that the case on hand reported in *Bharat Coking case* (supra) stands on a different footing, namely, that the arbitrator while passing the award in relation to some in terms failed and/or neglected to take into consideration the relevant clauses of the contract, nor did he take into consideration the relevant materials for the purpose of arriving at a correct finding and that such an order would amount to misdirection in law. The said question was not involved in the present case. The judgment reported in *Bharat Coking case* (supra) is not a case of silent or non-speaking award. Following the principles laid down in *Chokhamal case* (supra) we allow the appeal filed by the appellant herein and set aside the order passed by the learned Subordinate Judge and as affirmed by the High Court. In the result, the award passed by the arbitrator dated 4-7-1988 is restored and the appellant will be entitled to the amount awarded by the said award. The award of the arbitrator dated 4-7-1988 is made a rule of the court.

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179. LIMITATION ACT, 1963 – Articles 64 and 65

Adverse possession – Burden of proof – Starting point of limitation and ingredients thereof – Law explained.

M. Durai v. Muthu and others

Judgment dated 11.01.2007 passed by the Supreme Court in Civil Appeal No. 6195 of 2000, reported in (2007) 3 SCC 114

Held :

The change in the position in law as regards the burden of proof as was obtaining in the Limitation Act, 1908 vis-a-vis the Limitation Act, 1963 is evident. Whereas in terms of Articles 142 and 144 of the old Limitation Act, the plaintiff was bound to prove his title as also possession within twelve years preceding the date of institution of the suit under the Limitation Act, 1963, once the plaintiff proves his title, the burden shifts to the defendant to establish that he has perfected his title by adverse possession.

This aspect of the matter has since been considered by this Court in *Saroop Singh v. Banto, (2005) 8 SCC 330* wherein it was held thus: (SCC pp. 339-40, paras 28-3)

> "28. The statutory provisions of the Limitation Act have undergone a change when compared to the terms of Articles 142 and 144 of the Schedule appended to the Limitation Act, 1908, in terms whereof it was imperative upon the plaintiff not only to prove his title but also to prove his possession within twelve years, preceding the date of institution of the suit. However a change in legal position has been effected in view of Articles 64 and 65 of the Limitation Act, 1963. In the instant case, the plaintiff-respondents have proved their title and, thus, it was for the first defendant to prove acquisition of title by adverse possession. As noticed herein before, the first defendant-appellant did not raise any plea of adverse possession. In that view of the matter the suit was not barred.
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> 29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession becomes adverse (See *Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak, (2004) 3 SCC 376*
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> 30. 'Animus possidendi' is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See *Mohd. Mohammad Ali v. Jagadish Kalita, (2004) 1 SCC 271*)

Yet again in *T. Anjanappa v. Somalingappa, (2006) 7 SCC 570* this Court opined as under : (SCC p. 575, para 14)

> "14 Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of the rightful owner and tends to extinguish that person's title. Possession is not held to be adverse if it can be referred to a lawful title. The person setting up adverse possession may have been holding under the rightful owner's title e.g. trustees, guardians. bailiffs or agents."

It was furthermore held as under : (SCC p. 577, para 20)

> "20. It is well-recognised proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that

it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action."

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180. INDIAN PENAL CODE, 1860 – Section 149

Joint liability – Not necessary that each person of the assembly should be assigned independent role in the commission of crime.

Sheo Prasad Bhor alias Sri Prasad v. State of Assam

Judgment dated 08.01.2007 passed by the Supreme Court in Criminal Appeal No. 1165 of 2005, reported in (2007) 3 SCC 120

Held :

... When charge under Section 149 IPC is there, it is not necessary that each one should be assigned independent part played in the beating. If it is found that one of them was a member of the unlawful assembly and that unlawful assembly assaulted the deceased which ultimately caused the death of the deceased, then all who were members of the unlawful assembly can be held liable. Having regard to the facts and circumstances of the case the view taken by the trial court convicting the accused-appellant under Section 304 Part II IPC read with Section 149 IPC cannot be said to be bad ...

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181. RENT CONTROL AND EVICTION :

Whether in a suit for eviction all heirs of deceased original tenant are necessary parties ? Held, No – Ordinarily, suit can be filed against one who could have represented interest of the deceased tenant – Exception to rule explained.

Shkuntala Vasant Pahadi and others v. Purushottam Vasant Pethe and others

Judgment dated 27.09.2007 passed by the Supreme Court in Civil Appeal No. 3595 of 2000, reported in (2007) 3 SCC 123

Held :

... Learned counsel for the appellants submitted that if an original tenant dies leaving behind more than one heir, it is not necessary under law to implead all the heirs in a suit for eviction but the same can be filed only against one of the heirs who could have represented interest of the deceased tenant; in other words, his interest has been looked after in a bona fide manner, but if there is any clash of interest between the person concerned and his assumed representation or if the latter due to collusion or for any other reason mala fide neglects to defend the case, he cannot be considered to be a representative.

Reliance in this connection has been placed upon decision of this Court in *Surayya Begum (Mst) v. Mohd. Usman, (1991) 3 SCC 114.* In our view, in the absence of any allegation and proof against the mother, showing collusion with the landlord or mala fide neglecting the interest of her sons i.e. the plaintiffs, present case is squarely covered by the aforesaid decision of this Court, as such the High Court was not justified in decreeing the suit.

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182. CARRIERS ACT, 1865 – Section 10

When notice required u/s 10 ? It only requires where the common carrier delivers the goods in a damaged condition or losses the goods and informs about such loss – Where the delivery of goods is refused illegally – No notice required for claim relating to non-delivery of goods.

Transport Corpn. of India Ltd. v. Veljan Hydrair Ltd.

Judgment dated 22.02.2007 passed by the Supreme Court in Civil Appeal No. 3096 of 2005, reported in (2007) 3 SCC 142

Held :

Section 10 of the Act requiring notice, is extracted below :

> "10. *Notice of loss or injury to be given within six months.* – No suit shall be instituted against a common carrier for the loss of, or injury to, goods including containers, pallets or similar articles of transport used to consolidate goods entrusted to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff."

Section 10 requires a notice in the manner set out therein, for initiation of a proceedings against a common carrier for loss of goods or injury to goods entrusted for carriage. The notice need not say specifically that it is issued under Section 10 of the Carriers Act, 1865. It is sufficient if the notice fulfils the requirement of Section 10, that is to inform the carrier about the loss or injury to the goods. Such notice under Section 10 will certainly be required where the common carrier delivers the goods in a damaged condition, or where the common carrier loses the goods entrusted for carriage and informs about such loss to the consignor/consignee/owner. The object of the section is to put the carrier on notice about the claim in respect of the loss or damage to the consignment so that it can make good the loss occasioned. But where there is no loss or injury to the goods, but the common carrier wrongly or illegally refuses to deliver goods and the person entitled to delivery initiates action for non-delivery, obviously Section 10 will not apply. Similarly, where the common carrier informs the person

entitled to delivery (consignor/consignee/owner) that the consignment is being traced and process of tracing it is still going on and requests him to wait for the consignment to be traced and delivered, but does not subsequently inform him either about the loss of the consignment, or about its inability to trace and deliver the consignment, the claim by the consignor/consignee, will not be for loss or injury to goods but for non-delivery of goods. The requirement relating to notice within six months in Section 10 will not apply to a claim based on such non-delivery. In fact Section 10 does not use the word "non-delivery" of goods, but uses the words "loss of, or injury to, goods". A case of "non-delivery" will become a case of "loss" of consignment, only when the common carrier informs the consignor/consignee about the loss of the consignment.

In *Arvind Mills, Ltd. v. Associated Roadways, (2004) 11 SCC 545* relied on by the appellant, this Court held that the word "Suit" used in Section 10 will include a complaint under the Consumer Protection Act, 1986 and that in the absence of a notice under Section 10 of the Carriers Act, a complaint against a common carrier for compensation for loss suffered by the complainant cannot be entertained. But that decision did not relate to a claim regarding non-delivery of the consignment, where the carrier failed to inform that the goods have been lost. The said decision does not, therefore, help the appellant.

In this case, the appellant carrier did not inform the respondent that the goods were lost. The respondent was constantly in touch with the appellant and demanding delivery. By letters dated 15-12-1998, 21-6-1999 and 3-7-1999, the appellant repeatedly informed the respondent that it was in the process of locating the goods, sought time to report about the status and requested the respondent to wait. Even when the respondent issued a notice through counsel on 27-10-2000 (served on 30-10-2000) demanding the cost of the consignment, the appellant did not say that the consignment was lost. In such circumstances, it is not possible to attribute knowledge of "loss" to the person-instituting the action for non-delivery. Therefore, there was no need to issue a notice under Section 10, and non issue of a notice under Section 10, did not invalidate the claim or the complaint.

