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संपादकीय

शाकी भव

सिंतबर '96 में तीन जिलों में अवकाश कालीन एक दिवसीय शिविर लगाए गए थे। सिवनी, रतलाम एवं गुना में। शिविर अत्यंत सफल रहे ऐसा मेरा मत है। न्यायिक अधिकारीगण आपस में मिल बैठ कर नि: संकोच प्रश्नोत्तर कर व बौधिक धरातल पर चिंतन करें यह मुख्य उद्देश्य था। बराबरी के समकक्ष अधिकारी मिल-जुल कर बैठ कर यदि विचारों का आदान प्रदान करते हैं तो परिणाम निश्चित रूप से सकारात्मक ही होंगे। तब बिना किसी औपचारिकता के एक दूसरे से प्रश्न पूछे जा सकते हैं व उत्तरों के सम्बन्ध में समग्र रूप से चितंन हो सकता है। जिला शिविर आयोजन का आशय भी यही रहा है।

शिविर में न्यायिक अधिकारी गण अच्छे से तैयारी कर के आए थे व अद्यतन जानकारी भी उपलब्ध करने का प्रयत्न कर रहे थे।

दूध के कई प्रकार होते हैं। एक है शुद्ध सात्विक धारोष्ण दूध, पानी मिश्रित दूध से परेटा दूध जो सत्व विहीन होता है तथा सुखादूध। संभवत: यही स्थित प्रश्नोत्तर के समय दृष्टिगोचर हुई। अधिकांश न्यायिक अधिकारी गणों ने प्रश्नों के उत्तर केवल न्यायदृष्टांतो के आधार से दिये। न्याय दृष्टांतों के आधार से मात्र ज्ञानवर्धन होगा। यह भ्रामक कल्पना दूर होना चाहिये। जब न्यायिक अधिकारियों से उत्तर से सम्बन्धित प्रावधानों के विषय में पूछा जाता था तो प्रावधानों सम्बन्धित जानकारी ही नहीं थी। ऐसा ज्ञान तो सतही होगा। बैसाखियों के धारण करने मात्र से कोई व्यक्ति चल नहीं सकता उसे या तो स्वस्थ पैर का जोर लगाना होगा या कंधों की शक्ति से बैसाखियों को आगे बढ़ाना होगा। न्याय दृष्टांत विधि ज्ञान का मूलभूत आधार नहीं है। विषय से सम्बन्धित प्रावधानों की जानकारी, ज्ञान, माहिति, संसूचना हमारे पास होना चाहिये। यदि किसी अधिनियम के मूलपाठ को ही नहीं पढ़ा है तो न्याय दृष्टांतों से क्या होने वाला है। अच्छे पोषाक पर आभूषण शोभा देते हैं यही स्थिति न्याय दृष्टांतों की है। अत: मेरा विनम्र मत है कि हम सब न्यायिक अधिकारीगणों ने प्रकरणों के निराकरण के समय विधि सम्बन्धी प्रावधानों का मूल पाठ पढ़ कर उसका अध्ययन करना चाहिये जिससे विधि के मौन प्रावधान हमारे से संवाद स्थापित करे। नवजात शिशु को बोलना नहीं आता परंतु वह माता से तादात्म स्थापित कर लेता है अत: हमारा सम्बन्ध किसी विषय वस्तु से सम्बन्धित समस्त प्रावधानों के साथ गहराई लिये हो तो दूध में शक्कर, सोने में सुहागा हो सकता है हम आप सभी प्रयत्न करेंगे व वरिष्ठ अधिकारीगण कनिष्टों को न केवल उपदेश देंगे अपितु स्वंय भी उन्हें जीवन मे अपनाऐंगें ऐसी आशा की जा सकती है।

'मूक माटी' महाकाव्य में आचार्य विद्या सागर महाराज ने कहा है:

बोध के सिंचन बिना / शब्दों के ये पौधे कभी लहलहाते नहीं / शब्दों के पौधों पर सुगन्ध

मकरन्द भरे / बोध के फूल कभी महकते नहीं। फूल से नहीं फल से तृप्ति का अनुभव होता है। हमें विषय वस्तु से समग्र रूप से आद्योपान्त चिंतन करके जुड़ना चाहिये। हमें न्यायदान में सतत रूप से प्रयत्न शील रहना चाहिये। कितना अहोभाग्य है कि हमें इस मानव जन्म में न्यायदान करने का अवसर मिला है। उस भाग्य को हाथ से मत जाने दें। ऐसा कर्म जिस के करने से हम थकेंगे नहीं, ऐसा दान जिसके देने से वह कम नहीं होगा। संत कबीर दास जी सटीक शब्दों में कहते हैं :

कहैं कबीर देय तू, जब तक तेरी देह।
देह खेह होय जायगी कौन कहेगा देह ॥

भावार्थ है। जब तक आप पद पर हो आम व्यक्ति आपसे न्यायदान की अपेक्षा करेगा। आप हम ने सही शब्दों में वास्तविक अर्थ में न्यायदान ही करना चाहिये। वर्तमान भौतिक समय में जब अपरिग्रह की संस्कृति व संस्कार समाप्त होने के स्थिति में हैं तब तो हम न्यायिक अधिकारियों का कर्त्तव्य व दायित्व और भी ज्यादा गुरूत्तर हो जाता है। न्याय की नाव नदी के भंवर में हो तो छोटी सी पतवार एवं मस्तुल ही उसे उचित दिशा में ले जाने में सहायक होती है। नाविक के रूप में, न्यायाधीश के लिए न्यायदान की पतवार दृढ़, निश्चय के रूप में मस्तुल का उपयोग सार्थक होगा। भंवर में फंसी नाव को किनारे लगाते समय नाविक षड़रिपु (काम, क्रोध, लोभ, मोह, मद, मत्सर) को भूल जाता है व उसका एक मात्र लक्ष नाव को किनारे लगाने का होता है। यही स्थिति हमारी भी होना चाहिये। न्यायिक कार्य के समय हमें इन सभी रिपुओं से मुक्त भाव से कार्य करना होगा।

बुद्धियुक्तो जहातीह उभे सुकृत दुष्कृते।
तस्माद्योगाय युज्यस्व योगः कर्मसु कौशलम ॥

श्रीमद् भगवद्गीता के अध्याय 2 श्लोक 50 में कर्म योग का वर्णन बड़ा प्रभावी है। जो व्यक्ति निष्काम कर्म करेगा वह पाप पुण्य से मुक्त है। फल की इच्छा रखकर कार्य करना तो लिप्तता है। सकाम कर्म है। सकाम कर्म के कारण मनुष्य निरन्तर अपने स्वरूप से अनभिज्ञ बना रहता है। अतः आवश्यक है कि कर्म के प्रति पूर्ण समर्पण तथा फल की इच्छा से मुक्त होकर हम कार्य करें। इसी में सारा कार्य कौशल्य है। हमें सदैव जाग्रत रहना है, सचेत रहना है, दृढ़ संकल्प के साथ कार्य करना है अतः विषाद ग्रस्त नहीं होना है। पुरुषार्थ की जब अपेक्षा है तो वीर शूर होना है। ऋग्वेद में सूक्ति है "शाकी भव" अर्थात आप सामर्थ्यवान एवं शक्तिशाली बनो। अतः न्यायदान के लिए हमें विनम्रतापूर्वक दृढ़ संकल्प के साथ बौद्धिक रूप से सामर्थ्यवान व शक्ति शाली बनना है।

पुरुषोत्तम विष्णु नामजोशी

Law would be Strange Science if it rested solely upon Cases
-Lord Mansfield.

Work Paper

JURISPRUDENCE OF JUDICIAL PROCESS

By Hon'ble Shri Justice Gulab Chandra Gupta
Retd. Chief Justice

1. Importance of Judicial Process in India

I. Depository of People's faith and trust as also their freedom.

- Article 32 & 226 show that the Supreme Court and High Courts are envisaged as custodians of People's liberty and rights.
- Article 227 shows that High Courts are guarantors of JUSTICE to all.

II. LAWS, in this country, are enacted not only to govern human and institutional relations but also establish a new social order. Ours is a developing society, whose needs and requirements are fast changing. Legislatives process cannot keep pace with these needs. The job of keeping laws relevant to social requirements is therefore left to be done by the judiciary. JUDICIAL UP-DATING OF LAWS is therefore an important aspect of our system.

III. Preamble and Part IV of our Constitution lay down the future social order, which has to be established by enacting laws for the purpose and implementing them honsetly. The Judiciary is supposed to so interprete our laws as to facilitate establishment of the social order envisaged in the Constitution.

IV. Deteriorating Legislative Process is the bone of our constitutional process. These are attributable to :-

(a) Growing influence of political parties and leadership making legislative process less democratic,

(b) Deminishing opportunities of serious discussion and deliberations about impending legilslative measures, including growing illiteracy of our legislators,

(c) Emergence of minority governments in the recent has its own adverse effect in the quality of law making. As a necessary consequence.