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183. CONSUMER PROTECTION ACT, 1986 – Generally

Non-delivery of goods is deficiency of service – Non-payment of freight charges will not exonerate common carrier from liability for non-delivery.

Transport Corpn. of India Ltd. v. Veljan Hydrair Ltd.

Judgment dated 22.02.2007 passed by the Supreme Court in Civil Appeal No. 3096 of 2005, reported in (2007) 3 SCC 142

Held :

13. In *Patel roadways Ltd. v. Birla Yamaha Ltd., (2000) 4 SCC 91* this Court held that loss of goods or injury to goods or non-delivery of goods, entrusted to a common carrier for carriage, would amount to a deficiency of service and,

therefore, a complaint under the Consumer Protection Act, 1986 would be maintainable. When a person entrusts goods to a common carrier for transportation and the carrier accepts the same, there is a contract for "service", within the meaning of the CP Act. Therefore, when the goods are not delivered, there is a deficiency of service. It is no doubt true that "service" for purposes of the CP Act does not include rendering of service free of charge. Where the contract for transportation is for a consideration (freight charge), the mere fact that such consideration is not paid, would not make the service "free of charge". There is difference between contract without consideration, and contract for consideration, which is not paid. If there is non-payment of the freight lawfully due, the carrier may sue for the charges, or withhold the consignment and call upon the owner/consignor/consignee to pay the freight charges and take delivery, or on failure to pay the freight charges, even sell the goods with due notice to recover its dues, where such right is available. But where the common carrier has misplaced or lost the goods and, therefore, is not in a position to deliver the goods, it obviously cannot demand the freight charges, nor contend that non-payment of freight charges exonerates it from liability for the loss or non-delivery. Whey the carrier informs that the consignment is not traced and is under the process of being traced, obviously the owner/consignor/consignee cannot be expected to pay the freight charges.

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184. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Sections 2 (s), 17 and 19 (1) (f)
'Shared household', meaning of – Wife cannot claim right to live in a house which is exclusively belonging to her in-laws or relatives – Claim for alternative accommodation cannot be made against husband's relatives.
S.R. Batra and another **v.** *Taruna Batra (Smt.)*
Judgment dated 15.12.2006 passed by the Supreme Court in Civil Appeal No. 5837 of 2006, reported in (2007) 3 SCC 169

Held :

There is no such law in India like the British Matrimonial Homes Act, 1967, and in any case, the rights which may be available under any law can only be as against the husband and not against the father-in-law or mother-in-law.

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Apart from the above, we are of the opinion that the house in question cannot be said to be a "shared household" within the meaning of Section 2 (s) of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as "the Act"). Section 2(s) states :

> "2. (s) 'shared household' means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved

person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household;"

Learned counsel for the respondent.... has relied upon Sections 17 and 19 (1) of the aforesaid Act, which state :

"17. (1) Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title of beneficial interest in the same.

(2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.

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19. (1) While despising of an application under sub-section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order–

(a) restraining the respondents from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;

(b) directing the respondent to remove himself from the shared household;

(c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;

(d) restraining the respondent from alienating or disposing of the shared household or encumbering the same;

(e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or

(f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:

Provided that no order under clause (b) shall be passed against any person who is a woman."

Learned counsel for the respondent ..... stated that the difinition of shared household includes a household where the person aggrieved lives or *at any*

stage had lived in a domestic relationship. He contended that since admittedly the respondent had lived in the property in question in the past, hence the said property is her shared household.

If the aforesaid submission is accepted, then it will mean that wherever the husband and wife lived together in the past that property becomes a shared household. It is quite possible that the husband and wife may have lived together in dozens of places e.g. with the husband's father, husband's paternal grandparents, his maternal parents, uncles, aunts, brothers, sisters, nephews, nieces, etc. If the interpretation canvassed by the learned counsel for the respondent is accepted, all these houses of the husband's relatives will be shared households and the wife can well insist in living in all these houses of her husband's relatives merely because she had stayed with her husband for some time in those houses in the past. Such a view would lead to chaos and would be absurd.

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Learned counsel for the respondent ..... has relied upon Section 19(1)(f) of the Act and claim that she should be given an alternative accommodation. In our opinion, the claim for alternative accommodation can only be made against the husband and not against the husband's (sic) in-laws or other relatives.

As regards Section 17(1) of the Act, in our opinion the wife is only entitled to claim a right to residence in a shared household, and a shared household would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member. The property in question in the present case neither belongs to Amit Batra nor was it taken on rent by him nor is it a joint family property of which the husband Amit Batra is a member. It is the exclusive property of Appellant 2, mother of Amit Batra. Hence it cannot be called a "shared household".

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185. CIVIL PROCEDURE CODE, 1908 – O.39 Rr. 1 & 2
Whether injunction order passed by Court for limited period will continue till disposal of the case ? Held, No.
Ashok Kumar and others v. State of Harayana and another
Judgment dated 23.01.2007 passed by the Supreme Court in Civil Appeal No. 324 of 2007, reported in (2007) 3 SCC 470

Held :

... the order of stay dated 30-8-1997 was extended. On 29-11-1997, the following order was passed :

> "... The case is adjourned to 9-1-1998 for filing of written statement and reply to the injunction application. *Till then stay order dated 30-8-1998 is extended."* (emphasis supplied)

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After some adjournments, the suit was dismissed for default on 19-8-2000.

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The short question which arises for consideration in this appeal is as to whether the order of ad interim injunction granted by the learned Civil Judge, Senior Division, Panipat, was operative till 9-9-1998 or 19-8-2000. We have noticed hereinbefore the nature of the orders passed by the learned. Civil Judge, Although in its order dated 30-8-1997, the learned Civil Judge, used the term "in the meantime", which was repeated in its order dated 24-9-1997, but in the subsequent orders beginning from 29-11-1997, the expression used was "till then".

The term of the order of the learned Judge, in our opinion, does not leave any manner of doubt whatsoever that the interim order was only extended from time to time. The interim order having been extended till a particular date, the contention raised by the respondents herein that they were under a bona fide belief that the injunction order would continue till it was vacated cannot be accepted.

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We have noticed hereinbefore that the proviso appended to sub-section (1) of Section 6 is in the negative term. It is, therefore, mandatory in nature. Any declaration made after the expiry of one year from the date of the publication of the notification under sub-section (1) of Section 4 would be void and of no effect. An enabling provision has been made by reason of the Explanation appended thereto, but the same was done only for the purpose of extending the period of limitation and not for any other for the purpose of extending the period of limitation and not for any other purpose. The purport and object of the provisions of the Act and in particular the proviso which had been inserted by Act 68 of 1984 and which came into force w.e.f. 24.9.1984 must be given its full effect. The said provision was inserted for the benefit of the owners of land. Such a statutory benefit, thus, cannot be taken away by a purported construction of an order of a court which, in our opinion, is absolutely clear and explicit.

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186. INDIAN PENAL CODE, 1860 – Section 304-A

WORDS & PHRASES :

(i) Applicability of Section 304–A.

(ii) Phrases "rashness", "negligence", "criminal rashness" and "criminal negligence", meaning of – Law explained.

Rathnashalvan v. State of Karnataka

Judgment dated 11.01.2007 passed by the Supreme Court in Criminal Appeal No. 45 of 2007, reported in (2007) 3 SCC 474

Held :

Section 304–A applies to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death. The

provision is directed at offences outside the range of Sections 299 and 300 IPC. The provision applies only to such acts which are rash and negligent and are directly cause of death of another person. Negligence and rashness are essential elements under Section 304-A. Culpable negligence lies in the failure to exercise reasonable and proper care and the extent of its reasonableness will always depend upon the circumstances of each case. Rashness means doing an act with the consciousness of a risk that evil consequences will follow but with the hope that it will not. Negligence is a breach of duty imposed by law. In criminal cases, the amount and degree of negligence are determining factors. A question whether the accused's conduct amounted to culpable rashness or negligence depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider it to be sufficient considering all the circumstances of the case. Criminal rashness means hazarding a dangerous or wanton act with the knowledge that it is dangerous or wanton and the further knowledge that it may cause injury but done without any intention to cause injury or knowledge that it would probably be caused.

As noted above, "trashiness'" consists in hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury. The criminality lies in such a case in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence on the other hand, is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen it was the imperative duty of the accused person to have adopted.

The distinction has been very aptly pointed out by Holloway, J. in these words:

> "Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness *(luxuria)*. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection." (See *Nidamarti Nagabhushanam, In re,* 7 Mad HCR 119.)

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187. ARBITRATION ACT, 1940 – Section 34
ARBITRATION AND CONCILIATION ACT, 1996 – Section 8
WORDS & PHRASES :

(i) Difference between Section 34 of Arbitration Act, 1940 & Section 8 of 1996 Act – Under the 1940 Act, the suit was not barred – Court would not automatically refer the dispute to an Arbitration Tribunal – But under Section 8 of the 1996 Act the Court is under obligation to refer the parties to arbitration.

(ii) 'Dispute' in the context of Arbitration & Conciliation Act, 1996 must be given its general meaning.

Agri Gold Exims Ltd. v. Sri Lakshmi Knits & Wovens and others
Judgment dated 23.01.2007 passed by the Supreme Court in Civil Appeal No. 326 of 2007, reported in (2007) 3 SCC 686

Held :

(i) Difference between Section 34 of the Arbitration Act, 1940 and Section 8 of the 1996 Act is distinct and apparent. Section 8 of the 1996 Act makes a radical departure from Section 34 of the 1940 Act. The 1996 Act was enacted in the light of UNCITRAL Model Rules.

We need not dilate on this issue as this aspect of the matter has been considered by this Court in *Rashtriya Ispat Nigam Ltd. v. Verma Transport Co. (2006) 7 SCC 275* wherein this Court noticed: (SCC pp. 285-86, paras 24-25)

> "24. Section 34 of the repealed 1940 Act employs the expression 'steps in the proceedings'. Only in terms of Section 21 of the 1940 Act, the dispute could be referred to arbitration provided the parties thereto agreed. Under the 1940 Act, the suit was not barred. The court would not automatically refer the dispute to an Arbitral Tribunal. In the event, it having arrived at a satisfaction that there is no sufficient reason that the dispute should not be referred and no step in relation thereto was taken by the applicant, it could stay the suit.
>
> 25. Section 8 of the 1996 Act contemplates some departure from Section 34 of the 1940 Act. Wheres Section 34 of the 1940 Act contemplated stay of the suit; Section 8 of the 1996 Act mandates a reference. Exercise of discretion by the judicial authority, which was the hallmark of Section 34 of the 1940 Act, has been taken away under the 1996 Act. The direction to make reference is not only mandatory, but the arbitration proceedings to be commenced or continued and conclusion thereof by an arbitral award remain unhampered by such pendency. (See *O.P. Malhotra's The Law and Practice of Arbitration and Conciliation,* 2nd Edn., pp. 346-47.)"

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Section 8 of the 1996 Act is peremptory in nature. In a case where there exists an arbitration agreement, the court is under obligation to refer the parties to arbitration in terms of the arbitration agreement. (See *Hindustan Petroleum*

Corpn. Ltd., v. Pinkcity Midway Petroleums, (2003) 6 SCC 503 and Rashtriya Ispat Nigam Ltd. (supra) No issue, therefore, would remain to be decided in a suit. Existence of arbitration agreement is not disputed. The High Court, therefore, in our opinion, was right in referring the dispute between the parties to arbitration.

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(ii) The term "dispute" must be given its general meaning under the 1996 Act.

In *P. Ramanatha Aiyar's Advanced Law Lexicon,* 3rd Edn., p. 1431, it is stated:

> "In the context of an arbitration the words 'disputes' and 'differences' should be given their ordinary meanings. Because one man could be said to be indisputably right and the other indisputably wrong, that did not necessarily mean that there had never been any dispute between them...."

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188. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 141

S.141 postulates constructive liability on the part of Directors of company or other persons responsible for the conduct of business of company – A person would be vicariously liable for commission of an offence on the part of the company only in the event the condition precedent laid down therefore is satisfied.

Saroj Kumar Poddar v. State (NCT of Delhi) and another

Judgment dated 16.01.2007 passed by the Supreme Court in Criminal Appeal No. 70 of 2007, reported in (2007) 3 SCC 693

Held:

The question came up for consideration before a three-Judge Bench of this Court in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89* where in upon consideration of a large number of decisions this Court opined: (SCC pp. 98-99, paras 10-11)

> "10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the section are 'every person'. These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words:
>
> > 'Who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence, etc.'

What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and

responsible for the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a Director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a director or manager or secretary was enough to cast criminal liability, the section would have said so. Instead of 'every person' the section would have said 'every director, manager or secretary in a company is liable'..., etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

> 11. A reference to sub-section (2) of Section 141 fortifies the above reasoning because sub-section (2) envisages direct involvement of any Director, Manager, Secretary or other officer of a company in the commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these offices in a company. In such a case, such persons are to be held liable. Provision has been made for directors, managers, secretaries and other officers of a company to cover them in cases of their proved involvement."

It was further opined : (SCC pp. 102-03, para 18)

> "18. To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That the respondent falls within the parameters of Section 141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section 141, he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section 141. Even a non-director ca be

liable under Section 141 of the Act. The averments in the complaint would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial."

This aspect of the matter has also been considered recently by this Court in *Sabitha Ramamurthy v. R.B.S. Channabasavaradhya (2006) 10 SCC 581* stating: (SCC p. 585, para 7)

> "Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefore. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance with the statutory requirements would be insisted."

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189. SERVICE LAW :

CONSTITUTION OF INDIA – Article 234

Subordinate Judiciary – Recruitment process – State Judicial Service Rules framed by Government – Applicability *vis-a-vis* Rules framed by State Public Service Commission – Where Judicial Service Rules contain a specific provision in regard to any aspect of examination, such provision will prevail – Rule framed by Public Service Commission to that effect, if inconsistent, will be inapplicable.

Sanjay Singh and another v. U.P. Public Service Commission, Allahabad and another

Judgment dated 09.01.2007 passed by the Supreme Court in Writ Petition (C) No. 165 of 2005, reported in (2007) 3 SCC 720

Held:

The petitioners point out that the PSC Procedure Rules were not made in consultation with the High Court. On the other hand, the Judicial Service Rules, 2001 which came into effect from 1-7-2000, were made in consultation with both the Commission and the High Court. It is, therefore, submitted that the Judicial Service Rules alone will regulate and govern the recruitment of Civil Judges (Junior Division) including examinations and interviews and the proviso to Rule 51 of the PSC Procedure Rules will not apply to recruitment of Civil Judges. Reliance is placed on the decisions of this Court in *State of Bihar v. Bal Mukund Sah, (2000) 4 SCC 640, Union of India v. Hansoli Devi, (2002) 7 SCC 273* and *Union of India v. Deoki Nandan Aggarwal, 1992 supp. (1) SCC 323* in regard to interpretation of the Rules.

This question was considered briefly by this Court in U.P. Public Service Commission v. Subhash Chandra Dixit, (2003) 12 SCC 701 wherein it was held

that the PSC Procedure Rules made in exercise of power under the U.P. State Public Service Commission (Regulation of Procedure and Conduct of Business) Act, 1974 give the guidelines for any examination to be held by the Commission and therefore, all the provisions of the said Rules will be applicable to an examination for recruitment to Judicial Service also.

It is no doubt true that the Judicial Service Rules govern the recruitment to Judicial Service, having been made in exercise of power under Article 234, in consultation with both the Commission and the High Court. It also provides what examinations should be conducted and the maximum marks for each subject in the examination. But the Judicial Service Rules entrust the function of conducting examinations to the Commission. The Judicial Service Rule do not prescribe the manner and procedure for holding the examination and valuation of answer-scripts and award of the final marks and declaration of the results. Therefore, it is for the Commission to regulate the manner in which it will conduct the examination and value the answer scripts subject, however, to the provisions of the Judicial Service Rules. If the Commission has made Rules to regulate the procedure and conduct of the examination, they will naturally apply to any examination conducted by it for recruitment to any service, including the Judicial Service. But where the Judicial Service Rules make a specific provision in regard to any aspect of examination, such provision will prevail, and the provision of the PSC Procedure Rules, to the extent it is inconsistent with the Judicial Service Rules, will be inapplicable. Further, if both the Rules have made provision in regard to a particular matter, the PSC Procedure Rules will yield to the Judicial Service Rules.

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190. LAND ACQUISITION ACT, 1894 – Section 23

Compensation – Deduction of cost of cultivation – When not necessary – Law explained.