As a necessary consequence.

(a) Laws are enacted in haste without any serious consideration of its philosophy or mathodology,

(b) Laws do not reflect the will of the people,

(c) Legislative drafting is usually not what it should be, and

(d) Legal language is neither clear nor precise.

In such a situation it is left to the judiciary to inject rationality into the law through its interpretation and make it more meaningful and effective.

2. Nature of Judicial Process in India

All judicial processes are OPEN, OBJECTIVE and JUSTICE ORIENTED. Indian judicial process also has these qualities. The Indian process is also :-

I. **Quasi-legislative** and hence judges also make laws,

II. **forward looking** and aims at establishing social order envisaged in our Constitution.

III. **meaningfully interpretative** providing meaning and sustenance to the laws. The **TEXT AND CONTEXT** rule applied by our law courts to obtain objective and meaningful assessment of laws is perhaps the gift of Indian judicial process to the world.

3. Social Justice & the Judicial Process

Indian constitution guarantees JUSTICE - SOCIAL, ECONOMIC AND POLITICAL to all in the country. Judicial process has been engaged in giving meaning and shape to the concept of social justice, which has following perspectives :-

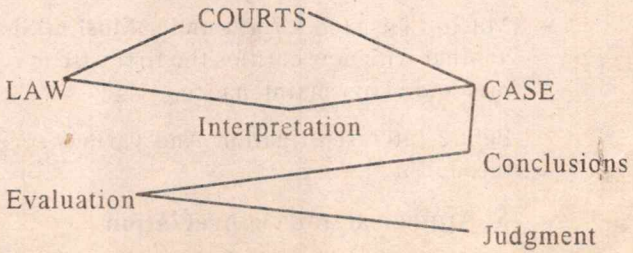
I. Social justice as a concept. Decisions indicate that it is (i) Distributive, as also (ii) corrective, and operates at the level of distribution of wealth and injecting discipline in national life.

II. Social justice as a judicial norm, channelising judicial thinking to the establishment of a just social order,

III. Social justice as an aid to interpretation, indicating that it is used not only as a principle of interpretation but also as an object of interpretation.

4. Interpretative Innovation - Text & Context Rule

I. Importance of interpretation in judicial process. Its graphic presentation could be as under :-



II. Rules of interpretation

- Plain meaning rule or Golden rule of interpretation no longer valid in India.
- Mischief Rule - not sufficient for our purposes.
- **Text and Context Rule** - an Indian development and meets our requirements.
- Rule of **Constructive Intuition** as stated in recent Bhopal Gas Disaster Case **AIR 1990 SC 1480.**

5. Dynamism of Indian Judicial Process

I. It has ensured JUSTICE to all by broadly interpreting Art. 14 of the Constitution in ***Maneka Gandhi's*** case and thereafter.

Now, Justice = Equality = Non arbitrariness = right, just and fair = not fanciful or oppressive.

II. It has guaranteed LIBERTY by liberally interpreting Art.21 of the Constitution.

Now LAW in this Article means good and valid law and PROCEDURE means right, just and fair and not arbitrary or fanciful procedure.

It now guarantees Substantive Due process as also Procedural due process of the USA.

III. It has shown remarkable agility which has kept law linked with life and effective enough to serve social purpose.

- Now, maintenance to a wife under sec. 125 Cr.P.C. means INTERIM maintenance also, not originally contemplated.
- Bhopal Gas victims are granted interim relief by the Government, which only represents victims and would in no case be liable to them.
- Muslim husband's right under Muslim Shariat law to take another wife now entitles the first wife to refuse to stay with him and claim maintenance.
- Public Interest litigation And various social issues solved through it.

6. Appraisal and Appreciation

नेतृत्व

श्री व्ही. के. भल्ला
डायरेक्टर जनरल, होमगार्डस् म.प्र.
भोपाल

काई भी कार्य करने से पहले उस पर विचार करें कि क्या कार्य उचित है? सदैव सही दिशा में सोचें, दिग्भ्रमित न हों। स्पष्ट बनें, आपके विचारों, शब्दों (अभिव्यक्तियों) एवं कार्यों में एकरूपता हो तो आप स्वाभाविक, स्पष्ट, एकाग्र एवं तनावमुक्त होंगे। जब आप तनावमुक्त होंगे, तभी आपको आत्मिक शांति का आभास होगा, तभी आपका क्रियात्मक व्यक्तित्व सामने आएगा, तभी आप इस स्थिति में होंगे कि समाज के लिए, अपनी संस्था के लिए कुछ स्थायी एवं उल्लेखनीय योगदान दे सकें।

क्या आपके पास एक लक्ष्य है? आप जिस समुदाय अथवा संस्था में रहते हैं, क्या आपका लक्ष्य उसके लक्ष्य के अनुरूप है? यदि आपके पास एक लक्ष्य है, तो आप किस प्रकार उस लक्ष्य की प्राप्ति के लिए प्रयास कर रहे हैं? इस प्रयास में आप किन साधनों का प्रयोग कर रहे हैं? आप जिन साधनों एवं तरीकों का प्रयोग करेंगे, उन पर ही आपके परिणाम निर्भर होंगे और इन परिणामों के लिए आप स्वयं उत्तरदायी होंगे।

यह न भूलें कि लक्ष्य प्राप्ति के लिए आप जो साधन प्रयोग कर रहे हैं, वे उचित हों। यदि आपके व्यवहार में ओछापन, दिखावा होगा, तो आपके सहकर्मी उसे तुरंत पहचान जाएंगे और तब आप उनकी नज़रों में अपना आदर खो देंगे।

सदैव याद रखें कि आपका संपूर्ण व्यवहार मनुष्यों के बीच ही होता है। मानव प्रकृति समझना एक जटिल एवं दुष्कर कार्य है। वह क्या है जो उन्हें क्रियाशील बनाती है? क्या उन्हें आगे बढ़ने की प्रेरणा देता है? क्या उन्हें ऊर्जा एवं उत्साह देता है? क्या उन्हें पराजित एवं मृतप्राय बनाता है? क्या उन्हें उदांस एवं निष्क्रिय बनाता है - आप एक अधिकारी के रूप में, एक दल-बल के रूप में मानव प्रकृति की इन जटिलताओं से भांति-भांति परिचित रहें। आप व्यक्ति की एकात्मक एवं सामूहिक मनोवृत्तियों को समझने की कोशिश करें। यदि आप ऐसा करते हैं तो आपकी सामाजिक एवं व्यावसायिक गतिविधियाँ सदैव सही दिशा में होंगी। आपके निर्णय सत्य के निकटतम होंगे। आप एक सक्षम एवं सफल व्यक्ति के रूप मे सराहे जायेंगे और आपके लिए अपने लक्ष्य की प्राप्ति भी अधिक सहज होगी।

इसलिए अपने मातहतों का नेतृत्व करते समय उन्हें वैयक्तिक और सामूहिक दोनों रूपों

में उन्नत करें ताकि वे प्रत्येक क्षेत्र में अधिकाधिक उत्तरदायित्वों का निर्वाह कर सकें। उन्हें जीवन के हर क्षेत्र का प्रशिक्षण दें जिससे वे भविष्य में एक कर्त्तव्यनिष्ठ एवं उत्तरदायी अधिकरी अथावा नेता के रूप में आगे आ सके। इस कार्य के लिए परिश्रम के साथ समर्पण की भी आवश्यकता है - अपने इस पवित्र लक्ष्य के प्रति एकाग्र समर्पण। यह एक चुनौती है, एक महान कार्य है।

क्या आप इस महान कार्य के लिए आत्मिक, मानसिक और शारीरिक रूप से तैयार हैं ? यदि हाँ तो यह प्रशंसनीय है। साथ ही आप स्वयं में गुणोत्तर सुधार लाने के लिए निरंतर प्रयत्नशील रहें।

यदि आप तैयार नहीं हैं, तो व्यर्थ समय न गंवाए। इसी क्षण से ईमानदार और एकाग्र प्रयास शुरू कर दें, जिससे आप इस महान लक्ष्य के लिए स्वयं को तैयार कर सकें। यह सदैव याद रखें कि यदि आप ऐसा करते हैं तो एक नेता अथवा अधिकारी के रूप में आप अपने व्यक्तियों के लिए अपने समाज के लिए, अपनी संस्था के लिए एक महत्वपूर्ण कदम उठाते हैं। साथ ही प्रत्यक्ष अथवा परोक्ष रूप से इनकी उन्नति के साथ प्रगति भी जुड़ी हुई है।