Acquisition of agricultural land – Compensation on yield basis – Multiplier of 20 is on higher side – Multiplier of 10 should be applied.

Land Acquisition Officer, A.P. v. Kamadana Ramakrishna Rao and another

Judgment dated 07.02.2007 passed by the Supreme Court in Civil Appeal No. 6489 of 2000, reported in (2007) 3 SCC 526

Held:

We have heard learned counsel for the parties. The learned counsel for the appellant raised two contentions. Firstly, he submitted that the High Court has committed an error of law in not deducting the amount towards cost of cultivation and no reasons whatsoever are given by the High Court in its order for enhancement of the compensation from Rs. 6000 per acre to Rs. 22,000 per acre. Secondly, it was contended that the Reference Court had erroneously applied multiplier of 20 for capitalising the income. Such multiplier should not be more than 10. On both these grounds, therefore, according to the learned counsel for the appellant, the impugned order is liable to be set aside and the order passed by the Land Acquisition Officer deserves to be restored.

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So far as the first point is concerned, the learned counsel for the appellant relied upon a decision of this Court in *State of Gujarat v. Rama Rana, (1997) 2 SCC 693.* In that case, compensation was awarded to the claimant on yield basis. There was no sufficient evidence as to the income from agriculture and the Reference Court noticed that the witnesses exaggerated the yield. In the circumstances, the Reference Court determined the market value after deducting 1/3rd towards cultivation expenses and awarded compensation on that basis. The High Court dismissed the appeal and confirmed the order. The State approached this Court. Allowing the appeal and reducing the amount of compensation, this Court observed that it is common knowledge that expenditure is involved in raising and harvesting the crop and on an average, 50% of the value of the crop realised would be spend towards cultivation expenses. Deduction of 1/3rd, in the circumstances, was improper in determining the compensation of the land on the basis of yield. The Court also applied multiplier of 10.

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In the facts and circumstances, in our opinion, the ratio laid down in *Rama Rana case* (supra) would not strictly apply in the present cases inasmuch as in fruit-growing trees the expenses would not be 50% as held by this Court. Moreover, the High Court also considered an important fact that the claimant respondents would be entitled to much more amount than Rs 25,000 per acre on yield basis but has fixed the market value of the land at the rate of Rs. 22,000 per acre. It, therefore cannot be said that the not deducting the amount of expenses for cultivation, the High Court had committed any illegality. The first contention, therefore, in the facts of the present appeals, is rejected.

... This Court in *Special Land Acquisition Officer v. T. Adinarayan Setty, AIR 1959 SC 429* held that in awarding compensation under the Act, the Court has to ascertain market value of the land as on the date of notification under Section 4(1) of the Act. It was observed that there were several methods of valuation, such as (1) opinion of experts, (2) the price paid within a reasonable time in bona fide transactions of purchase of the lands acquired or the lands adjacent to the lands acquired and possessing similar advantages, and (3) number of years' purchase of the actual or immediately prospective profits of the land acquired.

In *Tribeni Devi v. Collector of Ranchi, (1972) 1 SCC 480* this Court reiterated the methods of valuation and also stated that those methods do not preclude the court from taking into consideration other circumstances, the requirement being always to arrive at the nearest correct market value. It was also indicated that in arriving at a reasonably correct market value, it may be necessary to take even two or all of those methods into account since the exact valuation is not always possible as no two lands would be the same either in respect of the situation or the extent or the potentiality, nor would it be possible in all cases to have reliable material from which such valuation can be accurately determined.

In *Special Land Acquisition Officer v. P. Veerabhadarappa, (1984) 2 SCC 120* this Court held that when capitalisation method for valuation is applied,

proper multiplier should be 10. Similarly, in *Special Land Acquisition Officer v. Virupax Shankar Nadagouda, (1996) 6 SCC 124,* relying on P. Veerabhadarappa case, (supra) this Court determined compensation on the basis of 10 years' multiplier. In *Krishi Utpadan Mandi Samiti v. Malik Sartaj Wali Khan, (2001) 10 SCC 660* this Court held that computation of compensation for determination of market value may be carried out on yield basis and multiplier of 10 should be applied. Since multiplier of 20 was applied by the High Court, it was set aside by this Court by reducing the amount of compensation.

Again in *a recent decision in Asst. Commr-cum-Land Acquisition Officer v. S.T. Pompanna Setty, (2005) 9 SCC 662* it is reiterated that where compensation is awarded on yield basis, multiplier of 10 is considered proper and appropriate.

Applying the ratio of the decisions of this Court in the abovesaid cases, we are of the view that the High Court committed no error of law or any perversity in awarding the amount of compensation at the rate of Rs. 22,000 per acre to the claimant respondents. It is no doubt true that the High Court has not given adequate and proper reasons in its order, but the pith and substance of the order cannot be found to be faulty.

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191. CONSTITUTION OF INDIA – Articles 32, 142 & 226

Precedents – Prospective overruling – Power vested only in the Supreme Court and that too in the Constitutional matters.

The High Courts without applying the doctrine of 'prospective overruling' may grant a limited relief in exercise of its equity jurisdiction.

P.V. George and others v. State of Kerala and others

Judgment dated 23.01.2007 passed by the Supreme Court in Civil Appeal No. 322 of 2007, reported in (2007) 3 SCC 557

Held:

For the views we propose to take, it is not necessary for us to consider all the decisions relied upon by Mr. Rajan. The legal position as regards the applicability of doctrine of propective overruling is no longer resintegra. This Court in exercise of its jurisdiction under Article 32 or Article 142 of the Constitution of India may declare a law to have a prospective effect. The Division Bench of the High Court may be correct in opining that having regard to the decision of this Court in *Golak Nath v. State of Punjab, AIR 1967 SC 1643* the power of overruling is vested only in this Court and that too in constitutional matters, but the High Courts, in exercise of their jurisdiction under Article 226 of the Constitution of India, even without applying the doctrine of prospective overruling indisputably may grant a limited relief in exercise of their equity jurisdiction.

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192. WORDS & PHRASES :

Words 'any' and 'includes', meaning of.

Associated Indem Mechanical (P) Ltd. v. W.B. Small Industries Development Corpn. Ltd and others

Judgment dated 05.01.2007 passed by the Supreme Court in Civil Appeal No. 22 of 2007, reported in (2007) 3 SCC 607

Held:

... "Any" is a word of very wide meaning and prima face the use of it excludes limitation. (See- *Angurbala Mullick v. Debabrata Mullick, AIR 1951 SC 293).* It is well settled that the word "include" is generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute; and when it is so used those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. (See. *Dadaji v. Sukhdeobabu, AIR 1980 SC 150, Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. AIR 1987 SC 1023 and Mahalakshmi Oil Mills v. State of A.P. AIR 1989 SC 335).*

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193. WORDS & PHRASES :

Words 'material facts' and 'particulars', meaning of – 'Material facts' are primary or basic facts which must be pleaded by the plaintiff/ defendant in support of the case set up by either to prove his cause of action or defence – 'Particulars' on the other hand are details in support of material facts stated by the party.

Virender Nath Gautam v. Satpal Singh and others

Judgment dated 08.12.2006 passed by the Supreme Court in Civil Appeal No. 809 of 2005, reported in (2007) 3 SCC 617

Held:

The expression "material facts" has neither been defined in the Act nor in the Code. According to the dictionary meaning, "material" means "fundamental", "vital", "basic", "cardinal", "central", "crucial", "decisive", "essential", "pivotal", "indispensable", "elementary" or "primary". [*Burton's Legal Thesaurus* (3rd Edn.) p. 349]. The phrase "material facts", therefore, may be said to be those facts upon which a party relies for his claim or defence. In other words, "material facts" are facts upon which the plaintiff's cause of action or the defendant's defence depends. What particulars could be said to be "material facts" would depend upon the facts of each case and no rule of universal application can be laid down. It is, however, absolutely essential that all basic and primary facts which must be proved at the trial by the party to establish the existence of a cause of action or defence are material facts and must be stated in the pleading by the party.

In the leading case of *Philipps v. Philipps, (1874-80) AII ER Rep Ext 1684* (CA) Cotton, L.J. stated:

"What particulars are to be stated must depend on the facts of each case. But in my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial."

In *Brace v. Odhams Press Ltd., (1936) 1 AII ER 287 (CA) Scott, L.J. referring to Philipps v. Philipps (supra) observed: (AII ER p. 294)*

"The cardinal provision in Rule 4 is that the statement of claim must state the material facts. The word 'material' means necessary for the purpose of formulating a complete cause of action; and if any one 'material' statement is omitted, the statement of claim is baid; it is 'demurrable' in the old phraseology, and in the new is liable to be 'struck out' under RSC Order 25 Rule 4 [See Philipps v. Philipps (supra)]; or 'a further and better statement of claim' may be ordered under Rule 7".