यह एक नेता के रूप में आपके नेतृतव की परीक्षा है ? आप वैयक्तिक एवं सामूहिक रूप से अपने व्यक्तियों को इस प्रकार तैयार करें कि वे स्वेच्छा से अपने लक्ष्य आपके लक्ष्य के अनुरूप कर लें।

अपने अहं को अधिक महत्व न दें। ऐसा व्यवहार न करें जो आपकी गुरूता के अनुरूप न हो। आदर, सम्मान, विश्वास अर्जित करें, उसकी मांग न करें । याद रखें सच्चा सम्मान एवं विश्वास सभी कसौटियों पर खरे उतरने के बाद स्वयं व्यक्ति के दिलो-दिमाग से उत्पन्न होता है। आप के कार्य ऐसे हों कि वे एक आदर्श, एक उदाहरण के रूप में देखे जाएं। आप केवल अनुयायी न बनें, बल्कि कुछ ऐसा नवीन करें कि स्वयं लोग आपके अनुयायी हों। व्यर्थ की कठोरता, पक्षपात, नकल की प्रवृत्ति, दिग्भ्रमित विचार, विचारों और कार्यों में ढीलापन, अपनी पुरानी उपलब्धियों का गुणगान अथवा पुरानी असफलताओं का अतिशय पश्चाताप आपकी प्रगति में बाधक है। आपके सहकर्मी एवं आपके अधीनस्थ आपसे अपेक्षा करते हैं कि आपके निर्णय पक्षपात एवं बाह्य प्रभाव से मुक्त हों, आपके विचार स्पष्ट एवं बेबाक हों। आपके विचारों में सभी के लिए समानता और उन्नति के समान अवसर हों।

क्या आप स्वयं के आंकलन के आधार पर, इस कसौटी पर खरे उतरते हैं ? अथवा आपको अपने ही व्यक्तित्व में दरारें आभासित होती हैं। सत्य के समक्ष खड़े होने में हिचकिचाहट ही आपकी वास्तविकता को उज़ागर करने के लिए पर्याप्त है।

आपकी कथनी और करनी में अंतर कभी न हो। अपनी कमजोरियों को छिपाएं नहीं वरन् उन पर विजय प्राप्त करें। आपका व्यक्तित्व स्वनिर्मित हो वह दूसरों पर आश्रित न हो। अपने अधीनस्थ व्यक्तियों को उनकी वास्तविक अथवा संभावित त्रुटियों के लिए सार्वजनिक रूप से दंडित न करें। ऐसा कदापि न हो कि आपके लक्ष्य या प्राप्य की ओर आपके अधीनस्थ एवं सहकर्मी शंकित दृष्टि से देखने लगें। सदैव प्रयास करें कि आपका लक्ष्य आपके संगठन का भी ऐच्छिक लक्ष्य हो। यह प्रगति के लिए एक महत्वपूर्ण तत्व है। यदि आप अपने व्यक्तियों का विश्वास अर्जित करने में सफल नहीं होते हैं, तो यह एक नेता के रूप में आपकी पराजय है।

याद रखें कि आप का स्वयं का विश्वास एवं कर्त्तव्य अपने व्यक्तियों के प्रति कम न हो आपकी अपने व्यक्तियों के प्रति ईमानदारी कभी भी शंका की दृष्टि से न देखी जाए। आपका प्रथम कर्त्तव्य आपके सहकर्मियों के प्रति, आपकी संस्था के प्रति और आपके स्वयं के प्रति, ईमानदारी है।

ध्यान रखें कि नम्रता और सज्जनता सदैव प्रगति की सहगामी रहें। वास्तव में नम्रता और सज्जनता आपको अपने सहकर्मियों की दृष्टि में सम्मान दिलाने में सहायक ही सिद्ध होगी। अपने आस-पास सत्य, विश्वास और आपसी सहयोग का वातावरण तैयार करें। आदर्श विचार रखें और उनका क्रियान्वयन करें। सदैव याद रखें कि आप तभी एक सफल और सच्चे नेता हैं, जब आपके अधीनस्थ दिलो-दिमाग से आपके साथ हैं। यदि ऐसा नहीं है तो अवश्य ही आपसे कहीं न कहीं भूल हुई है और आप एक आदर्श नेता के रूप में अपनी इस भूल की खोज करें और उसका उचित निराकरण करें। यदि आप स्वयं की भूल को खोज लेते हैं। एवं उसका निराकरण करते हैं तो यह आपकी महान सफलता है, एक व्यक्ति के रूप में, एक नेता के रूप में स्वयं को अपने सहकर्मियों के निकट रखें और उनकी आशाओं, अपेक्षाओं को समझने का प्रयास करें, भविष्य के प्रति उनकी योजनाओं की जानकारी रखें, एवं उनके सुख-दुःख में सहभागी बनें। संक्षेप में स्वयं से व अपने सहकर्मियों से भली-भांति परिचित हों।

यदि आपके विचार एवं कार्य इस प्रकार के हैं तो आप एक अधिकारी एवं नेता के रूप में सफल होंगे। आपका कर्त्तव्य है कि आप अपने सहकर्मियों एवं अधीनस्थों के विचारों एवं कार्यों को भी आदर्श रूप प्रदान करें और फिर पारस्परिक सहयोग से लगातार सफलताएं अर्जित करते चले जाएं।

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" One Precedent creates another. They soon accumulate and constitute law. what yesterday was fact, today is doctrine."

-By Junius

AND SHALL ALSO BE LIABLE TO FINE

At Seoni Holiday Camp question was raised with reference to meaning and interpretation of the words 'And shall also be liable to fine' Shri V.K. Shrivastava D.J. and I myself have tried to answer question in an amateur manner. Hope this will pave to contemplate on this issue.

-Editor

INTERPRETATION OF STATUTES (WORD "AND")

Shri V.K. Shrivastava,

District Judge, Seoni

The simple dictionary meaning of the word "AND" is thereupon, then, next, also, in addition, moreover, as well as, as a consequence or result, if, to, in order to (Oxford Dictionary).

And has generally a cumulative sense, requiring the fulfilment of all conditions that it joins together, and herein it is the anti-thesis of "or". Sometimes, however, even in such a connection, it is by force, of a context read as "or". (Stroud's dictionary 3rd Edn.).

It has been accepted that to carry out the intention of the legislature it is occasionally found necessary to read the conjunction "or" and "and" one for other. (Maxwell on 'Interpretation of Statutes,' 11th Edn.).

The word "or" is normally disjunctive and "and" is normally conjunctive but at times they are read as vice versa to give effect to the manifest intention of the legilature as disclosed from the context. As stated by SCRUTTON, L.J. you do sometimes read "or" as "and" in a statute. But you do not do it unelss you are obliged because "or" does not generally mean "and" and "and" does not generally mean "or". And as pointed out by LORD HALSBURY the reading of "or" as "and" is not to be restored to, unless some other part of the same statute or the clear intention of it requires that to be done. but if the literal reading of the words produces an unintelligible or absurd result "and" may be read for "or" and "or" for "and" even though the result of so modifying the words is less favourable to the subject provided that the intention of the legislature is otherwise quite clear. (Principles of statutory interpretation by Hon'ble Ex.C.J. Shri G.P. Singh).

Normally the word "and" is conjunctive and "or" is disjunctive, but sometimes they are read as vice-versa to give effect to the manifest intention of the legislature as disclosed from the context. The court may resort to such unusual construction when it is apparent that the usual meaning of these words would defeat the purpose of the statute. Where the obvious intention so requires that the word "and" will be read "or" will be read "and" and "or" the general rule is that such construction may be restored to for the purpose of supplying an intention not otherwise manifest. (Interpretation of statutes by Shri K.P. Chakravarty).

Considering as a whole it is implicit that generally the meaning of word "and" is always "and" unless it produces an unintelligible or absurd result. If it appears from the context or a consideration of the other provisions of the statute that it was the intention of the legislature to give it another meaning then only departure from ordinary grammatical meaning could be made.

Section 53 of the Indian Penal Code prescribes the nature of punishment and other penal sections proposes the punishment imposable in the following form :-

1. Shall be punished with death. 2. Punished with death, or imprisonment for life, and shall also be liable to fine. 3. Imprisonment of either description, or with fine, or with both. 4. Punishment with imprisonment for a term which shall not be less than ..... but which may be extend to ..... . 5. Imprisonment for ..... and shall also be liable to fine. 6. Shall be punished with fine.

It is manifest that the emphatic intention of legislature is explicit and clear. if the word "and" is read in its conjunctive form, in no way it creates any confusion or absurdity but if the word "and" will be read as "or" in disjunctive form, the whole ideology of the legislation in awarding punishment may be impaired.

Therefore in Indian Penal Code the word "and" as used in penal sections carries the meaning of "and" only and not otherwise.

" The Law is the last result of human wisdom action upon human experience for the benefit of the public".

- By Samuel Johnson

"AND SHALL ALSO BE LIABLE TO FINE"

P.V. Namjoshi

A problem raised in the Seoni District Holiday Camp was whether it is mandatary to impose a sentence of fine under Section 325 of the I.P.C. or like other offences in which jail sentence has been prescribed as a must. For example Section 325 of the I.P.C. or Section 326 or Section 302 of the I.P.C. Section 325 of the I.P.C. says that, "shall be punished with imprisonment of either description for a term which may extend to 7 years ***"and shall*** also be ***liable*** to fine".

2. The word "or" is in normal sense disjunctive and "and" is normally conjunctive, but sometimes they are read as vice-versa to give effect to the manifest intention of the Legislature as disclosed from the context. if the literal meaning of these words produce an absurd or unintelligible result, they may be read as vice-versa. Overwhelming authorities of Supreme Court need not be cited here for a brief note on this subject. A reference to ***A.I.R. 1968 SC 1450 Ishwar Singh vs. State of U.P.*** and ***A.I.R. 1967 SC 276 State of M.P. vs. Azad Bharat*** can be made. Again the word "shall" is used in statutes and deeds in mandatary sense. Sometimes the word is used in discretionary sense; the word also is a word of futurity. The word "shall" denotes not always meant that the enactment is obligatory or mandatary; it depends upon the context in which it is used, whether it is used in the sense of mandatary or directory. In this context reference can be made to ***State of M.P. vs. Dukhulal A.I.R. 1967 SC 276 and A.I.R. 1968 SC 90 Girivar vs. Dukhulal.*** Again a reference can be made to ***Stroud's Judicial Dictionary 5th Volume 1974 Edition page 2521*** in which at Item No.71 "shall pay" has been interpreted and that will further expose that after that interpretation by the competent Court the Legislature amended and substituted "must" instead of "shall". This is as under :-

> "Shall pay (The Old R.S.C., Ord. 42,r.1(2) did not impose an obligation subject to penalty (Re A Debtor (No.277 of 1950) Exp. The Debtor v. Linguori (1951) Ch.95). See now R.S.C. Ord.45,r.2 where "shall" is replaced by "must".

Let us see the intention of the Indian Penal Code with regard to punishment. There are only 3 sections in which minimum sentence is prescribed. Section 303, Section 397 and Section 398. Section 303 has been declared unconstitutional by Supreme Court in ***Mithu vs. State of Punjab A.I.R. 1983 SC 473.*** The supreme Court in this judgment made the reference of 3 cases namely, ***A.I.R. 1976 SC 133 Dilip Kumar Sharma vs. State of M.P., A.I.R. 1970 SC 564 (Bank Nationalisation Case)*** and

A.I.R. 1978 SC 597 Maneka Gandhi's Case and held that

> "Judged in the right shed by Maneka Gandhi and Bachan Singh, it was impossible to uphold Sec.303 as valid . Sec. 303 excluded judicial discretion. The scales of justice are removed from the hands of the judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable was the sentence of death that no law which provided for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily by stigmatised as arbitrary and oppressive. Sec.303 was such a law and it must go the way of all bad laws. Therefore, Sec.303, I.P.C. must be struck down as unconstitutional. (Per Chennappa Reddy, J.)"

On perusal of this judgment the basic principle will be very clear that the basis of the Indian penal Code in reference to punishment is to arm the Courts with a discretion in matters of punishments. Again it is important to note that in Sections 303, 397 and 398 minimum sentence of death or jail sentence is prescribed as the case may be but imposition of fine has not been included. Therefore, again in these three sections also the legislature has abstained itself from imposing fine. Again in interpreting the words "and shall also be liable to fine", we must bear in mind the importance of the world "liable". The word "liable" has been referred to and defined by Supreme Court in ***Superintendent vs. Abani A.I.R. 1979 SC 1029*** making a reference of case ***A.I.R. 1964 SC 1140 Indo-China Steam Navigation Comapny Limited vs. Jasjeet Singh*** and defined as under :-

> "It is true that ordinarily, the word "liable" denotes: (1) "Legally subject or amenable to" (2) "Exposed or subject to or likely to suffer from (something prejudicial)"; (3) "Subject to the possibility of (doing or undergoing something undesirable)" (see Shorter Oxford Dictionary). According to Webster's New World Dictionary, also the word "liable" denotes "something external which may befall us."

Keeping this view in mind let us see the meaning of the phraseology "and shall also be liable to fine".

Here the word "liable" is to be read with "shall". Once it is read in this context it will be very clear that it is not mandatary on the courts to impose a sentence of fine where jail sentence is a must thing. Sec.324 of the I.P.C. says that, "shall be punished with imprisonment of either description for a term which may extend to 3 years or with fine or with both." Here in Section 324 of the I.P.C. jail sentence or the fine sentence is an optional thing. Where as in Section 325 of the I.P.C. jail sentence

though it may be till raising of Court is a must thing. But it is submitted that in addition to jail sentence imposing of fine is not a mandatary thing because the Courts have been given discretion to impose a sentence of fine in addition to jail sentence.

For perusal; few citations may be sumbitted.

The direct citation on this subject is ***A.I.R. 1968 Patna 287*** by Hon'ble Justice G.N. Prasad in ***Tetar Gope vs. Ganauri Gope*** in which two rulings were referred to ***A.I.R. 1933 Patna Page 179 Ramchander Raj vs. Rambilas*** and ***A.I.R. 1917 Calcutta 377 Khohua vs. Emperor.*** Referring these citations it was held in para 5 of the judgment that the true meaning of the expression "shall also be liable to fine" is ***that there is a liability to fine;*** not that a sentence of fine must be imposed in every case of conviction under such Section. Such an expression has been used in the Penal Code only in connection with those offences where the legislature has provided that a sentence of imprisonment is compulsory. In regard to such offences, the legislature has left a discretion in the Court to impose also a sentence of fine in appropriate cases in addition to the imposition of a sentence of imprisonment which alone is obligatory.

The another Ruling on this point is ***A.I.R. 1958 A.P., 380 In re Shankarappa*** it was held by the Division Bench of Hon'ble Shri Justice K. Subba Rao, C.J. and Hon'ble Shri Justice Basi Reddy that it is quite unnecessary to impose fines on persons who have been sentenced to death or to substantial term of imprisonment. Referring to this contention in para 26 of the judgment A.P. High Court said as under :-

> "The learned Sessions Judge has taked on three fines of Rs.5/- each on each of the accused in addition to the sentences of death and imprisonment. In our opinion, it is quite unnecessary to impose fines on persons who have been sentenced to death or to substantial terms of imprisonment. All the sentences of fine are set aside."

The another judgment is ***A.I.R. 1929 Allahabad 260 (1)*** by Division Bench ***Emperor vs. Durg and others*** in which it was held that some sentence of imprisonment must be given and the Court has a discretion to add or refrain from adding fine, for to the latter an offender is only "liable". This was a case under Section 420 of the I.P.C. in which jail sentences was compulsory.

In ***Emperor vs. Mehandi Ali 42 Cr.L.J. 1941 = A.I.R. 1911 Allahabad 310 (311)*** it was held that in an offence under Section 304 (1) of the I.P.C. 10 years rigorous imprisonment was sufficient but there was no need for impsoing a sentence of fine and in default to undergo rigorous imprison-

ment. It was held that it is undesirable to impose such a fine where the term of imprisonment to be undergone in default will bring; should aggreate sentence of imprisonment sanctioned by the particular section under which the accused is convicted. It was held that the Judges should exercise a careful discretion in the matter of ***super imposing*** fines upon long substantive terms of imprisonment. One more case of the ***State vs. Amru Tulsi Ram (A.I.R. 1957 Punjab 55)*** may be referred. The State itself preferred revision against the judgment of the Addl. Sessions Judge who set aside the judgment of a Magistrate who convicted the accused under Section 381 of the I.P.C. in which though a Magistrate Imposed a jail sentence but did not fine the accused. Remember that under Section 381 of the I.P.C. it is said that "shall be punished with imprisonment of either description for a term which may extend to 7 years and shall also be liable to fine. The Punjab High Court held in para 9 of the Judgment that the Magistrate has the power to impose a sentence of fine under Section 381 of the I.P.C. but it is discretionary. In this judgement in para 8 the High Court of Punjab made a reference of one case ***Chuha vs. Emperor 18 Punjab Re 1913 Cr.(C).*** In that case under Section 302 of the I.P.C. a man was sentenced to death and also to fine and the sentence of fine was set aside on the ground that there was an usual practice of the Court to avoid the imposition of fine where death sentence was imposed. Perhaps this is the practice in all Courts. It can be viewed from the several judgments of several Courts. Again in ***Adam G. Kumar Dalal's case 1953 Cr.L.J. 542 =A.I.R. 1952 SC 14*** the Supreme Court held that where a substantial term of imprisonment is inflicted it is unnecessary to inflict a substantial fine also. Again referring to ***Halsbury 4th Edition Vol. 11 para 520*** it is held that a fine and the imprisonment for a substantial term should be imposed only in exceptional circumstances. it is also held that whether a substantial term of imprisonment is inflicted it is unnecessary to inflict a substantial fine also. In ***State vs. Amru Tulsi A.I.R. 1957 Punjab 55*** referred above, the High Court has in para 7 explained the word "liable" as under:-

> "The word "liable" is also used in the rules of the English Courts under R.S.C. Ord. 16R. 28(1) and it has been interpreted to mean that jurisdiction is discretionary and not that the order must necessarily be made. ***See Collins vs. Collins, 1947-1 All ER 793 (B).***
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> ***The Law Laxicon by P. Ramnath Aiyar 1987 reprint at page 728*** says, "liable" is generally regarded by jurists as a word of modern English and not having any existence in ancient documents. it means very little more than 'under an obligation'. (Per

Kekewich, J., Re Chapman, 1896 I Ch 323; Stroude).