A distinction between "material facts" and "particulars", however, must not be overlooked. "Material facts" are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. "Particulars", on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. "Particulars" thus ensure conduct of fair trial and would not take the opposite party by surprise.

All "material facts" must be pleaded by the party in support of the case set up him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial.

In *Halsbury's Laws of England (4th Edn.), Vol. 36, para 38,* it has been stated:

"38. The function of particulars is to carry into operation the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without surprises, and incidentally to reduce costs. This function has been variously stated, namely, either to limit the generality of the allegations in the pleadings or to define the issues which have to be tried and for which discovery is required. Each party is entitled to know the case that is intended to be made against him at the trial, and to have such particulars of his opponent's case as will prevent him from being taken by surprise. Particulars enable the other party to decide what evidence he ought to be prepared with and to prepare for the trial. A party is bound by the facts included in the particulars, and he may not rely on any other facts at the trial without obtaining the leave of the court."

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PART - III

CIRCULARS/NOTIFICATIONS

(Ministry of Women and Child Development Notification No. S.O. 229 (E) dated the 15th February, 2007. Published in the Gazette of India (Extraordinary) Part II Section 3(ii) dated 15-2-2007 Page 1)

In exercise of the powers conferred by sub-section (3) of Section 1 of the **Commissions for Protection of Child Rights Act, 2005 (4 of 2006),** the Central Government hereby appoints the 15th day of February 2007 as the date on which the provisions of the said Act shall come into force.

●

Notification No. C-507-III-1-5-57 dated the 13th February, 2007 *[Published in M.P. Rajpatra Part I dated 16-2-2007 Page 606]* – In exercise of the powers conferred by Article 227 of the Construction of India, read with Section 23 of the **Madhya Pradesh Civil Court Act, 1958 (No. 19 of 1958)** and all other powers enabling the High Court of Madhya Pradesh, with the previous approval of Governor, hereby makes the following a amendment in Madhya Pradesh Pradesh Civil Courts Rules, 1961, published vide its Notification No. 1924/III-1-5-/57 dated 15th February, 1961, as under :–

Amendment

1. In the said rules, in Part I-rules relating to Civil Procedure Code, Chapter I (Court-Hours, Cause Lists, Pleadings, Petitions, etc.) –

(1) for the words and figures "10.30 A.M." wherever they occur, the words and figures "11.00 A.M." shall be substituted;

(2) In sub-rule (1) of rule 1, for the words and figure "5 P.M.", the words and figures "5.30 P.M.", shall be substituted.

(3) for sub-rule (2) of rule 1, the following sub-rule shall be substituted, namely :–

"(2) There shall ordinarily an interval (not exceeding half an hour) at about 2.00 P.M.",

(4) In rule 4, for the words and figures "5.00 P.M." wherever they occur the words and figures "5.30 P.M." shall be substituted.

(5) for sub-rule (1) of rules 5 the following sub-rule shall be substituted, namely :–

"(1) The working hours in every Judicial Office shall be from "10.30 A.M." to "6.00 P.M.".

2. Thie Notification shall come into force on the date of its publication in the Official Gazette.

●

MINISTRY OF HOME AFFAIRS

No. S.O. 1042 (E), dated July 11, 2006. – In exercise of the powers conferred under sub-section (2) of Section 265-A of **the Code of Criminal Procedure, 1973,** the Central Government hereby determined offences under the following laws for the time being inforce which shall be the offences affecting the socio-economic condition of the country for the purposes of sub-section (1) of Section 265-A of the said Act, namely, –

(i) Dowry Prohibition Act, 1961

(ii) The Commission of Sati Prevention Act, 1987

(iii) The Indecent Representation of Woman (Prohibition) Act, 1986

(iv) The Immoral Traffic (Prevention) Act, 1956

(v) Protection of Women from Domestic Violence Act, 2005

(vi) The Infant Milk Substitutes, Feeding Bottles and infant foods (Regulation of Production, Supply and Distribution) Act, 1992

(vii) Provisions of Fruit Products Order 1955 (issued under the Essential Commodities Act, 1955)

(viii) Provisions of Meat Food Products Orders 1973 (issued under the Essential Commodities Act, 1955)

(ix) Offences with respect to animals that find place in Schedule I and Part II of the Scheduled II as well as offences related to altering of boundaries of protected areas under Wildlife (Protection) Act, 1972

(x) The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

(xi) Offences mentioned in the Protection of Civil Rights Act, 1955

(xii) Offences listed in Sections 23 to 28 of the Juvenile Justice (Care and Protection of Children) Act, 2000

(xiii) The Army Act, 1950

(xiv) The Air Force Act, 1950

(xv) The Navy Act, 1957

(xvi) Offences specified in Section 59 to 81 and 83 of the Delhi Metro Railway (Operation and Maintenance) Act, 2002

(xvii) Explosives Act, 1884

(xviii) Offences specified in Sections 11 to 18 of the Cable Television Networks (Regulation) Act, 1995

(xix) Cinematograph Act, 1952

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Ministry of Labour and Employment (Child Labour Section) Notification No. S.O. 1742 (E) dated the 10th October, 2006. Published in the Gazette of India (Extraordinary) Part II Section 3(ii) dated 10.10.2006 Page 2.

In exercise of the powers conferred by Section 4 of the **Child Labour (Prohibition and Regulation) Act, 1986 (61 of 1986),** the Central Government on the recommendations of the Child Labour Technical Advisory Committee hereby makes' the following amendments further to amend the Schedule to the said Act and directs that they shall come into force on the date of their publication in the Official Gazette, namely :–

Amendment

In the Schedule to the Child Labour (Prohibition and Regulation) Act, 1986 (61 of 1986), in Part A under the heading "Occupations" –

after item (13) and the entry relating thereto, the following items and entries shall be added, namely :–

"(14) Employment of child as domestic workers or servants:

(15) Employment of children in dhabas (road-side eateries), restaurants, hotels, motels, tea-shops, resorts, spas or other recreational centers".

●

MInistry of Women and Child Development Notification No. S.O. 1776 (E) dated the 17th October, 2006. Published in the Gazette of India (Extra-ordinary) Part II Section 3(ii) dated 17-10-2006 Page 1.

In exercise of the powers conferred by sub-section (3) of Section 1 of **the Protection of Women from Domestic Violence Act, 2005 (43 of 2005),** the Central Government hereby appoints the 25th day of November, 2006, as the date on which the said Act shall come into force.

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मध्यप्रदेश शासन
सामान्य प्रशासन विभाग, मंत्रालय
वल्लभ भवन, भोपाल–462004

क्रमांक 59/12.3/07/1/8 भोपाल, दिनांक जनवरी, 2007

प्रति,

शासन के समस्त विभाग,
समस्त कलेक्टर,
मध्यप्रदेश

विषयः– व्यवहार प्रक्रिया संहिता की धारा 80 तथा इसी प्रकार के अन्य अधिनियमों/नियमों के प्रावधानों के तहत प्राप्त सूचना पत्रों का परीक्षण करने एवं जवाब देने हेतु नोडल अधिकारियों की नियुक्ति बाबत् ।

सलेम एडव्होकेट बार एसोसिएशन तमिलनाडु विरूद्ध यूनियन ऑफ इंडिया व अन्य के प्रकरण में सिविल याचिका क्रं. 496/02 (2003) 1 एससीसी 49 के प्रकरण में मा. सर्वोच्च न्यायालय द्वारा यह आदेश दिये गये हैं कि व्यवहार प्रक्रिया संहिता की धारा 80 एवं अन्य विधियां जिनमें भारत के नागरिक को कोई भी दावा पेश करने के पहले नोटिस देने का प्रावधान किया गया है, नोटिस मिलने पर संबंधित अधिकारियों द्वारा उनका परीक्षण कर समय सीमा में जवाब देना आवश्यक है, लेकिन शासन के विभागों/कलेक्टर्स द्वारा यह कार्यवाही नहीं की जा रही है जिसके कारण न्यायालयों में शासन को अनावश्यक मुकदमे बाजी का सामना करना पड़ रहा है।

2. अतः शासन के समस्त विभागों के विधिक प्रकोष्ठ/न्यायालयीन प्रकरणों की शाखा के प्रभारी उप सचिव को नोडल अधिकारी नियुक्त किया जाता है। उप सचिव न होने पर संबंधित शाखा के अवर सचिव/विशेष कर्तव्यस्थ अधिकारी/अपर सचिव जो भी अधिकारी यह कार्य देख रहे हैं, वे नोडल अधिकारी होंगे। प्रत्येक जिले में व्यवहार प्रक्रिया संहिता की धारा–80 का कार्य देख रहे प्रभारी अधिकारी (डिप्टी कलेक्टर/संयुक्त कलेक्टर/अपर कलेक्टर) इस हेतु नोडल अधिकारी होंगे।

3. मा. सर्वोच्च न्यायालय द्वारा व्यवहार प्रक्रिया संहिता के साथ–साथ अन्य अधिनियमों में इस प्रकार के प्रावधान होने पर नोडल अधिकारी नियुक्त करने हेतु निर्देशित किया गया है। अतः ऐसी संस्थाओं के मुख्य कार्यपालन अधिकारी अथवा समकक्ष स्तर के अधिकारी नोडल अधिकारी होंगे। उदाहरण स्वरूप नगर निगम में आयुक्त, नगर निगम एवं नगरपालिकाओं में मुख्य नगर पालिका अधिकारी।

4. नोडल अधिकारियों का यह कर्तव्य होगा कि व्यवहार प्रक्रिया संहिता एवं अन्य अधिनियमों के अन्तर्गत प्राप्त सूचना पत्रों का निर्धारित समय सीमा में पूर्ण परीक्षण कर जवाब भेजे जावें। मा. सर्वोच्च न्यायालय द्वारा यह भी निर्देश दिये गये हैं कि यदि न्यायालय यह पाता है कि दिमाग का उपयोग किये बिना जवाब भेजा गया है तो शासन के विरूद्ध भारी हर्जाना अधिरोपित किया जावे एवं इसकी वसूली संबंधित नोडल अधिकारी से की जा सकेगी।

सही/–

(डी.एस.राय)

सचिव,

मध्यप्रदेश शासन, सामान्य प्रशासन विभाग

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

मध्यप्रदेश श्रम विधि (संशोधन) और प्रकीर्ण उपबंध अधिनियम, 2002

(दिनांक 29 जुलाई, 2003 को राष्ट्रपति की अनुमति प्राप्त हुई; अनुमति "मध्यप्रदेश राजपत्र (असाधरण)" में दिनांक 5 अगस्त 2003 को प्रथमबार प्रकाशित की गई)

मध्यप्रदेश राज्य को लागू हुए रूप में औद्योगिक विवाद अधिनियम, 1947 और मध्यप्रदेश औद्योगिक संबंध अधिनियम, 1960 को और संशोधित करने हेतु अधिनियम.

भारत गणराज्य के तिरपनवें वर्ष में मध्यप्रदेश विधान–मण्डल द्वारा निम्नलिखित रूप में यह अधिनियमित हो :–

संक्षिप्त नाम और प्रारंभ

1. (1) इस अधिनियम का संक्षिप्त नाम मध्यप्रदेश श्रम विधि (संशोधन) और प्रकीर्ण उपबंध अधिनियम, 2002 है।

(2) यह ऐसी तारीख को प्रवृत्त होगा जिसे राज्य सरकार, अधिसूचना द्वारा नियत करे ।

भाग–1

औद्योगिक विवाद अधिनियम, 1947 का संशोधन

मध्यप्रदेश राज्य को लागू हुए रूप में केन्द्रीय अधिनियम 1947 का सं. 14 का संशोधन

2. मध्यप्रदेश राज्य को लागू हुए रूप में औद्योगिक विवाद अधिनियम, 1947 (1947 का सं. 14) जो इस भाग में इसमें इसके पश्चात् मूल अधिनियम के नाम से निर्दिष्ट है) को, उस रीति में संशोधित किया जाए जो इस भाग में इसमें इसके पश्चात उपबंधित है ।

केन्द्रीय अधिनियम, 1947 का सं. 14 का संशोधन

3. मूल अधिनियम में –

(एक) संपूर्ण अधिनियम में, शब्द और अक्षर "द्वितीय अनुसूची के भाग–क में" जहां कहीं भी वे आए हों, के स्थान पर शब्द और अक्षर "द्वितीय अनुसूची में" स्थापित किए जाएं ।

(दो) धारा 7 में, उपधारा (1–क) का लोप किया जाए,

(तीन) धारा 11–ख, 11–ग और 11–घ का लोप किया जाए ।

(चार) धारा 34 में, मध्यप्रदेश श्रम विधि (संशोधन) और प्रकीर्ण उपबंध अधिनियम, 1981 (क्रमांक 43 सन् 1981) द्वारा यथा स्थापित उपधारा (2) के स्थान पर, निम्नलिखित उपधारा स्थापित की जाए, अर्थात्:–

"(2) महानगर मजिस्ट्रेट या प्रथम वर्ग न्यायिक मजिस्ट्रेट से निम्नतर कोई न्यायालय इस अधिनियम के अधीन दंडनीय किसी अपराध का विचारण नहीं करेगा,"

(पांच) द्वितीय अनुसूची में –

(क) शब्द और अक्षर "भाग–क" का लोप किया जाए,

(ख) "भाग–ख" का लोप किया जाए,

भाग–2

मध्यप्रदेश औद्योगिक संबंध अधिनियम, 1960 (क्रमांक 27 सन् 1960) का संशोधन

मध्यप्रदेश अधिनियम क्र. 27 सन् 1960 का संशोधन–

4. मध्यप्रदेश औद्योगिक संबंध अधिनियम, 1960 (क्रमांक 27 सन् 1960) में –,

(एक) धारा 61 में,–

(क) उपधारा (1) में पैरा (घ) में, शब्द और अक्षर "और अनुसूची 2–क में विनिर्दिष्ट अधिनियमों" का लोप किया जाए;

(ख) उपधारा (3) में, शब्द और अक्षर "और अनुसूची 2–क में विनिर्दिष्ट अधिनियमों" का लोप किया जाए;

(दो) धारा 63 के स्थान पर, निम्नलिखित धारा स्थापित की जाए, अर्थात:–

अपराध का संज्ञान

"63. कोई न्यायालय इस अधिनियम के अधीन दंडनीय, किसी अपराध का संज्ञान, उससे प्रभावित व्यक्ति या कर्मचारियों के प्रतिनिधि या नियोजक द्वारा किए गए लिखित परिवाद पर या श्रम अधिकारी की लिखित रिपोर्ट पर ही करेगा अन्यथा नहीं."

(तीन) धारा 64 में, –

(क) उपधारा (1) में शब्द और अक्षर "या अनुसूची 2–क में विनिर्दिष्ट अधिनियमों में से किसी अधिनियम" का लोप किया जाए;

(ख) उपधारा (2) में, शब्द और अक्षर "या अनुसची 2–क में विनिर्दिष्ट अधिनियमों में से किसी अधिनियम" का लोप किया जाए

(चार) अनुसूची 2–क का लोप किया जाए।

भाग–3

प्रकीर्ण उपबन्ध

कठिनाइयों को दूर किया जाना

5. (1) यदि इस अधिनियम के उपबंधों को प्रभावशील करने में कोई कठिनाई उद्‌भूत होती है तो राज्य सरकार, राजपत्र में प्रकाशित साधारण या विशेष आदेश द्वारा, इस अधिनियम के उपबंधों से अनअसंगत ऐसे उपबंध कर सकेगी जो उसे ऐसी कठिनाई को दूर करने के लिए आवश्यक या समीचीन प्रतीत हों; परन्तु ऐसा कोई भी आदेश इस अधिनियम के प्रारंभ होने से एक वर्ष का अवसान हो जाने के पश्चात् नहीं किया जाएगा।

(2) उपधारा (1) के अधीन किया गया प्रत्येक आदेश विधानसभा के पटल पर रखा जाएगा।

भोपाल, दिनांक 4 अगस्त 2003

क्र; 4911–422 इक्कीस–अ– (प्रा.) – भारत के संविधान के अनुच्छेद 348 के खण्ड (3) के अनुसरण में मध्यप्रदेश श्रम विधि (संशोधन) और प्रकीर्ण उपबंध अधिनियम, 2002 (क्रमांक 26 सन् 2003) का अंग्रेजी अनुवाद राज्यपाल के प्राधिकार से एतद्द्वारा किया जाता है ।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार,

आर.के. सिटोके,

अतिरिक्त सचिव

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Ministry of Women and Child Development Notification No. G.S.R. 644 (E) dated the 17th October, 2006. Published in the Gazette of India (Extraordinary) Part II Section 3 (i) dated 17-10-2006 Pages 46-84.