It means the liability in legal terms is just an obligation and not any mandatary form. This is how the Supreme Court has also decided in the cases referred to above.

"Shall", "may" and "is liable" - The words "shall" or "shall not" imply that no discretion whatever was intended to be allowed while the use of the words "may be" or "is liable" imply the existence of a discretion of some kind, but it is not a necessary conclusion that the discretion allowed is - ***Moula vs. Durga Bharti, 6 O.W.N. 19 at page 23.***

In ***Everett Orient Line vs. Jasjeet Singh, A.I.R. 1959*** Calcutta 237 (at page 242) it is held that "shall be liable to confiscation" only means that if the offence is committed then the vessel must be confiscated. This means that so far as disposal of property is concerned the vessel shall be confiscated and it should be so. And again in ***Omita Nath Mittar vs. Administrator General of Bengal I.L.R. 25 Calcutta*** 54 at page 63 the words "shall be liable to pay" have been interpreted to mean "what Section 35 of the Administrator General's Act says that a creditor is under certain circumstance to be liable to pay the costs of the suit, not that he shall pay the costs. The language used show that it was intended not to impose upon a creditor to whom the condition of exemption was in applicable an absolute obligation to pay the costs of the suit, but to leave a discretion to the court if the circumstances of the case required.

Thus according to Supreme Court the word "liable" occuring in many statutes has been held as not conveying the sense of an absolute obligation or penalty but merely importing a possibility of attracting such obligation or penalty, even where this word used along with the words "shall be".

Thus to conclude it is submitted that the words "may" and "shall" when interpreted it is to be seen that whether it carries with it an element of compulsion or not whether it is permissive and enabling or obligatory. One must look at the object of the statute which vests this particular discretion and the intention of the Legislature to find out whether the discretion was coupled with duty to be exercised in favour of a particular party. sometimes "may" means "must". It depends on the subject-matter to which the phrase is applied. Same is the case with the word "shall". Again sometimes it is said that, "it is lawful for the Court to do it", and where that is said the Court is bound to do the particular thing and it is in fact unlawful to do anything else. In this context ***Neath & Brecon Railway Co. In re (1874) 9 Ch. app.263' 43 L.J. Ch.277 (2978)*** can be referred. In same case the word "must" or the word "shall" may be substituted for

the word "may" but that can be done only for the purposes of giving effect to the intention of the Legislature. The use of the word "shall" would not of itself make a provision of the Act mandatary.

Thus it can be submitted that the words "and shall also be liable to fine" are distinctly words of permission only. They are enabling and empowering words. Therefore, in case an accused is held guilty under Section 325, 326, 409, 420, 302, 307 or like offences in addition to jail sentence fine need not be imposed as a routine but it can be imposed in an exceptional circumstances whenever it is necessary to do.

Generally an argument is put forward that if an accused is not sentenced to fine then the complainant party cannot be compensated. But even in absence of fine on the accused, the accused can be ordered to compensate the complainant party under Section 357 (3) of the Cr.P.C. Section 357 (3) reads as under :-

> "When a court imposed a sentence, of which fine does not form a part, the court may when passing judgment, order the accused person to pay, by way of compensation such amount as may be satisfied in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced."

In ***Sarvan Singh vs. State, A.I.R. 1978 SC 1525 in paragraph*** 10(2) the Supreme Court held that if it is found that compensation should be paid, them the capacity of the accused to pay a compensation as to be determined in directing compensation. The object is to collect fine and pay it to the person who has suffered the loss. The purpose will not be served if the accused is not able to pay the fine or compensation for, imposing a default sentence for non-payment of fine would not achieve the object. Refer to case ***Harikishan vs. State of Haryana, A.I.R. 1988 SC 2127*** and ***Balaraj vs. State of U.P., A.I.R. 1995 SC 1935.*** In these cases the Supreme Court upheld the judgments of the courts below. The trial Court did not sentence the accused even under Section 302 and Section 307 of the I.P.C. to pay fine. Same was the position in ***Baldev singh vs. State of Punjab (1995) 6 SCC page 593*** in which the Supreme court reduced the sentence of the accused and convicted him under Section 299 read with Section 304 (Part I) of the I.P.C. to a term of imprisonment, which was limited to the period already undergone and awarded compensation to the victims under Section 357(3) of the Cr.P.C. from the accused.

Therefore my humble Submission is that fine is not mandatary U/SS 325, 326, 302 and like offences in which the words "and shall also be liable to fine" appears.

THEFT OF ENERGY

PERSON COMPITANT TO PROSECUTE

P.V. Namjoshi

By whom the prosecution should be instituted was a question posed by few judicial officers at Guna District Camp.

Section 50 of the Indian Electricity Act 1910 reads as under :-

> "No prosecution shall be instituted against any person for any offence against this Act or any Rule, license or order thereunder, except at the instance of the Government or a State Electricity Board or an (Electrical Inspector), or of a person aggrieved by the same".

Under this Section 4 classes of persons have been authorised to launch prosecution. First is the Government, second is the State Electricity Board, third is Electrical Inspector and lastly a person aggrieved by the same.

So far as first three persons are concerned generally no dispute arises. But in case of "aggrieved person" it is always a matter of debate that who is the aggrieved person. Generally prosecution ignores the fact that by whom, the prosecution should be launched. As a routine the prosecution presents its case but does not take care to the provisions of Section 39 and 50 of the Indian Electricity Act 1910. On perusal and careful study of Judgments it may appear that there is difference of opinion with regard to person aggrieved. But it is not the case. It is always for the prosecution to prove who is the person aggrieved if the prosecution is by Government, the Board or the Electricial Inspector there is no dispute but again if the Secretary to the Board launches a prosecution it is incumbent on the Board to prove that the Secretary has authority to launch prosecution.

Generally every Electricity Board authorises its few of the employees to launch the prosecution and such notification is also issued.

It is also incubent on the Board to prove the notification in every case in which an accused is being prosecuted for such offence. Attention is invited to the provisions of S.56 if the Evidence Act. Otherwise the Courts are not obliged to presume about the question of authorisation. In M.P.

also the M.P. Electricity Board has issued notification in this respect. The details are as under :-

(1)Order No.5/G.H./11/20/2166/1987-151 JPB. dtd.15.5.1987, MPEB.

(2)The Indian Electricity (Amendment) Act 1986 No.31 of 1986 dated 12.8.1996.

(3)MPEB Notification No.01-07/8611 JPB. 5.10.91 Para 7(a) (VIII) by which Junior Engineers have been authorised to lodge reports.

(4)Circular by Director (Prosecution) M.P. Bhopal dated 21.6.91 No.1063/91.