In exercise of the powers conferred by section 37 of the Protection of Women from Domestic Violence Act, 2005 (43 of 2005), the Central Government hereby makes the Following rules, namely :–

1. Short title and commencement.– (1) These rules may be called **the Protection of Women from Domestic Violence Rules, 2006.**

(2) They shall come into force on the 26th day of October, 2006.

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

(a) "Act" means the Protection of Women from Domestic Violence Act, 2005 (43 of 2005);

(b) "complaint" means any allegation made orally or in writing by any person to the Protection Officer :

(c) "Counsellor" means a member of a service provider competent to give counselling under sub-section (1) of section 14;

(d) "Form" means a form appended to these rules;

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

(f) words and expressions used and not defined in these rules but defined in the Act shall have the meanings respectively assigned to them in the Act.

3. Qualifications and experience of Protection Officers.– (1) The Protection Officers appointed by the State Government may be of the Government or members of non governmental organizations :

Provided that preference shall be given to women.

(2) Every person appointed as Protection Officer under the Act shall have atleast three years experience in social sector.

(3) The tenure of a Protection Officer shall be a minimum period of three years.

(4) The State Government shall provide necessary office assistance to the Protection Officer for the efficient discharge of his or her functions under the Act and these rules.

4. Information to Protection Officers.– (1) Any person who has reason to believe that an act of domestic violence has been, or is being, or is likely to be committed may give information about it to the Protection Officer having jurisdiction in the area either orally or in writing.

(2) In case the information is given to the Protection Officer under sub-rule (1) orally, he or she shall cause it to be reduced to in writing and shall ensure that the same is signed by the person giving such information and in case the informant is not in a position to furnish written information the Protection Officer shall satisfy and keep a record of the identity of the person giving such information.

(3) The Protection Officer shall give a copy of the information recorded by him immediately to the informant free of cost.

5. Domestic incident reports.– (1) Upon receipt of a complaint of domestic violence, the Protection Officer shall prepare a domestic incident report in Form I and submit the same to the Magistrate and forward copies thereof to the police officer in charge of the police station within the local limits of jurisdiction of which the domestic violence alleged to have been committed has taken place and to the service providers in that area.

(2) Upon a request of any aggrieved person, a service provider may record a domestic incident report in Form I and forward a copy thereof to the Magistrate and the Protection Officer having jurisdiction in the area where the domestic violence is alleged to have taken place.

6. Applications to the Magistrate. – (1) Every application of the aggrieved person under section 12 shall be in Form II or as nearly as possible thereto.

(2) An aggrieved person may seek the assistance of the Protection Officer in preparing her application under sub-rule (1) and forwarding the same to the concerned Magistrate.

(3) In case the aggrieved person is illiterate, the Protection Officer shall read over the application and explain to her contents thereof.

(4) The affidavit to be filed under sub-section (2) section 23 shall be filed in Form III.

(5) The applications under section 12 shall be dealt with and the orders enforced in the same manner laid down under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974).

7. Affidavit for obtaining ex parte orders of Magistrate.– Every affidavit for obtaining exparte order under sub-section (2) of section 23 shall be filed in Form III.

8. Duties and functions of Protection Officers. – (I) It shall be the duty of the Protection Officer –

(i) to assist the aggrieved person in making a complaint under the Act, if the aggrieved person so desires;;

(ii) to provide her information on the rights of aggrieved persons under the Act as given in Form IV which shall be in English or in a vernacular local language;

(iii) to assist the person in making any application under section 12, or sub-section (2) of section 23 of any other provision of the Act or the rules made thereunder:

(iv) to prepare a "Safety Plan" including measures to prevent further domestic violence to the aggrieved person, in consultation with the aggrieved person in Form V, after making an assessment of the dangers involved in the situation and on an application being moved under section 12;

(v) to provide legal aid to the aggrieved person, through the State Legal Aid Services Authority;

(iv) to assist the aggrieved person and any child in obtaining medical aid at a medical facility including providing transportation to get the medical facility;

(vii) to assist in obtaining transportation for the aggrieved person and any child to the shelter;

(viii) to inform the service providers registered under the Act that their services may be required in the proceedings under the Act and to invite applications from service providers seeking particulars of their members to be appointed as counsellors in proceedings under the Act under sub-section (1) of section 14 of Welfare Experts under section 15;

(ix) to scrutinise the applications for appointment as Counsellors and forward a list of available Counsellors to the Magistrate;

(x) to revise once in three years the list of available Counsellors by inviting fresh applications and forward a revised list of Counsellors on the basis thereof the concerned Magistrate;

(xi) to maintain a record and copies of the report and documents forwarded under sections 9,12,20,21,22, 23 or any other provisions of the Act or these rules;

(xii) to provide all possible assistance to the aggrieved person and the children to ensure that the aggrieved person is not victimized or pressurized as a consequence of reporting the incident of domestic violence;

(xiii) to liaise between the aggrieved person or persons, police and service provider in the manner provided under the Act and these rules;

(xiv) to maintain proper records of the service providers, medical facility and shelter homes in the area of his jurisdiction.

(2) In addition to the duties and functions assigned to a Protection Officer under clauses (a) to (h) of sub-section (1) of section 9, it shall be the duty of every Protection Officer –

(a) to protect the aggrieved persons from domestic violence, in accordance with the provisions of the Act and these rules;

(b) to take all reasonable measures to prevent recurrence of domestic violence against the aggrieved person, in accordance with the provisions of the Act and these rules.

9. Action to be taken in cases of emergency.– If the Protection Officer or a service provider receives reliable information through e-mail or a telephone call or the like either from the aggrieved person or from any person who has reason to believe that an act of domestic violence is being or is likely to be committed and in such an emergency situation, the Protection Officer or the service provider, as the case may be shall seek immediate assistance of the police who shall accompany the Protection Officer or the service provider, as the case may be, to the place of occurrence and record the domestic incident report and present the same to the Magistrate without any delay for seeking appropriate orders under the Act.

10. Certain other duties of the Protection Officers.– (1) The Protection Officer, if directed to do so in writing, by the Magistrate shall –

(a) Conduct a home visit of the shared household premises and make preliminary enquiry if the court requires clarification, in regard to granting *ex-parte* interim relief to the aggrieved person under the Act and pass an order for such home visit;

(b) after making appropriate inquiry, file a report on the emoluments, assets, bank accounts or any other documents as may be directed by the court ;

(c) restore the possession of the personal effects including gifts and jewellery of the aggrieved person and the shared household to the aggrieved person;

(d) assist the aggrieved person to regain custody of children and secure rights to visit them under his supervision as may be directed by the court;

(e) assist the court in enforcement of orders in the proceedings under the Act in the manner directed by the Magistrate, including orders under section 12, section 18, section 19, section 20, section 21 or section 23 in such manner as may be directed by the court;

(f) take the assistance of the police, if required, in confiscating any weapon involved in the alleged domestic violence.

(2) The Protection Officer shall also perform such other duties as may be assigned to him by the State Government or the Magistrate in giving effect to the provisions of the Act and these rules from time to time.

(3) The Magistrate may, in addition to the orders for effective relief in any case, also issue directions relating to general practice for better handling of the cases, to the Protection Officers within his jurisdiction and the Protection Officers shall be bound to carry out the same.

11. Registration of service providers.– (1) Any voluntary association registered under the societies Registration Act, 1860 (21 of 1860) or a company registered under the Companies Act, 1956 (1 of 1956) or any other law for time being in force with the objective of protecting the rights and interests of women by any lawful means including providing of legal aid, medical, financial or other assistance and desirous of providing service as a service provider, under the Act shall make an application under sub-section (1) of section 10 for registration as service provider in Form VI to the State Government.

(2) The State Government shall, after making such enquiry as it may consider necessary and after satisfying itself about the suitability of the applicant, register it as a service provider and issue a certificate of such registration :

Provided that no such application shall be rejected without giving the applicant an opportunity of being heard.

(3) Every association or company seeking registration under sub-section (1) of section 10 shall possess the following eligibility criteria, namely :–

(a) it should have been rendering the kind of services it is offering under the Act for atleast three years before the date of application for registration under the Act and these rules as a service provider;

(b) in case an applicant for registration is running a medical facility or a psychiatric counselling centre, or a vocational training institution, the State Government shall ensure that the applicant fulfils the requirements for running such a facility or institution laid down by the respective regulatory authorities regulating the respective professions or institutions :

(c) in case an applicant for registration is running a shelter home, the State Government shall, through an officer or any authority or agency authorised by it, inspect the shelter home, prepare a report and record its finding on the report, detailing that –

(i) the maximum capacity of such shelter home for intake of persons seeking shelter;

(ii) the place is secure for running a shelter home for women and that adequate security arrangements can be put in place for the shelter home;

(iii) the shelter home has a record of maintaining a functional telephone connection or other communication media for the use of the inmates.

(4) The State Government shall provide a list of service providers in the various localities to the concerned Protection Officers and also publish such list of newspapers or on its website.

(5) The Protection Officer shall maintain proper records by way of maintenance of registers duly indexed, containing the details of the service providers.

12. Means of service of notices.– (1) The notices for appearance in respect of the proceedings under the Act shall contain the names of the person alleged to have committed domestic violence, the nature of domestic violence and such other details which may facilitate the identification of person concerned

(2) The service of notices shall be made in the following manner, namely :–

(a) the notices in respect of the proceedings under the Act shall be served by the protection Officer or any other person directed by him to serve the notice, on behalf of the Protection Officer, at the address where the respondent is stated to be ordinarily residing in India by the complainant or aggrieved person or where the respondent is stated to be gainfully employed by the complainant or aggrieved person, as the case may be;

(b) the notice shall be delivered to any person in charge of such place at the moment and in case of such delivery not being possible it shall be pasted at a conspicuous place on the premises;

(c) for serving the notice under section 13 or any other provision of the Act the provisions under Order V of the Civil Procedure Code, 1908 (5 of 1908) or the provisions under Chapter VI of the Code of Criminal Procedure, 1973 (2 of 1974) as far as practicable may be adopted;

(d) any order passed for such service of notice shall entail the same consequences, as an order passed under Order V of the Civil Procedure Code, 1908 or Chapter VI of the Code of Criminal Procedure, 1973 respectively, depending upon the procedure found efficacious for making an order for such service under section 13 or any other provision of the Act and in addition to the procedure prescribed under the Order V or Chapter VI, the court may direct any other steps necessary, with a view to expediting the proceedings to adhere to the time limit provided in the Act.

(3) On a statement on the date fixed for appearance of the respondent, or a report of the person authorized to serve the notices under the Act, that service has been effected appropriate orders shall be passed by the court on any

pending application for interim relief, after hearing the complainant or the respondent, or both.

(4) When a protection order is passed restraining the respondent from entering the shared household or the respondent is ordered to stay away or not to contact the petitioner, no action of the aggrieved person including an invitation by the aggrieved person shall be considered as waiving the restraint imposed on the respondent, by the order of the court, unless such protection order is duly modified in accordance with the provisions of sub-section (2) of section 25.

13. Appointment of Counsellors.– (1) A person from the list of available Counsellors forwarded by the Protection Officer, shall be appointed as a Counsellor under intimation to the aggrieved person.

(2) The following persons shall not be eligible to be appointed as Counsellors in any proceedings, namely :–

(i) any person who is interested or connected with the subject-matter of the dispute or is related to any one of the parties or to those who represent them unless such objection is waived by all the parties in writing;

(ii) any legal practitioner who has appeared for the respondent in the case of any other suit or proceedings connected therewith.

(3) The Counsellors shall as far as possible be women.

14. Procedure to be followed by Counsellors. – (1) The Counsellor shall work under the general supervision of the court or the Protection Officer or both.

(2) The Counsellor shall convene a meeting at a place convenient to the aggrieved person or both the parties.

(3) The factors warranting counselling shall include the factor that the respondent shall furnish an undertaking that he would refrain from causing such domestic violence complained by the complainant and in appropriate cases an undertaking that he will not try to meet or communicate in any manner through letter or telephone, electronic mail or through any medium except in the counselling proceedings before the counsellor or as permissibly by law or orders of a court of competent jurisdiction.

(4) The Counsellor shall conduct the counselling proceedings bearing in mind that the counselling shall be in the nature of getting an assurance, that the incidence of domestic violence shall not get repeated.

(5) The respondent shall not be allowed to plead any counter justification for the alleged act of domestic violence in counselling the fact that and any justification for the act of domestic violence by the respondent is not allowed to be a part of the counselling proceeding should be made known to the respondent, before the proceedings begin.

(6) The respondent shall furnish an undertaking to the Counsellor that he would refrain from causing such domestic violence as complained by the aggrieved person and in appropriate cases an undertaking that he will not try to meet, or communicate in any manner through letter or telephone, e-mail, or through any other medium except in the counselling proceedings before the Counsellor,

(7) If the aggrieved person so desires, the Counsellor shall make efforts of arriving at a settlement of the matter.

(8) The limited scope of the efforts of the Counsellor shall be to arrive at the understanding of the grievances of the aggrieved person and the best possible redressal of her grievances and the efforts shall be to focus on evolving remedies or measures for such redressal.

(9) The Counsellor shall strive to arrive at a settlement of the dispute by suggesting measures for redressal of grievances of the aggrieved person by taking into account the measures or remedies suggested by the parties for counscling and reformulating the terms for the settlement, wherever required.

(10) The Counseller shall not be bound by the provisions of the Indian Evidence Act, 1872 or the Code of Civil Procedure, 1908, or the Code of Criminal Procedure, 1973, and his action shall be guided by the principles of fairness and justice and aimed at finding way to bring an end to domestic violence to the satisfaction of the aggrieved person and in making such an effort the Counsellor shall give due regard to the wishes and sensibilities of the aggrieved person.

(11) The Counsellor shall submit his report to the Magistrate as expeditiously as possible for appropriate action.

(12) In the event the Counseller arrives at a resolution of the dispute, he shall record the terms of settlement and get the same endorsed by the parties.

(13) The court may, on being satisfied about the efficacy of the solution and after making a preliminary enquiry from the parties and after, recording reason for such satisfaction, which may include undertaking by the respondents to refrain from repeating acts of domestic violence, admitted to have been committed by the respondents, accept the terms with or without conditions.

(14) The court shall, on being so satisfied with the report of consoling, pass an order, recording the terms of the settlement or an order modifying the terms of the settlement on being so requested by the aggrieved person, with the consent of the parties.

(15) In cases, where a settlement cannot be arrived at in the counselling proceedings, the Counsellor shall report the failure of such proceedings to the Court and the court shall proceed with the case in accordance with the provisions of the Act.

(16) The record of proceedings shall not be deemed to be material on record in the case on the basis of which any inference may be drawn or an order may be passed solely based on it.

(17) The Court shall pass an order under section 25, only after being satisfied that the application for such an order is not vitiated by force, fraud or coercion or any other factor and the reasons for such satisfaction shall be recorded in writing in the order, which may include any undertaking or surety given by the respondent.

15. Breach of Protection Order. – (1) An aggrieved person may report a breach of protection order or an interim protection order to the Protection Officer.

(2) Every report referred to in sub-rule (1) shall be in writing by the informant and duly signed by her.

(3) The Protection Officer shall forward a copy of such complaint with a copy of the protection order of which a breach is alleged to have taken place to the concerned Magistrate for appropriate orders.

(4) The aggrieved person may, if she so desires, make a complaint of breach of protection order or interim protection order directly to the Magistrate or the Police, if she so chooses.

(5) if, at any time after a protection order has been breached, the aggrieved person seeks his assistance, the protection officer shall immediately rescue her by seeking help from the local police station and assist the aggrieved person to lodge a report to the local police authorities in appropriate cases.

(6) When charges are framed under section 31 or in respect of offences section 498A of the Indian Penal code, 1860 (45 of 1860), or any other offence not summarily triable, the Court may separate the proceedings for such offences to be tried in the manner prescribed under Code of Criminal Procedure, 1973 (2 of 1974) and proceed to summarily try the offence of the breach of Protection Order under section 31, in accordance with the provisions of Chapter XXI of the Code of Criminal Procedure, 1973 (2 of 1974).

(7) Any resistance to the enforcement of the orders of the Court under the Act by the respondent or any other person purportedly acting on his behalf shall be deemed to be a breach of protection order or an interim protection order covered under the Act.

(8) A breach of a protection order or an interim protection order shall immediately be reported to the local police station having territorial jurisdiction and shall be dealt with as a cognizable offence as provided under sections 31 and 32.

(9) While enlarging the person on bail arrested under the Act, the Court may, by order, impose the following conditions to protect the aggrieved person and to ensure the presence of the accused before the court, which may include –