Few rulings will reveal that the Section Incharge of the circle can prosecute a person who has committed theft and no notification is required if it is proved that he is the person aggrieved. But it is for the incharge of the distribution circle to state on oath that he is the incharge of the circle and responsible for the electric supply made under that circle and by theft he is the aggrieved person. The Courts can take judicial notice of the fact that such a person is an aggrieved person. The purpose behind such restriction is that the prosecution should not be at the instance of anyone who has no concern with the matter. This will be made clear by ***Kishan vs. State of Kerala (1986) Crimes 719,*** Addl. Engineer of Electricity Department is a competent person who can prosecute an accused under Sec.39 read with Sec. 50. This will further be made clear by ***Ram Subhavan vs. State 1984 Cr.L.J. 1161.*** In ***State of Karnataka vs. Adi Murthy, A.I.R. 1983, SC 822.*** Supreme Court says that it is clear upon the terms of Section 50 of the Act that the Act no where requires that the authorisation should be by notification published in the official gazette. In ***Ram Shankar Singh vs. State, A.I.R. 1968 Patna 131 at page 132*** the High Court has observed that two prosecution witnesses have proved one letter of the Secretary, but it was not clear from the evidence that what functions the Secretary had to perform, what were his duties and the powers. The investigation by the police after lodging of F.I.R. by the person aggrieved is not illegal. That is how ***Chandu Ram vs. State of Bihar 1975 B.L.J.R. page 103 (Patna)*** expresses. In ***Jhalkhand Singh vs. State of M.P. 1981 Cr. L.J. 1235 M.P.*** High Court (Gwalior Bench) has declared that institution of prosecution in reference to theft of electricity by a Junior Engineer of State Electricity Board who is incharge of the Distribution Centre is competent. In that

judgment the case of ***1980 JLJ 117 and Surendra Singh's case 1991 (2) M.P. Weekly Note 20*** have been distinguished and this is because the view expressed by supreme court in ***Avtar Singh vs. State of Punjab A.I.R. 1965 SC 666.*** Again the Supreme Court has in 1996 in case ***Satyanarayan vs. Bhagwan Ramdas 1996 SCC (Cri) 71*** has made further clarification about its judgment of ***A.I.R. 1965 SC 666.*** In the judgment ***of 1992 Rampal Vs State Cr.L.J. 3745*** the M.P. High Court had held that investigation by police is not illegal. What is important is to prevent prosecution for offences against the Act being instituted by anyone who chooses to do so. This is how ***A.I.R. 1965 SC 666*** also expresses. Therefore a man possessing special qualification has been authorised to prosecute and therefore Section 50 left only with the authorities concerned to prosecute for an offence under Section 39 and again the 'aggrieved person' also has been authorised to institute prosecution. Supreme Court has in that judgment expressed its view in para 7 of the judgment. (Judicial officers are requested to kindly go through ruling 1992 Cr.L.J. 3245 which may solve every problem). Again reference may be given to ***1981 Cr.L.J. 1230 Jhalkhand Singh vs. State of M.P. = 1981*** M.P.L.J. 409 which has also a reference in the ruling of ***1992 Cr.L.J. 3745.*** In that case also the prosecution was instituted at the instance of officer incharge of Electricity Circle and the Court found that he was a person competent to prosecute. Officer incharge is a person aggrieved was the view expressed in that judgment. A further reference can be made to ***A.I.R. 1956 Bombay 354 State vs. Maganlal*** in which also the words "at the instance of person aggrieved" were explained and it was said that whether a person acting for and on behalf of the electric supply company lodges a complaint with police in respect of unlawful abstraction of electric energy, the subsequent prosecution started with a charge-sheet filed by a police must be regarded as instituted at the instance of the company. Another reference is ***1987 M.P.L.J. page 520 Prakash vs. State.*** In this the prosecution was launched at the instance of Assistant Engineer and the High Court found no error regarding person aggrieved.

In Sabbarapu Venkatna vs. Potula Simhachalam A.I.R. 1955 A.P. page 227 defines the word "person Aggrieved" and says that some person aggrieved implies that in some cases there may be more persons aggrieved than one. For instance case of theft of electricity the person aggrieved may not be only the Electricity Board or persons who are law abiding or neighbours who have seen the accused abstracting electricity. But in such

a case the aggrieved person is directly officer incharge of the concerning section who come to know about the instance or the owner of the company that is Electricity Board. But other persons who are equally aggrieved are only injured by the criminal act of the accused and not aggrieved persons.

In Babulal vs. State 1979 (I) M.P.W.N. Note No.245 the report was lodged by Assistant Engineer. The High Court upheld the judgments of both courts below and held that the words "At the instance of" occuring in Section 50 means "at the asking of" or "at the suggestion of" but does not mean "on the complaint of" or "with sanction of".

The total substance is that it is for the prosecution to prove that the person who made a complaint is a person aggrieved. We as judicial officers should not preside over the Courts as spectators only. Should not allow the prosecuting agency or defence agency to lead and record evidence as they like. It is the duty of we Judicial officers to see that evidence is properly recorded and the provisions of Evidence Act are properly followed. The important aspects regarding evidence, proof of documents is also to be seen by the Judicial officers. Attention is invited to the Provisions of the Section 56 of the Evidence Act.

Following Judicial officers were removed from their services by the Government :-

1. Mrs. Basant Mala Jha, Addl. Chief Judicial Magistrate and Civil Judge Class-I, Betul.
2. Shri Simon Kuzur, Addl. Chief Judicial Magistrate and Civil Judge Class-I, Kanker, Bastar.

Following Judicial Officers are suspended by the High Court of M.P. :-

1. Shri Eugene Lukas, Civil Judge Class-I,
2. Shri Ashwini Kumar Tripathy, Civil Judge Class-II, Lakhnadone.

Following Judicial Officer was Complsurily retired on 3.9.96

1. Shri S.C. Soni, A.D.J. Dist. Mandaleshwar, M.P.

(1996) 5 SCC 21 Sohan Lal vs. P. Shesh Reddy and others

TRIAL WHEN COMMENCES

("Common Cause" Judgement)

P.V. Namjoshi

Reference is made to *A.I.R. 1996 S.C. 1619 Common Cause vs. Union of India.* Again reference can be made to *A.I.R. 1979 S.C. 1360 Hussian Ara vs. Home Secretary, A.I.R. 1979 SC 1819 Hussain Ara vs. Home Secretary and A.I.R. 1979 S.C. 1377 Hussain Ara Vs Home Secretary* These three judgment also relate to same cause that is speedy trial, in which the Supreme Court has expressed that speedy trial is part of fundamental right to life and liberty and detention of undertrial prisoner for more than sentenced period is also illegal. Again the Supreme Court has in these judgment has reiterated for free legal service to indigent and poor accused persons. Desirability of expeditious trial was emphasised in these judgments. *Again in A.I.R. 1996 SC 1619* a Common Cause judgment has given a direction relating to disposal of long pending cases in courts and release on bail or discharge or acquittal of accused persons.

First point to be considered is trial when commences. For that reference can be made to paragraph 3 of the judgment at page 1621 in which it is stated as under :-

> "For the purpose of directions contained in clauses (1) and (2) above, the period of pendency of criminal cases shall be calculated from the date the accused are summoned to appear in the Court."

In 1996 JLJ page 8 (FB) M.P. Anand Swaroop vs. Ram Ratan the High Court has in para 18 of the judgement explained that.

> "to try means to examine judicially to examine and investigate a controversy by legal method to submit someone to judicial enquiry to submit a case of judicial examination".
>
> The word "trial" means a judicial examination in accordance with the law of the land, of a cause, either civil or criminal, of the issues between the parties, whether of law or facts, before a Court that has jurisdiction over it. Blacke's Dictionary, relied on.

Again in *1996 JLJ 305 (M.P.) the Full Bench* as in *Hanumanth Sinha vs. State* held in paragraph 5 of the judgment that :

"In a warrant case trial commences after charge is framed under S.246 - in such cases on police report discharge under S.238 of framing of charge under S.239/240 amounts to a trial." ***A.I.R. 1980 SC 962 followed.***

The Supreme Court as in ***A.I.R. 1996 SC Page 1340 Union of India vs. Major General*** has expalined the meaning when trial commences it is as under :-

"Trial commences the moment general court martial assembles, consider charge and examines whether they would proceed with trial."

In paragraph 27 of this judgment Supreme Court has given the conclusion that " it is settled law that under the said Code (Cr.P.C.) trial commences the moment cognizance of the offence is taken and process is issued to the accused for his appearances etc. Equally at a sessions trial, the Court considers the committal order under Section 209 by the Magistrate and proceeds further. It takes cognizance of the offence from that stage and proceeds with the trial. The trial begins with the taking of the cognizance of the offence and taking further steps to conduct the trial.

Two more citations can be submitted to consider when trial commences. That is ***1980 Suppl. SCC page 92 para 39 (S.C) V.C. Shukla vs. State = A.I.R. 1980 S.C. 1382*** in which it is held that,

"We are, however, unable to agree with this argument because it appears that the enactment of Section 251-A (Sic) by virtue of the amendment of 1955 words commencement of trial were introduced for the first time which clearly denote that the trial starts in a warrant case right from the stage when the accused appears or is brought before the courts".

The maiden case is of ***Dagdu vs. Punja A.I.R. 1937 Bombay 55 (D.B.)*** which lay down that "in Bombay presidency trial was always been understood to mean the proceeding, which commences when the case is called on with the Magistrate on the Bench and the accused in the Dock and the resumption of the prosecution and defence (accused person) in the Court for hearing of the case." If we go through the provisions of the Sections 238 and 239-240 of the Cr.P.C. relating to warrant trial; reading both sections together will again reveal that trial commences when accused is brought before the Magistrate for consideration of charge. Therefore, now it is clear that the trial commences when the accused is

says accordingly. The interpretation of words "the period of pendency of criminal cases shall be calculated from the date the accused are summoned, to appear in the court "means the accused appears in compliance with the summons or brought before it for consideration of the charge or explaining particulars of offence etc. Again in this respect reference can be made to Section 273 of the Cr.P.C. Trial in the absence of the accused is foreign to criminal law. Section 273 of the Cr.P.C. gives a mandate to the trial courts and lays down that evidence is always to be taken in the presence of the accused or his authorised counsel, as the case may be. Therefore, a trial commences only when the accused records his presence.

First part of the judgment refers to the detention of the accused in the jail. The Supreme Court has narrated different types of cases in which different types of punishments are prescribed and given a direction to the trial courts to grant bail to the accused who are in jail for more than 6 months. (Detailed note is not required to be given in this magazine). Sufficient is to give reference to paragraph 1-A "Common Cause" judgment. Again in para 2-F of the judgment Supreme court says that "If such pendency is for more than 2 years and trial have ***still not commenced,*** the criminal courts shall discharge or acquite the accused as the case may be and close such cases. In reference to cases compoundable with the permission of the courts, Supreme Court has given direction to the trial courts that after hearing the public prosecutor and other parties the accused may be discharged or acquitted as the case may .

In para 2 'A' of the judgment the Supreme Court in reference to Traffic Offences has directed that cases pending for more than two years on account of non serving of summonses of the accused or for other reason whatsoever, the Court may discharge the accused and close the case. But the terminology is different in cases of 2F and other sub-clauses wherein it is said that "if in such cases trial have still not commenced:. It means that Supreme Court had also meda a distinction between pending cases in which trial have not commenced and pending cases for not serving the accused also.

Therefore, where trial has not commenced and the accused is in jail for more than 6 months the accused is to be enlarged on bail. And if the trial does not commence for more than 2 years the accused is to be acquitted or discharged as the case may be. There are other cases also in which supreme court has given direction and the judicial officers can go through the terms referred to in the reported case.

Now the question becomes critical when there are more than one accused and again few of them are attending the court and few of them are either absconding or have not been summonned to appear in the court so far. Therefore, so far as regards accused persons who are appearing in the Court same procedure is to be adopted as described above if the charge or particulars of offence has not been framed because the court is responsible for not doing so and the accused persons who are appearing in the case will get benefit of it and they are entitle for an acquittal/discharge as the case may be.

Secondly generally speaking courts do not follow the provisions of Section 317 regarding separating the trial of the accused persons who are not available and declaring the accused persons absconding and recording evidence in their absence under Section 299 of the Cr.P.C. it is the duty of the Courts to see that the cases are not pending for long period and to achieve this object the Courts should try to get the accused available through the summons or warrant as the case may be in a reasonable time and if the accused is absconding or is not available steps under the Section 317 and 299 of the Cr.P.C. should be taken . And in reference to the accused persons who are attending evidence should be recorded and accused should either be acquitted, convicted or discharged as the case may be. Warrant of permanent nature should be given to the police for absconded accused or absent accused. if the judicial officers follow this procedure delay may easily be avoided. It is a wrong notion that if the accused is absconding no evidence is recorded in that case and case is sent to the Record Room. On the contrary if the accused is absconding evidence should be recorded and only then case should be sent to the Record room under the provisions of Section 299 of the Cr.P.C. If the trial has commenced (that is charge is framed in reasonable time) and the case is in progress my humble view is that in that case the accused is not entitled to benefit under this ruling. Nullus Commodum Capere Potest de injuria sua propria. (One cannot take benefit of ones own mistake.) Therefore if the accused is not appearing in the Court is a case for years together the accused cannot be given benefit of this judgment. The benefit is to be extended to the persons who are detained in jail for more than 6 months or/and persons who are continuously appearing in the court but the trial has not commenced due to the slackness of the Courts or carelessness on the part of the prosecution. Hope this may pave way to contemplate the problem.

TIT-BITS

1. JUDGMENT OF TRIAL COURT :

The Supreme Court in its Judgment ***Mukhtiar Sinha vs. State of Punjab*** A.I.R. 1995 S.C. 686 Supreme Court has held that.

"On the plainest requirement of justice and fair trial the least that was expected of the trial court was to notice, consider and discuss, however briefly, the evidence of various witnesses as well as the arguments addressed at the bar. The trial court has not done so. The trial court apparently failed in the discharge of its essential duties. There is no mention in the judgment as to what various witnesses deposed at the trial, except for the evidence of the medical witness. The judgment does not disclose as to what was argued before it on behalf of the prosecution and the defence. The judgment of the trial court is truly speaking not a judgment in the eyes of law. The trial court appears to have been blissfully ignorant of the requirements of Section 354(1)(b) Cr.P.C. Since, the first appeal lay to the Supreme Court, the trial court should have reproduced and discussed at least the essential parts of the evidence of the witnesses besides recording the submissions made at the bar to enable the appellate court to know the basis on which the 'decision' is based. A 'decision' does not merely mean the 'conclusion' - it embraces within its fold the reasons which form to basis for arriving at the 'conclusions'. The judgment of the trial court contains only the 'conclusions' and nothing more. The judgment of the trial court cannot, therefore, be sustained."

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2. SECTION 164 Cr.P.C. :

Kanchy Komuramma vs. State of A.P., 1995 Suppl.(4) SCC 118:1996 SCC (Cri) 31.

There are certain safeguards which must be observed by a Magistrate when requested to record a dying declaration. The Magistrate before recording the dying declaration must satisfy himself that the deceased is in a proper mental state to make the statement. He must record that satisfaction before recording the dying declaration. He must also obtain the opinion of the doctor, if one is available, about the fitness of the patient to make a statement and the prosecution must prove that opinion at the trial in the manner known to law.

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3. SECTION 125 Cr. P.C.

Whether a wife who has obtained divorce by mutual consent with the husband is entitled to maintainence. Whether a Magistrate has jurisdiction to enhance maintainence from any previous debt as he likes even from the date of original application under section 125 of the Cr.P.C. ?

(Gurumith Kaur vs. Surjith Singh (1996) 1 SCC 39)

Divorce obtained by mutual consent : Such divorced wife who has not re-married and entitled to maintainence under the Explanation (125 (4)) She cannot be debarred by invoking Section 125(4) of the Cr.P.C. After divorce the divorced wife has no occasion to live with the husband. After divorce there is no question of living seperately by mutual consent. Therefore. Section 125(4) does not apply. A woman who has been divorced or who has obtained a decree for divorce is not included under Section 125(4) of the Cr.P.C. Therefore a wife who has obtained a divorce by mutual consent cannot be denied maintainence. ***(1995) 5 SCC 299 Vanmala vs. H.M. Ranganath Bhat.*** ●

4. 1995 Supp. (3) SCC 221 State vs. Rustham and others "Compulsive Bail"

The High Court on 19.01.1994 passed an order of "Compulsive Bail" holding the accused respondents entitled to it by virtue of the provisions of Section 167(2) of the Cr.P.C. on the basis that 90 days from the date of the authorised detention. of the respondents has expired and the challan had not been filed within that duration. entitling them to bail. It would be relevant to mention that the respondents are accused of the offences punishable with death or life imprisonment under Section 302 IPC etc. Unfortunately. the factual details of the crime have not been made available to us. All the same. it is pertinent to note that the accused-respondents on 3.9.1993 were sent by the Magistrate concerned to judicial custody which custody. under orders. was extended from time to time. On 2.12.1993. the challan was submitted in the court whereafter the accused-respondents applied for compulsive bail. as according to them. the period of 90 days expired on 1.12.1993 and on the premise that their right to compulsive bail survived even after the challan was filed. The High Court agreeing with the pleas raised by the accused-respondents granted them bail.

The Supreme Court in its order held that the court erred both in the matter of computation of the period of 90 days prescribed as also in applying the principle of compulsive bail on entertaining a petition after

the challan was filed as the so-called "indefeasible right" of the accused, in our view stood defeated by efflux of time. The prescribed period of 90 days, in our view, would instantly commence either from 4.9.1993 (excluding from it 3.9.1993) or 3.12.1993 (including in it 2.12.1993). Clear 90 days have to expire before the right begins. Plainly put, one of the days on either side has to be excluded in computing the prescribed period of 90 days. *Sections 9 and 10 of the General Clauses Act* warrant such an interpretation in computing the prescribed period of 90 days. The period of limitation thus computed on reckoning 27 days of September, 31 days of October and 30 days of November would leave two clear days in December to compute 90 days and on which date the challan was filed, when the day running was the 90th day. The High Court was, thus, obviously in error in assuming that on 2.12.1993 when the challan was filed, period of 90 days had expired.

The Supreme Court referred to the following judgments :-

1. *Sanjay Dutt vs. State (1994) 5 SCC 410 : 1994 SCC (Cri) 1433.*
2. *Hitendra Vishnu Thakur vs. State of Maharashtra (1994) 4 SCC 602 : 1994SCC (Cri) 1087.*
3. *Naranjan Singh Nathawan vs. State of Punjab, 1952 SCR 395 : AIR 1952 SC 106 : 1952 Cri L.J. 656.*
4. *Ram Narayan Singh vs. State of Delhi, 1953 SCR 652 : AIR 1953 SC 277 :1953 Cri L.J. 1113.*
5. *A.K. Gopalan vs. Govt. of India, (1996) 2 SCR 427 : AIR 1966 SC 816 :1966 Cri L.J. 602.*

The Supreme Court further held that the Court is required to examine the availability of the right of compulsive bail on the date itself considering the question of bail and not barely on the date of presentation of the application for bail. It was held that on the dates when the Supreme Court entertained the petition for bail and granted it to the accused un-denyingly. Challan stood filed in the court and then the right as such was not available.

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5. Jernale singh vs. State of Punjab (1996) 1 SCC 527

The arguments of the counsel for appellant accused was that neither the trial court nor the High Court was justified in relying upon the evidence of the defence witness Swaran Singh DW 5 to record conviction against the appellant. it was also argued that this DW 5 Swaran Singh was not examined on behalf of this appellant. The supreme Court rejected the

contentions and found that the trial court made use of the evidence of DW 5 only for leading assurance to the conclusions already drawn by the learned courts on the basis of the evidences of PW 4 and PW 5. Such a course is legally and legitimately permissible, for DW 5 was subjected to cross-examination and in fact he was also cross-examined by the prosecution and the present appellant. The appellant could not illicit any answer in his favour thereby would not alter the position as regards the admissibility, relevancy or worth of the evidence of the above witnesses. The DW 5 was examined on behalf of the other accused persons. Accordingly the conclusion of the Supreme Court was that the Court can use defence evidence only for lending assurance to the evidence of other prosecution witnesses if such defence witness has been cross-examined by the accused.

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6. A.I.R. 1978, SC Page 1091 Indersingh vs. State :-

Credibility of testimony, oral circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. if a case is proved too perfectly, it is argued that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rate innocent from being punished, many guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processed. Judicial quest for perfect proof often accounts for police presentation of fool-proof concoction. Why take up ? Because the court asks for manufacture to make truth look true ? No, we must be realistic.

हिन्दी अनुवाद

ए. आय. आर. १९७८ सर्वोच्च न्यायालय पृष्ठ १०९१

इंदर सिंह विरुद्ध स्टेट :- सभी दांडिक मामलों में सबूत युक्तियुक्त संदेह के परे दिया जाना चाहिये किन्तु यह आवश्यक नहीं है कि वह परिपूर्ण हो। युक्तियुक्त संदेह से परे सबूत मार्ग-दर्शन है ना कि कोई जादू-टोना। और दोषी व्यक्ति कभी प्रतिशोध से बचकर नहीं निकल सकता क्योंकि सच्चाई में कुछ कमी होती है जब प्रक्रियाओं के माध्यमों से निरूपित किया जाता है। पूरे सबूत के लिए न्यायिक निरूपण अक्सर पुलिस द्वारा बनावटी बातों को बनाने का काम देता है। बनावटी झूठी बातें क्या बनाई जानी चाहिए ? क्योंकि न्यायालय सच्ची बातों को इस प्रकार बनाना चाहता है जिससे सच्चाई सच दिखाई दे ? यह सच नहीं है। हमें चाहिए कि हम यथार्थिक हों।

Proof beyond reasonable doubt required - Meaning and Scope of the rule:-

In a criminal trial the degree of proof is stricter than what is required in civil proceeding. In a criminal trial however intriguing may be facts and circumstances of the case. the charges made against the accused must be proved beyond all reasonable doubts and the requirement of proof cannot lie in the realm of surmises and conjectures. Although. the court's conscience must be satisfied that the accused is not held guilty when there are reasonable doubts about the complicity of the accused in respect of the offences alleged. it should be borne in mind that there is no absolute standard for proof in a criminal trial and question whether the charges made against the accused have been proved beyond all reasonable doubts must depend upon the facts and circumstances of the case and the quality of the evidences adduced in the case and the materials placed on record. The doubt must be of a reasonable man and the standard adopted must be a standard adopted by a reasonable and just man for coming to a conclusion considering the particular subject matter. The conscience of the court can never be bound by any rule but that itself dictates the consciousness and prudent exercise of the judgment. Reasonable doubt is simply that degree of doubt which would permit a reasonable and just man to come to a conclusion. Reasonableness of the doubt must be commensurate with the nature of the offence to be investigated. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice. according to law. ***State of W.B. vs. Orilal Jaiswal, (1994) 1 SCC 73, 89, 90.***

7. A.I.R. 1958 A.P. 380 In re vs Shankarappa

Before leaving this case. we should like to point out the haphazard manner in which charges have been framed in this case. The learned Sessions Judge adopted 'in toto' the charges framed by the committing Magistrate and did not choose to add to or alter the charges.

Only one charge was framed against each of the seven accused in the following terms :

"That you on 12th day of October. 1956 at 6 a.m.. in the Chambal Adi field situated on the seevar of the village Marayampur. were a member of

an unlawful assembly, committed the offence of rioting, did commit murder by intentionally causing the death of Sidramayya with the blows of lathies and axes, voluntarily caused hurt with lathi and axe to Iraiah Jangam and voluntarily caused grievous hurt with lathies and axes to Pashumian and that you have thereby committed an offence punishable under Ss.302/34, 147, 324 and 326 of the Indian penal Code and within the cognizance of this Court."

Thus the charge was a roledup one in respect of four distinct offences viz., the murder of Sidramayya, rioting, causing simple hurt to P.W. 3 and causing grievous hurt to P.W. 2 and there was no charge under S.149, P.I.C

In a Sessions, case, before the commencement of a trial, a Sessions Judge should scrutinize the Preliminary Register and the charge framed by the committing Magistrate and satisfy himself whether additions or alterations should be made to the charge, as contemplated by S.226, Cr.P.C. and then call upon the accused to plead to the charge under S. 271 of the Code (old). In the present case, the Sessions Judge should have framed a charge with seven heads :

1. Under S.147 or 148 as the case may be setting out the common object: 2. Under S. 302; 3. Under S. 326; 4. Under S. 324; 5. Under S. 302 read with S. 149; 6. Under S. 326 read with S. 149; and 7. Under S. 324 read with S. 149.

If the facts and circumstances of this case warranted the framing of a charge under S.34 "a fortiori" a charge under S. 149 could have been framed, in as much as S.149 is wider in its sweep and longer in its reach than S.34.

The framing of a charge is not a mere formality, and a defective charge may have serious repercussions on the ultimate result of a case. As observed by their Lordships of the supreme Court in ***W. Slaney vs. state of Madhya Pradesh, (S) AIR 1956 SC 116 (B).***

"The omission to frame a charge is a grave defect and should be vigilantly guarded against. In some cases, it may be so serious that by itself it would vitiate a trial and render it illegal prejudice to the accused being taken for granted.

8. (1996) 5 SCC 21 Sohan Lal vs. P. Shesh Reddy and others

On behalf of the appellant owner of the bus stand was taken that as he had appointed a driver to drive the vechicle. If the said driver allowed the cleaner/conductor of the bus to drive the vechicle without any authority from the appellant to the heirs and legal representative of the victim Rejecting the contention and allowing the appeal.

Held:

The crucial test is whether the initial act of the expressly authorised and lawful. Then the employer shall nevertheless be responsible for the manner in which the employees that is, the driver and the cleaner/ conductor executed the authority. This is neccessary to ensure so that the injured third parties who are not directly involved or concerned with the nature of authority vested by the master to his servant are not deprived from getting compensation. It the dispute revolves arond the mode or manner of execution of the authority of the master by the servant, the master cannot escape the liability so far third parties are concerned on the ground that he had not actually authorised the particular manner in which the act was done. in the present case, the accident took place when the act authorised was being performed in a mode which may not be proper but nonetheless it was directly connected within the course of employment. It was not an independent act for a purpose which had no nexus or connection with the business of the appellant so as to absolve the appellant from the liability. The appellant had authorised the driver to drive the vehicle but the driver allowed the cleaner/conductor who was also the employee of the appellant to drive the vehicle because of which the accident took place. It is not the stand of the appellant that the cleaner/conductor was driving the vehicle without the knowledge or consent of the driver, for his personal pursuit. He was driving the bus for the business of the appellant, that is to carry the passengers. In this background, the appellant cannot escape the liability so far the third parties are concerned on the ground that he had not actually authorised the particular manner in which the act was done. As it has been established that the negligent act of the driver and the cleaner/conductor was "in the course of employment", the appellant shall be liable for the same.